



13 February 2012

*By electronic submission to:*

**Department of the Treasury Board of Governors of the Federal Office of the Comptroller of the Currency  
Board of Governors of the Federal Reserve System  
Federal Deposit Insurance Corporation  
Securities and Exchange Commission**

**Agencies consultation on Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds ; 76 Federal Register 68846 ; November 7, 2011; Joint Notice and Request for Comment OCC: Docket ID OCC-2011-14; FRB: Docket No. R-1432 and RIN 7100 AD 82; FDIC: RIN 3064-AD85; SEC: File Number S7-41-11**

Dear Ladies and Gentlemen,

The Association Française des Professionnels des Titres ("AFTI") appreciates the opportunity to comment on the joint notice of proposed rulemaking implementing section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA"), popularly referred to as the "Volcker Rule".

AFTI is the leading association in France and the European Union representing the post-trade businesses. AFTI has more than 100 members, all actors in the securities market and back office businesses, including custodians, depository banks, investment firms, market infrastructures, and issuers.

The purpose of the present letter is to bring to the attention of the Agencies the main concerns of our members relating to the potentially very harmful impacts of the Volcker Rule on them:

- **The scope of application of the Volcker Rule ("VR") to non US-Banks**

We urge the Agencies to clarify that non-US Banks are exempted from the VR for their non-US activities. We write to you to express our concern and objection to the potential extraterritorial impact of your proposal. The proposal indicates that the Agencies intend to extend activity and affiliate transaction restrictions beyond the borders of the United States in a manner that would be at odds with the plain language of the statute and traditional delineations of supervisory authority. The U.S. Congress specifically incorporated references to existing statutes that explicitly limit the applicability of U.S. banking rules, namely, section 4(c)(9) of the Bank Holding Company Act and section 23A of the Federal Reserve Act. The long-standing approach to the supervision of foreign banking organizations, pursuant to which only their activities within the borders of the U.S. are subject to the same restrictions as domestic banking organizations, is an explicit acknowledgement that, for example, the policy decision to separate banking and commerce is not universal. In a similar vein, we note that section 23A of the Federal Reserve Act applies only to U.S. depository institutions that benefit from deposit insurance backed by the full faith and credit of the U.S. government and is applied to foreign banking organizations only with respect to transactions between the foreign banking organization's U.S. branch and its U.S. broker-dealer, as well as to transactions between its U.S. branch and subsidiaries held pursuant to the merchant banking rules. The proposed extension of affiliate transaction restrictions to entities that do not benefit from this federal safety net is so utterly at odds with the existing legal framework that it would undermine the credibility of the rule itself.

In addition to our concerns regarding the extraterritorial impact of your proposal and its potential to trample on divergent business models, legal systems and supervisory practices, we have specific suggestions regarding technical aspects of the rule.

- **We urge the Agencies to exclude non- US funds and funds which are not subject to an active distribution policy from the definition of "covered funds"**

We note that the language of the statute specifically refers to active distribution of covered funds in the U.S.: "...provided that no ownership interest in such hedge fund or private equity fund is offered for sale or sold to a resident of the United States..." We urge the Agencies to adhere to the plain language of the statute and clarify that a fund that is not actively marketed to U.S. residents is exempt.

- **We urge the Agencies to exclude non- US funds which present the same characteristics than U.S. mutual funds from the definition of "covered funds"**

The proposed rule excludes only funds that are registered for public sale in the U.S under the Investment Company Act of 1940 (U.S. mutual funds).

We urge the Agencies to state clearly that the « covered fund » definition is not applicable to non-U.S. funds which are identical to U.S. mutual funds according to their structure, third party investors, and distribution characteristics. As a consequence, regulated European UCITS and European alternative investment funds should be clearly excluded from the definition of « covered fund ».

- **We urge the Agencies to clarify the concept of "sponsorship"**

The proposal's directed trustee exception appropriately addresses U.S arrangements where a custody bank may be a trustee for a "covered fund" but has no investment discretion. However, we believe that the exception is inadequate to address the broader range of custodial arrangements outside of the U.S. in which a custodian may act as "depository bank" under the EU UCITS or AIFs rules and provide additional fiduciary or administrative services, but does not exercise investment discretion.

AIFMD is an ambitious text adopted in July 2011 that aims at offering a proper regulation for the authorisation and supervision of alternative investment funds managers. Throughout this legislative framework, the duties and liabilities of the depositaries are clearly and strictly specified (article 21).

Furthermore, the directive states that "*no delegation of portfolio management or risks management shall be conferred on the depository or a delegate of the depository*". Similarly, and in order to avoid conflicts of interest between the depository, the AIFM and/or the AIF and/or its investors, the AIFMD provides that "*an AIFM shall not act as depository*".

The Directive 2009/65/EC, well known as the UCITS IV Directive, has the same approach and indicates, under the article 25, that "*No company shall act as both management company and depository*" and that "*In the context of their respective roles, the management company and the depository shall act independently and solely in the interest of the unit-holder*".

Consequently, the proposal should clarify that custody/depository services are not deemed to be fund sponsoring activities in cases where the custodians/depositaries serve in directed, fiduciary, or administrative roles for a covered fund regardless of whether the covered fund is affiliated or not.

- **We urge the Agencies to exclude custody and settlement arrangements from the definition of "covered transactions"**

We believe that normal custody and settlement services for covered funds, to the extent they may be deemed to be provisional credit or liquidity for securities settlement, contractual settlement, pre-determined income or other banking custody-related transactions, should not be qualified as "covered transactions" for the purposes of the Section 23 A as this specific kind of transactions, by their very nature, do not raise a risk of undue credit support for sponsored and advised funds.

We thank in advance the Agencies for taking into consideration these comments and remain at your entire disposal for any further precision you may need.

To initiate follow-up, please contact Karima Lachgar, our General Manager, at +33 1 48 00 52 01 : [klachgar.ofti@bf.fr](mailto:klachgar.ofti@bf.fr).

Yours sincerely,

Marcel Roncin  
Chairman

