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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 on behalf of certain international financial institution clients and their affiliates 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 foreign banking organizations with affiliates that organize, offer, sponsor and/or invest in hedge funds and private equity funds, provide brokerage, futures brokerage, custody, financing, foreign currency transactions and other services and engage in investment advisory business for clients both in the United States and abroad. We respectfully submit these comments addressing some of the concerns of these clients raised by the Proposed Rules.

Background

Katten's clients include investment advisers, futures commission merchants, broker dealers, custodians, administrators and other dealers and providers of services to the financial services industry that are affiliated with foreign banking institutions. These foreign banking institutions also have some operations in the United States that cause them to be "banking entities" as defined in the Volcker Rule. Under current regulations, these institutions operate their U.S. banking operations and other businesses in the United States in compliance with U.S. law and regulation, but their activities outside of the United States are not subject to U.S. regulation. These institutions are also subject to the laws and regulation of their home jurisdictions and other jurisdictions where they operate their businesses. For these multinational institutions, navigating the regulatory regimes of many jurisdictions presents many challenges and can become impossible when regulations such as those in the Proposed Rules impose requirements that conflict with those of the home jurisdiction or make it impracticable to continue in certain businesses.

We appreciate this opportunity to comment on some of the aspects of the Proposed Rules that have serious negative consequences for these foreign financial institutions with little or no benefit to ensuring the safety and soundness of the U.S. banking system that is the primary aim of the Volcker Rule. In addition, our clients support the comments submitted by [EFAMA, IIB and SIFMA.]

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. Refine the definition of Covered Fund to:
   a. exclude foreign funds offered and/or operated outside the United States by qualifying foreign banking entities and all foreign regulated funds analogous to management investment companies registered under the Investment Company Act of 1940, as amended (the "1940 Act"); and
   b. exclude "funds of one" or vehicles established by an advisory client or investment adviser to carry out the investment mandate for a single advisory client; i.e. a dedicated managed account housed in a legal entity.

2. Revise the "solely outside the United States" exemption to clarify that the condition that the covered fund not be offered or sold to residents of the United States contained in Proposed Rule _____.13(c)(1)(iii) and Proposed Rule _____.13

(c)(3)(iii) prohibits such sales by the banking entity proposing to rely on the exception and its affiliates acting under its direction, but investment by a foreign banking entity outside the United States in a covered fund operated by a third party is still activity "solely outside the United States," even if the fund is offered directly or indirectly by its sponsor to U.S. residents.. For this purpose, only funds controlled by such banking entity or its affiliates and not by third parties would be "covered funds."

3. Revise the exclusion from the definition of "banking entity" in Proposed Rule ____.2(e)(4) 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 "solely outside the United States" as permitted by Proposed Rule _____.13 (c).

4. Conform the rules interpreting the "solely outside of the United States" exception for covered fund activities and the limitation that such funds not be offered to U.S. residents to industry norms and market practices as reflected in Regulation S under the Securities Act of 1933, as amended (the "1933 Act") to better effect Congressional intent to limit the extraterritorial impact of the Volcker Rule's provisions.

5. 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 Proposed Rule ___.16 or any other of the substantive requirements or restrictions as a result of such permitted activity.

6. Revise the condition in Proposed Rule ____.11(f) to eliminate affiliates and subsidiaries of the covered banking entity that do not themselves share the name of the federally insured deposit institution from the prohibition on sharing a name with a fund.

7. Clarify that the products and services constituting "prime brokerage transactions" include the types of products and services offered to support customer trading business in which the broker-dealer, futures commission merchant, swap dealer or banking entity engages on a regular basis and from which it expects to generate revenue from commissions, a finance charge or commission-like trading spread,

including various types of OTC derivatives, contracts for differences and foreign exchange services.

8. Clarify that for purposes of the prime brokerage transaction exception to the application of Super 23A contained in Proposed Rule ___.16(a), a covered fund in which a banking entity that serves as investment manager, investment adviser, commodity trading adviser or sponsor appoints an unaffiliated trading adviser to conduct the trading activities of the covered fund (i.e. a "managed account") is treated the same as an investee fund in a fund of funds or access platform structure. Alternatively, exclude from the restrictions in Proposed Rule ____.16(a), any covered fund in which the investment and trading activities are delegated to a trading adviser unrelated to the covered banking entity

9. Define "affiliate" of a covered banking entity that serves as investment manager, investment adviser, commodity trading adviser or sponsor to a covered fund for purposes of Proposed Rule ____.16(a) as an entity controlling or controlled by the investment manager, investment adviser, commodity trading adviser or sponsor, but exclude entities under common control so long as they are operationally independent from the investment manager, investment adviser, commodity trading adviser or sponsor.

10. The prohibition on taking covered fund interests as collateral in Super 23A should be clarified so that it is not a violation to take a lien on covered fund interests to secure loans made for purposes other than investing in covered funds and as part of a security package.

<u>Discussion</u>

1. Refine the definition of Covered Fund to:
    a. exclude foreign funds offered and/or operated outside the United States by qualifying foreign banking entities as well as all foreign regulated funds analogous to management investment companies registered under the Investment Company Act of 1940, as amended (the "1940 Act"); and
    b. exclude "funds of one" or vehicles established by an advisory client or investment adviser to carry out the investment mandate for a single advisory client; i.e. a dedicated managed account housed in a legal entity.

    a. International Comity

    The proposed definition of covered fund is unnecessarily intrusive in to the extraterritorial operations of the foreign financial institutions that are subject to the

Bank Holding Company Act in respect of their U.S. operations and also pulls in collective investment schemes that are not similar to hedge funds or private equity funds, such as UCITS and other publicly offered, regulated foreign investment funds. For foreign financial institutions, neither of these offshore funds offered outside the U.S. should be deemed "covered funds" under the Volcker Rule. Particularly in the case of regulated funds, there is no articulated rationale for treating these funds as covered funds while management investment companies registered under the 1940 Act are not covered funds. However, the inclusion in the definition of covered funds of foreign funds that would rely on Section 3(c)(1) or Section 3(c)(7) for exclusion from the 1940 Act would make almost every foreign fund a "covered fund" since foreign funds cannot register under the 1940 Act and therefore could only be offered in the U.S. pursuant to an exclusion or exemption from the 1940 Act. Therefore, the Proposed Rules should exclude these regulated funds from the definition of covered fund for both foreign and domestic banks.

Non-regulated foreign funds should also be excluded from the definition of covered fund when organized, offered, sponsored or invested in by foreign banks outside the U.S. as U.S. regulation should not impinge on the overseas operations of these foreign banks.

b. Substance over Form

Congress recognized that asset management is a legitimate business line of banking entities and while limiting involvement with hedge funds and private equity funds through the Volcker Rule, did not intend to limit the ability of banks to continue in investment management business. Congress also recognized that its definition of hedge fund and private equity fund could be over or underinclusive. The asset management affiliates of banking institutions manage assets for many institutional clients that are not themselves hedge funds or private equity funds, but that require for various business reasons that their funds be invested through a legal entity in which the institution is the only investor or in which the only other investor is the investment manager, either for its carried interest or because the client is requiring some investment from the manager. If the investor is a resident of the United States, these "fund of one" vehicles may need to rely on the 3(c)(1) or 3(c)(7) exception from the definition of "investment company" under the 1940 Act and thus would become "covered funds" subject to the restrictions of the Volcker Rule, the most problematic of which are the restrictions in Proposed Rule _____.16. Prohibiting the asset manager from using and offering these institutional clients the products and services of the manager's affiliates, could reduce the attractiveness of the manager to such clients and have significant negative impact on the manager's business. Congress did not attempt to impose the Super 23A provisions on the asset management business of banks in general, only with respect to their management of hedge funds and private equity funds. Therefore, it is a reasonable clarification for the rules to make it clear that the restrictions do not apply to banking entity affiliates management of "fund of one" vehicles that could technically fall within the statutory definition, but are not substantively the same as hedge funds or private equity funds.

2. Revise the "solely outside the United States" exemption to clarify that the condition that the covered fund not be offered or sold to residents of the United States contained in Proposed Rule _____.13(c)(1)(iii) and Proposed Rule _____.13 (c)(3)(iii) prohibits such sales by the banking entity proposing to rely on the exception and its affiliates acting under its direction, but investment by a foreign banking entity outside the United States in a covered fund operated by a third party is still activity "solely outside the United States," even if the fund is offered directly or indirectly by its sponsor to U.S. residents.. For this purpose, only funds controlled by such banking entity or its affiliates and not by third parties would be "covered funds."

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 United States 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 United States 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 United States, 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. In the latter scenario, 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 United States 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.

We urge the Agencies to clarify that (i) the law prohibits the covered banking entity (and not unrelated parties) from offering for sale or selling the covered fund in question to a resident of the United States, (ii) the covered banking entity need only have a reasonable belief that it is not offering or selling to residents of the United States and (iii) the exception would not become unavailable if ownership interests in a fund come into the hands of residents of the United States through other channels (such as sales by third parties not acting on behalf of the banking entity or relocation of an investor to the United States after purchase).

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 offers and sales by the banking entity as organizer or sponsor of the covered fund 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 United States for purposes of due diligence or monitoring of fund investments or cooperation of a U.S. affiliate or even a U.S.-based unrelated adviser engaged by the bank in gathering information about potential fund investments by the foreign banking affiliate could be deemed involvement of U.S. personnel in the offer or sale of fund interests thus causing an investment outside the United States by a foreign banking entity to fail to be "solely outside the United States."

3. Revise the exclusion from the definition of "banking entity" in Proposed Rule ____.2(e)(4) 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 "solely outside the United States" as permitted by Proposed Rule _____.13 (c).

Proposed Rule __.2(e)(4) correctly identifies and corrects an inadvertent problem in the statute by exempting from the definition of "banking entity" (i) any covered fund that becomes an affiliate or subsidiary of a banking entity by virtue of the permitted activity set out in Proposed Rule _____.11, and (ii) 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 Proposed Rule __.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. 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.

Further, the Agencies should revise the required disclosure under Proposed Rule ____.11 so that offering materials of non-U.S. funds provided to non-U.S. investors outside the United States need not include the specified disclosures nor refer to the FDIC or other specific U.S. agencies when offered by a banking entity pursuant to paragraph (9) or (13) of Section 4(c) of the BHC Act, whether or not such offering materials are delivered from a U.S. place of business or affiliate.

Banking entities that are foreign banking organizations that offer covered funds to U.S. residents may also offer those funds outside the United States When a non-U.S. person invests in a non-U.S. fund offered or sponsored by a non-U.S. banking entity, there is no expectation that such fund would be insured by the FDIC – in fact, the investor probably is not even aware of the function of the FDIC or what it is. Therefore, the specific language referring to FDIC insurance should not be required in offering materials that are not delivered to U.S. residents by such banking entities. The non-U.S. customers of the foreign bank do not expect U.S. regulations to apply in any event, not just with respect to FDIC insurance, and do not look to the U.S. government for protection of their local financial systems. Therefore, the disclosure requirements of Proposed Rule ____.11 should not apply to foreign fund offerings by foreign "banking entities."

4. 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 Proposed Rule ___.16 or any other of the substantive requirements or restrictions as a result of such permitted activity.

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 U.S. 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 United States 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.

5. The Agencies should conform the rules interpreting the "solely outside of the United States" exception for covered fund activities and the limitation that such funds not be offered to U.S. residents to industry norms and market practices as reflected in Regulation S under the Securities Act of 1933, as amended (the "1933 Act") to better effect Congressional intent to limit the extraterritorial impact of the Volcker Rule's provisions.

Without much justification, the Proposed Rules have interpreted when fund investment will have occurred outside the U.S. differently from the standards for offshore offerings established under the SEC's Regulation S. We urge the Agencies to harmonize the interpretation of "solely outside the United States" and "offered to residents of the United States" with Regulation S to fulfill Congress mandate to harmonize conflicting regulations to the extent possible.

An example of conflicting regulations is the definition of "resident of the United States" contained in Proposed Rule _____.2(t), which would include any account over which a dealer or fiduciary organized or resident (if an individual) in the United States exercised discretionary authority. This definition is at odds with the definition of U.S. person in Regulation S under the 1933 Act, which specifically excludes as U.S. persons accounts for the benefit of non-U.S. person over which a U.S.-based dealer or fiduciary exercises discretion. With the Volcker Rule definition, foreign banking organizations may decline to engage unrelated U.S.-based investment advisers in relation to their investments in private funds so as not to be deemed "residents of the

United States" and thus excluded from fund offerings outside of the United States. This expansive definition of resident of the United States is not required by the Volcker Rule provisions of the DFA and the Agencies have offered no explanation for why a rule that could hamper the business of U.S. investment advisers and broker-dealers that are not themselves banking entities affiliated with the foreign bank furthers the intent of Congress to protect the safety and soundness of the U.S. banking system.

The Proposed Rules exceed the intent of the statute again and conflict with existing Regulation S in adding the limitation on involvement by any "subsidiary, affiliate or employee of the covered banking entity" 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" for all purposes of Proposed Rule ___.13(c) even if the fund is not offered to residents of the United States. The involvement of such affiliates of a foreign bank or their U.S.-based personnel in the sale of funds to non-U.S. residents is not contemplated by the Volcker Rule when the banking entity is not otherwise a sponsor of the fund being offered. "Sponsor" is defined in the Volcker Rule itself and does not refer to sales activity. Similarly, under Regulation S under the 1933 Act, the involvement of persons in the United States in offers and sales to non-U.S. persons do not necessarily cause an offering under that safe harbor to have taken place in the United States. Further, there is no explanation or tie in to the statute explaining how the involvement of U.S. affiliates or U.S.-based personnel of a foreign banking entity with a covered fund would make an investment in such covered fund by the foreign banking entity constitute an investment by that banking entity in the United States or further the intent of the statute other than the naked assertion that it was Congress' apparent intent to preserve competitive parity.

The Agencies should also revise the conditions of the "solely outside of the United States exception" to recognize, as does Regulation S in its provisions on "directed selling efforts," that the involvement of persons located in the United States in the distribution of a non-U.S. covered fund's securities to potential purchasers outside the United States should not affect the analysis of whether a non-U.S. banking entity's investment or sponsorship of the fund occurs "solely outside the U.S." The Supreme Court in *National Australia Bank vs. Morrison* stated that absent a clear expression of legislative intent, U.S. laws are presumed not to have extraterritorial effect. In the current example, Congress clearly specified that it was not prohibiting the acquisition or retention of ownership interests or sponsorship of a hedge fund or private equity fund by a qualified banking entity solely outside the United States (i.e. attempting to avoid extraterritorial effect) and the only provisos added were that the fund interests not be offered or sold to a resident of the United States and that the banking entity not be controlled by a U.S. banking entity.

6. Revise the condition in Proposed Rule ____.11(f) to eliminate affiliates and subsidiaries of the covered banking entity that do not themselves share the name of the federally insured deposit institution from the prohibition on sharing a name with a fund.

While the rationale behind the naming convention in Proposed Rule ____.11(f) is clear, this rule may conflict with the rules of regulators in other jurisdictions and seems overly broad to accomplish its goal. Many banks have developed significant asset management businesses under names that are not related to the name of the bank. These entities have put great effort into generating good will associated with their brand name. When they start funds, these asset management businesses should be able to brand them with their own name so long as it is not the same as the name of the affiliated bank. Since some of these funds may be deemed affiliates of the bank once formed, prohibiting use of the name of the bank or any of its subsidiaries or affiliates in the fund name become tautological in any event. Prohibiting the asset management business of the bank to use its name on its products also unfairly disadvantages it in pursuing a permitted business when compared to its non-bank-affiliated peers.

7. Clarify that the products and services constituting "prime brokerage transactions" include the types of products and services offered to support customer trading business in which the broker-dealer, futures commission merchant, swap dealer or banking entity engages on a regular basis and expects to generate its revenue from commissions, a finance charge or commission-like trading spread, including various types of OTC derivatives, contracts for differences and foreign exchange services

Questions 314-316 request comment on the types of relationships that exist between banking entities and covered funds and the effect of the proposed rules on the banking entities' ability to continue to meet customer demand. We note that the definition of prime brokerage transaction gives a non-exclusive list of examples of the types of products and services that will not permitted exceptions to the application of Super 23A, but also note that the examples seem to arise from the perspective of services provided by traditional securities broker-dealers. In order for covered funds managed by asset management companies that are affiliated with banking entities to continue to manage the funds in a competitive manner and in accordance with expectations of investors and customers of the bank, "prime brokerage transactions" should be clarified to explicitly include transactions in commodities, futures and foreign exchange, as well as securities, and to transactions effected through OTC derivatives, including, without limitation contracts for differences, various swaps and security based swaps, foreign exchange swaps and forwards and "FX prime brokerage."

8. Clarify that for purposes of the prime brokerage transaction exception to the application of Super 23A contained in Proposed Rule ___.16(a), a covered fund in which a banking entity that serves as investment manager, investment adviser, commodity trading adviser or sponsor appoints an unaffiliated trading adviser to conduct the trading activities of the

covered fund (i.e. a "managed account") is treated the same as an investee fund in a fund of funds or access platform structure. Alternatively, exclude from the restrictions in Proposed Rule ____.16(a), any covered fund in which the investment and trading activities are delegated to a trading adviser unrelated to the covered banking entity.

The prime brokerage transaction exception is applicable to services to a covered fund in which a covered fund managed by a banking entity invests. However, not all funds with independent trading managers are structured in this two tiered form. There are many funds operated as "managed accounts" housed in a legal entity where the investment manager will appoint a trading adviser to manage the portfolio of the fund in parallel to the trading adviser's flagship fund, but that offer benefits to investors of being a separate account with oversight by another investment manager for the purpose of monitoring risk and net asset value calculation, among other things. Where a banking entity is the investment manager or sponsor of such managed accounts, and appoints an independent trading adviser to manage the portfolio of the fund, such fund should be treated as a covered fund in which a covered fund managed by a banking entity invests that would be eligible to receive prime brokerage services from an affiliate of the banking entity. In these structures, the service providers, such as brokers, derivatives counterparties and futures commission merchants are chosen by the trading adviser and are generally the same as those used by the trading adviser for its own fund and operationally are very similar to the structure specified in the proposed rule.

If the person providing the prime brokerage transaction service is affiliated with the banking entity providing the investment management oversight and the Volcker Rule were to prohibit the prime broker from continuing to provide the service or to limit the types of transactions it could engage in, the fund could not fulfill its mandate of operating in parallel to the trading adviser's flagship fund and many managed account platform providers affiliated with banks who are based outside the United States could decide to stop offering their funds to U.S. investors. If this were to occur, U.S. institutional investors, who favor such structures as they provide them with secondary (and independent) risk monitoring, will have fewer structures to select from, and the U.S. affiliates of these asset management companies would have significantly less business resulting in head count reductions in the United States.

9. Define "affiliate" of a covered banking entity that serves as investment manager, investment adviser, commodity trading adviser or sponsor to a covered fund for purposes of Proposed Rule ____.16(a) as entities controlling or controlled by the investment manager, investment adviser, commodity trading adviser or sponsor, but exclude entities under common control so long as they are operationally independent from the investment manager, investment adviser, commodity trading adviser or sponsor

Congress specified that covered banking entities and their affiliates be treated as "member banks" for purpose of Super 23A and the covered fund for which a banking entity directly or indirectly serves as investment adviser be deemed an affiliate. This provision would severely handicap funds for which a banking entity serves as adviser, even if the bank has no investment in such entity, by narrowing the universe of service providers such fund could transact with. Where a company under the umbrella of a banking organization is not itself a member bank, is not controlling or controlled by the asset manager advising the covered fund, and is operationally independent of the asset manager, such company should not be deemed an affiliate of the banking entity providing the asset management services. Particularly where the affiliated entity is owned by a foreign bank, and the risks of the entity do not implicate the U.S. branch of such bank, the restriction goes far beyond what could be justified as protecting the soundness of U.S. banking institutions.

10. The prohibition on taking covered fund interests as collateral in Super 23A should be clarified so that it is not a violation to take a lien on covered fund interests to secure loans made for purposes other than investing in covered funds and as part of a security package.

The prohibition on taking covered fund interests as collateral in Super 23A should be clarified so that it is not a violation to take a lien on covered fund interests to secure loans made for purposes other than investing in covered funds and as part of a security package. Not all hedge funds or private equity funds are illiquid, highly leveraged or particularly risky and could be valuable collateral for a bank. Where a bank is making a loan or entering into another credit transaction with a customer who owns covered funds, prohibiting the bank from placing a lien on such funds to secure the loan does not further the interests of protecting the bank. The restriction should be revised to prohibit taking such funds as the sole collateral for an extension of credit or provide guidelines for valuation of such funds based on their liquidity and risk profiles.

Please contact Marilyn Selby Okoshi (212-940-8512) or Guy Dempsey (212-940-8593) to discuss any of these comments.

Very truly yours,

Katten Muchin Rosenman LLP