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February 13, 2012

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
[Docket No. R–1432] (RIN 7100 AD 82)

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20851
(RIN No. 3038-AC[•])

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
(RIN 3064–AD85)

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 2-3
Washington, D.C. 20219
[Docket ID OCC-2011-14] (RIN 1557–AD44)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
[Release No. 34-65545; File No. S7-41-11]
(RIN 3235–AL07)

Re: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

Ladies and Gentlemen:

Wells Fargo & Company ("**Wells Fargo**" or "**we**") appreciates the opportunity to comment on the proposed rule (the "**Proposed Rule**") as contained in the notice of proposed rulemaking (the "**NPR**"),[1] jointly issued by the Board of Governors of the Federal Reserve

[1] *See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Covered Funds* 76 Fed. Reg. 68846 (Nov. 7, 2011).

System ("**Board**"), the Securities and Exchange Commission ("**SEC**"), the Federal Deposit Insurance Corporation ("**FDIC**") and the Office of the Comptroller of the Currency ("**OCC**"), and the notice of proposed rulemaking issued by the Commodity Futures Trading Commission ("**CFTC**")[2] (collectively, the "**Agencies**"), implementing new Section 13 of the Bank Holding Company Act of 1956, as amended (the "**BHC Act**"), commonly referred to as the "**Volcker Rule**", as set forth in Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**").

Wells Fargo is a diversified financial services company, providing retail, commercial and corporate banking services through banking stores located in 39 states and the District of Columbia. We provide other financial services through subsidiaries engaged in various businesses, principally: wholesale banking, mortgage banking, consumer finance, equipment leasing, agricultural finance, commercial finance, securities brokerage and investment banking, insurance agency and brokerage services, computer and data processing services, trust services, investment advisory services, mortgage-backed securities servicing and venture capital investment. We have the leading market share of banking relationships with middle market companies (defined as companies with revenues of $25-500 million) in the United States.

We have submitted a separate letter regarding a certain "covered fund" aspect of the Agencies' Proposed Rule, specifically on what we believe to be the inadvertent categorization as a "private equity fund" of a type of subsidiary investment structure that Wells Fargo has long used to make permissible direct merchant banking and venture capital investments in operating companies. In addition, we have participated in the preparation of the comment letters on the Proposed Rule to be submitted to the Agencies by: the International Swaps and Derivatives Association, Inc. ("**ISDA**"), regarding the Proposed Rule's proprietary trading prohibitions on swap activities; the Securities Industry and Financial Markets Association ("**SIFMA**"), The Clearing House Association L.L.C. ("**The Clearing House**"), The Financial Services Roundtable (the "**Roundtable**") and the American Bankers Association ("**ABA**"), regarding the proprietary trading aspects of the Proposed Rule (the "**Trade Associations Proprietary Trading Letter**"); SIFMA, The Clearing House, the Roundtable and the ABA regarding the covered fund aspects of the Proposed Rule; SIFMA regarding the inclusion of state and municipal agency securities in the exemption from the proprietary trading provisions for government obligations and tender option bond ("**TOB**") programs; SIFMA

2 The CFTC's notice of proposed rulemaking has not been published in the Federal Register as of the date of this letter.

regarding the impact of the Volcker Rule on securitizations and insurance-linked securities; The Clearing House regarding the need for any rules to clearly permit bona fide asset-liability management ("**ALM**") activities; The Clearing House regarding the Proposed Rule generally; Ashurst LLP ("**Ashurst**"), regarding inclusion of state and municipal agency securities in the exemption from the proprietary trading provisions for government obligations and TOB programs; the American Securitization Forum ("**ASF**"), regarding the proprietary trading and covered fund provisions that might apply to securitizations; the ABA, regarding the proprietary trading aspects of the Proposed Rule and the covered fund aspects of the Proposed Rule; the Roundtable, regarding the proprietary trading and covered fund provisions that might apply to the insurance industry; the Loan Syndication and Trading Association ("**LSTA**"), regarding the treatment of bridge loans and any debt securities issued in lieu of, or in refinancing, bridge loans; and Cleary Gottlieb Steen & Hamilton LLP ("**Cleary**"), regarding the proprietary trading aspects of the Proposed Rule (collectively, the "**Trade Group Letters**").

INTRODUCTION

We recognize that, through Section 619 of Dodd-Frank, Congress has required the Agencies to implement changes that will impact the business of Wells Fargo and other covered banking entities. The Agencies, however, should implement the Volcker Rule in a way that is consistent with the statutory text and intent. At the same time as it required covered banking entities to cease engaging in proprietary trading through Section 619 of Dodd-Frank, Congress, in apparent recognition that covered banking entities play a critical role in ensuring the proper functioning of the capital markets in the United States, expressly exempted from that statutory prohibition on proprietary trading various activities that presumably were deemed to be beneficial to the financial system as a whole.[3] These permitted activities include, among other things, the purchase, sale, acquisition or disposition of securities and other instruments in connection with underwriting or market making-related activities, risk-mitigating hedging

3 The Financial Stability Oversight Council (the "**FSOC**") similarly has acknowledged the importance of various roles that covered banking entities play in the market, including as market makers and underwriters, in its study of the Volcker Rule. *See* FSOC, *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds* 1, 21 (Jan. 2011) (the "**FSOC Study**").

activities designed to reduce specific risks to a covered banking entity, and the purchase, sale acquisition and disposition of securities (and other instruments) on behalf of customers.[4]

Wells Fargo is concerned that the Proposed Rule is too broad in its definition of prohibited proprietary trading, and that the scope of the permitted activities – particularly, trading on behalf of customers, market making, underwriting and hedging – as implemented by the Proposed Rule is too limited, and excludes, or casts doubt upon the validity of, a number of activities and services that we and other covered banking entities provide to our customers to help them raise capital, access credit, manage their risks, invest their savings and generate liquidity from their securities holdings when they need to do so. All of these services, we believe, are essential for the effective functioning of the capital markets in the United States, and promote employment, investment, and economic growth.

The decisions made by the Agencies in implementing the Volcker Rule, in particular, the way in which the Agencies draw the lines between impermissible proprietary trading and the permitted activities referenced above will have substantial and long-lasting implications for the covered banking entities that will be subject to the Volcker Rule, and for the financial markets of the United States. In an apparent effort to prevent the statutory exemptions and exclusions from making the prohibition on proprietary trading ineffective, we believe that the Agencies have struck the balance too far in the other direction. The Proposed Rule essentially sets forth an assumption that all trading by or positions of a covered banking entity are prohibited proprietary trading until proven otherwise. In our view, the fundamental purpose of the Volcker Rule was to eliminate proprietary trading conducted by business units within banking entities that received the benefit of federal assistance programs. The sort of proprietary trading that the Volcker Rule was intended to address, we believe, was the type of trading that was conducted out of a banking entity's proprietary trading businesses – units that were readily identifiable, with dedicated trading capital and that served as a source of profit for the banking institution without principal regard to customer service functions of the banking institution. We believe that the Volcker Rule's proprietary trading ban was intended to take out of covered banking institutions such bright-line proprietary trading while allowing trading done in the course of a customer-centric banking business to continue, in a way that is flexible enough to allow covered banking entities to continue providing traditional services to their customers.[5]

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4 *See* Section 13(d)(1) of the BHC Act.

5 *See also* FSOC Study, p. 26 (recommending that "[t]he Volcker Rule . . . be implemented with the understanding that markets, products and trading activity will continue to evolve …

(footnote continued…)

While we can appreciate that the Agencies may be concerned that, with the elimination of proprietary trading for its own sake, covered banking entities that historically have engaged in proprietary trading may seek to engage in those same proprietary trading activities under the guise of permitted trading, we do not agree that the approach taken by the Proposed Rule is the best way to address this concern.

Even on its own terms, the Proposed Rule is not sufficiently tailored to the variety of financial intermediation services and hedging practices offered in different markets (equities, fixed income, commodities, interest rates and foreign exchange, among others) and by different market players.[6] We note that the Proposed Rule appears to define all of the permitted activities largely through the model of highly liquid, exchange-traded U.S. equity securities. This paradigm, however, does not work for many other financial markets, including the corporate credit market, municipal market and other less liquid markets, where much of the trading is done over-the-counter ("**OTC**") and where prices are often unavailable other than through participation in the market (*i.e.*, inter-dealer trading is necessary for price discovery). This is of particular concern to Wells Fargo because these are the capital markets in which so many of our mid-sized corporate and municipal customers operate. The Proposed Rule is likely to have the greatest impact on such customers.

We also do not believe that the Proposed Rule's transaction-by-transaction approach, which would require analyzing permitted customer trading, market making, underwriting and hedging activities on a transaction-by-transaction basis, is the best way for the Agencies to implement the Proposed Rule. An approach of that sort, especially when combined with the methods that the Proposed Rule would require as to how each individual trade is to be evaluated, would further restrict the ability of covered banking entities to engage in permitted activities. Wells Fargo historically has not engaged in a significant proprietary trading business; our trading generally has been in support of our customer-driven business. Nevertheless, any individual trade, viewed in isolation and through the hard-wired requirements and evaluation metrics of the Proposed Rule, potentially could look like a proprietary trade. Analyzing trades

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(...*footnote continued*)
[and the] Agencies' supervisory approaches should be flexible enough to account for this evolution.").

6 The FSOC Study acknowledged that regulations implementing the Volcker Rule would need to account for this variation. FSOC Study, pp. 18-20, 22-23 and 26-27.

on a transaction-by-transaction basis is likely to provide many "false positives" and will also further contribute to discouraging covered banking entities from engaging in activities that Congress wanted banking entities to continue to provide.

If trading on behalf of customers, market making and underwriting activities of banking entities are stymied as we think they would be under the Proposed Rule, then liquidity is very likely to be reduced, and it will become more difficult for investors to earn a return on investments. Liquid capital markets provide a lubricant for the entire commercial system in the United States.[7] Decreased returns on investments would, in turn, make it harder for individuals and families to save for retirement, education and other goals. Reduced liquidity also will make it more difficult and costly for businesses to raise capital, which, in turn, would make them less able to hire employees and less able to grow. A reduction in liquidity is contrary to the stated purpose of the Volcker Rule, which is to reduce volatility and risk in the market. If trading on behalf of customers, market making and underwriting activities of covered banking entities are unduly restricted, price transparency is likely to be reduced and the ability of businesses to hedge risk is likely to be impaired. The Proposed Rule thus could in fact increase systemic risk in the global financial system, even if through the Volcker Rule prohibitions as implemented by the Agencies it becomes less likely that covered banking entities need government assistance in the future.

We believe that if the Volcker Rule goes too far in restricting the types of services that covered banking entities may provide to their customers in order to prohibit proprietary trading, there could be irreversible negative consequences to the United States financial and commercial system as a whole. In this regard, we note the past experience of the rise of the Eurodollar market.[8] Global financial markets evolve quickly to adapt to regulatory regimes and,

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7 *See* Testimony of Phillip L. Swagel before the U.S. Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection, "Enhanced Supervision: A New Regime for Regulating Large, Complex Financial Institutions" (Dec. 7, 2011). *See also* Testimony of Douglas J. Elliot before the U.S. House of Representatives Committee on Financial Services, Subcommittees on Capital Markets and Government Sponsored Entities and Financial Institutions and Consumer Credit, "Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation" (Jan. 18, 2012).

8 This example is discussed in greater detail in other comment letters submitted to the Agencies, including a letter prepared by The Clearing House.

once alternative markets come into being, or as existing alternative markets expand, these alternatives may thrive even if the regulations that led to their birth or expansion are modified or eliminated. As the Agencies consider whether and how to revise their proposal to implement the Volcker Rule in response to comments, we believe that they will be well-suited to remain aware of the dangers of overly restrictive regulation and the possible consequences to U.S. global competitiveness.

In this regard, we also note that one of the exemptions to the proprietary trading ban permits trading outside of the United States if certain conditions are met.[9] We strongly believe that this will put U.S. banking entities at a severe competitive disadvantage in servicing corporate, retail and commercial customers in comparison relative to their non-U.S. counterparts, particularly those that are not subject to the Volcker Rule at all.[10]

We do not believe that Congress intended these significant, and potentially irreversible, negative consequences to be the outcome of the Volcker Rule. We note that Dodd-Frank mandates the Agencies' coordinated rulemaking to "avoid providing advantages or imposing disadvantages to the companies affected by [the Volcker Rule] and . . . protect the safety and soundness of banking entities and nonbank financial companies supervised by the [Board]."[11] The BHC Act also provided the Agencies with authority to exempt additional activities from the ban on proprietary trading where the Agencies determine it "would promote and protect the safety and soundness of the banking entity and the financial stability of the United States."[12] While Congress charged the Agencies with implementing a ban on proprietary

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9 *See* Proposed Rule, §___.6(d).

10 In this regard, one observer noted that the major trading partners of the United States have not adopted rules analogous to the Volcker Rule, which: "puts American businesses and financial institutions at a disadvantage. By eliminating a core revenue stream from U.S. banks, the Volcker Rule would effectively reduce the ability for U.S. banks to compete and grow." Testimony of Anthony J. Carfang before the U.S. House of Representatives Committee on Financial Services, Subcommittees on Capital Markets and Government Sponsored Entities and Financial Institutions and Consumer Credit, "Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation" (Jan. 18, 2012).

11 Section 13(b)(2)(B)(ii) of the BHC Act.

12 Section 13(d)(1)(J) of the BHC Act.

trading, we respectfully urge the Agencies to consider the expected burdens and costs in considering how to define the statutory exemptions to that ban, in considering whether to exempt additional activities, and in considering revisions to the Proposed Rule in response to comments. Consistent with the legislative intent of the Volcker Rule and sound public policy, the Proposed Rule should be modified to clearly permit a broad range of activities that are necessary for covered banking entities to serve their customers, including as market makers of securities and OTC derivatives and as underwriters of securities, and to hedge the risks that covered banking entities face.

In addition to our concerns about the activities that would remain permissible under the Volcker Rule as implemented by the Agencies, Wells Fargo is also concerned that the compliance, testing and reporting infrastructure that the Proposed Rule requires in order to prove that any trade is in fact not prohibited proprietary trading will be very complicated and will take a great deal of time and expense to build and maintain. Under the Proposed Rule, all covered banking entities would be subject to the same complex and costly compliance infrastructure requirements. In our view, the costs of compliance that will be borne by covered banking entities (and, ultimately, their customers) are not proportional to the benefits that may be achieved.

Wells Fargo respectfully urges that the Agencies adopt a more flexible approach to any required Volcker Rule compliance program, one that takes into consideration the differences among covered banking entities and, in particular, among large banks. The Agencies should not impose a one-size-fits-all approach that imposes unnecessary compliance burdens and costs, or that requires an organization to significantly change its approach to regulatory compliance. We believe that a better approach would be to allow each covered banking entity to work with its primary federal regulator to tailor more general rules applicable to each covered banking entity and its unique trading attributes. To be sure, an approach of this sort will evolve over time and will require robust and ongoing dialogue between covered banking entities and their regulators. We nevertheless believe an approach of this sort should better serve the financial stability of the United States by permitting more robust participation in the financial markets for the benefit of the issuers and investors that are the customers of a covered banking entity and should reduce the overall complexity of complying with the Volcker Rule.

In addition, although we agree with the provision of Appendix C of the Proposed Rule[13] that allows a covered banking entity to establish its compliance program on an enterprise-

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13 Proposed Rule, Appendix C to Part [__].

wide basis, we recommend that the Agencies go further to allow a covered banking entity the flexibility to establish an enterprise-wide program that specifically excludes certain subsidiaries and affiliates, provided that each subsidiary or affiliate is covered by a separate compliance program. In other words, we believe that a covered banking entity should not be limited to the choice between a single enterprise-wide program that covers all entities within the banking organization, or separate programs for each subsidiary engaged in activities covered by the Proposed Rule. For example, if a high percentage of covered activities are conducted within a particular subsidiary, and a more limited degree of other activities are scattered among multiple entities, it may be more effective for the organization to have one "enterprise" program that covers those multiple entities, and one that covers only the entity that is more extensively engaged in covered activities.

The Agencies should also allow flexibility regarding the appropriate oversight of the effectiveness of the compliance program. Specifically, we urge that the Agencies not impose a rigid requirement that the board of directors and the Chief Executive Officer review the effectiveness of a compliance program. While that may be appropriate in a situation where a banking organization has been found to have materially violated the Volcker Rule, it is otherwise an extraordinary measure given how banking organizations usually operate. In organizations with well-established independent risk management functions led by chief risk officers, the chief risk officers should be permitted to oversee compliance program effectiveness, as they do now. The Agencies should provide in any final rule that the primary supervisory agency of a covered banking entity may determine that oversight by the chief risk officer of the entity is sufficient. In many organizations, a requirement for a determination of effectiveness at the board or CEO level would add additional layers of compliance burden and expense with little added value. The reality is that in such organizations, the independent risk management function would already be required to judge the effectiveness of compliance with the requirements of the rule, as with any other compliance requirement. If the primary supervisor is satisfied with the effectiveness of the organization's compliance oversight function, we see no reason why this set of regulatory requirements should be singled out from other risk management functions for special treatment. Wells Fargo is very concerned about the increasing burden placed on boards of directors and strongly urges that the Agencies allow a more flexible approach based on a determination by the primary supervisor that oversight by an independent risk management function is sufficient.

While it is true that some of the compliance burdens that we foresee potentially could be lessened if our suggestions set forth in this letter are adopted by the Agencies in any final rule, we nevertheless are confident that the overall impact of the Proposed Rule will be to increase significantly our compliance costs and create uncertainty as to whether activities that we historically have performed in the course of serving our customers will remain permissible, which will increase our costs and the costs borne by our customers, will impede liquidity and will impact the flow of capital that is critical to both the credit markets and the capital markets.

We also wish to raise our concerns with the conformance period established by the Proposed Rule. The Proposed Rule requires covered banking entities to calculate required metrics and implement the required compliance program across all of their trading units by July 21, 2012. With regard to the metrics, we believe that a longer period for implementation will be required. In the NPR, the Agencies indicate that they plan to review the quantitative trading metrics, which could result in some of the metrics being eliminated or modified, or new metrics being added.[14] We do not believe that a rush to implement the metrics makes sense given the inherent uncertainty in this process. In addition, in our judgment, many of the metrics exceed what is necessary, are difficult to compute, are not likely to provide the Agencies with useful data to determine where further investigation into trading would be appropriate, and are not workable across all ranges of trading activity.

In addition, we are confident that it will take a significant effort to develop, test, implement and provide robust internal controls for new systems to collect, monitor, analyze and output data for required metrics reporting. We believe that covered banking entities will have a very difficult time installing the comprehensive compliance regime envisioned by the Proposed Rule in light of the expected short period between the issuance of any final rule and July 21, 2012, especially given that covered banking entities are expected to generate a host of other, sometimes overlapping, compliance procedures in response to other rules that are being adopted under Dodd-Frank. Wells Fargo believes a prudent implementation of the rule would allow for at least 365 days from the date that any final rules are published in the Federal Register to the date that such rules go effective in order to allow firms to implement these requirements in a way that does not harm their legitimate roles supporting customers and engaging in underwriting and market making activities. We also suggest that the Agencies identify the key metrics that are clearly workable across all ranges of trading activity and most likely to provide the Agencies with useful data, require covered banking entities to implement those metrics first, and then require covered banking entities to phase in other metrics subsequently over time, in consultation with their primary federal regulator.

[14] NPR, 76 Fed. Reg. 68846, at 68883.

Finally, with regard to the quantitative metrics of the Proposed Rule, we believe they should not be used by the Agencies as a dispositive tool,[15] and we also are of the view that many of the quantitative metrics set forth in the Proposed Rule are not well conceived for application to less liquid markets such as the OTC derivatives markets.

The Trade Associations Proprietary Trading Letter contains an extended discussion of various individual metrics. We endorse the comments set forth in that letter, including the suggestion that the Spread Profit and Loss, VaR Exceedance, Comprehensive Profit and Loss Attribution and Pay-to-Receive Spread Ratio metrics should be removed from the list of required metrics. In particular, we believe that the Spread Profit and Loss metric is not useful because market movements are a natural result of providing liquidity to customers. When world events happen that result in market stress and illiquidity, there could be mark to market profits or losses even when there is no customer trading. This is not indicative of proprietary trading. As a market maker, the liquidity we provide to our customers is accomplished by holding positions despite market movements. If the Agencies determine that the metric is necessary, one way that the Spread Profit and Loss metric might be improved would be to measure the metric against an index to ensure that widespread market movements unrelated to a specific position are not picked up in the metric. We also would like to point out that depending on the size of the trading unit, banks may have mark to market profits or losses prior to a large new issue as covered banking entities have to prepare to handle customer demand on the new issue. We do not think that this is indicative of proprietary trading.

We believe that the Customer-Facing Trade Ratio is appropriate as long as banking entities have the flexibility to determine who is a customer.[16] Permitted risk-mitigating hedges with dealers should not be included in the Customer-Facing Trade Ratio because such hedges are designed to reduce risk and their inclusion would undermine the usefulness of the metric. In addition, we agree that the Inventory Risk Turnover metric is appropriate. However, we believe that it should be calculated on a *group* basis, because it would be meaningless to calculate it on a transaction-by-transaction basis.

We further note that many of the metrics are not routinely calculated by market participants today. Accordingly, it would require substantial changes to infrastructure and data

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15 *See* FSOC Study, p. 37.

16 We call your attention to the Trade Associations Proprietary Trading Letter for a more detailed discussion about determining who should be a customer.

collection mechanisms in order to begin regular reporting, and for such unused metrics, a covered banking entity would be doing so just so that it can report for the sake of reporting – the metric serves no other functional purpose for that covered banking entity and will not help the Agencies identify impermissible proprietary trading. If the Agencies believe that quantitative metrics are essential tools for them to understand trading activity and to assess whether further investigation into trading activities at a covered banking entity is warranted, we believe that the requirements need to be tailored specifically to each covered banking entity and its particular trading activity, in a way that would evolve over time in consultation with the entity's primary federal regulator.

As we have indicated above, we believe that the Proposed Rule adopts an approach that exceeds what is necessary to implement the statutory provisions of the Volcker Rule and will result in negative unintended consequences. Wells Fargo respectfully requests the Agencies to take a different approach in any final rules to avoid the consequences to U.S. banks and the financial markets of excessively restrictive controls that will do more harm than good. Rather than start from an assumption that all trading by or positions of a covered banking entity are proprietary trading until proven otherwise, we respectfully suggest that the Agencies begin with a presumption that trading conducted by a covered banking entity outside of a readily identifiable proprietary trading unit is in support of underwriting, market making, hedging and other services traditionally provided to customers, and permitted under Section 619 of Dodd-Frank. Covered banking entities like Wells Fargo would then work with their primary federal regulator to develop metrics and other surveillance tools to help detect and expose any impermissible proprietary trading in which the covered banking entity may engage in without principal regard to the customer service functions of the banking entity.

Nevertheless, the remainder of this comment letter focuses on various aspects of the Proposed Rule's ban on "proprietary trading" and the several activities that are established as exemptions from the proprietary trading prohibition under the Proposed Rule, as described further herein, and includes comments on a few additional aspects of the Proposed Rule. We appreciate that the Agencies will receive many comments on the Proposed Rule. Accordingly, our comment letter is intended to emphasize the aspects of the Proposed Rule that we believe will be among the most significant to Wells Fargo and our customers. This comment letter is not a comprehensive response to each of the Agencies' requests for comments on the Proposed Rule, and many of our comments are also made in the Trade Group Letters in which we have participated. Where appropriate, this comment letter seeks to illustrate for the Agencies some of the consequences that we believe the Proposed Rule may have, through "real-world" examples of how our concerns are likely to manifest themselves in the market and how our customers are likely to be affected. We believe that the suggested clarifications and modifications that we recommend in this comment letter are fully consistent with the terms, purposes, and legislative history of Section 619 of Dodd-Frank.

COMMENTS TO THE "ON BEHALF OF" CUSTOMER TRADE EXEMPTION

In our view, the Proposed Rule's implementation of the statutory "on behalf of customers" exemption[17] is too narrow. We agree that the limited set of transactions that are identified as "on behalf of customers" in the Proposed Rule should be permitted under this exemption. However, we believe that in an apparent effort to prevent the statutory exemptions and exclusions from making the prohibition on proprietary trading ineffective, the Agencies have struck the balance too far in the other direction so as to significantly lessen the benefits to customers of the "on behalf of customers" exemption.

As we have said above, in our view, the Volcker Rule's proprietary trading ban was intended to take out of covered banking institutions bright-line proprietary trading for its own sake, while allowing trading done in the course of a customer-centric banking business to continue with flexibility to allow covered banking entities to continue providing traditional services to customers, and to provide new services to customers.

We believe that covered banking entities should be afforded the freedom to engage in transactions to respond to a customer's needs, in all situations where the banking entity is acting as principal to accommodate the customer. Rather than tightly defining this by rule and by reference to a narrowly-defined "riskless principal" transaction,[18] we believe that the better approach is to accommodate a wide variety of transactions where a banking entity acts as principal to address the needs of its customer. A covered banking entity's compliance would be monitored internally through written plans and procedures that it designs and through the entity's compliance and risk management infrastructure, as may be reviewed by the entity's primary federal regulator.

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[17] Section 13(d)(1)(D) of the BHC Act.

[18] We note that the three sources that the Agencies point to in the NPR regarding guidance on "riskless principal" transactions, the Federal Reserve's Regulation Y, the SEC's Exchange Act Rule 3a5-1 and certain OCC interpretive letters, do not provide identical definitions of riskless principal transactions. We believe that it would be very useful for the Agencies to provide in any final rule additional clarity as to how the "riskless principal" requirement will be interpreted.

We also do not understand why the Proposed Rule requires that, for a covered banking entity to be deemed to be acting on behalf of a customer, it must be acting "as investment adviser, commodity trading adviser, trustee, or in a similar fiduciary capacity" for the customer.[19] Section 13 of the BHC Act does not specifically define when a transaction would be conducted "on behalf of customers" for purposes of the Volcker Rule, but we believe that the better view is that the exemption was intended to capture a wide range of trading activity conducted in the context of customer-driven transactions. Many customer-driven transactions take place even without a covered banking entity having a specific advisory, trust or fiduciary relationship with the customer, and we believe that the Agencies recognize this today in other rules that they administer.[20]

If the Proposed Rule is adopted as proposed, we expect that customers will be unable to engage in many transactions that covered banking entities currently facilitate for them, or only will be able to participate if the covered banking entity is able to conclude that the transaction fits within the market making or underwriting exemption. While many of these transactions may indeed be exempted market making-related activity, the uncertainty and cost of reaching that determination comfortably may discourage banking entities from offering many of the services that they provide today to their customers. Banking entities act as principal to address customer needs in a wide variety of circumstances in which the banking entity does not intend to carry principal risks in the long term, but may carry principal risks, which are promptly hedged, in the short term on the customer's behalf. In most cases, the banking entity bears risk to facilitate a customer transaction that cannot be effectively done as agent. In many cases, these transactions resemble riskless principal transactions, but do not clearly fit within the very narrow riskless principal requirement as has been set forth in the Proposed Rule.[21]

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19 Proposed Rule, §___.6(b)(2)(i)(A).

20 *See* OCC Interpretive Letter No. 892 (Sept. 13, 2000). *See also* OCC Interpretive Letter No. 1090 (Nov. 2007). In these two letters, the OCC interpreted a "customer driven" transaction as being one entered into for a customer's valid and independent business purpose.

21 The Trade Associations Proprietary Trading Letter contains several additional comments on the customer exemption, and we endorse the points set forth therein.

COMMENTS TO THE UNDERWRITING EXEMPTION

The Proposed Rule permits a covered banking entity to purchase or sell a "covered financial position" [22] in connection with the banking entity's underwriting activities, if the activities satisfy certain criteria set forth in the Proposed Rule.[23] In describing the purpose of the underwriting exemption, the Agencies stated that:

> The Agencies anticipate that the proposed approach to implementing the underwriting exemption should permit legitimate forms of underwriting in which market participants currently engage and, thus, should not unduly burden capital formation. In addition, the [Proposed Rule] would permit underwriters to continue to employ existing practices to stabilize a distribution of securities, which stabilization promotes confidence among issuers, selling security holders, and investors and further supports capital formation.[24]

We are concerned, however, that the exemption for underwriting-related activities as drafted in the Proposed Rule is too narrow to permit a host of appropriate underwriting activity, including activities that the Agencies appear to have intended to allow.

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22 The Proposed Rule broadly defines a covered financial position as any long, short, synthetic or other position in: (i) a security (as defined in the Securities Exchange Act of 1934 (the "**Exchange Act**")); (ii) a derivative; or (iii) a contract of sale of a commodity for future delivery (as defined in the Commodity Exchange Act ("**CEA**"), which uses the term to refer to a listed exchange-traded futures contract); and (iv) in each case, an option on the same. *See* Proposed Rule §__.3(b)(3). We note that the Proposed Rule employs a broad definition of "derivative" for this purpose, *see* Proposed Rule at § __.2(l), which appears to incorporate financial instruments, such as foreign exchange forwards and swaps, and forward contracts on physical commodities, that are or may be excluded from regulation as "swaps" under Dodd-Frank, and urge the Agencies to consider clarifications to the definition of "derivative" in any final rule.

23 Proposed Rule §__.4.

24 NPR, 76 Fed. Reg. 68846, at 68925.

One of the criteria that must be satisfied in order to qualify for the exemption for underwriting activities is that the underwriting transaction be effected "solely in connection with a distribution of securities for which the covered banking entity is acting as underwriter" (emphasis added). For this purpose, the Proposed Rule employs definitions borrowed from Regulation M of the SEC. We are concerned that, taken together, these requirements will exclude a significant amount of legitimate underwriting activity, and urge the following changes.

First, the term "solely" should be deleted. Inclusion of the word "solely" adds a requirement not embodied in the text of the statute and creates ambiguity regarding the permissibility of activities that support or otherwise facilitate an underwriting and orderly after-market. Covered banking entities engage in a range of underwriting-related activities that are integrally related to underwritings and beneficial for the capital raising process.

We are aware that other letters, including the Trade Associations Proprietary Trading Letter, have identified stabilization activities of the syndicate as a potential concern under this definition. Given the provisions of the NPR quoted above, we agree that the Agencies certainly intended to permit such activities. There are a number of additional activities that are not addressed in the NPR that we believe should be clarified in any final rules.

For example, underwriters of a new series of debt may offer to repurchase other debt securities of the issuer from investors in order to help stimulate demand in the new issuance, if the investor has limited risk tolerance to the issuer's credit or portfolio restrictions. This is particularly common where a new issuance targets the existing investor base. Any securities that the underwriter purchases to support the new issuance would typically be sold by the underwriter to new investors. Another example is that in the fixed income market, Wells Fargo, as underwriter, may need to be a purchaser in the market of the debt of comparable issuers to the issuer for a proposed underwriting as a price discovery mechanism. Without conducting such purchasing activities, Wells Fargo will not necessarily be in a position to offer its issuer customers and prospective issuer customers advice on how best to price proposed offerings. As a general matter, we are concerned that the underwriting exemption, while it works imperfectly even with respect to underwriting the securities of "blue chip" issuers, really does not work as the statute and even the Agencies appear to contemplate that it should for issuers that are not as widely followed, with more thinly-traded securities.

We could describe many other examples, and there are many others that we would not be able to describe today, because underwriting-related practices are constantly evolving. The point of our comment is not that the rule must spell out every possible permitted underwriting-related activity that would be permitted activity under the Volcker Rule. Rather, the point is that any final rules in this regard should be flexible enough to allow covered banking entities to engage in underwriting activity and underwriting support activity without concern.

Second, the Proposed Rule employs the definition of "distribution" under Regulation M of the SEC.[25] Our concern with the use of this term is that it has a specific, limited meaning. Although the Agencies' NPR states that the underwriting exemption is intended to cover private placements,[26] the term "distribution" generally is understood more narrowly, and we are concerned that the meaning of the term for purposes of Regulation M may not translate appropriately to this context. Among others, capital raising and financing transactions that may not qualify as "distributions" under Regulation M also include commercial paper issuances.[27] Although these types of offerings would involve the purchase of securities by the covered banking entity directly from an issuer with a view toward resale, they may not always be clearly distinguished by "special selling efforts and selling methods" or by "magnitude"[28] as Regulation M would require.

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[25] Under Regulation M, "distribution" means "an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods." 17 C.F.R. § 242.100(b).

[26] NPR, 76 Fed. Reg. 68846, at 68867.

[27] We are concerned that the Proposed Rule will make it more difficult for corporate borrowers to obtain bridge loans from Wells Fargo and other banking entities. A common way in which bridge loans are replaced or refinanced, and the way that a covered banking entity typically disposes of securities that it obtains as a replacement for or in the refinancing of these bridge loans, potentially could be deemed to be outside of the underwriting exemption as defined by the Proposed Rule. We fully support the recommendations set forth in the LSTA's letter to the Agencies with respect to the treatment of bridge loans and any debt securities issued in lieu of, or in refinancing, bridge loans.

[28] Although we recognize that the NPR indicates that the "magnitude" requirement "does not preclude small offerings or private placements from qualifying for the underwriting exemption", *id.*, the concern is twofold: on the one hand, the Agencies' statement in the NPR may be viewed as inconsistent with the plain text of the rule, and thus to be disregarded, and on the other hand, there are many other offerings that exist today, or that will exist in the

(footnote continued...)

Third, underwriting-related syndicate activities should more clearly be permitted by the underwriting exemption. Regulation M applies to "underwriters," but also to other "distribution participants," including prospective underwriters, brokers, dealers and other persons that are participating or have agreed to participate in the distribution.[29] If the Volcker Rule exemption for underwriting activities is limited to "underwriters," any final rule would exclude covered banking entities that do not deal directly with the issuer or selling securityholder (as might often occur, for example, in the case of selling groups). Although Wells Fargo often serves as an "underwriter," Wells Fargo serves in other capacities as well. The involvement of other "distribution participants" is a standard practice that enhances liquidity for the issue and otherwise benefits capital formation. Accordingly, we respectfully suggest that any final rule provide that a Regulation M "distribution participant" is eligible for the benefit of the underwriting exemption.

COMMENTS TO THE HEDGING EXEMPTION

The prohibition on proprietary trading does not apply to the purchase or sale of a covered financial position if the transaction is made in connection with, and related to, individual or aggregated positions, contracts or other holdings of a banking entity, and is designed to reduce the specific risks to the banking entity in connection with, and related to, such positions, contracts or other holdings.[30] However, in order to rely on this exemption, the Proposed Rule

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(*...footnote continued*)
future, that should be eligible for the underwriting exemption, but that are not mentioned specifically in text explaining any final rule.

[29] Regulation M defines "underwriter" as "a person who has agreed with an issuer or selling security holder: (1) to purchase securities for distribution; or (2) to distribute securities for or on behalf of such issuer or selling security holder; or (3) to manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder;" and "distribution participant" includes "an underwriter, prospective underwriter, broker, dealer, or other person who has agreed to participate or is participating in a distribution." 17 C.F.R. §§ 242.100(b) and 242.101.

[30] Proposed Rule §__.5.

requires that the trading activity of a covered banking entity satisfy a number of specific criteria.[31]

As the FSOC Study recognized, "[p]rudent risk management is at the core of both institution-specific safety and soundness, as well as macroprudential and financial stability . . . . The Volcker Rule should not be applied in a way that interferes with a banking entity's ability to use risk-mitigating hedging."[32]

We understand that in drafting the Proposed Rule, the Agencies were seeking to prevent impermissible proprietary trading under the disguise of permissible hedging. We are concerned, however, that the Proposed Rule establishes a framework where hedging is presumed to be impermissible proprietary trading, unless proved otherwise – a constraining framework likely to lead covered banking entities to retain risk that cannot be effectively hedged because of the overly constrictive terms of the Proposed Rule.

1. Broad Permission of ALM Activities

In order to help address these concerns, we urge that the Proposed Rule be revised to expressly permit covered banking entities to engage in *bona fide* ALM activities. ALM activities are critical to safe and sound management of the risks that arise from the core business

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[31] The Proposed Rule requires that (i) the transaction must hedge one or more specific risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, basis risk, or similar risks, arising in connection with individual or aggregated positions, contracts or other holdings of a banking entity; (ii) the transaction must be "reasonably correlated" based upon the facts and circumstances of the underlying and hedging positions and the risks and liquidity of those positions, to the risk or risks that the transaction is intended to hedge or otherwise mitigate; (iii) the hedging transaction must not give rise, at the inception of the hedge, to significant exposures that are not themselves hedged in a contemporaneous transaction; and (iv) if a hedge is established at a different level of organization than the level establishing the related positions, contracts or other holdings, the banking entity must, at a minimum, contemporaneously document the risk-mitigating purpose of the transaction and identify the risks of the individual or aggregated positions, contracts or other holdings that the transaction is designed to reduce.

[32] FSOC Study, p. 21.

of banking, as the FSOC Study recognized.[33] Indeed, the FSOC Study stated that the treatment of ALM activities is "one of the more significant scope issues" under the Volcker Rule and concluded that:

> All commercial banks, regardless of size, conduct [ALM] that help[s] the institution manage to a desired interest rate and liquidity risk profile. This study recognizes that ALM activities are clearly intended to be permitted activities, and are an important risk mitigation tool .... A finding that these are impermissible under the Volcker Rule would adversely impact liquidity and interest rate risk management capabilities as well as exacerbat[e] excess liquidity conditions. These activities also serve important safety and soundness objectives.[34]

As proposed, the only exemption set forth in the Proposed Rule that potentially covers ALM activities in general (although other exemptions, such as the government obligations exemption, might address transactions involving specific types of instruments) is the exemption for risk-mitigating hedging transactions, and the only exclusion that touches upon ALM activities in general is the exclusion from the definition of "trading account" (and thus not prohibited proprietary trading) for *bona fide* liquidity management. We are concerned, however, that neither the hedging and government obligations exemptions, nor the *bona fide* liquidity management exclusion, will be sufficient to cover a wide variety of ALM activities. ALM is too important for the safety and soundness of a covered banking institution to be left to a patchwork of partial exemption and partial exclusion analysis, and we respectfully submit that ALM activities should therefore be the subject of a separate exemption or exclusion that is broad enough to cover all ALM activities identified as such by a covered banking entity. Although an exemption or exclusion of this sort could take many forms,[35] we believe that the key elements would be: (i) a requirement that covered transactions be pursuant to a documented ALM policy of the covered banking entity, which is subject to the review of the entity's principal regulator;

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[33] *Id.*, at 47.

[34] *Id.*

[35] In the letter of The Clearing House letter on this topic, it has been proposed that the Agencies should replace the Proposed Rule's exclusion for *bona fide* liquidity management activities with an exclusion from the definition of trading account for *bona fide* ALM activities that is conditioned on meeting appropriate criteria. We support this approach.

and (ii) a requirement that trading that qualifies under the ALM exemption or exclusion be conducted or directed by persons serving the ALM function at the applicable entity.

2. Treatment of Hedging Derivatives that Qualify for Hedge Accounting

In addition, whether or not a new ALM exemption or exclusion is adopted, we believe that it would be appropriate for any final rule to include as one of the exclusions from the definition of trading account any transaction in a derivative instrument that qualifies for hedge accounting treatment under the Financial Accounting Standards Board's Accounting Standards Codification Topic 815, Derivatives and Hedging (**"FASB ASC Topic 815"**). At a minimum, any final rule should treat such transactions as reasonably correlated without further inquiry for purposes of the hedging exemption set forth in the Proposed Rule.[36]

In our view, although designed for different purposes, the FASB ASC Topic 815 tests are well known to covered banking entities that use derivatives as hedging instruments, which will help with compliance burdens. To qualify for hedge accounting under FASB ASC Topic 815, the hedge relationships must meet extensive documentation requirements, and hedge effectiveness must be assessed and hedge ineffectiveness measured on a continuous basis. We believe that hedging that satisfies these tests is not proprietary trading that Section 13(a) of the BHC Act intends to prohibit and we urge that the Agencies adopt this position in any final rule.[37] In any event, a transaction that qualifies for hedge accounting under FASB ASC Topic 815 is sufficiently correlated, in our view, to an identified risk for purposes of Section 13(d)(1)(C) of the BHC Act and the Proposed Rule, and any final rule should recognize that a hedging transaction will be reasonably correlated for purposes of the Volcker Rule without additional inquiry if it so qualifies.

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[36] We recognize that, in its discussion of the hedging exemption's "reasonably correlated" test, the Agencies stated in the NPR, 76 Fed. Reg. 68846, at 68875 n.158, that the Proposed Rule does not rely on or refer to accounting standards, such as FASB ASC Topic 815.

[37] If a derivative does not qualify for hedge accounting under FASB ASC Topic 815, that does not mean that it should be presumed to be a proprietary position because hedge accounting under FASB ASC Topic 815 has extensive requirements. Our position is that FASB ASC Topic 815 should provide a "safe harbor."

3. Mortgage Pipeline Risk and Mortgage Servicing Rights

In addition to the general comments above regarding ALM and permissible hedging activities, we would like to comment on the particular situations of mortgage pipeline risk and mortgage servicing rights. Wells Fargo Home Mortgage is the leading mortgage lender in the United States and services one out of every six mortgage loans in the United States. A division of Wells Fargo Bank, N.A., it has a national presence in mortgage stores and banking stores, and also serves the home financing needs of customers nationwide through its call centers, Internet presence and third-party production channels.

When a covered banking entity commits to make a mortgage loan to a customer, that institution, as lender, assumes interest rate risk from the time of the lending commitment until the closing of the loan (while the loan is in the "pipeline"), which usually is within a 30-60 day period. In order to manage the risk of interest rate increases between commitment and funding of the loan, mortgage lenders, such as Wells Fargo, often enter into mortgage pipeline hedging transactions.

The purpose of mortgage pipeline hedging is to reduce the interest rate risk between the commitment of a loan and the funding of a loan, a period that usually is 60 days or less. Accordingly, we hedge using various instruments that commonly settle within 60 days. However, the presumption in the Proposed Rule is that an account used to acquire financial positions held for 60 days or less is a trading account (and thus trades in the account are proprietary) casts doubt upon the continuing validity of this risk management strategy. We respectfully submit that, regardless of the Agencies' final position with respect to ALM, any final rule should expressly allow mortgage pipeline hedging as fully consistent with sound risk management practices, even though the hedging instruments are typically settled within a 60-day period.

Relatedly, after the mortgage loan is funded, it must then be serviced. When an institution selling a mortgage loan retains the right to service the mortgage, this retention gives rise to a mortgage servicing right ("**MSR**"), which is capitalized and booked on the servicer's balance sheet. The value of this MSR fluctuates based on interest rates. As interest rates decrease, borrowers tend to refinance their loans. Therefore, an MSR will generally have a shorter duration and less value when mortgage loans are prepaid or market conditions are such that the likelihood that mortgage loans will be prepaid increases. In order to hedge the value of the MSR asset, the servicer typically utilizes various hedging instruments with potential holding periods, expirations or settlement dates of 60 days or less, such as trading in the agency to-be-announced market ("**TBAs**"), entering into interest rate swaps, options, and other transactions.

As is the case with mortgage pipeline hedging activities, the Proposed Rule's 60-day presumption casts doubt upon the continuing validity of these risk management strategies and we respectfully submit that any final rule should expressly allow such hedging as fully consistent with sound risk management practices.

Another example of legitimate and prudent hedging of MSRs that might not be permitted under the Proposed Rule is as follows. MSRs generally are "negative duration" assets, in that the asset appreciates in value as interest rates increase. Accordingly, a prudent hedge would be an asset that exhibits "positive duration" to offset the value change and thus mitigate interest rate risk. However, positive duration assets, such as Treasuries, interest rate swaps or mortgage-backed securities, typically pay positive interest income. We are concerned that this prudent hedging strategy for MSRs might therefore produce profits that could be deemed to violate the "appreciable profit" standard set forth in the permitted risk-mitigating hedging exemption. We note that MSR hedging is already a highly-regulated activity, subject to ongoing scrutiny of hedging policies and procedures, risk limits and controls by the Agencies, and including these MSR strategies in the hedging exemption to the Volcker Rule's prohibitions on proprietary trading would not mean that the trading activity takes place outside of governmental oversight.

COMMENTS TO THE GOVERNMENT OBLIGATIONS EXEMPTION

The Proposed Rule permits the purchase or sale of a covered financial position that is an obligation of the United States or any agency thereof, or any state or any political subdivision thereof (including both general obligations and limited obligations, such as revenue bonds), or an obligation, participation or other instrument of or issued by certain U.S. government-sponsored enterprises ("**GSEs**"), including the principal housing-related GSEs, any Federal Home Loan Bank, the Government National Mortgage Association ("**Ginnie Mae**"), the Federal National Mortgage Association ("**Fannie Mae**") and the Federal Home Loan Mortgage Corporation ("**Freddie Mac**").[38] While the Proposed Rule implements the exemptions explicitly provided by Section 13(d)(1)(A) of the BHC Act, the BHC Act, of course, provides the Agencies with the authority to provide exemptions for additional classes of activity as the Agencies determine "would promote the safety and soundness of the banking entity and the financial stability of the United States."[39] In our view, any final rule should provide additional

[38] Proposed Rule §__.6.

[39] Section 13(d)(1)(J) of the BHC Act.

exemptions for a range of additional government and government-related obligations, as described further below.

1. Exemption for state and municipal agency obligations

Wells Fargo has a significant presence in the municipal securities market. Wells Fargo is a large source of capital to states and political subdivisions, and their agencies, and of liquidity to municipal investors. In 2011, Wells Fargo Securities[40] participated as an underwriter in approximately $70.7 billion in negotiated municipal bond underwritings. As such, Wells Fargo Securities is a leading underwriter of municipal securities in the United States. Wells Fargo is among the top five institutions in the United States in the municipal market in terms of providing secondary market liquidity.[41] Furthermore, Wells Fargo is one of the top five financial institutions in the United States with respect to municipal securities holdings. As such, Wells Fargo is particularly interested in ensuring that any final rule does not disrupt the municipal securities market.

We believe that it is important for the government obligations exemption to be expanded in any final rule beyond obligations of states and their political subdivisions, to also include state and municipal agency obligations. We estimate that approximately 40% or more of the municipal securities currently outstanding would not be covered by the terms of the government obligations exemption as currently proposed.[42] We believe that the statement in the

[40] Wells Fargo Securities is the trade name for certain capital markets and investment banking services of Wells Fargo & Company and its subsidiaries, including Wells Fargo Bank, N.A. and Wells Fargo Securities, LLC, member NYSE, FINRA, and SIPC.

[41] We note that because of the liquidity characteristics of the municipal market, with the multiplicity of investors and bond issues, we do not believe that it is feasible to satisfy the liquidity needs of investors (as buyers or sellers) by simply crossing bonds on a riskless basis. Accordingly, Wells Fargo Securities satisfies liquidity needs by holding large inventories of investment grade municipal bonds, and hedges interest rate risk using a variety of strategies. Since this municipal asset class is high quality, and our risk can be hedged, Wells Fargo Securities is able to satisfy the needs of municipal issuers, by helping to keep their rates low, and the needs of investors, by helping to provide liquidity and fair pricing for their municipal bonds, without undue risk to Wells Fargo's balance sheet.

[42] *See also* the letter to the Agencies from the Municipal Securities Rulemaking Board, dated January 31, 2012 (stating that 41.4% of the municipal securities issued in FY2011 were

(footnote continued...)

Proposed Rule that the government obligations exemption does not extend "to transactions in obligations of an *agency* of any State or political subdivision thereof"[43] is a narrow interpretation of the statutory language and is inconsistent with existing Federal statutes, regulatory guidance, and market usage of the terms "municipal securities" and "political subdivision." Existing Federal regulations and statutory guidance on the definition of "municipal securities" generally treat securities issued by agencies of states and political subdivisions as municipal securities. For example, the OCC defines "municipal bonds" as "obligations of a State or political subdivision other than general obligations, and includes limited obligation bonds, revenue bonds, and obligations that satisfy the requirements of section 142(b)(1) of the Internal Revenue Code of 1986 issued by or on behalf of any State or political subdivision of a State, including any municipal corporate instrumentality of 1 or more States, or any public agency or authority of any State or political subdivision of a State."[44] Further, the OCC defines "political subdivision" as a "county, city, town, or other municipal corporation, a public authority, and generally any publicly owned entity that is an instrumentality of a State or municipal corporation."[45] The terms "political subdivision," "agency," "authority," "instrumentality," "municipal corporation" and similar terms are used interchangeably and frequently in the municipal securities market to refer to issuers of municipal securities. Ideally, the category of securities to be covered by the government obligations exemption should be broadened to include all bank-eligible securities under 12 U.S.C. § 24 (Seventh) and should in any case include all instruments that meet the definition of "municipal securities" set forth in Section 3(a)(29) of the Exchange Act.[46] We can

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(*...footnote continued*)
issued by agencies and authorities) (the "**MSRB Letter**"). We endorse the comments set forth in the MSRB Letter.

43 NPR, 76 Fed. Reg. 68846, at 68878 n.165.

44 12 C.F.R. Part 1, Section 1.2(g).

45 12 C.F.R. Part 1, Section 1.2(i).

46 15 U.S.C. § 78c(a)(29). In that provision, the term "municipal securities" is defined to include "securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section
(*footnote continued...*)

think of no reason to vary from the Exchange Act's definition of municipal securities, which has been widely recognized by the market and applicable regulators for decades.[47]

We believe that the Proposed Rule, as formulated, would create a number of problems. First of all, it is not always apparent whether a municipal issuer qualifies as a political subdivision of a state, as opposed to an agency or instrumentality or some other form. Furthermore, municipal issuers in different states with the same organizing purpose may be treated as a political subdivision in one state and not in the other. Requiring these distinctions to be drawn in assessing whether certain trading activities are subject to the Volcker Rule's proprietary trading provisions or exempt will impose significant costs on participants in the municipal securities space, a task that will be particularly burdensome for outstanding municipal securities for which the covered banking entity did not act as an underwriter at issuance. To give some idea of the magnitude of the task, there currently are more than 1.1 million municipal securities (as identified by unique CUSIP number) outstanding.

More important, we see no principled basis to draw a distinction, as agency and instrumentality securities generally have the same or very similar credit, liquidity and risk characteristics as securities issued by states and political subdivisions that will clearly be exempt under the Proposed Rule. As an example, last year, Wells Fargo Securities underwrote the general obligation bonds of a state, and the bonds of an agency of that state for the benefit of that state, which were secured by a lien on that state's personal income taxes. The state used the proceeds of the agency bonds for public purposes, just as it used the proceeds of its general obligation bonds. In fact, the agency bonds, as they were secured by a particular state revenue

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(*...footnote continued*)

103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security."

[47] We note in this regard that Mary Schapiro, the Chairman of the Securities and Exchange Commission, testified on January 18, 2012 that the SEC is considering a broader municipal issuer exemption from the Volcker Rule. *See* Testimony of Mary L. Schapiro before the U.S. House of Representatives Committee on Financial Services, Subcommittees on Capital Markets and Government Sponsored Entities and Financial Institutions and Consumer Credit, "Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation" (Jan. 18, 2012); *see also* the MSRB Letter.

source, are rated higher than the state's general obligation bonds. We see no sensible reason why the former class of state bonds would be exempt but not the latter class of agency bonds. It is our view that drawing a distinction between municipal securities based solely on the type of issuer that issues such securities does not promote the goals of the Volcker Rule and is a form over substance approach to rulemaking.

Furthermore, we believe treating securities issued by agencies of states and political subdivisions differently from those issued by a state or a political subdivision does not enhance the safety or soundness of financial institutions such as Wells Fargo. We are unaware of any evidence to suggest that securities issued by agencies of states or political subdivisions generally represent higher risks than other municipal securities.

Lastly, the government obligations exemption as currently drafted would adversely impact TOB programs,[48] which represent a significant portion of the municipal securities market. Securities issued by agencies of states and political subdivisions are commonly used as the deposited asset in TOB programs. The nature of these programs requires multiple sales to and from intermediate entities prior to deposit of the municipal securities into the TOB trust. These transactions may not fit precisely into one of the currently proposed exemptions from the proprietary trading prohibition and therefore could, without an exemption, be prohibited. The result of this would likely be to prevent the creation of TOB programs backed by securities issued by agencies of states and political subdivisions. As such, it is equally important for the government obligations exemption to be expanded as described in this letter to enable TOB programs to continue to efficiently operate and not disrupt the municipal securities market.

In sum, the result of adopting the exemption as it has been proposed likely will be an adverse impact on depth and liquidity of the municipal securities market, with an inefficient bifurcated municipal securities market, wider bid-ask spreads, more limited access for state and municipal issuers to low-cost financing for public projects, and potentially less flexibility for state and municipal issuers in how to structure their financing of public projects. We believe that an exemption along the lines we are proposing would be consistent with congressional intent in adopting the statutory exemption to the Volcker Rule's proprietary trading ban and consistent with sound public policy.

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48 We discuss TOB programs in more detail below.

2. TBAs and Treasury Futures

In connection with the trading of government obligations and related instruments, banking entities enter into various types of transactions. Some examples particularly significant to Wells Fargo and its mortgage business are the use of Treasury futures and forward purchases in the "To-Be-Announced" ("**TBA**")[49] market for mortgage-backed securities ("**MBS**") guaranteed by Fannie Mae, Freddie Mac and Ginnie Mae. In each case, Wells Fargo enters into a transaction with a private counterparty and obtains the right to obtain (or sell) a government-issued security from (or to) that counterparty in the future. These transactions may be entered into as part of a hedging strategy (and potentially may qualify for the hedging exemption). In some cases, the transactions may simply be used to ensure adequate price discovery and support customer flow. Failure to expressly include these and similar activities in the government obligations exemption, in our view, could significantly restrict overall activity in government obligations in direct opposition to what was expressly permitted by statute.

Although certain of these transactions may fall under the market making or hedging exemptions, we believe this issue is distinct and should be treated by any final rule as such. Restricting activity in these types of transactions, even if that activity also could qualify under other exemptions or exclusions, raises the same concerns about liquidity and depth of markets in government obligations that presumably motivated the statutory exclusion in the first place. Such restrictions on trading in TBAs and Treasury futures would, at a minimum, damage liquidity in the mortgage finance industry resulting in higher costs to the consumer and, at worst, eliminate the ability of mortgage originators to offer rate locks to consumers under the terms currently available.

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[49] TBAs are transactions in MBS guaranteed by Fannie Mae, Freddie Mac and Ginnie Mae for forward delivery. The specific MBS bonds are not known at the time of the forward TBA transaction, but are announced at a later date, generally 48 hours prior to settlement of the forward. The MBS to be delivered must strictly adhere to the rules of "good delivery." This form of TBA trading is a pillar of liquidity in the mortgage finance market, and a vital part of risk management within any mortgage finance operation. TBA transactions account for the vast majority of MBS trades. We note that the Federal Reserve Bank of New York appears to agree with our assessment of TBA liquidity, considering that it has purchased well over $1 trillion of MBS for its portfolio via TBAs to date.

In referencing the government obligations exemption, the NPR states that "[t]he Agencies also note that the terms of the exemption would encompass the purchase or sale of enumerated government obligations on a forward basis (*e.g.*, in a to-be-announced market)."[50] Although we appreciate this acknowledgment by the Agencies, we believe that any final rule should expressly exempt TBAs. Given their structure, we are concerned that the plain language of the Proposed Rule might be interpreted mistakenly as excluding TBAs from the government obligations exemption. We respectfully submit that TBAs, Treasury futures and similar instruments should be explicitly exempt from the proprietary trading restrictions of the Volcker Rule.[51]

FOREIGN EXCHANGE SWAPS AND FORWARDS

We respectfully urge that the Agencies provide in any final rule that the Volcker Rule's proprietary trading restrictions do not extend to foreign exchange swaps and forwards. The Proposed Rule includes in the definition of "derivative," foreign exchange swaps and forwards as those terms are defined in the CEA.[52] Under the CEA, as amended by Dodd-Frank, the Treasury Department is authorized to, and has, proposed to exempt (for most purposes) physically-settled foreign exchange swaps and forwards from the definition of "swap." The rationale for the Treasury Department's proposed exclusion, in our view, equally supports an exclusion of these instruments from the proprietary trading ban: these instruments are essential to international commerce in a growing global market. The Treasury Department, in proposing the exclusion from the definition of "swap," noted that: "[b]usinesses that sell goods in international trade, or that make investments in foreign countries, frequently ask their banks to arrange foreign exchange swaps and forwards to control the risk that their own country's currency will rise or fall against the other country's currency while the sale or investment is pending."[53] As such, foreign exchange swaps and forwards are similar to traditional banking

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[50] NPR, 76 Fed. Reg. 68846, at 68878 n.164.

[51] We also would suggest that the Agencies include their stated definition of "agencies" for purposes of the "obligation of the United States or any agency thereof" as the one provided in Section 201.108(b) of the Board's Regulation A, 12 C.F.R. § 201.108(b), as set forth in the NPR, 76 Fed. Reg. 68846, at 68878 n.164, in part of any final rule text.

[52] Proposed Rule § __.2(l)(i)(C).

[53] Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 76 Fed. Reg. 25774, at 25776 (May 5, 2011).

products whereby a bank provides foreign currency to customers and, at the same time, helps the customer to manage its foreign exchange risk.

Covered banking entities provide access to these products to end users as well as liquidity to the foreign exchange swaps and forwards markets. With greater liquidity comes the possibility of better pricing for the end user. Covered banking entities provide this liquidity by transacting with customers, maintaining sufficient inventory, by hedging their own risk and in managing their overall foreign exchange portfolio. In our view, forcing a covered banking entity to rely solely on the narrowly-drafted and burdensome to prove exemptions for market making, hedging and customer trading to permit trading in these instruments would make it very difficult and costly for a covered banking entity to hedge its foreign exchange risk and manage its own inventory, as liquidity will be reduced, and customer-only transactions will not offset with one another. With respect to market making specifically, it is unclear whether a prohibition or limitation in the local market of a currency by the local regulator would mean a covered banking entity would never qualify as a market-maker for that currency.[54] If a covered banking entity is not freely able to trade in foreign exchange swaps and forwards, less liquid markets and, consequently, worse pricing for the end users will result, potentially harming those who need foreign exchange markets the most in order to conduct their business around the world.

Accordingly, we respectfully urge that the Agencies exclude physically-settled foreign exchange swaps and forwards from the definition of "derivative."

COMMENTS TO THE MARKET MAKING EXEMPTION

As we have stated in our introduction above, Wells Fargo is concerned that the Proposed Rule has taken an approach to defining the market making exemption that will unnecessarily restrict and have a chilling effect on legitimate activity that Congress never meant to be captured by the proprietary trading ban. If the Proposed Rule is not modified to more clearly permit covered banking entities to engage in a broad range of market making-related activities, the rules are likely to have the effect in the United States financial markets of

[54] In some instances, local markets may work to exclude end users from transacting in the needed foreign currency, leaving such end users unable to hedge their risk. It is for this reason that non-deliverable forwards ("**NDFs**") are often used. NDFs permit an entity to hedge the risk of a particular currency, but avoid possible limitations on or prohibitions to trading in that currency. On that basis, we respectfully submit that the Agencies should also exempt trading in NDFs from the ban on proprietary trading.

decreasing liquidity, increasing price volatility and making capital formation significantly more difficult.

We believe that the hard-coded criteria set forth in the Proposed Rule are inappropriate and do not capture the wide range of market making-related activities in various financial markets, and that the exemption for market making should be structured as a general grant of authority to engage in market making-related activity, where "market making" is defined as the business of being willing to facilitate customer purchases and sales of covered financial positions as an intermediary over time and in size, including by holding positions in inventory, and "market making-related activity" is defined as any transactions entered into as part of a covered banking entity's market making business,[55] including those profit taking activities which are common in the OTC derivatives dealing markets.

In addition, the requirement that a market maker "hold[] [itself] out as willing and available to provide liquidity by providing quotes on a regular (but not necessarily continuous) basis" does not appear to allow a covered banking entity to act as an "immediate" market maker in one-off transactions. While this problem potentially could be solved by broadening the "on behalf of customers" exemption as we discuss above, we nevertheless respectfully suggest that the Agencies define permitted market making-related activity to expressly include transactions in instruments that are new or that occur infrequently so as to allow market making in situations where the covered banking entity may not have, or may not have had the opportunity to have, previously held itself out as willing to buy and sell the applicable instrument.

Although we understand that the Agencies do not want the market making exemption to serve as a cover for impermissible proprietary trading, and while we recognize that it may be difficult to distinguish between the two, we believe that the better approach is to provide covered banking entities with a broad and general exemption as described above, and allow banking entities to monitor compliance internally through their compliance and risk management infrastructure, as may be required by the entity's primary federal regulator, as a check on the covered banking entity's activities, subject to oversight by the entity's primary federal regulator. Such an approach, in our view, would be the best way to implement the statutory ban on proprietary trading while still protecting and enhancing financial stability in the United States.

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[55] The Trade Associations Proprietary Trading Letter contains this suggestion and additional comments on the market making exemption, and we endorse the points set forth therein.

COMMENTS TO THE COVERED FUNDS ACTIVITIES AND INVESTMENTS PROVISIONS

As we mentioned above, Wells Fargo has submitted a separate letter regarding what we believe to be the inadvertent categorization as a "private equity fund" of a type of subsidiary investment structure that Wells Fargo has long used to make permissible direct merchant banking and venture capital investments in operating companies. In addition, we have the following comments on the "covered funds" aspects of the Proposed Rule.

In addition to the ban on proprietary trading, the other key component of the Volcker Rule is to prohibit a covered banking entity from acquiring or retaining any equity, partnership or other interest in, or sponsor a "hedge fund" or "private equity fund." Although the nature of private equity and hedge funds is generally understood, it has proved difficult to legally define such funds in the federal laws relating to financial services. Section 13(h)(2) of the BHC Act settled on a convenient definition of the terms "hedge fund" and "private equity fund" by reference to an exemption that each type of fund typically relies upon in order to avoid having to register as an investment company under the Investment Company Act of 1940 Act, as amended (**"ICA"**). Specifically, the statute defines hedge fund and private equity fund as an issuer that would be an investment company, as defined in the ICA, but for Section 3(c)(1) or 3(c)(7) of the ICA, or any similar fund as the Agencies may by rule determine.

This definition captures funds that are commonly understood to be hedge funds and private equity funds. Unfortunately, this broad statutory definition also includes numerous entities that are clearly not, or that in operation and form are not truly similar to, hedge funds and private equity funds. We recognize that the Proposed Rule, with an understanding by the Agencies that the breadth of the statutory definition is not properly harmonized with the stated statutory intent that the prohibition set forth in Section 13(a)(1)(B) of the BHC Act apply to hedge funds and private equity funds, provides limited exemptions for certain fund structures.[56]

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[56] Congress has acknowledged that the Agencies' rulemaking authority includes the ability to exempt entities that should not be treated as hedge funds or private equity funds in order to avoid expanding the Volcker Rule beyond its intended objectives. *See* 111 Cong. Rec. H5226 (daily ed. June 30, 2010) (colloquy between Representative Barney Frank, the co-sponsor of Dodd-Frank, and Representative Jim Himes (referred to herein as the "Himes-Frank colloquy")). In the Himes-Frank colloquy, Representative Himes asked on the floor of the House of Representatives for confirmation that the Volcker Rule is not intended to disrupt firms' ownership or control of "subsidiaries or joint ventures that are used to hold other investments, [and] that the Volcker Rule won't deem those things to be private equity

(footnote continued...)

However, these exemptions are relatively limited, and will require significant costs to comply with and/or restructure transactions to comply to and do not do enough to correct the unintentional capture of a variety of vehicles that rely on Section 3(c)(1) or 3(c)(7) to avoid registration as an investment company under the ICA.

We respectfully request that the Agencies modify the definition of covered fund to explicitly exclude from that definition the vehicles described below as well as any other investment vehicle that is clearly understood not to be a hedge fund or private equity fund.

Below are a few examples of vehicles or funds that are clearly not hedge funds or private equity funds as the term is commonly understood by regulators, investors and market professionals, but that appear to be captured by the overbroad definition of the Proposed Rule. As noted above, the following issues are addressed extensively in the Trade Association Letters. Given their critical importance to Wells Fargo, we feel compelled to re-emphasize these issues here.

1. Impact of Super 23A on Wholly Owned Subsidiaries and Controlled Joint Ventures

In our separate comment letter we have referenced above, we discuss the potentially inadvertent categorization as a "private equity fund" of a type of subsidiary investment structure that Wells Fargo has long used to make permissible direct merchant banking and venture capital investments in operating companies. This subsidiary investment structure, however, is only one aspect of what we believe is a more general concern with the Proposed Rule. Wells Fargo believes that joint ventures controlled by banking entities and wholly owned subsidiaries of banking entities should not be deemed to be covered funds.[57]

(*...footnote continued*)

or hedge funds and disrupt the way the firms structure their normal investment holdings." Representative Frank confirmed this point as "absolutely correct. We do not want these overdone. We don't want there to be excessive regulation. And the distinction the gentleman draws is very much in this bill, and we are confident that the regulators will appreciate that distinction, maintain it, and we will be there to make sure that they do."

[57] Although we recognize that the Proposed Rule provides certain exemptions for joint ventures and wholly owned subsidiaries, *see* Proposed Rule, § __.14(a)(2), we believe that the conditions to those exemptions significantly limit their utility.

If joint ventures and wholly owned subsidiaries are treated as covered funds, not only would banking entities be limited in their ability to structure their businesses, but even if banking entities are permitted to own them, these entities will be prohibited from receiving extensions of credit from, selling assets to, or engaging in other ordinary course transactions with, their parent companies (or their parent companies' respective affiliates) under Super 23A. These restrictions likely would make operation of a subsidiary or joint venture difficult, impractical or functionally impossible. Congress clearly intended that the Volcker Rule not disrupt firms' ownership or control of "subsidiaries or joint ventures that are used to hold other investments."[58]

2. TOB Programs

The Agencies should (i) narrow the definition of "covered fund" to exclude trusts created in connection with TOB programs, and (ii) provide an exemption from any applicable Volcker Rule restrictions for activities and transactions entered into in connection with the establishment and maintenance of TOB programs. Otherwise, the Proposed Rule's failure to expressly exempt TOBs from the definition of covered fund activities and covered transactions with covered funds will have a significant adverse effect on the municipal securities market. As we have mentioned above, we have participated in the preparation of the comment letter prepared by Ashurst on the topic of TOB programs generally and we endorse the comments set forth therein.

TOBs are effected through the creation of a trust that relies upon the exception from the definition of "investment company" provided by Section 3(c)(1) or 3(c)(7) of the ICA. These trusts purchase a municipal security (typically a single series of a highly-rated municipal bond) and issue two classes of certificates with the municipal obligation serving as collateral. One class, the floating rate class, is generally sold to short-term investors as a money-market eligible class of securities and distributes interest based on a floating rate of interest. The floating rate class has the added benefit of a tender option supported by a liquidity facility which is often provided by the sponsoring bank. The other class, the residual class, is generally either retained by the sponsoring bank or a sophisticated third-party investor. The residual class is paid any remaining coupon payments available after payment of interest on the floating rate certificates.

[58] *See* the Himes-Frank colloquy.

TOB programs share neither the investment characteristics nor the lack of transparency of traditional private equity funds and hedge funds. Unlike hedge funds and private equity funds, which are actively managed and may take large risks based upon aggressive or speculative investment strategies, TOBs normally consist entirely of a single series of a highly-rated municipal bond. Detailed disclosure on the TOB structure and the underlying municipal bond are provided ahead of time to investors. In contrast, private equity funds and hedge funds often provide little or no information about the specific issuers of securities held in their funds. The fact that TOBs rely on a similar exemption to the ICA is a technical similarity that in no way warrants similar treatment to private equity funds and hedge funds.

TOB trusts, in fact, are economically similar to repurchase agreements, which the Agencies have proposed to exclude from the prohibitions on proprietary trading because they "operate in economic substance as a secured loan, and are not based on expected or anticipated movements in asset prices."[59] The main reason municipal securities are funded through TOB programs, and not through repurchase agreements, is to maintain the favorable tax treatment that municipal securities enjoy, not to otherwise allow for risky or speculative trading strategies.

TOB programs do not pose a safety and soundness threat to the banking system, which was one of the primary objectives of Section 619 of Dodd-Frank. Creating a TOB trust poses no greater risk to the sponsoring bank than owning the underlying high-grade municipal securities in the first place. In fact, given the additional sources of funding and liquidity that TOB programs provide to banking institutions, we believe that TOBs promote safety and soundness, not threaten it. In addition, TOBs represent a significant source of short-term tax-exempt investments for money market funds. As written, the Proposed Rules will likely limit the availability of TOBs and therefore result in far fewer investment opportunities for money market funds, as well as their individual and institutional investors.

Finally, TOBs represent a significant source of primary and secondary market demand for fixed rate municipal debt. Eliminating them would significantly reduce demand and liquidity in this market, which would in turn drive up the cost of financing to our municipal issuer clients at a time when they can least afford it.

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[59] NPR, 76 Fed. Reg. 68846, at 68862.

3. Securitization Vehicles

Many securitization vehicles also rely upon the exception from the definition of "investment company" provided by Section 3(c)(1) or 3(c)(7) of the ICA. While the Proposed Rule does exempt certain securitization structures and activities, the securitization market is quite broad and the Proposed Rule does not exempt a broad enough range of such structures. Unless a broad exemption for securitization vehicles and activities is provided, the ability of covered banking entities to free up capacity for additional lending likely will be constrained, with a significant negative impact on municipalities, consumers and the U.S. economy.

We are also concerned about the impact the Proposed Rule would have on relationships that are necessary to make a securitization vehicle work as currently constructed. In a resecuritization transaction, a covered banking entity like Wells Fargo may act as depositors. In other securitization vehicles, covered banking entities may act as a servicer and may be obligated to make servicer advances in anticipation of receipts from the loans that have been securitized. In addition, covered banking entities also act as underwriters, placement agents and remarketing agents for securitization vehicles that are not covered by the loan exemption and it is not always possible or feasible that all of the securities of a securitization are sold on the closing date. If a broad exemption for securitization vehicles is not possible, then we think that certain activities should be exempted from the definition of sponsor.

The Proposed Rule's implementation of Section 13(f) of the BHC Act imposes a blanket prohibition on a variety of transactions between a banking entity and any covered fund managed, advised, sponsored or organized and offered by the banking entity. [60] The consequences of the Proposed Rule are severe, as Super 23A would apply broadly to any "covered fund" with which the covered banking entity has a relationship. Even if a banking entity is permitted to invest in or sponsor a covered fund, Super 23A may nevertheless prohibit a wide range of transactions between the banking entity (and its affiliates) and the covered fund. Asset-backed commercial paper conduits that fund consumer loans, including auto loans, student loans, residential mortgages and credit card receivables, could be problematic under the Proposed Rule, as a covered banking entity provides liquidity to these vehicles. If banking entities are prohibited from entering into new covered transactions with a changing basket of their wholly owned subsidiaries, joint ventures and acquisition vehicles, they will no longer be able to enter into funding, risk-mitigating or other ordinary course intercompany transactions with these non-fund affiliates. We believe that providing an exemption for asset-backed

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[60] Proposed Rule, Section __.16(a).

securitization vehicles would be consistent with the safe and sound operation of banking entities, and would promote financial stability.

As we have mentioned above, we have participated in the preparation of the comment letters prepared by ASF and SIFMA on the topic of securitization vehicles generally and we endorse the comments set forth therein.

4. Bank-Owned Life Insurance

Wells Fargo long has used insurance investment products to offset the costs of providing the highly competitive benefit plans that it offers to its work force. Included among these products is "separate account" bank-owned life insurance ("**BOLI**"). In this program, an insurance carrier establishes legally separate accounts. While the accounts are owned by the insurance carrier, they are outside the reach of the carrier's general creditors. These accounts thereby shield premium dollars invested by Wells Fargo in the policy.

In addition, separate account BOLI allows Wells Fargo to allocate cash values to investment funds within the separate account, and to hedge returns on premiums through stable value protection and similar arrangements offered by the insurance carrier. A bank earns income from the growth of the BOLI's cash surrender value and from insurance proceeds paid to the bank on the death of an insured employee.

Separate account BOLI generally would be an investment company subject to registration under the ICA, but for the exceptions to the definition of "investment company" set forth in Section 3(c)(1) and 3(c)(7) of the ICA. Accordingly, Wells Fargo is concerned that the Volcker Rule would affect our ability to continue to use separate account BOLI investment products. We are equally concerned that the Volcker Rule would prohibit insurance carriers affiliated with banks that previously have sold separate account BOLI policies to Wells Fargo from being able to continue to own BOLI separate accounts on behalf of our banks. In this regard, several insurance carriers affiliated with banks have underwritten separate account BOLI on behalf of Wells Fargo.

We are pleased that the Proposed Rule contains a separate account BOLI exemption from the Volcker covered funds prohibition.[61] And we believe that the intent of the separate account BOLI exemption is to permit a bank to continue to use separate account BOLI

[61] Proposed Rule § __.14(a)(1).

as an end-user to offset employee benefit costs and to permit an insurance company affiliated with a bank to continue to sponsor separate account BOLI, and to own the separate account once a policy is placed with a bank customer. However, we remain concerned that the Proposed Rule may leave room for interpretation, especially with respect to the meanings of the terms "ownership" and "sponsorship" in the context of bank-owned life insurance and separate accounts.

For these reasons, Wells Fargo respectfully requests that the agencies include language in the text of any final rule, or alternatively in the promulgating release accompanying any final rule, that specifically acknowledges that the exemption for separate account BOLI is intended to provide an exemption from the covered funds prohibition both with respect to (i) bank entity end-user investment activities and (ii) the sponsorship and issuance of separate account BOLI by insurance carriers that are banking entities due to their affiliation with depository financial institutions.

5. Commodity Pools

In the case of commodity pools, we are concerned about a problem other than the overbreadth of the definition of hedge fund and private equity fund by reference to issuers that would be an investment company but for Section 3(c)(1) or 3(c)(7) of the ICA. Rather, the problem is that the Proposed Rule designates as a "similar fund" all "commodity pools" as that term is defined in the CEA.[62] The CEA definition is very broad, and includes any investment trust, syndicate, or similar form of enterprise that is operated for the purpose of trading in commodity interests. We are concerned that, in light of this broad definition, and staff interpretations and applications thereof, it is possible that under the Proposed Rule, many entities not commonly understood to be "commodity pools" and that do not have trading of commodity instruments as a primary focus could be covered, including registered mutual funds and exchange traded funds. We urge that any final rule clarify that only commodity pools that are principally engaged in trading commodity interests will be treated as "similar funds."

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[62] Dodd-Frank amended the CEA to define "commodity pool" as "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests." 7 U.S.C. § 1a(10).

Additionally, any final rule should clarify that an SEC-registered investment company would not be a "similar fund."[63]

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[63] We believe this treatment is consistent with Rule 4.5 under the CEA, which excludes from the definition of the term "commodity pool operator" any person sponsoring a registered investment company.

We appreciate your consideration of our comments and suggestions on the Volcker Rule proposal set forth in this letter. If you have any questions or would like to discuss any of our comments or suggestions further, please do not hesitate to contact the undersigned at James.Strother@wellsfargo.com, or (415) 396-1793. We would be pleased to discuss our comments and suggestions in further detail, and to provide additional information as the Agencies may require.

Sincerely,

James Strother

James M. Strother
Senior Executive Vice President and
General Counsel