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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, Northwest
Washington, DC 20551

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

Office of the Comptroller of the Currency
250 E Street, Southwest
Mail Stop 2 - 3
Washington, DC 20219

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on Proposed Rules Relating to "Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds"
Federal Reserve Docket Number R–1432/RIN 7100-AD82
FDIC RIN 3064-AD85
OCC Docket ID No.OCC - 2011–14
SEC File no. S7-41-11

Ladies and Gentlemen,

We are submitting this letter in response to your request for comments on proposed rules issued on October 11, 2011 (the "Proposed Rules") by the Federal Reserve, FDIC, OCC and SEC (the "Agencies") relating to Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "DFA"). Section 619 adds a new section 13 to the Bank Holding Company Act of 1956 (the "BHC Act") that, in general, prohibits proprietary trading and investments in hedge funds and private equity funds by banks and their affiliates (the "Volcker Rule"). Katten Muchin Rosenman LLP is a law firm that represents a number of investment advisers in the United States that advise private funds, offshore funds similar to private funds and banks organized in jurisdictions other than the United States who have expressed concerns regarding the scope and impact of the Proposed Rules intended to implement the "Volcker Rule." On behalf of these clients, Katten respectfully submits the comments contained in this letter.

Background

Katten's clients include investment advisers based in the United States who advise foreign banking institutions and their affiliates on investments in various private funds operated by third party managers that would fall under the definition of "covered fund" as proposed by the Agencies. These foreign banking institutions usually have some operations in the United States that cause them to be "banking entities" as defined in the Volcker Rule even though their investments as passive investors comply with the regulations of their home jurisdiction and their U.S. operations comply with applicable U.S. banking regulations. On occasion, the advisers may negotiate for a third-party manager to operate a separate vehicle solely for the foreign bank client rather than have the banking entity invest in the managers commingled fund. The bank client has determined in accordance with its home jurisdiction's regulations that the relevant investments are authorized and suitable for it. In many instances, similar to other institutional investors, the foreign bank may have determined that allocating some of its capital reserves to investments in alternatives and private funds serves to reduce overall risk rather than increase risk. In any event, as recognized by Congress in enacting the "solely outside the United States" exception to the Volcker Rule, investments by foreign banking institutions outside the United States are not properly the subject of U.S. regulation. Our clients are concerned that the implementation of the Volcker Rule in the Proposed Regulations exceeds the intended or logical scope of U.S. regulation of foreign banks' investment activities and will harm the business of U.S. based investment advisers to such foreign bank clients event when such investment advisers are not otherwise related to "banking entities" intended to be covered by the Volcker Rule. The unintended consequence of some of these excesses will be to put U.S. investment advisory firms out of business and further reduce financial industry jobs in the United States without any public policy or regulatory rationale.

Executive Summary

Katten respectfully suggests that the following changes to the Proposed Rules are necessary to prevent the Proposed Rules from having an impermissibly broad extra-territorial effect:

1. Revise Proposed Rule _____.13(c)(1)(iii) and Proposed Rule _____.13 (c)(3)(iii) to clarify that the prohibition on the offer and sale of ownership interests in the covered fund to residents of the United States is on activity by the banking entity proposing to rely on the exception and its affiliates acting under its direction and "covered fund" for this purpose would only be funds controlled by such banking entity or its affiliates and not by third parties.

2. Revise the exclusion in Proposed Rule ____.2(e)(4)'s definition of "banking entity" to exclude not only covered funds under Proposed Rule ____.11, but also to exclude the bank or affiliate investing in potentially covered funds, and the funds in which they invest as permitted by proposed Rule _____.13 (c) from the definition of "banking entity." Without these exclusions, qualifying entities may be uncertain as to the potential reach of U.S. regulation to their businesses, even when their investments in private funds have been conducted "solely outside the United States" as such entities and all of their affiliates, even those with no U.S. nexus would seem to fall within the definition of "banking entity" as defined in Proposed Rule _____.2(e). We respectfully assert that this would extend the extraterritorial reach of U.S. regulation to activities Congress intended to exclude as evidenced by inclusion of the "solely outside the U.S." provisions.

3. Clarify that all parties involved (the bank, its subsidiaries or affiliates, the purported covered fund, etc.) in offering, retaining, investing in or sponsoring funds pursuant to the "solely outside of the United States" exception from the Volcker Rule's restrictions on covered fund investments or sponsorship (i) should not be considered "banking entities" or affiliates of a banking entity, and (ii) should not be subject to the "Super 23A" restrictions under section ___.16 of the Proposed Rules or any other of the substantive requirements or restrictions as a result of such permitted activity.

1. Activity Solely Outside the United States

The definition of "banking entity" in Section 13(h)(1) of the BHC Act added by Section 619 captures any foreign bank that has a U.S. branch or agency, since that presence in the U.S. causes the foreign bank to be "treated as a bank holding company." However, Section 13(d)(1)(I) provides a statutory exception to the prohibition on acquisition and retention of hedge fund and private equity fund ownership interests if the activity takes place solely outside the U.S. and does not involve the sale of ownership interests to U.S. residents. The activity permitted by the DFA includes the acquisition and retention of private fund interests as well as the sponsorship of such funds solely outside of the U.S., but the Proposed Rules seem to address only investments in private funds that are sponsored by a banking entity and not those in which the banking entity may be a passive investor. For instance, if a banking entity makes a $1 million investment in a $100 million fund, the banking entity will not be able to influence the marketing and sale of fund interests and may not even have a way to obtain knowledge of whether the fund has been offered for sale or sold to a U.S. resident. We suggest that it would be more consistent with the purpose of this exception, which is to allow non-U.S. entities to conduct activities outside the U.S. solely in compliance with their home jurisdictions' regulations, to interpret that second requirement to apply only in cases where the non-U.S. banking entity controls the offering of the fund interests to U.S. residents and not to funds over which the banking entity has no control.

Similarly, the requirement that no "subsidiary, affiliate or employee of the covered banking entity" be involved in the "offer or sale of an ownership interest in the covered fund" if that person is incorporated or physically located in the United States or in one or more States could be clearer that the prohibited offers and sales are to persons other than the foreign banking entity attempting to rely on the exception. As currently written, some foreign banking entities have raised concerns that visits by bank personnel to the U.S. for purposes of due diligence or monitoring of fund investments or cooperation of a U.S. affiliate or even an U.S. based unrelated adviser engaged by the bank in gathering information about potential fund investments by the foreign banking affiliate could cause an investment outside the U.S. by a foreign banking entity to fail to be "solely outside the United States."

2. Consistent Treatment of U.S. and non-U.S. Banking Entities

Section __.2(e)(4) of the Proposed Rules correctly identifies and corrects an inadvertent problem in the statute by exempting from the definition of "banking entity" 1) any covered fund that becomes an affiliate or subsidiary of a banking entity by virtue of the permitted activity set out in Section _____.11, and 2) any fund controlled by that covered fund. The introductory section of the Proposed Rules notes that this exception is necessary to avoid the result of the covered fund itself becoming subject to all the restrictions and limitations in Section 13, "which would be inconsistent with the purpose and intent of the statute" because Section 13(f)(3) specifically contemplates that covered funds will make investments in other funds.

Given that rationale, this exemption does not go far enough. It also needs to address the case of covered funds that might be controlled by a banking entity by reason of one of the exceptions to ownership of funds that is set forth in Subpart C of the Proposed Rules other than Section __.11. In particular, the exception must be expanded so that there is also an exception for a fund that becomes a subsidiary or affiliate of a banking entity by virtue of activity that takes place solely outside the United States, which could potentially impose onerous restrictions on the operations of such funds and compliance obligations on the foreign banks when there is no U.S. regulatory interest.

3. Eliminate Circularity in the Definitions of "Banking Entity" and Covered Fund for Purposes of the Application of Sections 23A and 23B of the Federal Reserve Act.

One consequence under the Volcker Rule of an entity being deemed a "banking entity" that advises or organizes and offers a covered fund and a fund being deemed a "covered fund" is the restrictions imposed on the banking entity, its subsidiaries and affiliates with respect to its interaction with the covered fund. When a foreign banking entity invests in or retains an investment in a fund or sponsors the fund "solely outside the United States," neither the bank,

nor any of its affiliates, should be deemed a "banking entity" for purposes of the Volcker Rule and the fund should not be a covered fund. This is particularly true where the foreign banking entity or its affiliate making or retaining the investment in a fund is not sponsoring, organizing or offering the fund, even if a bank affiliate acts as investment manager or adviser, but does not control the management of the fund itself. In this case, the banking entity and its investment adviser have no ability to impose restrictions on which service providers, lenders or brokers the fund engages or to monitor what transactions the fund may enter into with affiliates of the bank other than the investing entity.

Proposed Rule ____.2(e) defines banking entities so as to include all affiliates. Proposed Rule _____.16 prohibits covered transactions between a banking entity that advises, sponsors, organizes or offers covered funds or its affiliates, with the covered fund. The definition of "covered fund" in Proposed Rule _____.10(b)(1) would include all funds, even if not offered to United States residents, by virtue of subsection (iii) of the definition. As a result, the foreign bank and its affiliates could run afoul of the prohibitions in Super 23A when any affiliate provides services to a fund in which the banking entity invests solely outside the United States. U.S. regulations should not be applied extraterritorially to impede the activities of non-U.S. institutions outside the U.S. that are governed and permitted by the institutions' home regulators. The Agencies should use their rulemaking authority to clarify that non U.S. banks and their affiliates would fall outside the scope of Super 23A and 23B with respect to their dealings outside of the United States with funds not offered to U.S. residents and advised by the bank or its affiliates outside the United States.

If you would like further information please contact Marilyn Selby Okoshi (212-940-8512) or Guy Dempsey (212-940-8593).

Very truly yours,

Katten Muchin Rosenman LLP

Katten Muchin Rosenman LLP