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February 2, 2012

The Honorable John G. Walsh
Acting Comptroller of the Currency
Department of the Treasury

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the Federal Reserve System

The Honorable Martin J. Gruenberg
Acting Chairman
Federal Deposit Insurance Corporation

The Honorable Mary L. Schapiro
Chairman
Securities & Exchange Commission

Re: **Notice of Proposed Rulemaking, Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds**, 76 Fed. Reg. 68846 (November 7, 2011) (the "Notice"): (FRS Docket No. R-1432 & RIN 7100 AD 82; OCC Docket ID OCC-2011-14; FDIC RIN 3064-AD 85; SEC File Number S7-41-11).

Dear Agencies:

We are submitting this letter on behalf of the Committee of Annuity Insurers (the "Committee") in response to the above-referenced Notice of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Securities and Exchange Commission (SEC) (collectively, the "Agencies"). The Notice proposes regulations that would implement what is known as the "Volcker Rule," *i.e.*, Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), codified as new Section 13 of the Bank Holding Company Act of 1956 (the "BHC Act").

I. Background and Context

A. The Committee

The Committee was formed in 1981 to address Federal legislative and regulatory issues relevant to the annuity industry and to participate in the development of Federal securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping the Federal government's policies with respect to annuities. Today the Committee is a coalition of 32 of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent over 80% of the annuity business in the United States. This comment letter focuses on those aspects of the proposed regulations that would most directly impact Committee members as issuers of annuities and other guaranteed retirement income products. A list of the Committee's member companies is attached as Appendix A.

B. The Volcker Rule and the FSOC Study: Accommodating The Business of Insurance

The Volcker Rule generally prohibits any insurers that qualify as a "banking entity" from (a) engaging in proprietary trading, or (b) investing in or sponsoring hedge funds and private equity funds ("covered funds"), subject to enumerated exceptions for "permitted activity." A "banking entity" includes any insurer that is an affiliate of an insured bank or thrift. A number of the Committee's members are banking entities as defined in the Dodd-Frank Act.

However, the Dodd-Frank Act clearly indicates that regulations implementing the Volcker Rule should "appropriately accommodate the business if insurance." Subsection 13(b)(1) of the BHC Act mandates that the Financial Stability Oversight Council (the "FSOC") conduct a study[1] and make recommendations on implementing the Volcker Rule, and subsection (b)(1)(F) indicates that the implementing regulations should

> "appropriately accommodate the business of insurance within an insurance company, subject to regulation in accordance with the relevant insurance company investment laws, while protecting the safety and soundness of any banking entity with which such insurance company is affiliated and of the United States financial system."

Subsection 13(b)(2)(A) of the BHC Act directs the Agencies to consider the findings of the FSOC study in adopting rules to carry out the Volcker Rule. The study includes "explicit recommendations to address conflicts of interest and accommodations for" the insurance

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[1] See *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds*, Financial Stability Oversight Council, January 2011 (the "Study"). The Study is available here:
http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

industry,[2] and recognizes that simply applying certain provisions of the Volcker Rule to insurers could be "unduly" disruptive to the business of insurance, stating:

> Insurance companies assume risk and collect premiums and, in turn, invest those premiums. Investment return contributes to the company's net worth (i.e., policyholder surplus), which in turn supports underwriting and the payment of future claims to policyholders and claimants.[3] The investment activity of insurers is central to the overall insurance business model and could be unduly disrupted if certain provisions of the Volcker Rule applied.[4]

The Committee recognizes and appreciates that the proposed regulations reflect a serious effort to accommodate the business of insurance, and in a number of respects those efforts have succeeded. However, as discussed below, in a number of other, very important respects the proposed regulations could have a serious, adverse impact on Committee members because the proposals fail to appropriately accommodate the business of insurance, contrary to the Congressional intent clearly expressed in the Dodd-Frank Act. The Committee offers specific recommendations, below, to resolve these concerns.

C. State Insurance Company Investment Laws

A number of the Committee's comments below are based (at least in part) on the existing state regulation of, and restrictions on, an insurance company's general account investments. The Dodd-Frank Act itself, in the 'Volcker Rule' provision, specifically references insurance company investment laws. Therefore, a brief summary of such laws is appropriate.

The Accreditation Program of the National Association of Insurance Commissioners (NAIC) requires that states adopt legislation governing the investments of insurance companies that is substantially similar to one of two NAIC model laws for investments of insurers: the Investment of Insurers Model Act (Defined Limits Version) or the Investment of Insurers Model Act (Defined Standards Version). In addition, a Derivative Instruments Model Regulation sets the standards for the prudent use of derivative instruments by insurers. These state laws and regulations thoroughly and rigorously regulate the investments of insurers to ensure the long-term safety and soundness of life insurance companies.

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[2] Study, *supra* note 1, at 9.

[3] Insurance companies also retain assets and earnings, and in the case of stock companies, may pay dividends to shareholders, or in the case of mutual companies, may provide dividends or other benefits to members.

[4] Study, *supra* note 1, at 71.

The Investment of Insurers Model Act (Defined Limits Version) sets forth limits on the amounts or relative proportions of different investments that insurers can hold to ensure adequate diversification and limit associated investment risk.[5] The NAIC describes this model as follows:

> Under this model, an insurer's board of directors is required to adopt a written plan for acquiring and holding investments that specifies guidelines as to the quality, maturity and diversification of investments and other specifications including investment strategies intended to assure that the investments are appropriate for the business conducted by the insurer. ... The Model outlines a number of prohibited investments and specific limitations that are placed upon insurers with regard to various investment classes. ... If an insurer fails to comply ... the insurer is deemed to be in hazardous financial condition, and the [insurance] commissioner shall take one or more of the actions authorized by law as to insurers in hazardous financial condition.[6]

The Investment of Insurers Model Act (Defined Standards Version) utilizes what is known as the "prudent person" approach. Under this approach, insurers must demonstrate that they have a sound investment plan and that they adhere to that plan. The insurer is required to exercise prudent judgment and care, considering the probable income as well as the probable safety of its capital, and to establish and implement internal controls and procedures to assure compliance with its policies and procedures. The insurance commissioner can order the insurer to make changes necessary to comply with the model, and if the commissioner determines that the interests of insureds, creditors or the general public are endangered, the commissioner may impose restrictions on the investment practices of an insurer, including prohibition or divestment.[7]

Under the Derivatives Investment Model Regulation, an insurance company, before being allowed to engage in a derivative transaction, must establish written guidelines (which must be approved by the commissioner), which must specify the objectives and strategies, as well as applicable risk constraints and credit risk limits. The guidelines must also establish counterparty exposure limits and credit quality standards. This model regulation includes other requirements

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[5] The descriptions herein of these NAIC model laws are taken from material published (and copyrighted) by the NAIC. Corporate Governance Working Group, National Association of Insurance Commissioners, *Existing U.S. Corporate Governance Requirements* (Exposure Draft, 2011), at 8, *available at* http://www.naic.org/documents/committees_ex_isftf_corp_governance_exposures_111107_existing_us_corp_gov_requirements.pdf.

[6] *Id.* A majority of states have adopted substantially this model. Study, *supra* note 1, at note 67.

[7] *Id.* at pp. 8 -9.

relating to written policies and internal controls, the credit risk management process, and board of director's approval and review.[8]

The state insurance system of regulating and restricting insurance company investments is thorough and comprehensive. It is designed to ensure the safety and soundness of insurance companies, so that they can meet their long-term financial commitments to policy owners and their beneficiaries. As noted above, the Dodd-Frank Act itself mandates that the Agencies take this into account in applying the Volcker Rule to insurance companies.[9]

As noted in the FSOC study, state insurance company investment laws are not uniform, but they "are substantially similar and generally conform to the standards set out in model laws and regulations developed by the National Association of Insurance Commissioners."[10]

II. The Committee's Comments and Recommendations

The above information and discussion generally forms the basis for the Committee's comments and recommendations set forth below.

A. Scope of the Insurance Company General Account Exemption: §__.6(c)

The statutory Volcker Rule (section 619 of the Dodd-Frank Act, codified as section 13 of the BHC Act), by its terms, exempts the "permitted activities" from *both* the proprietary trading and covered fund restrictions in subsection (a). However, the Notice states that "the proposed rule applies some of these statutory exemptions to *only* the proprietary trading prohibition or the covered fund prohibitions and restrictions, but not both, where it appears either by plain language or by implication that the exemption was intended only to apply to one or the other."[11] The proposed regulation (§__.6(c)) only exempts insurance company general account investment activity from the ban on proprietary trading (§__.3(a)) but not from the prohibitions or restrictions on covered fund activity (§__.10(a)). Accordingly, since under the proposed regulation, the general account exemption for proprietary trading does not provide an exemption from the covered fund prohibition, the general account generally could not invest in or sponsor private equity or hedge funds.

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[8] *Id.* at 9.

[9] We note that in connection with Section 13(d)(1)(F) of the BHC, the Notice states that the agencies have not proposed to determine that the insurance company investment laws, regulations and written guidance of any state are insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States. Notice, footnote 172.

[10] Study, *supra* note 1, at 73.

[11] Notice, footnote 16 (emphasis added).

The permitted activity exemption for insurance company general account activity in the statute (subsection (d)(1)(F)) literally is an exemption from "subsection (a)," and subsection (a) includes both the proprietary trading and covered fund prohibitions, so the statutory exemption applies to covered fund activity as well as to proprietary trading. The Notice does not explain why the permitted activity exemption in the proposed regulations is limited to the ban on proprietary trading and does not also apply to the covered fund restrictions, as the statute does. There is neither plain language nor any implication that the exemption was only intended to apply to proprietary trading. In this regard, the proposed regulations would have the effect of repealing part of a provision of the Dodd-Frank Act, because the permitted activity exemption (under subsection (d)(1)(F)) clearly applies to both the proprietary trading ban and to the restrictions on covered fund activity.[12]

The Committee acknowledges that subsection (d)(1)(F) does refer to the purchase or sale of "securities and other instruments described in subsection (h)(4)," and that subsection (h)(4) defines proprietary trading. However, this does not indicate that the subsection (d)(1)(F) exemption is limited to proprietary trading. Subsection (d)(1)(F) refers to *securities and other instruments* "described" in subsection (h)(4);[13] subsection (d)(1)(F) does ***not*** refer to *proprietary trading* described in subsection (h)(4).[14] The instruments described in (h)(4) include "any security." The term "any security" clearly includes limited partnership interests in covered funds organized as partnerships, stock in covered funds organized as corporations, and any other security representing an investment or ownership interest in a private equity or hedge fund. Therefore, the exemption in subsection (d)(1)(F) for insurance company general account investment activity extends to investments in covered funds as well as proprietary trading.[15]

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[12] In this regard, the Committee agrees with and supports the view that the wording of the Volcker Rule clearly indicates that the subsection (d)(1)(F) provision for regulated insurance company permitted activities extends to covered fund activity because the prohibition in subsection (a)(1)(B) states that banking entities shall not "acquire" interests in covered funds, and the permitted activity provision in (d)(1)(F) allows the "acquisition" of securities described in subsection (h)(4). Therefore, the permitted activity for "acquisition" is an exemption from the "acquire" prohibition in subsection (a)(1)(B). This analysis of the Volcker Rule statutory language is discussed more fully in a comment letter submitted by the American Council of Life Insurers (ACLI), and therefore it is not addressed more fully herein.

[13] Section 13 of the BHC Act does not define "securities and other instruments", so it is only logical that subsection (d)(1)(F) refer to the description in the second part of subsection (h)(4); this in no way indicates that subsection (d)(1)(F) is limited to proprietary trading.

[14] In addition, subsection (d)(1)(F) does not refer to trading accounts, and the trading account concept is key to the ban on proprietary trading.

[15] This same plain reading of the statute applies to separate account trading on behalf of customers, discussed in section II.B below, since subsection (d)(1)(D) of the Volcker Rule also refers to "securities and other instruments described in subsection (h)(4)," and not to "proprietary trading" described in subsection (h)(4) (which requires investment activity in a trading account of the banking entity).

Moreover, the overall construction of section 13 of the BHC Act supports this reading of the exemption. It is a well-established principle of statutory construction that where two provisions appear to conflict, the more specific provision prevails over the general.[16] The Volcker Rule begins with very broad, general prohibitions in section 13(a) of the BHC Act – banking entities shall not engage in proprietary trading or covered fund activity. This is clearly a *general* provision. The permitted activity exemptions in subsection 13(d)(1) address *specific* activities that Congress exempted from the general provisions in section 13(a). There are in fact nine specific exemptions in subsections (d)(1)(A) through (d)(1)(I); each of these specific permitted activities prevails over the general prohibitions in subsection (a). Accordingly, the specific provision for insurance company general account investment activity in subsection (d)(1)(F) prevails over both the general proprietary trading ban and covered fund restrictions in subsection (a).

In addition, the legislative history of the Volcker Rule supports reading the proprietary trading ban and the covered fund restrictions together, rather than separately. Mr. Volcker himself, in testimony before the Senate banking committee, indicated that they should be taken together. In an exchange with Senator Warner, Mr. Volcker testified that the provisions are "substitutable" for one another:

> "Senator WARNER. You talk about three different areas: proprietary trading, private equity and hedge funds. …
> Mr. VOLCKER. … I was concerned about … the fact that you could not prohibit something called an equity fund, and a bank that developed something that looked very much like an equity fund, but they did not call it an equity fund. And the false---
> Senator WARNER. The same may be said about hedge funds, right?
> Mr. VOLCKER. Yes, the same thing you say about hedge funds which could become often a vehicle for just conducting proprietary trading operations. …
> Senator WARNER. … Is the primary aim here we want to try to prohibit the proprietary trading activities, and proprietary trading activities being re-marked or remasked as a hedge fund or a private equity investment?
>
> Or would you say, no, we want to take—the first thing we want to get rid of is the private equity and then hedge funds and, last, proprietary trading? Is there a rank order of these three?
> Mr. VOLCKER. Not to me because I think to some degree they are substitutable, as you were saying. …

[16] See *Sutherland, Statutes and Statutory Construction* (Singer, N.J. and Singer, J.D.), §51:5 (2011); *see also Id.* at §46.5, text at footnote 23.

> But I think there is enough substitution. I do not see any reason to permit one and not permit the other."[17]

The prohibitions in subsection (a) should be read together, and similarly the permitted activity exemption (d)(1)(F) applies to both prongs of subsection (a)- both the proprietary trading and covered fund provisions.

Two provisions of the Volcker Rule evidence a clear Congressional intent that its restrictions should not interfere with or negatively impact the normal activities and business of insurance – subsection (b)(1)F), instructing the FSOC to study and make recommendations to "appropriately accommodate the business of insurance,"[18] and the permitted activity exemption for insurance company general account activity (subsection (d)(1)(F)). A certain amount of investing in and organizing and offering covered funds is an important part of the normal business of insurance in several respects. First, these investment vehicles (hedge funds and private equity funds), within the limits of state insurance investment laws discussed above, can be an important component of an insurance company's ability to diversify its investments. The inability of an insurance company to utilize these important asset classes could have an adverse impact on the financial soundness of the insurance company as well as a detrimental impact on policyholders (because it could lead to higher premiums). Second, certain types of important insurance products may involve investments in covered funds (which may or may not be made through separate accounts). These include funding agreements, stable value products, guaranteed investment contracts, qualified retirement plans, bank owned life insurance, corporate owned life insurance (used for the same purposes as bank owned life insurance),[19] and other private placement products. Third, insurance companies may set up investment subsidiaries to

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[17] "Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies," Hearing before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 111th Cong., 2nd Sess. February 2, 2010, at 24 (S. Hrg. 111-771).

SEC Chairman Mary Schapiro, in very recent testimony before subcommittees of the House Committee on Financial Services, also indicated that the provisions on proprietary trading and covered fund activities should be read together. After discussing how the proposed regulations address proprietary trading, Chairman Schapiro said:

> "The joint proposal also implements the statute's prohibitions and restrictions on investments in, and relationships with, hedge funds and private equity funds. These provisions are designed to prevent a banking entity from engaging in proprietary trading indirectly through an investment in a hedge fund or private equity fund … ."

Mary L. Schapiro, Testimony on "Examining the Impact of the Volcker Rule on Markets, Business, Investors and Job Creation," January 18, 2012 (available at http://sec.gov/news/testimony/2012/ts011812mls.htm).

[18] Subsection (b)(2)(A) instructs the agencies, in their rulemaking, to consider the findings of the FSOC study.

[19] See the discussion in the Notice at pages 148 – 149.

manage investments on behalf of the insurance company,[20] and certain of these subsidiaries (or affiliates) rely on section 3(c)(1) or 3(c)(7). These are all important parts of the business of insurance that the regulations clearly should accommodate.

For the reasons discussed above, subsection (d)(1)(F) permits insurance company general account investments in covered funds and the final regulations must also allow this activity.

But wholly apart from subsection (d)(1)(F), subsection (d)(1)(J) of section 13 of the BHC Act provides an independent basis for permitting and authorizing insurance company general account covered fund investments. For the reasons discussed above, permitting these covered fund activities for insurance company general accounts would promote and protect the safety and soundness of the insurance company (banking entity) by allowing access to important asset classes (for better investment diversity and returns), by allowing more diverse (and hopefully more profitable) product offerings, by allowing flexibility in structuring investment activity, and by not putting banking entity insurers at a competitive disadvantage.[21] On an aggregate or industry-wide level, this in turn promotes the financial stability of the United States. Subsection (d)(1)(J) of the Volcker Rule (which does *not* refer to subsection (h)(4)) is a permitted activity provision for such other activity that "would promote the safety and soundness of the banking entity and the financial stability of the United States." Accordingly, insurance company general account investment activity in covered funds should be permitted under subsection (d)(1)(J) of the Volcker Rule, as well as under subsection (d)(1)(F).

For these reasons, insurance company investment activity that is exempt from the prohibition on proprietary trading should also be exempt from the prohibition on investing in a covered fund. Accordingly, the Committee recommends that this be accomplished simply by adding a new section __.13(e) to the regulations, to read as follows:

> "§__.13 (e) *Permitted Activity By A Regulated Insurance Company.* The prohibition contained in §__10(a) does not apply to (1) acquiring or retaining any ownership interest in a covered fund by a regulated insurance company that meets the conditions of §__.6(c)(1) of these regulations, or (2) acquiring or retaining any ownership interest in a covered fund by a subsidiary or affiliate of such a company, if the ownership interest is solely for the general account of the insurance company."

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[20] Section __.6(c) of the proposed regulations specifically includes investments made by an affiliate in the exemption (from the ban on proprietary trading only) for insurance company general accounts.

[21] Because the proposed exemption in §__.6(c) does not include covered fund activities, insurance companies that are affiliated with an insured depository institution would not be permitted to engage in such activities (no matter how remote the affiliation and regardless of how insignificant the bank might be in relation to the insurer), while other insurance companies would have the advantage of being able to do so.

B. Scope of Permitted Trading on Behalf of Customers by Insurance Company Separate Accounts: §__.6(b)(2)(iii)

The Volcker Rule provides that trading "on behalf of customers" is a permitted activity, exempt from both the proprietary trading ban and the prohibition on covered fund activity (subsection (d)(1)(D)). Insurance companies maintain separate accounts to fund variable annuities and variable life insurance products, where the policy owners bear all of the investment risk since the income, gains and losses on the assets in the account are passed through to the policy owners (and therefore the profits and losses in the account inure to the benefit or detriment of the policy owners).[22] These can be referred to as "variable" separate accounts. The FSOC Study only briefly addressed insurance company separate accounts, and it appears to have had variable separate accounts in mind. It stated that the general account does not include separate account assets, and that assets in separate accounts "are legally segregated for the benefit of particular policyholder /customer"[sic].[23] The Study further noted that insurers maintain investments in separate accounts that are "legally separate from the assets of the insurance company itself."[24] The proposed rules do provide that certain separate account investment activity is exempt from the proprietary trading ban under the statutory provision for trading "on behalf of customers."[25]

A very common type of insurance company separate account invests solely in shares of mutual funds (*i.e.*, management investment companies registered under the Investment Company Act of 1940) and the exemption in the proposed regulations (§__.6(b)(2)(iii)), from the ban on proprietary trading, adequately accommodates this separate account aspect of the business of insurance. However, other variable separate accounts invest in hedge funds and private equity funds. Nevertheless, they share the key attributes of separate accounts investing in mutual funds and meet the conditions of the proposed exemption from the proprietary trading ban in

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[22] Insurers also maintain separate accounts (as defined under state insurance laws) that do not pass through investment gains or losses to policy owners (and where the separate account assets may or may not be chargeable with liabilities arising out of other business of the company). Under the Committee's proposed revision of the definition of separate account in §__.2(z) of the regulations (see below), these types of accounts would not be included in the definition of "separate account", and therefore they would be included in the general account, and their investment activity would be subject to the provisions of the regulations applicable to general account investment activity.

[23] Study *supra* note 1, at n. 65.

[24] *Id.* at 74.

[25] Proposed regulations §__.6(b)(2)(iii).

§__.6(b)(2)(iii). Transactions in these accounts are customer-driven and do not expose the insurance company to gains or losses on the separate account assets. The same regulation and supervision under insurance laws applies, and they are not structured to allow gains or losses from the investments to inure to the benefit or detriment of the insurance company.[26]

However, the proposed exemption for separate account trading on behalf of customers in §__.6(b)(2)(iii) would only apply to the ban on proprietary trading. It would not permit separate accounts to invest in covered funds on behalf of customers.[27] This is, we submit, contrary to the statute which exempts trading on behalf of customers from both the ban on proprietary trading and the covered fund restrictions. And this fails to appropriately accommodate this aspect of the business of insurance.

The Volcker Rule 'permitted activity' provision for trading on behalf of customers (subsection (d)(1)(D)) does refer to subsection (h)(4), which defines proprietary trading. But subsection (d)(1)(D) does **not** refer to *proprietary trading* described in subsection (h)(4); subsection (d)(1)(D) refers to *securities and other instruments* described in subsection (h)(4).[28] As discussed above with respect to general account investment activity in covered funds, the instruments described in subsection (h)(4) include "any security," which clearly includes securities representing interests in private equity and hedge funds. Therefore, the permitted activities in subsection (d)(1)(D) extend to investments in covered funds on behalf of customers, as well as proprietary trading.[29]

In addition, the discussions above regarding the specific provisions for permitted activity in subsection (d)(1) prevailing over the general prohibitions in subsection (a), and regarding the

[26] These attributes are discussed in the Notice at page 74, explaining §__.6(b)(2)(iii).

[27] The prohibition in §__.10(a) only applies to trading "as principal," and it has been suggested that insurance company separate account trades are not "as principal," and therefore §__.10(a) does not prohibit separate accounts investing in covered funds. However, regardless of whether separate account trades are attributable to policy owners (where policy owners bear the profits or losses), the insurance company is still the legal owner of the separate account assets. And certain of the separate account assets may be attributable to the insurer's seed money in the account. For these reasons, there are issues regarding the applicability and coverage of the "as principal" phrase. The Committee therefore believes that this uncertainty should be resolved with a clear and specific exemption.

[28] In addition, subsection (d)(1)(F) does not refer to trading accounts, and the trading account concept is key to the ban on proprietary trading.

[29] Other statutory language in the Volcker Rule leads to the same conclusion. The prohibition in subsection (a)(1)(B) on covered fund activity uses the word "acquire," while the permitted activity provision in subsection (d)(1)(D) allows the "acquisition" of securities on behalf of customers. The permitted activity for "acquisition" therefore is an exemption from the "acquire" prohibition in subsection (a)(1)(B). *See* footnote 12, *supra.*

issue of "substitutability" raised by Mr. Volcker in the Senate hearing, apply here to the separate account exemption as well as to the general account exemption.

Accordingly, the Committee recommends that a new section __13(f) be added to the regulations, to read as follows:

> "§__.13(f) *Permitted investments in covered funds by separate accounts.* The prohibition in §__.10(a) does not apply to investments by separate accounts as defined in §__.2(z) of these regulations."[30]

This proposed exemption also should be permitted under subsection (d)(1)(J) as well as subsection (d)(1)(D) of the Volcker Rule. Subsection (d)(1)(J) of the Volcker Rule (which does not refer to subsection (h)(4)) is a permitted activity provision for such other activity that "would promote the safety and soundness of the banking entity and the financial stability of the United States." This exemption would allow insurers to continue offering variable insurance products that invest in private equity and hedge funds, which is generally a different market than that for variable insurance products that invest in mutual funds. Allowing insurance companies to continue offering different types of products, in different markets, contributes to the financial strength, stability, and safety and soundness of the insurance company. On an aggregate or industry-wide basis, this promotes the financial stability of the United States.

C. The Definitions of "General Account" and "Separate Account"

The primary accommodation to the insurance industry in the Volcker Rule is the allowance for investments made by insurance companies for their general accounts. Subsection (d)(1)(F) of the Volcker Rule specifically provides that general account investment activity is a "permitted activity" under the Volcker Rule. The Notice states that the proposed rule, in §__.6(c), "generally restates the statutory requirements of the exemption."[31] Proposed regulation §__.6(c)(2) would limit the exemption to trading activity that is "solely for the general account of the insurance company." Hence, the scope of both the proprietary trading and covered fund exemptions for insurance company general account investment activity depends on the definition of general account, which §__.3(c)(5) of the proposed regulations defines as "all of the assets of the insurance company that are not legally segregated and allocated to separate accounts."

"Separate Account" is defined to mean an account established and maintained by a regulated insurance company

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[30] As discussed below, the Committee recommends that the definition of separate account be revised to narrow its scope.

[31] Notice, p. 76.

> under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.[32]

The Committee assumes that the proposed regulations were intended to appropriately accommodate *the totality* of the business of insurance through the two "insurance" exemptions. First, of course, there is the exemption for the general account investment activity in §__.6(c). Second, there is the exemption for separate account trading activity "on behalf of customers" in §__.6(b)(2)(iii). Since general account is defined in terms of excluding separate accounts, it appears that, taken together, the two exemptions were intended to appropriately accommodate the full scope of the business of insurance. However, as discussed below, the proposed regulations present certain interpretational difficulties and appear to leave certain gaps with respect to some types of products and separate accounts.

1. Types of Separate Accounts: Narrow Definition of Separate Account

It may be generally thought that all of an insurance company's assets are either in its general account or in a "variable" separate account. As noted above, a variable separate account is one where the income, gains, and losses on the assets in the account are allocated to the account without regard to any other income, gains or losses of the company (meeting the definition of separate account in §__.2(z) of the proposed regulations) and where the investment performance of the separate account assets is passed through to the applicable contract owners, because the profits and losses of the account inure to the benefit or detriment of the contract owners (meeting the condition in subsection (C) of §__.6(b)(2)(iii) of the proposed regulations). The Notice does not discuss the definition of separate account in the proposed regulations or explain its origin or source. However, it is nearly the same as the definition of separate account in Section 2(a)(37) of the Investment Company Act of 1940, which supports reading the definition as *intended to be* limited to variable separate accounts (since that Act generally only applies to variable separate accounts). However, there are also separate accounts where the income, gains or losses are credited to or charged against the account (so the account meets the definition in §__.2(z), and does not qualify for the general account exemption) but where the profits and losses in the account may not inure to the benefit or detriment of the policy owners (so the account is not "variable" and fails the condition in subsection (C) of the exemption for trading on behalf of customers).[33] Insurance company separate accounts are not limited to "variable" insurance products, where income, gains and losses are credited to or charged against

[32] Section ___.2(z) of the proposed rules.

[33] This crediting or charging of income, gains and losses might be done for the company's accounting or reserving purposes, but not for purposes of passing investment performance through to contract owners as with a variable contract.

the account and the profits and losses inure to the benefit or detriment of the contract owners. "Non-variable" or "non-unitized" separate accounts[34] are also used, and have been used for many years, with various types of 'fixed' or guaranteed insurance products for a variety of reasons.[35] Accordingly, the definitions of general account and separate account in the proposed regulations, when compared with the related proposed exemptions, may not operate to exempt all of an insurer's assets. Simply put, certain types of separate accounts cannot rely on the exemption for trading on behalf of customers but also are excluded from the definition of general account.

In addition, the definition of general account may create some ambiguities and potential gaps. The definition of general account in §__.3(c)(5) excludes assets that meet two requirements: (1) they must be "legally segregated," and (2) they must be allocated to a separate account. The term "legally segregated" is not defined or discussed in the Notice,[36] and it is not entirely clear whether it is superfluous or actually adds a substantive condition, and exactly what that condition might be. The NAIC Model Variable Contract Law (Model 260), section 1, provides for the establishment of separate accounts to provide for life insurance or annuities, payable in fixed or variable amounts or both, and provides seven attributes for such separate accounts. Some combination of one or more of these attributes may be viewed as "legal segregation." These attributes are: (1) the income, gains and losses from assets in the account are credited to or charged against the account, without regard to other income, gains, or losses of the company;[37] (2) the assets in the account are not subject to the investment laws and regulations governing an insurer's general account investments (discussed above); (3) reserves for guaranteed benefits generally shall not be maintained in a separate account; (4) assets in a separate account shall be valued at their market value (as opposed to book value); (5) if and to

[34] A "unitized" separate account is one where "accumulation units" are used as an accounting mechanism to measure investment performance and pass it through to contract owners.

[35] For example, as far back as 1986, the SEC recognized that insurers "use such 'nonunitized' separate accounts to facilitate matching of maturities of fixed-income securities that support contract liabilities and as a mechanism for complying with state law reserve requirements or statutory accounting standards." SEC Release No. 33-6645, 51 Fed. Reg. 20254, 20256 (June 4, 1986) (footnote omitted) (adopting Rule 151 under the Securities Act of 1933). Insurers may also use such accounts to be able to use market value for the assets (as opposed to book value), or to provide asset insulation to provide greater assurances of safety to policy owners.

[36] Similarly, the FSOC Study simply states that "Assets held in separate accounts are legally segregated for the benefit of particular policyholder/customer" (sic) (Study, *supra* note 1, footnote 65) and that investments in separate accounts "are legally separate from the assets of the insurance company itself," (*Id.* at 74); the FSOC Study does not define or discuss what it means by "legally segregated" or "legally separate." Separate accounts are part of the insurance company, and a separate account does not have a separate corporate existence. Assets in separate accounts are owned by the insurance company, and the insurance company is not a "trustee" and does not hold separate account assets in trust. SEC Rule 26a-2(a) under the Investment Company Act of 1940 explicitly recognizes this.

[37] This is essentially the definition of separate account in §__.2(z) of the proposed rules.

the extent so provided in the applicable contract,[38] that portion of the assets in the account equal to the reserves and other contract liabilities of the account shall not be chargeable with liabilities arising out of any other business of the company (this is generally referred to as "asset Insulation:" in the event of insolvency or receivership, these assets are not subject to the claims of general creditors); (6) transfers between the separate account and any other investment accounts of the insurer are generally prohibited (with exceptions); and (7) the separate account may be subject to special governance provisions, including management by a committee the members of which need not be affiliated with the company.[39]

Many might view the "asset insulation" (in (5) above) as the key factor in determining legal segregation. But as noted above, whether the assets are insulated may depend on the terms of the applicable annuity or life insurance contract. There can be separate accounts where the income, gains or losses are credited to or charged against the account (so the account meets the definition in §__.2(z)) but the account assets are not legally insulated (because the contract does not so provide). There also are accounts that are legally insulated but where the profits and losses in the account may not inure to the benefit or detriment of the policy owners. These types of accounts are used for guaranteed investment contracts, funding agreements, stable value products, and bank and corporate owned life insurance. Accordingly, it appears that certain assets can be "legally segregated" and therefore not qualify for the general account exemption, but also not qualify for the exemption for separate account trading on behalf of customers.

The Committee suggests the these issues can be resolved, and the intent of the Volcker Rule and the proposed regulations in this regard can be achieved, by narrowing the definition of separate account in the regulations to include only "variable" separate accounts, and not separate accounts that support fixed or guaranteed contracts.[40] This narrowing of the definition of separate account would have the effect of broadening the definition of general account to include accounts that do not support variable insurance products because they do not 'pass through' investment performance (income, gains, profits, and losses) to the contract owners. Excluding only variable separate accounts from the general account provision is appropriate because variable separate accounts are exempt from the insurance investment laws applicable to insurance company general accounts, whereas 'non-variable' separate accounts are generally subject to the insurance investment laws that apply to general account assets. Accordingly, the definition of general account would include assets in separate accounts that do not pass investment performance through to contract owners (because they do not provide that the profits and losses in the account inure solely to the benefit or detriment of contract owners) even though

[38] The terms "contract" and "policy" are used interchangeably herein.

[39] Subsections (A) through (G) of Section 1 of Model 260. The state insurance commissioner can generally allow for exceptions.

[40] Indeed, this may have been what was intended by the proposed definition of separate account.

they may have other separate account attributes (such as the crediting of gains and losses to the account for reserving or accounting purposes, asset insulation or the use of market value accounting).

Specifically, the Committee believes that the intent of the definitions of general account and separate account can be achieved simply by adding the requirement currently in subparagraph (C) of §__.6(2)(b)(iii) to the definition of separate account in §__.2(z), so that the definition of separate account includes the requirement that profits and losses inure to the benefit or detriment of policy owners, and not the insurance company. This would effectively narrow the definition so that it only applies to variable separate accounts. (The specific recommended language is set forth below).

2. Exemption for Separate Account Seed Money and Charges

Insurance companies may "seed" a separate account with sufficient funds to begin operations for several reasons. Seed money may be appropriate or necessary for the account to achieve diversification, to make certain types of investments, to establish an investment track record, and generally to fulfill its investment objectives and policies. This seed money shares in the investment gains or losses of the account equally with all other assets in the account. It is a normal part of the insurer's operations, and is fully subject to and conducted in accordance with state insurance supervision, laws and regulations. However, such seed money would not appear to be covered by the exemption from the proprietary trading ban in §__.6(2)(b)(iii) for trading on behalf of customers by insurance company separate accounts, because it would not meet subparagraph (C) of that exemption. Subparagraph (C) provides that profits and losses of the separate account must inure to the benefit or detriment of the policy owners and not the insurance company. In addition, a threshold requirement of the §__.6(b)(2)(iii) exemption is that the trading must be for a separate account, and the current subparagraph (C) language (if added to the definition of separate account, as recommended above) could disqualify a separate account that contained insurance company seed money.

In addition, various types of fees and charges are assessed against and deducted from insurance company separate accounts. Some of these are flat dollar amounts (*e.g.*, an annual administrative charge of $30 per year per annuity contract) while others are asset-based charges (*e.g.*, a daily charge at an annual rate of 1.25% of assets for mortality and expense risks).[41] The Committee recognizes that footnote 169 of the Notice states that the Agencies would not consider profits to inure to the benefit of the insurance company due to "payment, out of separate account profits, of fees unrelated to the investment performance of the separate account."

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[41] Although they may be 'daily' charges, insurance companies may not actually remove such amounts from the separate account on a daily basis. Rather, they may accumulate in the separate account until they are removed on a less frequent basis. Accordingly, there are almost always a certain amount of accumulated charges in a separate account, and these amounts are not held on behalf of customers (since they belong to the insurance company).

However, fees are generally charged to the separate account even if there are no profits, and it is not clear whether the agencies consider asset-based fees to be "unrelated to the investment performance."[42] For these reasons, the Committee believes that it would be helpful to clarify that the deduction of such fees is permitted under §__.6(b)(2)(iii), by revising the definition of separate account.

Accordingly, the Committee recommends including a provision in the new definition of separate account to appropriately accommodate these aspects of the business of insurance.

3. The Recommended Revisions to the Definition of Separate Account

Specifically, the Committee recommends revising the definition of separate account so that the current requirements are designated subsections (1) and (2) and a new subsection (3) is added, so that the revised definition of separate account reads as follows:

> "§__.2(z) *Separate account* means
>
> (1) an account established and maintained by an insurance company subject to regulation by a State insurance regulator or a foreign insurance regulator;
>
> (2) under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company; and
>
> (3) where all profits and losses arising from the purchase or sale of a covered financial position are allocated to the account and inure to the benefit or detriment of the owners of the insurance policies supported by the account, and not the insurance company; *provided,* that this subparagraph (3) shall not apply to amounts in the separate account that are attributable to:
>
> > (i) amounts allocated to or invested in the separate account to facilitate its operations (*e.g.,* seed money), or
> >
> > (ii) amounts resulting from or derived from separate account charges (or annuity contract or life insurance policy charges), including asset-based charges."

[42] The actual dollar amount of such fees reflects the value or amount of the separate account assets, which does reflect investment performance (among other things), but the fee percentage is not affected by or related to investment performance.

Subparagraph (C) (without revision) can also remain in §__.6(b)(2)(iii) for separate account trading on behalf of customers.

The first part of new subparagraph (3) above would narrow the definition of separate account so that it only includes "variable" separate accounts. This would mean that assets in non-variable insurance company separate accounts, where investment performance is not passed through to policy owners (where profits and losses may inure to the benefit or detriment of the insurance company), would be included in the definition of general account.

The effect of the "*provided*" clause in (3) above is that seed money and accumulated charges in an account do not result in the account being excluded from the definition of separate account. This clause is necessary because profits and losses attributable those amounts do inure to the benefit or detriment of the insurance company. The result is that trading in a variable separate account that is attributable to (*i.e.,* assets in a separate account that are attributable to) policy owners should qualify for the provision in §__.6(b)(2)(iii) (trading on behalf of customers), even if the separate account contains assets that are attributable to seed money and accumulated charges.(where the profits and losses are allocated to the insurance company).

Those variable separate account assets that are attributable to the insurance company (reflecting seed money and accumulated charges) should be covered by the general account exemption in §__.6(c) since the insurance company (not policy owners) bears the profits or losses attributable to such amounts, and such assets are not insulated from claims of general creditors (even where the other assets in the account are insulated).[43] To eliminate any uncertainty in this regard, the Agencies should clarify that the term "legally segregated" in the definition of general account means "insulated," *i.e.,* that the assets are not chargeable with liabilities arising out of any other business of the insurance company.[44]

Finally, in accordance with the "legally segregated" requirement in the definition of general account, any other assets in separate accounts that are not insulated from claims of general creditors would also be included in the definition of general account.

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[43] In the case of separate accounts that rely on section 3(c)(1) or 3(c)(7) of the 1940 Act and hence are covered funds, such seed money investments and amounts attributable to fees and charges would also be exempt from the prohibition in §__.10(a) on investing in a covered funds pursuant to the recommendation in section II.D below.

[44] Preferably, this would be done by including such a definition of "legally segregated" in the final regulations. It could also be accomplished by including a statement in the adopting release or preamble to the final regulations explaining that legally segregated means that those assets are not chargeable with liabilities arising out of any other business of the insurance company.

D. Section 3(c)(1) and 3(c)(7) Accounts

The proposed regulations define "covered fund" to include any issuer that relies on the exemptions in sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. These exemptions are most commonly used by hedge funds and private equity funds. However, as noted above, certain types of insurance company separate accounts also rely on these exemptions.

Separate accounts used to fund or support bank owned life insurance ("BOLI") may rely on these exemptions. Subsection (d)(1)(J) of the Volcker Rule permits a banking entity to engage in any proprietary trading or covered fund activity or investment that the Agencies determine promotes and protects the safety and soundness of banking entities and the financial stability of the United States. The Agencies have proposed to permit acquiring and retaining an ownership interest in, or acting as sponsor to, certain BOLI separate accounts under this authority. The proposed rules would provide an exemption from the covered fund prohibitions and restrictions on acquiring or sponsoring a BOLI product or separate account in §__.14(a).[45] The proposed exemption is two-fold: (1) it would permit insurance companies (that are banking entities) to sponsor (and acquire and own interests in)[46] a separate account for BOLI products, and (2) it would permit banking entities to purchase and own insurance policies invested in or supported by a 3(c)(1) or 3(c)(7) separate account. In short, it applies to both insurers as sponsors and to banks as purchasers. The Committee supports this provision.

However, the proposed exemption for BOLI separate accounts may raise some uncertainty as to an insurance company's ability to establish and offer other separate accounts the rely on the section 3(c)(1) or 3(c)(7) exemptions. The Committee does not believe that insurers are "sponsors," as defined in §__.10(b)(5) of the proposed regulations, of their own separate accounts (which are part of the insurance company, and not a separate legal entity like a hedge fund or private equity fund). However, the proposed exemption seems to assume that the

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[45] Section __.14(a)(1) of the proposed rule permits a banking entity to acquire and retain these BOLI investments, as well as act as sponsor to a BOLI separate account. The proposal includes a number of conditions designed to ensure that BOLI investments are not conducted in a manner that raises the concerns that the Volcker Rule is intended to address. In particular, in order for a banking entity to invest in or sponsor a BOLI separate account, the banking entity that purchases the insurance policy: (i) may not control the investment decisions regarding the underlying assets or holdings of the separate account; and (ii) must hold its ownership interests in the separate account in compliance with applicable supervisory guidance provided by the appropriate Federal regulatory agency regarding BOLI. The Agencies, according to the Notice, have structured this exemption in the proposed rule so as to allow a banking entity to continue to manage and structure its risks and obligations related to its employee compensation or benefit plan obligations in a manner that promotes and protects the safety and soundness of banking entities, which on an industry-wide level has the concomitant effect of promoting and protecting the financial stability of the United States. Notice at 149.

[46] For example, the exemption would permit the insurer to make seed money investments in such accounts.

insurance companies are "sponsors" of BOLI separate accounts since §__.14(a) provides an exemption for "acting as sponsor to" such an account, and that can only apply to the insurance company of which the BOLI separate account is a part. If an exemption is necessary for insurers to create, establish and offer a BOLI section 3(c)(1) or 3(c)(7) separate account, then logically such an exemption would also be necessary for insurers to create, establish and offer other types of section 3(c)(1) or 3(c)(7) separate accounts. Accordingly, the exemption allowing insurance companies to "sponsor" BOLI separate accounts may, unfortunately, create some uncertainty regarding whether an insurance company is the "sponsor" of its own separate accounts.[47]

Accordingly, such an exemption should not be limited to BOLI separate accounts. From the insurance company perspective, the rational for the exemption is that the investment risk is born by the policy owner, since the investment performance of the account generally is passed through to the policy owner.[48] In addition, this separate account activity by insurers is subject to regulation and supervision by the state insurance regulators. These rationales apply as equally to section 3(c)(1) and 3(c)(7) separate accounts used in other contexts, such as corporate owned life insurance[49] and high net worth private placement products,[50] as they do to BOLI separate accounts. These types of activities are equally part of the business of insurance that the regulations should accommodate, and they pose no risk to the safety or soundness of the insurance company (or the U.S. financial system); indeed, issuing a wide variety of products supports the financial soundness of insurers.[51] The regulations should not have the unintended effect of eliminating an insurer's ability to offer these products.

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[47] This uncertainty is increased because insurance companies are referred to as "sponsors" of their own separate accounts in other contexts. Sections 26(f) and 27(i) of the Investment Company Act of 1940 (the "1940 Act") both refer to the insurance company as "sponsoring" its separate account. In addition, certain SEC rules and registration statement forms also refer to insurance companies as "sponsoring" their separate accounts (*see, e.g.,* Rule 26a-2(a) under the Investment Company Act of 1940; Form N-4, General Instruction D (definition of Depositor)). Of course, this is without regard to the definition of "sponsor" in §__.10(b)(5) of the proposed regulations.

[48] This assumes, as noted above, that the proposed definition of separate account in §__.2(z) was intended to mean variable separate accounts. In addition, separate accounts that do not pass through investment performance in this manner generally would not rely on section 3(c)(1) or 3(c)(7) (and hence would not be covered funds).

[49] Corporate owned life insurance, or "COLI," is used by corporations for the same purposes that banks use BOLI (*i.e.* to manage and structure risks and obligations relating to employee benefit and retirement plans). See discussion in the Notice at 148-49.

[50] Wealthy individuals and organizations may use private placement variable insurance products (funded by 3(c)(1) or 3(c)(7) separate accounts) for estate planning and other reasons.

[51] Since this supports the safety and soundness of the insurance company banking entity, and in the aggregate industry-wide the financial stability of the United States, the Agencies can adopt the proposed exemption under subsection (d)(1)(J) of the Volcker Rule.

In this regard, the FSOC Study noted that insurance companies interface with the Volcker Rule not just as market investors, but also as providers of products that are investment vehicles. The Study said:

> "Some commenters also expressed concerns that some separate account products could be included in the definitions of 'hedge fund' and 'private equity fund' ... because the definition includes funds required to be registered under the Investment Company Act, but for the exclusions under Sections 3(c)(1) or 3(c)(7). *Agencies should examine this carefully so as not to preclude certain insurance products that may not have been intended to be limited by the Volcker Rule*."[52]

Therefore, in order to eliminate any uncertainty and to appropriately accommodate this aspect of the business of insurance, the Committee recommends adding a new subsection __.14(c) to the proposed regulations, to read as follows:

> "§__.14(c) *Insurance Company Section 3(c)(1) and 3(c)(7) Accounts.* The prohibition contained in §__.10(a) does not apply to the acquisition or retention by a regulated insurance company of any ownership interest in or acting as a sponsor to a covered fund that is an account of the insurance company."

The Committee notes that certain types of these 3(c)(1) and 3(c)(7) accounts may not meet the definition of "separate" account in §__.2(z) of the proposed regulations,[53] even though they are separate accounts under state insurance law. Accordingly, the proposed exemption above deliberately refers to "an account of the insurance company," rather than a separate account.

The Committee also notes that this recommended exemption would only apply to insurers as sponsors and not to banks as purchasers; in that context, banks would have to rely on, and comply with, §__.14(a)(1).

Finally, as noted above, this recommended exemption also is intended to cover seed money investments and amounts attributable to fees and charges that may be retained in the account.

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[52] Study, *supra* note 1, at 75 (emphasis added).

[53] For example, they may be 'stable value' accounts, where all profits and losses are not passed through to the policy owners.

III. <u>Conclusion</u>

The Committee very much appreciates the opportunity to comment on the proposed regulations. The Committee recognizes that the Dodd-Frank Act imposed tremendous rule-making burdens on the Agencies (and hence their staffs), and that a great deal of very hard work has gone into implementing the Volcker Rule. The Committee submits its views and recommendations in hopes that they further the common goals of implementing the Volcker Rule in a way that is effective and reflects Congressional intent to appropriately accommodate the business of insurance, and the Committee hopes that the Agencies find these views useful and helpful. We would be more than happy to answer any questions or provide any further information that would assist you in completing the difficult task in finalizing these regulations.

* * * * *

The members of the Committee very much appreciate your consideration of the views expressed above. If you have any questions, please feel free to contact the undersigned.

Respectfully submitted,

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