Comments

Association of German Banks

Subject: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Federal Reserve Docket No. R–1432 and RIN 7100 AD 82; OCC Docket ID OCC–2011–14; FDIC RIN 3064–AD85; SEC File No. S7–41–11)

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Ladies and Gentlemen,

The Association of German Banks represents more than 200 privately-owned banks in Germany. Many of our internationally active banks have banking and securities operations in the U.S. and thus would be subject to the prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds (henceforth, Volcker rule, or VR, proposal) proposed by your Agencies.

While we fully support the separate comment letters submitted by the Institute of International Bankers (IIB) and the Banking Federation of the European Union (EBF), we would like to use this letter to highlight from a German banking perspective some concerns on the Volcker rule proposal by your Agencies.

A. Introduction and general comments

First, we observe that the VR proposal has an unprecedented degree of both complexity and uncertainty (cf. its more than 400 questions, many of which are multi-pronged). In addition, its potential negative, if unintended, effects on U.S. and global liquidity in financial markets are also without precedent.

These circumstances make it extraordinarily difficult for us, as for any interested person or group, to meaningfully and constructively comment on the VR proposal. May we, therefore, respectfully ask you to consider re-issuing the VR proposal in close coordination with the CFTC, which has tabled its separate proposal on January 11, 2012, building on the comments received so far. If this does not appear feasible, at least a separate proposal of the specific compliance and reporting aspects of the VR proposal insofar as they relate to foreign banks should be considered.

Second, while the VR is a measure approved by U.S. Congress and signed into law by the U.S. President as Section 619 of the Dodd-Frank Act (DFA) that has to be implemented by your Agencies and the CFTC, this provision, unlike many other parts of the DFA, has not been echoed elsewhere in the world, either nationally or at the level of international financial market standard-setting bodies. Instead, international, European Union and German rule-makers have preferred other measures to apply their lessons learned from the financial crisis, which started in 2007.

Against this specific global regulatory background, we think it particularly unfortunate and misplaced to suggest applying the VR extraterritorially to global non-U.S. operations of non-U.S. banks the way the VR proposal seems to indicate. In this connection, we urge the Agencies also to consider that such an overly extraterritorial approach would interfere with the traditional rights of non-U.S. jurisdictions to regulate and supervise their banks and thus might endanger the broader international cooperation in financial regulation, which currently is more needed than ever. This, in turn, could result in a further fragmentation of U.S. and global capital markets and the ensuing costs in terms of less liquidity and higher prices of financial products. In this connection, we would also like to highlight that, as a rule, U.S. Agencies’ regulation of non-U.S. banks' U.S. operations give due regard to international comity and appropriately defer to home-jurisdiction regulation and supervision. We urge the Agencies not to abandon these principles.

What is more, we see the extraterritorial reach of the VR proposal at odds with the statutory text of the VR itself and Congressional intent to promote the stability of the U.S. financial system, safety and soundness of U.S. banks and protect U.S. taxpayer funds.

We respectfully recommend that the VR proposal be revised to reflect the concerns expressed in this letter, in particular with regard to the following:

1. The proposed VR exemptions for non-U.S. banks' proprietary trading and sponsoring of or investing in hedge funds or private equity funds outside the U.S. should be put in a way that avoids inappropriate extraterritorial application of the VR and appropriately limits the burden of compliance for non-U.S. banks.

2. The VR should not only exempt U.S. government securities from the prohibition of banks' proprietary trading, but include in this exemption EU member state government bonds as well as third countries' bonds.

3. A worldwide effective prohibition against any non-U.S. bank lending to or otherwise transacting with those hedge and private-equity funds it sponsors, manages or advises, even when such funds bear no relation to the U.S. at all (also known as "Super 23A" requirement), must be avoided.

4. The definitions of "covered funds"/"foreign equivalent funds" and "banking entity" must be corrected to avoid inadvertent discriminations and inconsistencies.

5. The VR's possible further-reaching restrictions on banking activities by U.S. supervisory authorities (prudential backstops) should be explicitly limited to U.S. operations of non-U.S. banks.

6. In view of (i) the large number of unanswered questions raised by the Agencies' current VR proposal and (ii) the statutory deadline for the final VR being as close as July 21, 2012, we urge the Agencies to allow non-U.S. banks sufficient time to adapt their U.S. and non-U.S. operations to comply with the requirements of the final VR.

Please allow us to explain these concerns in more detail in the following section.

B. Specific concerns with the VR proposal

I. The proposed VR exemptions for non-U.S. banks' proprietary trading and sponsoring of or investing in hedge funds or private equity funds outside the U.S. should be put in a way that avoids inappropriate extraterritorial application of the VR and appropriately limits the burden of compliance for non-U.S. banks (commenting on questions 136-141 and 291-295 of the VR proposal)

We hold the firm view that the unique U.S. regulatory approach which the VR constitutes does not justify a degree of extraterritorial application that would unduly interfere with (i) non-U.S. legislators' and regulators' prerogative to determine the regulation of the banks that are active in their jurisdictions such as the EU, Germany or elsewhere in the world outside the U.S., and (ii) non-U.S. banks' and non-U.S. financial markets' freedom of operation outside the U.S. jurisdiction. As we will argue in more detail below, we regard the VR proposal as significantly going beyond the limits which these principles of international comity would suggest.

Sections __.6(d) and __.13(c) of the proposed rule would implement sections 13(d)(1)(H) and 13(d)(1)(I) of the Bank Holding Company (BHC) Act, which permit certain foreign banking entities to engage in proprietary trading that occurs solely outside the United States (the foreign trading exemption) and, respectively, to acquire or retain an ownership interest in, or to act as sponsor to, a covered fund so long as such activity occurs solely outside the United States and ownership interests in such fund are not offered or sold to any resident of the United States (the foreign funds exemption).[1] In addition, eligible entities under these exemptions must meet the requirements of section 4(c)(9) of the BHC Act. Both the foreign trading and the foreign funds exemptions are available to non-U.S. banks as long as these are not controlled by U.S. banks (and with the exception of the former's U.S. branches and subsidiaries, which themselves are not covered by the exemptions). The VR proposal would rely on the established Qualifying Foreign Banking Organization (QFBO) definition and test under subpart B of the Federal Reserve Board's Regulation K but also provide some leeway to allow inclusion of certain other non-U.S. banks for the purposes of the foreign trading and foreign funds exemptions.

While these definitions of entities eligible for the foreign trading and foreign funds exemptions from the VR seem practicable and may provide legal certainty especially for those many non-U.S. banks that already qualify as QFBOs, we regard the criteria suggested in the VR proposal to define "solely outside the U.S." for the purposes of the two exemptions as overly restrictive, inappropriately burdensome to comply with on a worldwide scale and unduly extending the extraterritorial reach of the VR.

According to the VR proposal's criteria for delineating "solely outside the U.S." for the purposes of applying the foreign trading exemption, the slightest nexus in terms of trade counterparty, personnel or execution between the U.S. and proprietary trading in Europe and elsewhere outside the U.S. would disqualify

[1] Cf. Section __.6(d) (pp. 231-232) and Section __.13(c) (pp. 243-244) of the VR proposal.

reliance on the foreign trading exemption and instead require the foreign trading activity to conform to the requirements prescribed for one of the other specifically permitted activities, such as market-making-related and risk-mitigating hedging activities or activities on behalf of customers, including the comprehensive and extremely complex compliance and reporting requirements prescribed by the VR proposal with respect to such activities.

In the case of the foreign funds exemption, the VR proposal would prohibit involvement of U.S.-based personnel in the offering or sale of a covered fund to non-U.S. persons, notwithstanding the plain language of the statute limiting the prohibition on offering and sale activities to those directed at U.S. residents. Moreover, the VR proposal treats as covered funds non-U.S. funds that have no nexus to the United States, including funds that are publicly registered and offered and sold only outside the United States (notwithstanding that U.S.-registered mutual funds are not subject to the VR), thereby potentially subjecting them to treatment as “banking entities” for the purposes of the VR and/or imposing on them the Super 23A prohibitions (cf. sections B.III. and B.IV. below).

As interpreted in the VR proposal, the foreign trading and foreign funds exemptions would imply substantial extraterritorial enforcement activity by the U.S. Agencies. This almost certainly would not go down well with the relevant home-country authorities and would lead to tensions that would be highly counterproductive in view of the need for internationally coordinated regulatory reform in order to retain both a level-playing field and a minimum degree of openness for international financial markets.

In order to avoid these negative ramifications, we suggest focussing on the following criteria for defining “solely outside the U.S.” for the purposes of the foreign trading and foreign funds exemptions of the VR:

Foreign trading exemption:

- The covered banking entity conducting the purchase or sale is not organized under the laws of the United States or of one or more States;
- The proprietary trading positions as principal (including financial obligation and ownership) are held, reported and maintained outside the United States; and
- The decision to engage in the trade is made by such a non-U.S. banking entity and the trading is conducted pursuant to specific directives and parameters set by the non-U.S. banking entity.

Foreign funds exemption:

- The transaction or activity is conducted by a banking entity that is not organized under the laws of the United States or of one or more States;
- No ownership interest in such covered fund is offered for sale or sold to a U.S. person (as defined in the SEC’s Regulation S) <u>directly by the non-U.S. banking entity.</u>

The above criteria for the foreign trading exemption, which we respectfully propose, would focus on the actual proprietary trading activity, which, in our view, Congress intended to prohibit inside and allow – at least for non-U.S. banks – outside the U.S. We also suggest continuing the traditional treatment of non-U.S. banks’ trading through U.S. agents in U.S. banking and securities law (e.g. SEC Rule 15a-6 under the Exchange Act) by phrasing the foreign trading exemption in the manner suggested above. By contrast, we regard the additional criteria for defining purchases or sales occurring “solely outside of the U.S.” suggested in the VR proposal that would focus on U.S. counterparties, U.S. personnel and U.S. execution as much too restrictive, unnecessarily burdensome and even impracticable and not required by statutory language of Section 619 Dodd-Frank Act and conflicting with Congressional intent to exempt non-U.S. banks’ proprietary trading outside the United States.

We also would like to point to negative implications for the competitive position of the United States as a leading international financial center if the VR proposal’s restrictive interpretation of the foreign trading exemption were retained in the Final Rule. Non-U.S. banks then would be strongly induced to avoid, on a global scale, U.S. trade counterparties, execution facilities and agents. This, in turn, would reduce liquidity in U.S. markets, encourage migration of trade execution activities overseas and cause job losses in the United States.

For similar reasons, we see no justification for inclusion of a criterion in the foreign funds exemption’s definition of an activity occurring “solely outside of the U.S.” that would require that no U.S.-incorporated or, respectively, U.S.-located subsidiary, affiliate, or employee of the banking entity be involved in the offer or sale of an ownership interest in the covered fund, as is suggested in the VR proposal. Again, there would also be a detrimental effect on the U.S. as an international financial center if the Final Rule retained this criterion, inasmuch as it would prohibit marketing of non-U.S. funds of non-U.S. banks by their U.S. offices and personnel to, e.g., Latin American customers, without serving any policy purpose of the VR.

With respect to the proposed criterion prohibiting sales to U.S. investors, we urge the Agencies to clarify (cf. as emphasized above) that this prohibition applies to <u>direct</u> fund sales or offers by the <u>banking entity</u> qualifying for the foreign funds exemption. It should by no means cover sales in the secondary market by third-party investors in covered funds sponsored by a non-U.S. banking entity or investments in a third-party non-U.S. covered fund that may be sold by a third-party sponsor to U.S. investors, since, as a rule, non-U.S. banks would not be in a position to be informed about or let alone control such activities. In addition, neither the statutory language of the VR nor Congressional intent requires such an extension that would severely interfere with both non-U.S. banks’ funds business outside the U.S. and the regulatory prerogative of non-U.S. jurisdictions. For the sake of regulatory clarity and consistency, may we also recommend adapting the definition of “U.S. resident” fully to the notion of “U.S. person” in the SEC’s Regulation S.

We would regard the criteria suggested above for the foreign trading and foreign funds exemptions as practicable and sensible criteria that would strike an appropriate balance between the U.S. interest in applying the VR on its banks and markets and the freedom to regulate and operate for the rest of the world’s regulators and financial market participants. In this connection, we would also like to point to the fact that the Agencies have ample authority to prevent evasions of the statutory requirements.

Based on these criteria, which would limit the geographical scope of the VR appropriately, the Agencies’ compliance, reporting and recordkeeping requirements should focus on non-U.S. banks’ U.S.-based activities. We observe that the VR proposal does not address in any detail how these requirements would be applied to non-U.S. banks with U.S. operations, which leaves many practical questions open and creates legal uncertainty for them. We urge the Agencies, therefore, to propose a specific VR compliance program framework for non-U.S. banks that would take into account the above considerations and allow these banks sufficient time to, first, comment upon it and, then, implement it. In line with our above discussion of the foreign trading and foreign funds exemptions, the thresholds for the enhanced VR compliance standards and quantitative reporting must be based on the U.S. “footprint” of the non-U.S. banks, not on their global activities.

II. The VR should not only exempt U.S. government securities from the prohibition of banks' proprietary trading, but include in this exemption EU member state government bonds as well as third countries’ government bonds (commenting on questions 122-123 of the VR proposal)

The U.S. Agencies’ VR proposal, following the language in Section 619 of the Dodd-Frank Act, exempts only U.S. government securities from the prohibition of banks' proprietary trading. By contrast, banks in the U.S. and – as soon as there is the slightest relation to the U.S. in terms of trade counterparty, personnel or trade execution (cf. section B. I. above) – worldwide would have to cease their proprietary trading in EU member state government bonds, unless such trading activities would qualify under one of the extraterritorially applied other exemptions of the VR such as those for underwriting, market making or hedging, which in turn would trigger the extremely burdensome U.S.-mandated compliance and reporting requirements discussed above. Thus, even if trading in EU member states’ government bonds by European and German banks may, in theory, be eligible under one of these exemptions, the extraterritorial application of their requirements may strongly incentivize many European banks to avoid, or reduce substantially, their market-making and underwriting activities for such bonds at least when involving a U.S. nexus prohibited under the foreign trading exemption. This would not only affect European banks’ earnings situation by reducing their corresponding fee income, but also interfere with their efficient management of liquidity and funding requirements, for which such government obligations serve as a major tool. Introduction of the new liquidity requirements under Basel III will further increase the need for European banks to hold such securities.

Even a less restrictive definition of the foreign trading exemption, as suggested in section B.I. above, would still leave the potentially significant negative impact on the trading in such bonds both in the United States and through U.S. banks worldwide, as long as the VR restricts its government obligation exemption to U.S. government securities as suggested in the VR proposal. In view of the global importance of the U.S. financial marketplace, this could still impact very negatively on the market liquidity of government bonds issued by European member states. To give an example, the list of primary dealers for obligations of the German Federal government (bunds) contains many U.S. banking entities.[2].

We presume that Congressional intent behind the government obligation exemption in DFA Section 619 was not to discriminate against non-U.S. governments by submitting transactions in their obligations that involve a prohibited U.S. nexus to the U.S. VR with its restrictions that may, as shown above, even be broadly extraterritorially applied. This, however, would be the very outcome of the VR proposal. This would come down to a – certainly unintended, but nevertheless highly unwelcome – negative impact on European

[2] Cf. http://www.bundesbank.de/download/kredit/kredit_bietergruppe_rangliste.pdf, showing that, in 2011, three U.S. banks were among the top 10 primary dealers for German bunds, while the top 20 included five and the top 30 six U.S. banks.

government bond markets. This could also backfire on the financial market and economic development in the U.S. For example, lower liquidity and increased volatility in European government bond markets could hamper U.S. investors.

May we, therefore, respectfully request the Agencies to amend the VR proposal’s government obligation exemption to include non-U.S. government securities.

Of course, the scope of the non-U.S. government obligation exemption then should also be comparable to the one chosen by the Agencies for U.S. government securities in the Final VR for each qualifying non-U.S. government. In the case of Germany, not only bonds issued by the German Federal Government, but also issuances by German states, municipalities and German Federal Government agencies would have to be included in a non-U.S. government obligation exemption. We also encourage the Agencies to include multilateral agencies (e.g. development banks) in the amended government obligation exemption.

As we have argued above, such an amendment to the VR proposal would put an end to a discrimination of foreign nations’ government securities markets, which we regard as unintended by Congress. Such an amendment in the Final VR would also promote and protect the safety and soundness of banking entities and the financial stability of the United States, not least by avoiding possible negative repercussions of a VR-caused contraction of European government bond market liquidity for the U.S. The risk of endangering international cooperation in the field of financial regulation mentioned in our introductory comments above also needs to be considered in this respect.

We also observe that U.S. Agencies could invoke the prudential backstops of the VR anytime if they deem that proprietary trading in government securities, which qualify for the broadened government obligation exemption we suggest above, would trigger the criteria for these backstops. Of course, these backstops must not be applied extraterritorially to non-U.S. banks (cf. also our separate comments in section B.V. below).

III. A worldwide effective prohibition against any non-U.S. bank lending to or otherwise transacting with those hedge and private-equity funds it sponsors, manages or advises, even when such funds bear no relation to the US at all (also known as "Super 23A" requirement), must be avoided

The statutory language of the VR prohibits “covered transactions” as defined in Section 23A of the Federal Reserve Act (the FRA) between banking entities and the covered funds they sponsor, advise, manage or organize and offer, and the covered funds such funds control (the “Super 23A requirement”), and requires all other transactions between a banking entity and such funds to comply with Section 23B of the FRA.

The Agencies’ VR proposal seems to prohibit all extensions of credit and other covered transactions by an non-U.S. bank with all of its advised or sponsored covered funds, inside or outside the United States.

We believe that such a result cannot possibly have been intended and would represent an unjustifiable extraterritorial expansion of the VR. Thus, the Final Rule’s implementation of the Super 23A requirement should, in line with both traditional application of Section 23A FRA to non-U.S. banks as well as the policy objectives of the VR, only apply to the activities of banking entities inside the United States (including U.S. subsidiaries or branches of non-U.S. banks) but not to the activities of non-U.S. banks acting from outside the United States (i.e. transactions between an international bank, or its affiliate, acting from outside the United States and a non-U.S. covered fund or a U.S. covered fund that the international bank advises or sponsors). Fully consistent with the VR's policy purposes, regulation and supervision of such transactions should remain the primary responsibility of such banks' home-jurisdiction authorities.

IV. The definitions of "covered funds" / "foreign equivalent funds" and "banking entity" must be corrected to avoid inadvertent discriminations and inconsistencies

We urge the Agencies to consider for their Final Rule an appropriate narrowing of the definition of "covered funds" subject to the VR with regard to the non-U.S. activities of non-U.S. banks in order to avoid (possibly inadvertent) extraterritorial overreach and discrimination of non-U.S. funds types. Thus, if the Agencies retain the foreign "equivalent" funds provision in the Final Rule, they should exclude regulated foreign investment companies and mutual funds (such as Undertakings for Collective Investment in Transferable Securities, or "UCITS" under EU law) from the definition of "covered funds". The Agencies should consider only such foreign funds as a foreign equivalent fund that exhibit all the characteristics of a hedge fund or a private-equity fund. In addition, we urge the Agencies to clarify that the Super 23A requirement and the prudential backstops would only apply to non-U.S. banks' sponsoring or investing activities in the U.S. (cf. Sections B.III. and B.V.).

Apart from the "covered funds" definition, we are also concerned about apparent flaws in the definition of "banking entity", which would lead to a variety of anomalous results with respect to covered funds. As structured, it appears that the VR proposal (i) would exclude from treatment as a banking entity covered funds that are organized and offered in reliance on Section 13(d)(1)(G) of the BHC Act and Section __.11 of the VR proposal, but (ii) would treat as a banking entity covered funds organized and offered in reliance on any of the other VR covered funds exemptions, including the foreign funds exemption.

As with an overly broad definition of "covered funds", the ensuing restrictions would severely curtail foreign banks' ability to freely operate their funds businesses, especially hedge funds and funds of funds, outside the United States. These results cannot have been intended either, and would be particularly unreasonable when applied to non-U.S. funds. Thus, the Final Rule should exclude from the definition of "banking entity" any covered fund that is permissibly sponsored or controlled under the Volcker Rule, including pursuant to the foreign funds exemption, and also any registered investment company controlled by a banking entity. The "banking entity" definition should also exclude all regulated foreign funds.

Finally, we also respectfully recommend excluding securitizations from the definitions of "covered funds" and "banking entity", since these transactions are dealt with in other sections of the Dodd-Frank Act and not doing so could significantly and unjustifiably hamper international banks' securitization activities.

V. The VR’s possible further-reaching restrictions on banking activities by US supervisory authorities (prudential backstops) should be explicitly limited to US operations of non-US banks

Sections __.8 and __.17 of the Proposed Rule implement the prudential backstops in BHCA Section 13(d)(2), which would prohibit any transaction or activity otherwise permissible pursuant to Sections __.4 through __.6 or Sections __.11 through __.14 and __.16 if (i) it would involve a material conflict of interest between the banking entity and its customers, clients or counterparties; (ii) it would expose the banking entity to high-risk assets or trading strategies, or (iii) it would pose a threat to the safety and soundness of the banking entity or the financial stability of the United States.

The application of these prohibitions outside the U.S. (i.e. to international banks other than to their U.S. operations and subsidiaries) would be an extraordinary and unjustifiable extraterritorial expansion of U.S. regulation of foreign banking activities outside the United States. We urge the Agencies to clarify that the prudential backstops would apply only to non-U.S. banks’ activities in the United States, as they address matters of prudential regulation traditionally left to the discretion of home-country regulators.

We also observe that appropriately confining these prudential backstops to the U.S. jurisdiction as suggested above would still allow the Agencies to prohibit or otherwise restrict, e.g., U.S. banks’ (including U.S. operations of non-U.S. banks) activities in non-U.S. government securities qualifying under the appropriately broadened government obligation exemption, which we urge the Agencies to adopt (cf. section B.II. above), if deemed necessary.

VI. In view of (i) the large number of unanswered questions raised by the Agencies’ current VR proposal and (ii) the statutory deadline for the final VR being as close as July 21, 2012, we urge the Agencies to allow non-U.S. banks sufficient time to adapt their U.S. and non-U.S. operations to comply with the requirements of the final VR

The VR proposal would appear to require banking entities to establish and implement a compliance program as of the Effective Date. At the same time, we do not believe it would be practicable or prudent for an international bank to attempt to begin implementation at this time, in light of the many fundamental questions regarding the application of the VR to international banks and the possibility that the Final Rule might significantly diverge from the VR proposal. Because compliance planning and program development will need to begin significantly before the Effective Date, and the Final Rule is unlikely to be issued significantly in advance of that date, implementation of the full required compliance and reporting regimes as of the Effective Date will be a practical impossibility for international banks.

As discussed above (cf. sections A. and B.I.), we strongly urge the Agencies to establish and communicate a specific, reasonable schedule for international banks to bring their proprietary trading and covered fund activities into compliance with the VR restrictions. Such a schedule should leave sufficient time for the

Agencies to propose, and for international banks to review and comment on, a specific approach regarding application of compliance and reporting requirements to international banks.

Conclusion

We respectfully urge the Agencies to consider our proposals with regard to an appropriately balanced Volcker rule implementation that respects non-U.S. regulatory prerogatives and freedom to operate for non-U.S. markets, banks and funds outside the U.S. As we have pointed out above, many of the unnecessarily extraterritorial interpretations of the statutory language contained in the VR proposal could also significantly weaken the U.S. as an international financial center. These effects might even be exacerbated by non-U.S. banks' retreat from the U.S. to escape an overly extraterritorially extended VR. Should you have any questions or require any further information, please do not hesitate to contact us (+49-30-1663-1110; tobias.unkelbach@bdb.de).

Yours Sincerely,

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