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Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Proposed Rule (Federal Reserve Docket No. R-1432 and RIN 7100 AD 82; OCC Docket ID OCC-2011-14; FDIC RIN 36064-AD85; SEC File No. S7-41-11; CFTC RIN 3038-AC[•][1]

The Australian Bankers Association ("ABA") welcomes the opportunity provided by the agencies to comment on the Proposed Rule for Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds ("proposed rule").

The ABA represents the Australian banking industry. It works with its members to provide analysis, advice and advocacy and contributes to the development of public policy on banking and other financial services. The ABA also works to

[1] At the time of submission, the CFTC RIN was not available.

ensure the banking system can continue to deliver the benefits of competition to Australian banking customers. In communicating the industry's views, the ABA works with National, State and Territory Governments, regulators, international organisations, other industry associations, the public, community groups and the media. The ABA has 23 members, including the four major Australian commercial banks, regional banks, and international banks holding an Australian banking licence.

This submission is also endorsed by the Financial Services Council (FSC). The FSC is an independent body which represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has over 130 members who are responsible for investing $1.8 trillion on behalf of more than 11 million Australians.

The ABA and its members accept the right of the US to make laws for good governance and the protection of its national economic interests. Australian banks operating in the US will comply with the law of the land, as they do in all other jurisdictions in which they operate.

The focus of this submission is on the application of the proposed rule to bank operations outside the US. Section 1 addresses the general extra-territorial impacts of the proposed rule in relation to both the restrictions on proprietary trading and owning or sponsoring hedge and private equity funds. Sections 2 and 3 address the likely impacts and issues with the proposed restrictions on the proprietary trading and funds management operations of Australian banks, respectively. Lastly, section 4 comments on the proposed compliance framework and reporting requirements.

It should also be noted that several of our member banks have also provided input into the submissions being prepared by the Institute of International Bankers (IIB) as well as submissions made by other Australian finance industry bodies, including the Australian Financial Markets Association (AFMA). We support the key points made within these submissions on likely impacts of the proposed rule on non-U.S. banks.

1. Extra-territorial application

Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) in general prohibits certain banking entities, including foreign banks that operate branches in the United States from engaging in proprietary trading and owning or sponsoring hedge and private equity funds. S619 creates sections 13(d)(1)(H) and 13(d)(1)(I) of the Bank Holding Company (BHC) Act which together provide that the restrictions on activities imposed by s619 do not apply to the activities of non-US BHCs that are conducted "solely" outside the United States.

In colloquy upon the passage of DFA through the Senate, Senator Merkley, a principal author of s619 provided an explanation of the purpose and intent of the statute, during which he noted:

> *"Subparagraphs (H) and (I) recognize the rules of international regulatory comity by permitting foreign banks, regulated and backed by foreign taxpayers, in the course of operating outside of the United States to engage in activities permitted under relevant foreign law"*[2]

We accept that the intent of s619 is to protect the US financial system, and US taxpayers, and further that the US banking operations of non-US banks should always and appropriately be subject to US banking laws and regulations.

However, we respectfully raise our significant concerns with the drafting of the proposed rule in relation to its extra-territorial application, as follows.

1.1 Definition of "solely outside of the United States"

The proposed rule sets out the criteria by which non-US BHC activities would be considered "solely outside" the United States. These criteria, effectively capturing any connection whatsoever with the United States, extend the coverage of s619 to much of the global activity of a non-US BHC. We submit that this is inconsistent with the wording of the statute, the stated intent of the Congressional authors, and with the rules of international regulatory comity.

The position of the ABA is that activity "solely outside" the United States under s619 should be defined in a manner identical with the wording and intent of Senator Merkley's comments above. That is, activities of a non-US BHC where the risks are held in the home or other non-US jurisdiction, subject to the laws and regulation of that jurisdiction, pose a risk to that jurisdiction and not the financial system of the United States or the United States taxpayer. The home country should be responsible for setting capital requirements, activity restrictions and other prudential requirements according to the risk they are prepared to accept on behalf of their taxpayers.

Further we read the statute as consistent with this position. The statute, in the case of proprietary trading, defines "proprietary trading" as "engaging as a principal for the trading account of the banking entity" (13(h)(4), BHC Act). Under 13(d)(1)(H) a non-US BHC is permitted to engage in "proprietary trading" "solely outside of the United States". Therefore if a non-US BHC engages as a principal (i.e. taking the risk on its own account) from outside the United States it should be considered a permitted activity under the statute, consistent with the arguments above regarding which jurisdiction authorises, regulates, and bears the risk.

Finally, from a practical view point, the definition of US resident which forms the basis upon which the activities of non-US BHCs could be considered "solely outside" the United States, creates much uncertainty as to which US persons and entities would be captured and how such persons and entities could be practically identified. This is particularly problematic where the US resident is located outside the US, as the proposed definition creates considerable uncertainty as to its application. In the case of non-US funds offered and sold only in non-US

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[2] Colloquy between Sen. Merkley and Sen. Levin, Congressional Record at S5897 (July 15, 2010).

jurisdictions to individuals and entities located in that jurisdiction they would be required to restrict sales to investors domiciled in that jurisdiction may also be considered "US residents".

1.2 Impact of proposed definition

The preamble to the proposed rule uses terms such as "competitive equality" and "competitive parity" to explain the intention of the proposed "solely outside" definition. However the proposed definition would create an environment where it is highly likely that US banks, investors and companies will be placed at a significant disadvantage in global capital markets. This is considered in detail below in section 2.2.2, but in short non-US BHCs subject to s619 will have a very strong incentive to significantly reduce or eliminate entirely covered activities with US residents. In particular US banks will find themselves severely curtailed in their ability to conduct permitted trading activities globally.

This raises a concern for all banks of both reduced and constrained liquidity in global markets, and the concern of the emergence of bifurcated financial markets globally – effectively creating a US and a non-US market.

1.3 Prudential Backstops

The proposed rule implements the Prudential Backstop provisions of s619, giving the authorities the capacity to prohibit any activity that would otherwise be permitted under s619 (including that activity which is "solely outside" the United States) that is deemed as either a material conflict of interest, exposing the banking entity to high risk assets and strategies, posing a threat to the safety and soundness of the banking entity, or posing a threat to the financial stability of the United States.

This represents an unwarranted and inappropriate intrusion of regulatory sovereignty as it relates to non-US BHCs.

Consistent with our position in section 1.1, with the exception of the very last backstop criteria, this must be the sole domain of the home regulator of the non-US BHC (and any third country non-US host regulator as applicable) for activities outside the United States. It is the non-US country that determines the risk that they are prepared to accept and manage within banking entities; it would be an extraordinary use of powers to prohibit the activities of non-US banks outside the United States.

Further, the home regulator is the only entity with unimpeded access to all the information required to make a full assessment of the riskiness that any specific activity poses to a given entity, and given that the criteria are highly subjective, the only authority with sufficient knowledge and experience of the banking entity to determine if any such prohibition was ever warranted.

Even in the case where US authorities are concerned that a permitted activity outside the United States may pose a threat to the financial stability of the United States, this would be more appropriately addressed through engagement between the non-US and US regulators, since the activity of concern must be considered in the context of the entity overall and therefore, as above, the only appropriate regulator is the home regulator.

Recommendation:

The ABA proposes that in the case of non-US BHCs, otherwise prohibited activities under s619 are permitted and compliance, reporting and other obligations related to that activity are excluded, where the risk of that activity is domiciled outside the US, with deference to relevant home and other non-US host jurisdictions (whose taxpayers determine the risks and activities in which they are prepared to allow their banks to engage). Such risks and activities do not pose threats to US taxpayers.

For non-US BHCs, only those activities where the risks are held in the United States should be subject to US regulation.

2. Proprietary trading

2.1 Exemption for Government securities

It is proposed that the only government securities eligible for the exemption will be a range of US Government securities. The ABA is concerned that this will create a bias against foreign government securities in favour of US Government securities. As US banks are active market makers in the Australian Government bond market, and such market-making activities (absent an exemption) will be significantly constrained under the proposed rule, this potentially undermines the liquidity of the Australian Government bond market.

This problem will be compounded if Australian banks operating in the Australian bond market can only invoke the SOTUS exemption by not dealing with such US banks. Further it would appear under the proposed rule that US banks will be prohibited from bidding in bond auctions, except in the case that they have customer orders or a specific expected near-term demand. This will remove bidders from the auction process impacting the efficient operation of Australian government bond auctions.

It may also have flow-on effects for the implementation of the Basel III liquidity reforms, which in general require banks to hold demonstrably high quality liquid assets, and in particular government bonds.

We note that a number of jurisdictions (including Canada, Japan and the UK) have expressed the same concerns about the potential impacts on international bond markets. Expanding the range of exempted securities to include other Government bonds would address this problem.

Recommendation:

The ABA recommends that the current exemption for government securities be extended to Australian federal and state government debt securities.

2.2 Exemptions to the prohibition on proprietary trading

In considering the exemptions included in the draft regulation, Australian banks would look primarily to "solely outside of the United States" (SOTUS) exemption in conforming their activities. For those trading activities not satisfying SOTUS we would need to look to the permitted activities such as market-making, hedging underwriting and liquidity management.

2.2.1 Permitted activities

The focus of this submission is the operation of the proposed rule on Australian banks (and non-US banks more generally). However, we would make the following brief comments regarding the permitted activities criteria:

(1) An efficient market-making operation intermediates and warehouses risk, ensuring investors have the opportunity to transact with ease and reliability. The criteria as drafted will restrict market-making by limiting the ability of banks to warehouse risk, thereby reducing market liquidity and impacting investors. We concur with the submission of Darrell Duffie on the likely market impacts[3].

(2) The hedging and underwriting criteria are likewise restrictive and will likely lead to reduced liquidity and hence stability in financial markets

(3) The liquidity management criteria are particularly constraining, notably the requirement that liquid assets held should not be subject to near term price movements. This effectively rules out many assets that a bank would normally purchase in managing its liquidity requirements.

Taken together we consider that these criteria will have a negative impact on market liquidity and efficiency, the ability for banks to manage their own risks, and the ability for investors to clear their risk in financial markets, which will ultimately flow through to consumers.

A case in point is the market for semi-government / State Government bonds in Australia. This market tends to be less liquid than other bond markets, which results in market makers holding inventory for longer periods when servicing client needs (which in itself may be considered a prohibited proprietary trade). To protect their position, market makers often establish cross-market hedges which may not directly match the underlying bond position. The resultant gains/losses from the positions may be classified a prohibited proprietary trade. Such an outcome could discourage banks from market making, depriving customers of the ability to trade these bonds in a timely and cost effective manner.

This issue would also apply to a large number of regional markets around the world that do not have the depth of US bond markets, and would be a particular

[3] http://www.darrellduffie.com/uploads/policy/DuffieVolckerRule.pdf

problem for emerging markets, significantly dampening their development and the capital flows to those economies.

A related concern for Australian banks is that US non-government debt markets may suffer if US banks are forced to significantly reduce their underwriting and market-making in US non-government debt securities. This would affect access by foreign issuers such as Australian banks, into the US debt markets, and impact their ability to achieve satisfactory pricing and volume.

2.2.2 Solely outside the United States

Four criteria must be satisfied for the transaction to be "solely outside of the United States" (SOTUS):

- The affiliated entity conducting the purchase or sale is not organised under the laws of the US or any state;
- No party to the transaction is a resident of the US;
- No personnel of the affiliated entity who is directly involved in the purchase or sale is physically located in the US; and
- The purchase or sale is executed outside of the US

As noted earlier this exemption covers much of the trading activity of non-US banks worldwide, and in particular extends deep into the trading activity of Australian banks in the Australian financial markets.

Turning to the specific conditions, the second (that no party be a resident of the US) would introduce a clear and strong incentive for an Australian bank (operating in Australia or any global market) to ensure it did not deal with a US bank (and its world-wide branches), a US corporate, or a resident of the US in Australia. This incentive would also apply more generally to non-US banks worldwide.

If this incentive led to decisions by Australian and other non-US banks to elect to not transact with, or significantly curtail activity with, US residents it would very likely:

(1) Impact the smooth and efficient functioning of Australian (and global) financial markets.

(2) Diminish the ability of US counterparties to transact in non-US markets and potentially, to hedge financial risks and client positions.

(3) Reduce the safety and soundness of the US financial system by diminishing the capacity of US banks to clear risk with foreign counterparties.

As we move to central clearing this would also extend to an Australian bank's considerations when choosing a clearing bank, custodian or other agent. Australian banks, concerned about the potential to lose the SOTUS exemption, will have a strong incentive to select non-US agents to avoid this potential risk.

The fourth condition appears to include at a minimum contracts traded on exchanges and Swap Execution Facilities (or similar) located in the United States. Such contracts do, and likely increasingly so in the future, cover both US and global financial market products. As above this creates a strong and clear incentive to favour transacting such contracts on non-US domiciled facilities. Should Australian (or more generally non-US) banks continue to direct business towards US domiciled facilities they will be subject to the other narrowly defined exemptions in the proposed rule, significantly curtailing such remaining activity. This will have the likely effect of reducing liquidity in US domiciled facilities, as a response to both reduced activity and moving business to non-US facilities.

The term "executed" is not further defined in this context, and we assume that it refers to conducting transactions on organised trading facilities, and the foregoing impacts relate to this definition. However, the lack of a definition raises concerns that execution may be more broadly defined and includes, for example, affirmation platforms and payments & clearing systems. In such an event the situation above regarding the reduction and migration of business would be extended to those additional US domiciled facilities. Of particular concern is that over-the-counter (OTC) central counterparties (CCPs) may be captured. In light of the G20 commitment and DFA Title VII requirement to ensure transactions are centrally cleared wherever possible, the proposed condition, if it were to include CCPs, would actively work against the development of CCP infrastructure in the United States across a broad range of derivative products, and as such impact on the implementation of DFA Title VII.

It is also of concern that a number of existing non-US specific products (e.g. commodities) are currently quoted only on US exchanges. While over the longer term alternative non-US venues would likely develop, non-US banks would effectively be restricted to the permitted activities under the proposed rule when transacting these non-US products as part of their otherwise non-US business. This represents an unnecessary and unwarranted restriction on not just non-US banks operating in global markets, but will have an impact on the efficient operation of these global markets and a consequent negative impact on end-users ability to hedge risk.

Recommendation:

The ABA reiterates the principle of our initial recommendation above regarding SOTUS being defined by the location of the risk rather than counterparty or trade execution. In particular, to mitigate the likely negative impacts identified above, we strongly recommend removing both the second and fourth condition of the SOTUS definition.

3. Covered funds

3.1 Definition of Covered Fund

Australian banks have a number of concerns with the definition of a "covered fund". Firstly we share the general concern that has been echoed by many others that the definition of a "covered fund" provided in s619 covers many traditional wholesale funds management businesses that would not ordinarily be considered hedge funds.

The proposed rule however goes further and extends the definition to include all foreign funds that if they were domiciled in the United States would but subject to the Investment Company Act of 1940 but for exemptions 3(c)(1) or 3(c)(7). Given the structural differences in funds management regulation globally this creates uncertainty as to whether a broad range of foreign funds meet this definition.

For instance, in Australia, bank-owned funds management businesses regularly sponsor and invest in funds that would be considered wholesale funds, and therefore likely considered covered funds. These funds may be domiciled outside the US and operated by independent fund managers. Given the size of the Australian funds management industry (circa USD $2 trillion), these investments are often significantly greater than 3% of the fund in question and as such, Australian banks must look to the SOTUS exemption.

However, if these covered funds, either operated by the banks themselves or, in many cases, operated by independent funds managers, are sold to US investors, which would be outside the control of the bank itself, they would also fail the SOTUS test.

3.1.1 "Wraps" and "platforms"

Australia has a significant bank-owned retail funds management industry operating under a structure that allows retail investors to invest in wholesale funds through what is known colloquially as a "wrap" or a "platform". Although the retail investors make all investment decisions, it is done through a bank operated vehicle acting as a single investor, investing into a broad range of wholesale funds that regularly have less than 100 investors or are only open to wholesale investors. These would therefore, noting the uncertainty regarding definition above, potentially be considered covered funds.

Further, as the bank has no control over the retail investor decisions they would have no control over the management of the 3% ownership provisions of the de minimis requirement.

The platform business in Australia is significant globally, and is subject to rigorous regulation, in particular regarding "arms-length" relationships between banking entities and the funds they operate.

3.1.2 Superannuation (pension) funds

The preamble to the proposed rule discussing Section __.10(a) clarifies that the proposed rule does not prohibit *"the acquisition or retention of an ownership interest ... in a covered fund ... by a ''qualified plan,'' as that term is defined in section 401 of the Internal Revenue Code of 1956 (26 U.S.C. 401), if the ownership interest would be attributed to a banking entity solely by operation of section 2(g)(2) of the BHC Act"* .

Australia has one of the most advanced pension schemes in the world. All Australian workers by law contribute a minimum of 9% of their salary to regulated pension funds, known as superannuation funds or schemes in Australia. The funds under management in such schemes in Australia are in excess of US$1 trillion dollars, making them one of the largest pension schemes in the world despite our small population. Further, pension scheme investors are free to choose the fund manager in which they invest and the asset mix, creating an extremely competitive environment.

The Australian banks all manage significant investment pools therefore on behalf of not only their own employees but employees from across the employer spectrum. In particular Australia has also established a robust well-regulated self-managed scheme framework, where individuals can create and manage their own individual pension schemes.

The exemption in the proposed rule for only 401 qualified plans places non-US jurisdictions at a distinct disadvantage. Given the scale of the pension funds under management in Australia allowing them to not share the equivalent exemption, and potentially therefore considered covered funds, would be extremely problematic.

Recommendations:

The ABA recommends:

(1) In the first instance, consistent with the argument and recommendation above, that it be confirmed these activities are considered "outside the United States".

(2) Secondly, that the definition of "covered fund" clarifies the position of alternative funds management regimes to those prevailing in the United States. In particular, where the banking entity acts as a fiduciary conduit for retail investors, with no control over investment decisions, these activities should be excluded from the definition of "covered fund".

(3) Lastly, clarification in the proposed rule, that 401 plans captured by the operation of section 2(g)(2) of the BHC Act are not covered funds should be explicitly extended to equivalent pension schemes in non-US jurisdictions.

3.2 Covered Transactions with Covered Funds

In relation to covered transactions with covered funds, Australian banks own and operate significant funds management businesses. These activities are subject to stringent domestic regulatory requirements, one of which is that transactions must be conducted on an arms-length basis. Fund managers therefore obtain the best price on behalf of their investors for the particular covered transaction through transacting with a range of counterparties.

Implementation of the proposed restrictions (in Australia) on covered transactions with covered funds could have the effect of removing one or more of the major domestic banking institutions from the potential pool of domestic counterparties. The impact of this is a reduction in available counterparties for transactions, which will have a significant impact on pricing and efficiency, particularly as the major Australian banks are important liquidity providers in domestic markets (resulting in increased costs to investors). Further, we question the benefit of a transaction prohibition in a jurisdiction like Australia where transacting with affiliates on an arm's length basis has been mandated in law and regulation, having been tested and proven sound during recent turbulent financial periods.

The impact of this proposed rule has the potential to be particularly far-reaching as the bank platform operators all provide wholesale funds operated by the other banks, creating a situation which may prevent certain funds and managers from transacting with all Australian banks.

Recommendation:

The ABA recommends that the regulations should be amended so that the covered transactions restrictions do not apply to covered transactions between a non-US banking entity and its affiliate covered funds where both the covered fund activities and the covered transactions are undertaken in a non-US jurisdiction.

3.3 Investments in "covered funds" by insurance companies

We understand that the proposed rule is intended to ensure that banks' balance sheets are not compromised by investments in risky assets. We believe, however, the proposed rule's general prohibition on investing "as principal" in covered funds is too far-reaching and will not achieve that intent, in part because the proposed rule does not expressly exempt investments in covered funds made by insurance companies (that are affiliated with US banks or non-US banks subject to the BHC Act).

Under Australian regulation and accounting standards, investments (including investments in covered funds) by Australian bank-owned insurance companies are required to be recorded on the balance sheet of the insurance companies, notwithstanding that such investments are held for the benefit of the insurance companies policyholders.

The consequence of this for Australian bank-owned insurance companies is that there is an element of uncertainty as to whether such investments, albeit made by insurance companies with insurance premiums for the benefit of policyholders, are permitted under s619. This uncertainty could prevent such Australian banks' wealth management businesses from diversifying into covered funds on behalf of policyholders as part of their legitimate and usual practices for the benefit of their customers.

In this regard, we believe that the proposed rules do not reflect the Congressional intent that the business of insurance be accommodated – rather they restrict the exemption for transactions for insurance companies to the prohibition on proprietary trading, whereas the exemption should also apply to the prohibition on such insurance companies investing in covered funds.

Recommendation:

The ABA proposes that the final rule provides an express exemption from the general prohibition on investing as principal in covered funds any investments made by insurance companies.

3.4 Australian funds marketed in the US

The draft rules provide that an offshore fund is not a covered fund for purposes of the rule 10(b)(1) so long as the offshore fund is:

- Organised under the relevant offshore jurisdictional equivalent of the Investment Company Act of 1940 ("ICA"); and
- Does not rely on the offshore equivalent of equivalent of sections 3(c)(1) or 3(c)(7) of the ICA.

We submit that the regulations should be specific and recognise the jurisdictional legislation to which an offshore fund may refer to so as to make an equivalency determination for purposes of assessing its status against the ICA.

If an offshore fund is not able to make an equivalency determination due to a lack of clear regulatory guidance then it may be faced with the options of establishing an entity under the US regulatory framework solely to satisfy a regulatory requirement, or alternatively the offshore fund may unnecessarily be required to comply with the proposed requirements.

We consider that any lack of clear guidance as to the relevant jurisdictional specific legislation to which an offshore fund may refer so as to determine its equivalency obligations (when compared against the requirements of the ICA and similar) will result in unnecessary compliance costs which ultimately will be borne by the end acquirer/consumer of the product.

4. Compliance and reporting

Foreign banks will be required to conform their global trading activities by ensuring that their activities either remain "outside of the United States" or fall within the permitted activities. The magnitude of a bank's non-US trading activities will affect the scope of the reporting obligations for any US-based transactions, and a non-US BHCs will be required to adopt compliance procedures for non-US trading entities even if those entities trade solely outside of the United States.

These onerous reporting and compliance procedures must be put in place rapidly, as proposed, by 21 July 2012. We contend that this requirement is simply impossible to achieve given the uncertainty as to the final form, scope and application of the rules.

Australian banks are already subject to robust regulations in relation to their trading and funds management activities from their home regulators, the Australian Prudential Regulation Authority (APRA), and Australian Securities and Investment Commission (ASIC). The need to comply with these regulations, in addition, to the prescriptive requirements of the proposed compliance and reporting regime for the non-US segment of a non-US BHC's global business, would represent both an intrusion into those activities and raise questions of regulatory sovereignty, especially in their home jurisdiction. The proposed rule would entail a significant increase in the compliance burden of non-US BHCs to report on risks that pose no threat to the US taxpayer.

As proposed the compliance and reporting regime is required for all transactions and activities to ensure compliance with the proposed rule, including the SOTUS exemption. This will impose a significant cost on the global activities of non-US banks, when a significant part of that business will be outside of the United States, and as such outside the scope of s619.

Recommendations:

It is recommended that:

(1) The target date for the compliance framework in place be amended to 12 months from the date of issue of the final rule.

(2) Consistent with our primary recommendation those activities and portfolios subject to non-US regulatory oversight and risk-bearing be considered outside the United States, and that no US-based compliance and reporting regime be imposed on those non-US activities.

Yours sincerely

Tony Burke