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Attn: Comments

Re: Notice of Proposed Rulemaking: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds;
OCC Docket ID – OCC-2011-0014; Federal Reserve Board Docket No. R-1432; FDIC RIN 3064-AD85; SEC File No. S7-41-11, Release No. 34-65545

Ladies and Gentlemen:

The Commercial Real Estate ("CRE") Finance Council® appreciates the opportunity to respond to the joint-agency ("Agencies") notice of proposed rulemaking concerning prohibitions and restrictions on banking entities' proprietary trading and interaction with hedge funds and private equity funds under Section 619 of the Dodd-Frank Act, also known as the "Volcker Rule."[1] Our members appreciate the Agencies' effort to effectuate the rule of construction in Section 619 directing that implementation of the Volcker Rule must not limit the ability of

[1] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Notice of Proposed Rulemaking, 76 Fed. Reg. 68846 (Nov. 7, 2011) (hereafter, "NPR").

banking entities or nonbank financial companies to engage in lawful securitization activities. However, we are concerned that the proposed definition of "Covered Fund" is unnecessarily broad, and would sweep in certain types of securitization issuers and structures despite the fact that such entities are not involved in the brand of speculative activities the Volcker Rule seeks to address. Failure to appropriately limit the "Covered Fund" definition would create a host of functional difficulties for banks and affected nonbank financial companies that have engaged in sound and long-established interactions with these securitization entities. Consequently, the **CRE Finance Council recommends that the definition of "Covered Fund" be interpreted more narrowly, in a manner that is more consistent with the intent and purpose of the Volcker Rule**.

The CRE Finance Council is the collective voice of the entire $3.5 trillion commercial real estate finance market, including portfolio, multifamily, and commercial mortgage-backed securities ("CMBS") lenders; issuers of CMBS; loan and bond investors such as insurance companies and pension funds; servicers; rating agencies; accounting firms; law firms; and other service providers. Our principal functions include setting market standards, facilitating the free and open flow of market information, and education at all levels, particularly related to securitization, as securitization is one of the essential processes for the delivery of capital necessary for the growth and success of commercial real estate markets. To this end, we have worked closely with policymakers to educate and inform legislative and regulatory actions to produce efficient and practical regulatory structures.

As a preliminary matter, we recognize that "Covered Funds" are defined in the statute and the NPR as those entities operating under a Section 3(c)(1) or 3(c)(7) exclusion from the Investment Company Act ("ICA") of 1940, as amended. We further recognize that this definition does not presently encompass CMBS structures because CMBS structures typically rely on SEC Rule 3a-7 or ICA Section 3(c)(5) exclusions.[2] Nevertheless, we share the concerns expressed by the securitization industry as a whole that the scope of the definition will encompass – as the Agencies acknowledge – many entities and corporate structures that would not usually be thought of as a "hedge fund" or "private equity fund," including "certain securitization vehicles."[3]

The NPR seeks comment on the "Covered Fund" definition's potential impact on asset-backed securities issuers and securitization vehicles.[4] We are concerned about the impact that Volcker Rule restrictions would have on securitization generally, including any future restrictive impact the Volcker prohibitions could have on CMBS should the CMBS market ever find it necessary to rely on ICA exclusions other than Rule 3a-7 or Section 3(c)(5).

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[2] *See id*. at 68897, n.222 ("Under the proposed rule, if an issuer (including an issuer of asset-backed securities) may rely on another exclusion or exemption from the definition of 'investment company' under the Investment Company Act other than the exclusions contained in section 3(c)(1) or 3(c)(7) of that Act, it would not be considered a covered fund, as long as it can satisfy all of the conditions of an alternative exclusion or exemption for which it is eligible.).

[3] *Id*. at 68897.

[4] *Id*. at 68899.

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As it stands, the proposed definition would create a host of functional difficulties for the banking entities covered by the Volcker Rule. Among the potential problems created by the definition are:

- Inability to abide by the prohibitions in Dodd-Frank Section 619(f) on "covered transactions" (as defined in Federal Reserve Act Section 23A) between banks and a "Covered Fund" that the bank sponsors, manages, or advises, given that certain securitizations necessarily involve transactions and activities (e.g., provision of liquidity support, servicing activities) that would be prohibited "Super 23A" transactions;

- Concerns about the ability to retain more than the minimum credit risk required under Dodd-Frank Section 941 risk retention requirements, if a bank so desires, because the NPR proposes to exempt ownership in a Covered Fund only to the extent of the "minimum requirements" of the risk retention rules;[5]

- Inability to place the cash proceeds from the sale of securitization assets into high-quality short-term investments, as is typically required by securitization documents for the benefit and protection of investors, when the NPR would only accommodate a Volcker Rule exemption for Covered Funds backed by loans, rather than by cash investments;

- Concerns about the cost of recordkeeping and compliance pertaining to those "Covered Funds" that are backed by loans (and are thereby relieved from the Volcker Rule's substantive restrictions). The NPR would require banks to establish a monitoring and recordkeeping program with respect to such funds that includes "policies and procedures reasonably designed to monitor trading activities … and investments with respect to a covered fund," independent testing of the program, training, and recordkeeping.[6] Such Covered Funds are merely passive vehicles that do not engage in proprietary trading or investments in hedge funds or private equity funds; therefore, we submit that it would be unduly onerous to require the establishment of such monitoring and recordkeeping with regard to these passive entities.

In the foregoing instances, and in the many other examples where the NPR might inadvertently restrict securitization activity that bears no relation to the types of transactions the Volcker Rule seeks to address, the securitization industry conceivably could request the Agencies to provide a carve-out to enable securitization to function. However, the more logical and straightforward approach would be to revise the definition of Covered Fund so that it is more functionally consistent with the hedge funds and private equity funds that Congress clearly had in mind when adopting the Volcker Rule, rather than treating securitization as a "Permitted Activity" by Covered Funds.

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[5] *See* § __.14 (a)(2)(iii) of the Proposed Rules.

[6] *See id*. at § __.20(b).

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There is no impediment in Section 619(h)(2) that would preclude the Agencies from categorically exempting certain entities from Section 619's purview notwithstanding the entities' reliance on ICA Section 3(c)(1) or 3(c)(7) exemptions.[7] And this interpretation would hew more closely to the direction of the Financial Stability Oversight Council ("FSOC") when it cautioned the Agencies to "carefully evaluate the range of funds and other legal vehicles that rely on the exclusions contained in [ICA] section 3(c)(1) or 3(c)(7) and consider whether it is appropriate to narrow the statutory definition by rule in some cases," because the ICA Section 3(c)(1) and 3(c)(7) exclusions are used by a wide variety of funds other than private equity and hedge funds.[8] Indeed, the FSOC's recommendations in this regard urged that regulators focus on determining whether an entity "engage[s] in the activities or ha[s] the characteristics of a traditional private equity fund or hedge fund," in evaluating whether to include the entity or transaction within the "Covered Fund" definition.[9] Securitization issuers and transactions do not possess the same characteristics or engage in activities similar to private equity or hedge funds. And as explained, banks' securitization activity does not involve the type of speculative conduct that the Volcker Rule seeks to address.

The CRE Finance Council appreciates your consideration of our comments regarding the NPR. We stand ready to provide any additional assistance that may be helpful.

Respectfully submitted,

Stephen M. Renna
Chief Executive Officer
CRE Finance Council

[7] Dodd-Frank Section 619(h)(2) defines a hedge fund and private equity fund as an issuer "that would be an investment company, as defined in the Investment Company Act of 1940 …, but for section 3(c)(1) or 3(c)(7) of that Act, *or* such similar funds as the appropriate … [Agencies] may, by rule, … determine." (emphasis added). Congress's use of "or" rather than "and" provides the Agencies with the necessary flexibility to more appropriately define "hedge fund" and "private equity fund."

[8] *See* Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships With Hedge Funds & Private Equity Funds, Financial Stability Oversight Council (January 2011), at 61-62 (available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf).

[9] *Id*. at 62-63.

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