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February 13, 2012

The Honorable Martin J. Gruenberg  
Acting Chairman  
Federal Deposit Insurance Corporation  
550 17th St., NW  
Washington, DC 20429

The Honorable Ben S. Bernanke  
Chairman  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

The Honorable John G. Walsh  
Acting Comptroller of the Currency  
Department of the Treasury  
250 E St., SW  
Mail Stop 2-3  
Washington, DC 20219

The Honorable Mary L. Schapiro  
Chairman  
Securities & Exchange Commission  
100 F St., NE  
Washington, DC 20549-1090

***Re: Notice of Proposed Rulemaking on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (FDIC RIN 3064-AD85; FRS Docket No. R-1432 RIN 7100-AD82; OCC Docket No. OCC-2011-0014 RIN 1557-AD44; SEC Release No. 34-65545; File No. S7-41-11 RIN 3235-AL07)***

Dear Sirs and Madam:

OptumHealth Bank (“Bank”) appreciates the opportunity to submit comments on the joint proposed rulemaking on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds (“Proposed Rule”). For purposes of this letter, we refer to Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203) as the “Volcker Rule,” which added Section 13 to the Bank Holding Company Act “BHCA”.

The Bank is a Utah chartered FDIC insured financial institution that provides health savings accounts and other health-related banking products and services to the health care industry. The Bank is part of the overall corporate structure of UnitedHealth Group (“UHG”), a worldwide organization that includes UnitedHealthcare (“UHC”). Through its affiliated insurance companies and HMOs, UHC is one of the largest health insurance companies in the United States. Although the Bank represents an extremely small percentage of UHG’s overall assets, the very broad definition of “banking entity” in BHCA Section 13(h)(1) and § \_\_\_.2(e)(1) of Subpart A of the Proposed Rule would result in the application of the Volcker Rule to UHG and all of its worldwide subsidiaries, including UHC.

The Volcker Rule was designed to prevent “systematically critical banking institutions”<sup>1</sup> from relying on precarious short term funding sources and other high-risk practices that contributed to the recent financial crisis. Congress intended that the Volcker Rule “prohibit high-risk proprietary trading at banks, limit the systemic risk of such activities at systemically significant nonbank financial companies, and prohibit material conflicts of interest in asset-backed securitizations.”<sup>2</sup> Neither the Bank, UHG, nor any of UHG’s worldwide subsidiaries, were or are involved in the types of activities that led to the financial crisis. The application of the Volcker Rule to all non-bank affiliates and subsidiaries of UHG is unnecessary and will not address the underlying goals of the legislation.

It is our belief that the Proposed Rule changes the intent and scope of the Volcker Rule by, among other things, narrowing the permitted investment activities of regulated insurance companies and their affiliates for the general account of the insurance company solely to proprietary trading. Therefore, in order to ensure alignment with the plain language and the Congressional intent of the Volcker Rule, the Proposed Rule should be modified so that the final rule: (i) allows a regulated insurance company and its affiliates to continue to engage in general and separate account investment activity with respect to covered funds<sup>3</sup>; and (ii) “appropriately accommodate[s] the business of insurance within an insurance company”<sup>4</sup> by eliminating any reporting, recordkeeping requirements, and compliance monitoring for insurance companies and their non-bank affiliates.

**1. The “Regulated Insurance Company” Exemption in Subpart B of the Proposed Rule §6(c), Should be Included in Subpart C of the Final Rule.**

It is our belief that the plain language and structure of the Volcker Rule exempts a regulated insurance company and its non-bank affiliates from each of the prohibitions set forth in Section 13(a) of the BHCA, namely, the prohibition against proprietary trading and the prohibition against acquiring or retaining any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund. Accordingly, we request that Subpart C of the Proposed Rule be revised so that the final rule expressly includes these two exemptions.

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<sup>1</sup> See 156 CONG. REC. S5894 (daily ed. Jul. 15, 2010) (statement of Sen. Jeff Merkley) (describing the rationale behind the Dodd-Frank Act).

<sup>2</sup> Id.

<sup>3</sup> Section \_\_\_.10(b)(1)(i) of Subpart C of the Rule uses the term “covered fund” in lieu of the statutory references to “private equity fund” and “hedge fund.”

<sup>4</sup> BHCA §13(b)(1)(F).

Section 13(a) of the BHCA sets forth the entire prohibition by a banking entity from engaging in proprietary trading or sponsoring or acquiring and retaining an ownership interest in a private equity fund or hedge fund:

“(a) In General

(1) Prohibition.—Unless otherwise provided in this section, a banking entity shall not—

(A) engage in proprietary trading; or

(B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund.”

Section 13(d)(1) of the BHCA sets forth the specific activities that are permitted under the Volcker Rule “[n]otwithstanding the restrictions under subsection (a)”:

“(d) Permitted Activities—

(1) In General.—*Notwithstanding the restrictions under subsection (a)*, to the extent permitted by any other provision of Federal or State law, and subject to the limitations under paragraph (2) and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine, the following activities (in this section referred to as ‘permitted activities’) are permitted...” (emphasis added).

By using the plural term “restrictions” and referring to the entire prohibition in subsection (a), the plain language of the text establishes that each activity enumerated in subsection (d)(1) is permitted notwithstanding both the proprietary trading restriction in subsection (a)(1)(A) and the restriction on covered funds in subsection (a)(1)(B).

Section 13(d)(1)(F) sets forth the permitted activities of a regulated insurance company and any affiliate for the general account of the company and refers to the purchase or sale of “securities and other instruments described in subsection (h)(4)”. While subsection (h)(4) is the definition of “proprietary trading,” this cross-reference does not indicate that the subsection (d)(1)(F) exemption is limited to proprietary trading, rather it is merely used to incorporate the list of “securities and other instruments” into the exemption.

If Congress had wanted to limit the subsection (d)(1)(F) exemption, it would have used the defined term “proprietary trading” in the same way such term is used in subsection 13(d)(1)(H), which specifically exempts “[p]roprietary trading conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c), provided that the trading occurs solely outside of the United States” (emphasis added).

Similarly, Congress used the defined terms “*private equity fund*” and “*hedge fund*” in subsection 13(d)(1)(I) to specifically exempt “[t]he acquisition or retention of any equity, partnership, or other ownership interest in, or the sponsorship of, a *hedge fund or a private equity fund* by a banking entity pursuant to paragraph (9) or (13) of section 4(c) solely outside of the United States” (emphasis added).

It is our belief that Congress intentionally used defined terms to distinguish whether a specific subsection (d)(1) exemption was applied only to the proprietary trading restriction in subsection (a)(1)(A) or only to the restriction on covered funds in subsection (a)(1)(B). Judicial analysis of a statute must presume that Congress chose each word purposefully so that plain, unambiguous language means exactly what it says. Congress did not use the defined term “proprietary trading” to limit the exemption set forth in subsection (d)(1)(F), rather it used a general reference to subsection (h)(4) to incorporate the list of “securities and other instruments” into the exemption and there is no legislative history that would suggest otherwise.

Consequently, we request that the permitted investments and covered fund activities under Subpart C of the Proposed Rule be expanded to reflect Congressional intent by explicitly including a “regulated insurance company” exemption subject to the same conditions as the comparable exemptions in Subpart B of the Proposed Rule § \_\_.6(c).

**2. The Reporting, Recordkeeping Requirements and Compliance Monitoring of the Proposed Rule Do Not Appropriately Accommodate the Business of Insurance and are an Undue Burden to Heavily Regulated Insurance Companies and Their Non-Bank Affiliates.**

Due to the comprehensive state regulatory infrastructure that governs and oversees the investment activity of insurance companies and their non-bank affiliated entities, the reporting, recordkeeping requirements and compliance monitoring set forth in § \_\_.7, § \_\_.15, § \_\_.20 and Subpart D of the Proposed Rule do not appropriately accommodate the business of insurance, are unnecessary and therefore should not apply to insurance company investment activities that are permitted activities under Section 13 of the BHCA and the Proposed Rule.

Congress explicitly recognized the potential unintended effects of Section 13 of the BHCA on insurers with small banking operations and articulated that the Volcker Rule was not meant to affect the ordinary business of insurance since insurance companies are heavily regulated by state insurance regulators and in most cases do not pose the same level or type of risk<sup>5</sup>. Regulated insurance companies provide a safe and sound corporate structure within which an affiliated depository institution may operate. This is due to the comprehensive state regulatory infrastructure that governs investment activity of insurance companies and their affiliated entities.

Additionally, regulated insurance companies are required to regularly file reports (which generally include detailed annual financial statements) with state insurance regulators in each jurisdiction in which they do business, and their operations and accounts are subject to periodic examination by such authorities. Insurance companies also are subject to risk-based capital (“RBC”) requirements, which take into account the inherent differences associated with investments in equity and investments in fixed income and generally assess a higher capital charge to equity investments. Within equity investments, including investments in pooled vehicles such as private equity and hedge funds, the RBC calculations often further

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<sup>5</sup> See 156 CONG. REC. S5894 (daily ed. Jul. 15, 2010) (statement of Sen. Jeff Merkley).

differentiate to approximate the relative risk to the insurer's capital and solvency associated with such investments. Insurance laws provide state insurance regulators the authority to require various actions by, or take various actions against, insurance companies whose RBC ratios do not meet or exceed certain levels.

The McCarran-Ferguson Act<sup>6</sup> ("MFA") establishes that the states should have virtually exclusive jurisdiction in regulating and taxing the business of insurance with some narrow limitations that are not applicable in this situation. The MFA reflects Congress' belief that it is in the public interest that the states, and not the federal government, regulate the business of insurance. Congress did not amend the MFA through passage of the Volcker Rule. Furthermore, the federally-imposed investment activity restrictions and associated reporting, recordkeeping requirements and compliance monitoring on insurance companies as provided under the Proposed Rule, as opposed to *state*-sponsored investment restrictions, are contrary to the principles of the MFA and should be properly considered preempted and not applicable to insurance companies and their related investment activities.

In light of the comprehensive state regulatory infrastructure that governs investment activity of insurance companies and their non-bank affiliates and the Congressional intent to place regulatory authority over the business of insurance in the hands of the states, the reporting, recordkeeping requirements and compliance monitoring set forth in § \_\_.7, §\_\_.15, §\_\_.20 and Subpart D of the Proposed Rule do not appropriately accommodate the business of insurance and are unnecessary, redundant and should not apply to insurance companies and their non-bank affiliates.

Consequently, we request that the reporting, recordkeeping requirements and compliance monitoring set forth in § \_\_.7, §\_\_.15, §\_\_.20 and Subpart D be revised to clarify that they do not apply to insurance company investment activities that are "permitted activities" under BHCA § 13 and the Proposed Rule. These would include: (i) the permitted proprietary trading activities in § \_\_.6(c); and (ii) the permitted covered fund activities and investments described herein.

### **3. Conclusion**

The Volcker Rule was designed to protect individuals, financial institutions and the safety and soundness of the financial system by preventing the reliance by systematically critical banking institutions on precarious short term funding sources and other high-risk practices. As part of a comprehensive and effective system of state insurance regulation, insurance companies do not present the same risk.

As you craft the final rule, please permit regulated insurance companies and their affiliates to continue to engage in general and separate account investment activity with respect to covered funds and eliminate any reporting, recordkeeping requirements and compliance monitoring for insurance companies and their non-bank affiliates. This will ensure that the legislative intent of § 13 of the BHCA is strictly fulfilled and prevent widespread unintended negative impact on the ordinary business of insurance.

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<sup>6</sup> See U.S. Code Title 15, Chapter 20

We appreciate this opportunity to express our concerns and hope that you will find this information helpful. Please contact us if additional information is needed or if you would like to discuss our concerns in further detail. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelvin Anderson". The signature is fluid and cursive, with the first name "Kelvin" being more prominent than the last name "Anderson".

Kelvin Anderson  
President  
OptumHealth Bank

cc: Ms. Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

Mr. Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
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