COMMITTEE ON CAPITAL MARKETS REGULATION

February 13, 2012

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Re: <u>Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds</u>, 76 Fed. Reg. 68,846 (OCC Docket ID OCC-2011-0014, OCC RIN 1557 – AD44; Fed Docket No. R-1432, Fed RIN 7100 – AD82; FDIC RIN 3064 – AD85; SEC Release No. 34 – 65545, File No. S7-41-11, SEC RIN 3235 – AL07); <u>Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships with, Hedge Funds and Covered Funds</u> (CFTC RIN 3038 – AD05).

Dear Mr. Walsh, Ms. Johnson, Mr. Stawick, Mr. Feldman, and Ms. Murphy:

The Committee on Capital Markets Regulation (Committee) appreciates the opportunity to comment on the Office of the Comptroller of the Currency (OCC), Federal Reserve Board (Board), Federal Deposit Insurance Corporation (FDIC) and Securities and Exchange Commission's (SEC) notice of proposed rulemaking,[1] and the Commodity Futures Trading Commission's (CFTC, and together with the OCC, the Board, the FDIC, and the SEC, the Agencies) separate but substantially similar notice of proposed rulemaking,[2] regarding prohibitions and restrictions on proprietary trading and certain interests in, and relationships

[1] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) [hereinafter Proposed Rules].
[2] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Covered Funds, 17 C.F.R. Part 75 (proposed Jan. 2012).

with, hedge funds and private equity funds under Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[3]

Since 2005, the Committee, composed of 32 members, has been dedicated to improving the regulation of U.S. capital markets. Our research has provided an independent and empirical foundation for public policy. In May 2009, the Committee released a comprehensive report entitled *The Global Financial Crisis: A Plan for Regulatory Reform*, which contains fifty-seven recommendations for making the U.S. financial regulatory structure more integrated, more effective, and more protective of investors in the wake of the financial crisis of 2008.[4] Since then, the Committee has continued to make recommendations for regulatory reform of major areas of the U.S. financial system.

We believe that Section 619 of Dodd-Frank as well as the Proposed Rules introduce great potential for harm to our banks and financial markets more broadly, without any clear evidence of their risk-mitigating benefits. As a result, and as the Committee has stated in the past,[5] we strongly encourage the Agencies to interpret the proprietary trading ban as narrowly as possible to limit the damage that will result.

Section 619 of Dodd-Frank adds a new Section 13 to the Bank Holding Company Act of 1956, which generally prohibits banking entities from engaging in proprietary trading or from acquiring or retaining certain interests in or relationships with hedge funds or private equity funds. The rule provides for numerous exceptions to the ban on proprietary trading, including for market-making, underwriting, hedging activities, acting on behalf of customers, trading in certain government obligations, certain trading by regulated insurance companies, and others. The Proposed Rules seek to define these exemptions, which admittedly is an extremely complex and difficult task. Defining the exemptions too narrowly would arguably impede the objectives of the Proposed Rules. Defining too broadly, however, could seriously limit core banking and capital market functions, permitted by Congress, that are critical to the smooth functioning of our financial markets.

In its attempt to strike this balance, the Agencies have drafted 298 pages of a proposed regulation which ultimately raises more questions and concerns than it answers (in addition to the nearly 400 specific questions posed). Paul Volcker himself said: “It’s much more complicated than I would like to see.”[6] We know that the Agencies are working diligently with market participants to understand their concerns over the Proposed Rules’ wide-reaching effects, both intended and unintended, and over the aspects of the Proposed Rules where further clarity is needed. We strongly encourage the Agencies to continue in this dialogue. Because the Proposed Rules will result in fundamental changes to the way U.S. and certain non-U.S. banks conduct

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act § 619, Pub. L. No. 111-203 (2010) [hereinafter Dodd-Frank].
[4] COMM. ON CAPITAL MKTS. REG., THE GLOBAL FINANCIAL CRISIS: A PLAN FOR REGULATORY REFORM (May 2009), http://www.capmktsreg.org/research.html.
[5] Letter from the Comm. on Capital Mkts. Reg. to Timothy F. Geithner, Chairman, Fin. Stability Oversight Council 2 (Nov. 5, 2010), http://www.capmktsreg.org/pdfs/2010.11.05_Volcker_Rule_letter.pdf.
[6] Rachel Armstrong, *Paul Volcker Says Volcker Rule Too Complicated*, REUTERS, Nov. 11, 2011, http://www.reuters.com/article/2011/11/11/us-regulation-volcker-f-idUSTRE7AA48K20111111.

business, at tremendous cost, the Committee urges the Agencies to implement the rule with the utmost care.

Following are several significant concerns the Committee has with respect to the Proposed Rules:

1. **The Proposed Rules go well beyond the language and intent of Section 619 and limit proprietary trading and fund investments at tremendous cost.**

To begin, it bears reiterating that there is no evidence that short-term proprietary trading investments or hedge fund and private equity fund investments were the major source of losses during the credit crisis.[7] In fact, one Wall Street firm estimates that more than 95% of U.S. bank losses during the credit crisis can ultimately be traced back to bad lending or investment decisions.[8] The investment losses include portfolio investments in real estate backed securities, an activity, like lending, which can continue under the Volcker Rule.[9] The recent U.S. Government Accountability Office (GAO) report found that during the period from mid-2006 through December 2010, stand-alone proprietary trading and fund investment revenues were generally a small percentage of total revenues at the six largest U.S. bank holding companies: proprietary trading revenues ranged from a low of about 0.2% to a high of about 3.1% of combined quarterly revenues for all activities at the bank holding companies,[10] while revenues from hedge fund and private equity fund investments represented between approximately .08% to 3.5% of combined revenues.[11] Furthermore, proprietary trading revenues were relatively flat over the period of the study.[12] The GAO report admittedly used a narrow definition of "proprietary trading," looking only at the activity of stand-alone proprietary trading desks at the bank holding companies. The definition and sample may account for their estimate of the small impact on financial firms. On the other hand, the GAO report did not analyze the profitability of the proprietary trading activity, nor did it challenge the diversification benefits such trading provides.

At the same time, the enormous cost of the Proposed Rules is widely acknowledged. The Proposed Rules will result in significant costs for banks, including lost revenues following the shuttering of remaining proprietary trading desks at certain banks that had been active and successful traders,[13] and enormous compliance and recordkeeping costs. In addition, the Proposed Rules will result in increased transaction costs and liquidity constraints that will be felt across the financial industry. While these increased transaction costs would benefit banks, such

[7] Not all members of the Committee agree on the lack of contribution of proprietary trading to the financial crisis.
[8] Goldman Sachs Group, Inc., Goldman Investment Research, *United States: Financial Services* 5 (Jan. 22, 2010).
[9] *See* Proposed Rules, *supra* note 1, at 68,857 (defining the term "trading account" to which the proprietary trading ban applies).
[10] U.S. GOV'T ACCOUNTABILITY OFFICE, PROPRIETARY TRADING: REGULATORS WILL NEED MORE COMPREHENSIVE INFORMATION TO FULLY MONITOR COMPLIANCE WITH NEW RESTRICTIONS WHEN IMPLEMENTED 16 (July 2011) [hereinafter GAO Report].
[11] *Id.* at 23.
[12] *Id.* at 14.
[13] Note that while the GAO report suggested proprietary trading was a small part of firm revenues over the period studied, the GAO report used a narrow definition of "proprietary trading" and furthermore, it presented aggregate data measured across six firms with differing degrees of proprietary trading activity.

benefits may be offset by the expected decline in market-making, underwriting and hedging activities that the Committee believes will result if, by reason of an overbroad series of regulations, the Agencies cause a contraction in the integrated business units that support these activities. While it is admittedly difficult to quantify the full impact of the Proposed Rules, recent estimates are staggering. The Institute of International Finance suggests the Volcker Rule may depress bank earnings by $3.5 – $4 billion per year.[14] Bernstein Research analyst Brad Hintz estimates that it will result in a reduction of fixed income revenues of between 20% and 25%.[15] Moody's characterized the Proposed Rules as a "credit negative" for bondholders of Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase and Morgan Stanley.[16]

Impact on Liquidity and Transaction Costs

While non-bank financial institutions not subject to the Proposed Rules may eventually take on all or a portion of the trading activity in which banks can no longer engage, or other forms of intermediation may emerge, thus returning liquidity to the market and reducing transaction costs, it is not likely such a shift would occur in the short-term, and furthermore, it is uncertain whether such a shift will fully offset banks' diminished trading activity. Following implementation of the Proposed Rules, there will be a dramatic reduction in liquidity in assets that banks can no longer trade and, as a result, bid-ask spreads and transaction costs will increase. The Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce estimates that the Proposed Rules "will impose at least a five basis point increase in bid-ask spreads"[17] and suggests the spreads could actually be many times greater. This total increase, measured over the nearly $8 trillion corporate bond market, will be enormous. Overall "incremental transaction costs for investors and financing costs for U.S. companies could total into the tens of billions of dollars."[18]

Compliance and Recordkeeping Costs

The Proposed Rules' lengthy, detailed compliance and reporting requirements will also result in significant cost. For the 2,096 national banks, for example, in its September 2011 report, the OCC estimated these <u>annual</u> costs would reach nearly $1 billion.[19] Significant infrastructure investments will have to be made and internal controls put in place to quantitatively monitor all transactions. These added compliance burdens will be incurred at a time when banks are already facing the challenges of a weak economy.

[14] Inst. of Int'l Fin., *The Cumulative Impact on the Global Economy of Changes in the Financial Regulatory Framework* 23 (Sept. 2011), http://www.iif.com/download.php?id=oXT67gHVBJk=.
[15] Katie Little, *Which Banks Would the Volcker Rule Affect?*, CNBC STOCK BLOG (Oct. 11, 2011), http://www.cnbc.com/id/44860768/Which_Banks_Would_the_Volcker_Rule_Affect.
[16] Rachel Kakouris & John Balassi, *IFR-Investors Warn of Volcker Rule Liquidity Concerns*, REUTERS, Nov. 18, 2011, http://www.reuters.com/article/2011/11/18/us-markets-credit-idUSTRE7AH1OG20111118.
[17] Letter from the Ctr. for Capital Mkts. Competitiveness of the U.S. Chamber of Commerce to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve, Robert E. Feldman, Exec. Sec'y, Fed. Deposit Ins. Corp., Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n, and Office of the Comptroller of the Currency 7 (Dec. 15, 2011) [hereinafter CCMC Letter].
[18] *Id.*
[19] Memorandum from the Office of the Comptroller of the Currency, Impact Analysis of Proposed Rule to Implement the Volcker Rule 10 (Sept. 7, 2011).

2. **<u>As currently drafted, the Proposed Rules will unnecessarily limit banking and capital market functions that Dodd-Frank specifically permits.</u>**

The Agencies themselves acknowledge that "the delineation of what constitutes a prohibited or permitted activity…often involves subtle distinctions that are difficult both to describe comprehensively within regulation and to evaluate in practice."[20] At the same time, the Agencies recognize that financial services including "underwriting, market making, and traditional asset management services, are important to the U.S. financial markets and the participants in those markets, and the Agencies have endeavored to develop a proposed rule that does not unduly constrain banking entities in their efforts to safely provide such services."[21] The Proposed Rules' approach to identifying permitted and prohibited activities must be narrowed and revised so that it is flexible enough to accommodate differences in the structure and business of each firm.

Market-Making

Distinguishing between market-making and speculative proprietary trading poses significant challenges. This is because, as Darrell Duffie notes: "Market making is inherently a form of proprietary trading."[22] The Agencies acknowledge that "Market-making related-activities…sometimes require the taking of positions as principal, and the amount of principal risk that must be assumed by a market maker varies considerably by asset class and differing market conditions."[23] Duffie goes on to suggest: "In order to provide significant immediacy to its customers, a market maker requires substantial discretion and incentives regarding the pricing, sizing, and timing of trades. It must also have wide latitude and incentives for initiating trades, rather than merely reacting to customer request for quotes, in order to properly risk manage its positions or to prepare for anticipated customer demand or supply."[24]

The Proposed Rules suggest seven criteria for examining positions to determine whether they represent *bona fide* market-making. The Proposed Rules' implementation of the requirement that market-making activities should not exceed reasonably expected near term demand of clients, customers, and counterparties must be revised. First, while Section 619 makes clear that these activities may be with clients, customers or counterparties, the Proposed Rules focus on demand of customers. They must be clarified to reflect that this demand can come from other dealers or future customers, for example. Furthermore, while Section 619 says market-making activities are permitted to the extent they "are designed not to exceed the reasonably expected near term demands of clients, customers or counterparties,"[25] the Proposed Rules seem to tighten this standard and require that "anticipatory buying or selling activity is reasonable and related to clear, demonstrable trading interest of clients, customers, or counterparties."[26]

[20] Proposed Rules, *supra* note 1, at 68,849.
[21] *Id*.
[22] Darrell Duffie, *Market Making Under the Proposed Volcker Rule* 3 (Jan. 16, 2012), http://www.sifma.org/workarea/downloadasset.aspx?id=8589937022.
[23] Proposed Rules, *supra* note 1, at 68,869.
[24] Duffie, *supra* note 22, at 4.
[25] Dodd-Frank § 619.
[26] Proposed Rules, *supra* note 1, at 68,871.

In addition, if a bank makes a market in relatively illiquid instruments, or a bank is entering a new market, the concept of “near term demand” must be implemented to supply flexibility and to acknowledge market differences. A market-maker may also need to hold significant inventory for example to accommodate potential block trade requests. Under the current, narrow market-making exemption, it is likely banks will reduce their inventory in many asset classes, resulting in decreased liquidity and increased transaction costs, bid-ask spreads and volatility. Traders will be hesitant to make markets in assets where there is questionable ability to sell them in the near term. Furthermore, should a bank feel compelled to sell certain assets at an inopportune time to avoid being viewed as holding a proprietary position, this could have extremely negative, destabilizing impact–for example, if a bank were forced to sell its assets in a fire sale during a period of market crisis.

The final criterion in the Proposed Rules for a determination of market-making activity sets forth quantitative measurements (or “metrics”) that banks’ market-making activities must meet to be eligible for exemption. We believe metrics can be an appropriate and a potentially valuable tool in analyzing investments. However, we note that the application of metrics to activities at different firms may produce very different results. It is critical to recognize that such different results may all reflect legitimate market-making activities. For example, one bank may be more aggressive than its peers when it is looking to move into a new line of business. As a result, it may find it acceptable to make less profit on these new trades, resulting in a different result under the quantitative measurements than the results of its peer firms. However, these low-priced trades may very well be bona fide market-making. The Agencies (or potentially the Board, as discussed further below) should consider the results of the quantitative measurements on a case-by-case basis, looking horizontally across all business units in each firm. Any use of metrics must ensure that the specific characteristics of an individual firm are not overlooked in a rigid application of the rules.

Hedging

Again, to assist in identifying permitted hedging activities, the Proposed Rules approach this process with a test applying seven criteria. However, the criteria seem to suggest a belief on the part of the Agencies that hedging should be more precise a practice than it generally is, not producing excess profit or loss. Alliance Bernstein notes: “Given…the emphasis…on avoiding profit or loss on positions taken by market makers, intermediaries are not going to be able to place great confidence in the use of hedging as a means of staying within the exemption.”[27] Furthermore, when determining whether hedging activity is permissible, Agencies must acknowledge that hedging may take place horizontally across business units within a firm (and, thus, may take place in a different legal entity from the underlying positions being hedged). In addition, the criterion which requires that “the transaction be reasonably correlated…to the risk or risks the transaction is intended to hedge or otherwise mitigate”[28] could inadvertently prohibit certain types of hedging activity altogether. For example, scenario hedges, which are meant to

[27] Letter from Peter Kraus on behalf of AllianceBernstein to Fed. Deposit Ins. Corp., Sec. & Exch. Comm’n, Bd. of Governors of the Fed. Reserve Sys., and Office of the Comptroller of the Currency 6 (Nov. 16, 2011).
[28] Proposed Rules, *supra* note 1, at 68,875.

mitigate the risk of unlikely "tail" events and thus do not exhibit such correlation,[29] would likely be prohibited under the Proposed Rules. The Proposed Rules should be revised to avoid such unintended consequences.

Underwriting

Similar to its approach with market-making and hedging, the Proposed Rules contain seven criteria to assist in identifying *bona fide* underwriting activities. We would encourage the Agencies to revisit the third criteria, that "the transaction must be effected *solely* in connection with a distribution of securities for which the banking entity is acting as an underwriter"[30] (emphasis added). The inclusion of the word "solely" will inadvertently prohibit some complex underwritings that banks may undertake.

Government Securities

The question of whether U.S. government debt should be treated differently from foreign government debt has been raised by numerous commentators including the United Kingdom, Japanese and Canadian governments. We encourage the Agencies to consider this issue further, particularly with respect to foreign banks with U.S. branches that are subject to the Proposed Rules and that would no longer be able to trade in the United States in their own government debt. Ideally, we believe the Agencies should use their authority under paragraph (d)(1)(J) of Section 619 to exempt all foreign sovereign debt, whether held by U.S. or foreign banks. The potential risk introduced by banks holding such debt on their balance sheet would be addressed through Basel risk-weightings.

In addition, the U.S. government obligation exemption under the Proposed Rules is narrowly defined, and excludes state and local agency securities. This is a narrower approach than that taken under the Securities Exchange Act of 1934 or by any banking regulation (including under the Glass-Steagall Act itself). Excluding agencies will result in an inconsistent application of the exemption across different jurisdictions; the Municipal Securities Rulemaking Board cites the "extremely divergent ways" in which different states "organize and empower their subdivisions, municipalities, agencies, authorities, instrumentalities and districts" and concludes that "[t]wo issues of securities with identical terms and provisions, and with identical risk profiles, and which otherwise would exhibit the identical trading behavior, would be treated in completely different ways under the Volcker Proposal…."[31] In their current form, the Proposed Rules would prohibit banking entities from trading in over half of the municipal bonds outstanding.[32] Institutional investors are generally less active in municipal markets, thus

[29] *Joint Hearing Before the Subcomm. on Capital Mkts. and Gov't Sponsored Enterprises and the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 6 (Jan. 18, 2012) (written Testimony of Securities Industry and Fin. Mkts. Ass'n) [hereinafter SIFMA Testimony].
[30] Proposed Rules, *supra* note 1, at 68,866.
[31] Letter from the Municipal Securities Rulemaking Board to the Office of the Comptroller of the Currency, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., and Sec. & Exch. Comm'n 7 (Jan. 31, 2012).
[32] *A Critical Analysis of the Potential Impact of the Volcker Rule on Municipal Bonds*, CLIENTS AND FRIENDS MEMO (Cadwalader, Wickersham & Taft LLP), Dec. 12, 2011, at 2, http://www.cadwalader.com/assets/client_friend/121211CriticalAnalysisPotentialImpactBond.pdf.

proprietary trading desks and market makers play a more significant role in providing liquidity.[33] We encourage the Agencies to further review this exemption, and unless there is clear evidence that the current approach will result in a corresponding reduction in risk, it should be revised accordingly.

Prohibition on Fund Investments

The Proposed Rules prohibit banks from acquiring or retaining ownership interest in, or sponsoring, "covered funds."[34] In an attempt to define "covered funds," the Agencies have incorporated definitions from the Investment Company Act of 1940. The result is an extremely over-inclusive definition that captures many types of entities beyond the hedge funds and private equity funds that the legislative history of Section 619 makes clear that Section sought to cover. Prohibiting such investments impacts not only the banks, but also the funds themselves, many of which are managed by third party asset management firms and which will suffer from this shrinkage of their client base. SIFMA wrote: "It is difficult to overstate the time, effort and expense banks will have to commit to identifying, monitoring and conforming thousands of entities in their ownership structures that in no way resemble hedge funds or private equity funds."[35] In particular, we note the prohibition extends to registered, publicly-offered non-U.S. funds (including non-U.S. exchange-traded funds, where this ban would result in U.S. banks being left unable to serve as market-makers in this asset class), commodity pools (which could include U.S. mutual funds that hold futures positions), credit funds (which are economically identical to loans), certain asset-backed securities issuers, and certain repackagings of municipal securities, among other entities. We urge the Agencies to address this issue and to appropriately exempt from the definition of "covered funds" those entities that bear no resemblance to the hedge funds and private equity funds covered by Dodd-Frank.

In addition, Dodd-Frank exempts regulated insurance companies trading for their general accounts from both the proprietary trading and hedge fund and private equity fund restrictions, while the Proposed Rules take a narrower approach and permit only proprietary trading by insurance companies. The Agencies do not provide any explanation as to their narrower approach, which is contrary to the intent behind the provision, as summarized by Senator Merkley: "The Volcker Rule was never meant to affect the ordinary business of insurance… These activities, while definitionally proprietary trading, are heavily regulated by State insurance regulators, and in most cases do not pose the same level of risk as other proprietary trading."[36] Numerous commenters have raised this issue, and we urge the Agencies to revise the Proposed Rules accordingly.

[33] *U.S. Municipal Strategy Special Focus*, CITIGROUP GLOBAL MARKETS (Citigroup), Nov. 20, 2011, at 1, http://www.nabl.org/uploads/cms/documents/Volcker_Muni_Proposal.pdf.
[34] Proposed Rules, *supra* note 1, at 68,851-68,852.
[35] SIFMA Testimony, *supra* note 29, at 8.
[36] 156 CONG. REC. S5896 (daily ed. July 15, 2010) (statement of Sen. Jeff Merkley).

High Risk Assets

Dodd-Frank requires the Agencies to issue regulations that implement Section 619's prohibition on activities that "would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies."[37] The definitions provided in the Proposed Rules are too vague and broad to be meaningful. "High-risk assets" are defined as "an asset or group of assets that would, if held by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail" and "high-risk trading strategy" is defined as "a trading strategy that would, if engaged in by the banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would fail."[38] We would encourage the Agencies to propose a more specific definition. Such a definition should take into account the public policy behind the Proposed Rules.

Subsidiaries of Banking Entities

The prohibitions of the Proposed Rules also apply to "subsidiaries" of banking entities, as defined in Section 2 of the BHC Act.[39] Section 2 offers a three-part test in identifying subsidiaries. The first two factors are objective—whether the parent owns 25% or more of a class of voting securities of the subsidiary, and whether the parent controls the election of a majority of the directors of the subsidiary. The third factor however is subjective—whether "the Board determines, after notice and opportunity for hearing, that the [parent] company directly or indirectly exercises a controlling influence over the management or policies of the bank or company."[40] This third factor requires analysis of the facts and circumstances of each particular situation, and introduces uncertainty as to whether certain subsidiaries will be covered by the definition. We believe that this particular factor should not be included in the identification of subsidiaries for purposes of the Proposed Rules, and instead, a clear and objective definition based on the first two factors should be used. Such an objective approach is consistent with the Board's approach in defining "control" in its proposed rules on Enhanced Prudential Standards and Early Remediation Requirements.[41]

3. **The Proposed Rules raise concerns over extra-territoriality and a lack of international coordination.**

As discussed above, the inability of foreign banks with U.S. branches to trade in the United States in their own sovereign debt could result in these banks shuttering their U.S. branches. The Canadian Office of the Superintendent of Financial Institutions has called for an exemption to permit at least foreign banks to trade in their own sovereign debt, and warns that "a failure to include these additional exemptions at least for banking entities whose parent bank is located outside of the U.S. would undermine the liquidity of government debt markets outside of

[37] Dodd-Frank § 619.
[38] Proposed Rules, *supra* note 1, at 68,894.
[39] *Id.* at 68,945.
[40] Bank Holding Company Act § 2(a)(2)(C).
[41] Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 Fed. Reg. 614 (proposed Jan. 5, 2012).

the U.S. and could significantly impede the ability of foreign banks to efficiently manage their liquidity and funding requirements at an enterprise-wide level."[42]

In addition, foreign banks will be prohibited from investing in funds that are offered or sold to U.S. residents even if the foreign bank makes that investment from outside the United States. The Proposed Rules provide an exemption to permit foreign banks to invest in covered funds "so long as such activity occurs solely outside the United States"[43] (the Offshore Exemption), which exemption the Agencies say is aimed specifically to limit the extraterritorial application of the covered fund restrictions on foreign banks. However, as noted by several commentators including the Japanese government and the Institute of International Bankers, whether a fund has been offered or sold to U.S. investors may be difficult if not impossible to determine (for example, where investors include omnibus accounts or other arrangements with intermediaries serving as the shareholder of record), thus preventing foreign banking entities from investing in these funds. There is no reason why the Proposed Rules should (as they do) take the approach that any U.S. investor in a fund "taints" that fund, even if the investing bank had noting to do with any sale to a U.S. person; rather, the intent behind the Offshore Exemption was to prohibit foreign banks from offering sponsored hedge fund and private equity fund investments to U.S. persons.[44] Mark Standish testified: "[T]hese fund restrictions represent an extraordinary and unprecedented extraterritorial expansion of U.S. banking regulation into the core prudential regulation of the non-U.S. activities of international banks by their home country regulators."[45]

Besides the effects on foreign banks, the narrow Offshore Exemption will also impact U.S. asset managers unaffiliated with any banking entity. These asset managers will either be forced to exclude foreign banks from investing in their funds, or will need to ensure that no U.S. investors are present in such funds (including U.S. tax exempts, which commonly invest in offshore funds). We encourage the Agencies to modify the Offshore Exemption to explicitly permit foreign banks investing in funds that they do not sponsor or advise, even if those funds are offered or sold to U.S. residents.

Finally, the application of the Proposed Rules' compliance program on foreign banks would be duplicative and extremely burdensome and runs the real risk that foreign jurisdictions will take a similar approach with respect to U.S. operations. We urge the Agencies to consider the suggestions of The Norinchukin Bank that "foreign banks should be exempted from reporting requirements if the U.S. authorities are able to utilize monitoring information gathered by the

[42] Letter from Julie Dickson, Superintendent, Office of the Superintendent of Fin. Insts. Canada to Fed. Deposit Ins. Corp., Sec. & Exch. Comm'n, Bd. of Governors of the Fed. Reserve Sys., and Office of the Comptroller of the Currency 3 (Dec. 28, 2011).
[43] Proposed Rules, *supra* note 1, at 68,852.
[44] 156 CONG. REC. S5897 (daily ed. July 15, 2010) (statement of Sen. Jeff Merkley)..
[45] *Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation: Joint Hearing Before the Subcomm. on Capital Mkts. and Gov't Sponsored Enterprises and the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 8 (Jan. 18, 2012) (written Testimony of Mark Standish on behalf of the Institute of Int'l Bankers).

authorities in their home countries…"[46] and that such requirements should potentially be limited to the U.S.-based subsidiaries or branches of these foreign banks.[47]

We note that Mr. Volcker, in his testimony before the Senate in February of 2011, said "[S]urely a strong international consensus on the proposed approach would be appropriate, particularly across those few nations hosting large multi-national banks and active financial markets."[48] However, no other country has since followed suit. The United Kingdom will follow an approach recommended by the Vickers Commission and will separate and "ringfence" their retail and wholesale banking operations from each other. This approach is far less restrictive than the absolute prohibitions of the Volcker Rule, as it does not prohibit proprietary trading and investments in funds; it just requires their separation from a retail bank. The fact that U.S. banks will exist under a much more onerous regime than foreign ones does not bode well for the competitiveness of U.S. banks and argues strongly for the understanding that the Proposed Rules should be more precisely tailored to prohibit only the specific activities that Section 619 encompasses.

4. **The Proposed Rules raise significant logistical issues, including the roles and potential overlapping jurisdiction of multiple agencies and issues with the timing of implementation.**

Dodd-Frank requires "coordinated rulemaking" among the five regulators who have issued the Proposed Rules, however, it does not clarify the division of responsibility among them. The Proposed Rules say that each Agency should have supervisory, examination and enforcement authority over the legal entities over which it has rulemaking authority but this will be difficult to implement in practice. In modern banking structures, trades and their hedges may be conducted across multiple legal entities and jurisdictions; similarly quantitative metrics as prescribed with respect to the market-making exemption are also measured across multiple legal entities. If a bank's U.S. corporate credit market-making desk buys both a bond and a related credit default swap, the bond might be held in its U.S. broker-dealer, the credit default swap in a separate legal entity (soon to be registered as a securities-based swap dealer), and the desk might hedge the position with a futures position at its futures commission merchant. Thus, a single trade could be held across multiple legal entities that fall under the jurisdiction of different regulators. Such an arrangement of multiple enforcers seems unduly complicated and likely to lead to conflict, inconsistency and confusion. Instead, the Board, which is the primary enforcer of the Bank Holding Company Act and the single regulator that currently looks across banks' entire global businesses regardless of legal entity, should be given initial authority to supervise the implementation of the Proposed Rules. The Board can then determine whether an activity should be delegated to one of the other Agencies for further examination or enforcement.

[46] Letter from The Norinchukin Bank to the Fed. Deposit Ins. Corp., Sec. & Exch. Comm'n, Bd. of Governors of the Fed. Reserve Sys., Commodity Futures Trading Comm'n, and Office of the Comptroller of the Currency 10 (Jan. 25, 2012).
[47] *Id*. at 12.
[48] *Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 3 (Feb. 2, 2010) (written Testimony of Paul Volcker).

Furthermore, while the Proposed Rules generally have a two-year conformance period, the compliance and recordkeeping requirements of the Proposed Rules will take effect this coming July. Considering that the initial comment period for the Proposed Rules ends on February 13 and that the Proposed Rules themselves pose hundreds of questions and significant further work needs to be done by the Agencies and market participants before the rules can be finalized, it seems premature for banks to begin building their compliance and reporting infrastructures until the specific requirements are finalized. SIFMA rightly concludes: "it was not the intent of Congress that banks would be left scrambling to erect massive compliance structures within the span of a few short weeks."[49] We urge the Agencies to delay the compliance and recordkeeping deadlines until these requirements have been finalized.

Further, we urge that the Agencies repropose the Proposed Rules once they have had the opportunity to review, and reflect, the numerous comments and suggestions that governments, the industry and market practitioners have raised.

5. <u>Lack of Cost-Benefit Analysis.</u>

Finally, we note that further cost-benefit analysis is critical in light of the ruling this past July by the U.S. Court of Appeals for the D.C. Circuit in *Business Roundtable v. SEC*.[50] Although the five different Agencies each have their own standards and internal practices for economic analysis of proposed rules,[51] the Proposed Rules contain virtually no quantitative analysis other than providing estimated paperwork burdens. The OCC's assertion "that this proposed rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year"[52] is not plausible, and we encourage the OCC to provide further explanation as to how this conclusion was reached. If the Proposed Rules are to withstand judicial scrutiny, robust analysis of the broader impact of the Proposed Rules must be undertaken.

Thank you for considering our comments. Please do not hesitate to contact us at (617) 384-5364 if we can be of any further assistance.

Respectfully submitted,

Hal S. Scott
Director
Committee on Capital Markets Regulation

[49] SIFMA Testimony, *supra* note 29, at 11.
[50] Bus. Roundtable v. Sec. and Exch. Comm'n, 647 F.3d 1144, 1148 (D.C. Cir. 2011).
[51] CCMC Letter, *supra* note 17, at 3.
[52] Proposed Rules, *supra* note 1, at 68,939.