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February 7, 2012

By electronic submission

Department of the Treasury
Office of Domestic Finance
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20520

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
Re: File Number S7–41–11

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Re: Docket No. R-1432 & RIN 7100 AD82

Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219
Re: Docket ID OCC–2011–14

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Re: RIN 3064–AD85

Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20551

Re: Comments on the Notices of Proposed Rulemaking Implementing the Volcker Rule

Ladies and Gentlemen:

On behalf of DBS Bank Ltd, Oversea-Chinese Banking Corporation, United Overseas Bank Limited, and the Association of Banks in Singapore, we are pleased to provide comments on the joint notices of proposed rulemaking to implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] more commonly known as the "Volcker Rule."[2]

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[1] Pub. Law No. 111-203, 124 Stat. 1376 (2010) (H.R. 4173) (hereinafter, the "Dodd-Frank Act").

[2] 76 FED. REG. 68,846 (Nov. 7, 2011) and 77 FED. REG. ____ (Feb. __ 2012) (collectively, the "Proposal"). In this comment letter, the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Office of Comptroller of the Currency (the "OCC"), the Federal Deposit Insurance Corporation (the "FDIC"), the Securities and Exchange Commission (the "SEC"), and the Commodity Futures Trading Commission (the "CFTC") are referred to collectively as the "Agencies",

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DBS Bank Ltd, with assets of approximately US $271 billion, is a Singapore incorporated bank which, along with its affiliates, have operations in 15 countries and territories. **Oversea-Chinese Banking Corporation Limited,** with assets of approximately US $213 billion, is a Singapore incorporated bank which, along with its affiliated banks, have operations in 15 countries and territories. **United Overseas Bank Limited,** with assets of approximately US $184 billion, is a Singapore incorporated bank which, along with its affiliates, have a network of more than 500 offices in 19 countries and territories in Asia-Pacific, Western Europe and North America. These three entities (collectively, the "Singaporean Banks") are generally regarded as the strongest banks in Southeast-Asia and among the strongest banks in the world. The Singaporean Banks are the three largest banks in Singapore, which is itself one of the world's largest financial centers. The Singaporean Banks are regulated by the Monetary Authority of Singapore (the "MAS").

The Association of Banks in Singapore (the "ABS") is a financial services industry association representing more than 140 banks and financial institutions conducting business in Singapore, including the three Singaporean Banks.

While the Singaporean Banks have no depository institution operations in the U.S. and do not otherwise maintain any material business operations in the U.S., each of the Singaporean Banks maintains one or two nonbranch agency offices in the U.S. Thus, each is treated as a "banking holding company" for purposes of the International Banking Act of 1978. Due to the maintenance of one or two nonbranch agency offices in the United States, each of the Singaporean Banks – and every one of their respective affiliates worldwide – would be considered a "banking entity" subject to the strictures of the Volcker Rule.

Background

The Volcker Rule generally prohibits a "banking entity" from engaging in "proprietary trading," and from investing in or sponsoring a "private equity fund or hedge fund," subject to certain exceptions as set forth in the Volcker Rule and in the Agencies' Proposed Regulations. In addition, the Volcker Rule prohibits certain transactions between a banking entity and a

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the text of the proposed rules as the "Proposed Regulations," and the final regulations the Agencies plan to issue to implement the Volcker Rule as the "Final Regulations." In this comment letter, "we," "us" and "our" refer to the commenters – DBS Group Holdings Limited, Oversea-Chinese Bank Corporation Limited, United Overseas Bank Limited, and The Association of Banks in Singapore.

private equity fund or hedge fund that is advised, managed, or sponsored by the banking entity or by any of its affiliates.

The Proposed Regulations are intended to implement the Volcker Rule by clarifying the definitions used in the Volcker Rule and its various exceptions, and in a few instances, by establishing additional exceptions. The Proposed Regulations would require banking entities that rely on certain of these exceptions to implement compliance programs meeting certain enumerated standards. In addition, the Proposed Regulations would require banking entities that rely on certain exemptions to the proprietary trading restrictions to provide regular and detailed reports to the Agencies concerning their trading activities.

In considering the substantive merits of these requirements, we believe that one must take into account Congress' apparent intent in imposing the Volcker Rule. While the legislative history behind the Volcker Rule is somewhat sparse,[3] we believe that the policy underlying the Volcker Rule is that U.S. banks, U.S. nonbank banks, and foreign branches operating in the U.S. enjoy an implied subsidy by virtue of federal deposit insurance coverage and access to Federal Reserve discount window loans. As a consequence, these entities play a role in maintaining the stability of the U.S. financial system, and should not then use that government subsidy to engage in, and should be prohibited from, proprietary trading and fund investing activities, both of which were deemed to be risky. These activities are also considered to place

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[3] We understand that the Volcker Rule was adopted by Congress largely without any significant debate or discussion. The Volcker Rule originated in January 2009, when the Group of Thirty issued a white paper, *Financial Reform: A Framework for Financial Stability*, containing 18 recommendations for changes in global financial regulation. The Group of Thirty, an international consultative group chaired by Paul Volcker (formerly the Chairman of the Board of Governors of the Federal Reserve System and the current chairman of the President's Economic Recovery Advisory Board), includes many former foreign central bankers or treasury executives. Recommendation 1 of the white paper called for limits on proprietary securities trading and private fund investing activities by large banks, citing the risk of these activities on the stability of the international banking system, as well as the potential for conflicts of interest when a bank trades for its own account. At the suggestion of Mr. Volcker, the Volcker Rule was endorsed by President Obama as part of the Administration reform plan in early 2010, and the Volcker Rule was included in the April version of the Senate bill (S. 3217), well after the House of Representatives had passed its version of financial reform legislation in December 2009 (H.R. 4173). S 3217 passed the Senate with little, if any, debate or discussion of the Volcker Rule. The Volcker Rule was discussed in the House-Senate Conference Committee proceedings in June 2010, and was amended somewhat in Conference. The little legislative history concerning the Volcker Rule stems from the Conference Committee proceedings, or from floor statements by members of Congress before final passage of the legislation in July 2010.

a financial institution in potential conflicts of interest because such proprietary transactions are, by their nature, self-interested. Further, engaging in these transactions may conflict with certain advisory or agency functions in which a banking entity is acting on behalf of a customer.[4]

Consistent with these principles, we note that the Congressionally mandated study conducted by the Financial Stability Oversight Council (the "FSOC"), published in January 2011, anticipated that the Volcker Rule should have little impact on foreign banking organizations except for their activities conducted within the United States.[5] The Study concluded:

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[4] Although there is no express statement of Congressional intent in the Volcker Rule itself, Congress' intent can be gleaned from the Congressional mandate imposed on the Financial Stability Oversight Counsel (the "FSOC") regarding the Volcker Rule. Under this mandate, the FSOC study was required to make recommendations for implementation so as to:

> (A) promote and enhance the safety and soundness of banking entities;
> (B) protect taxpayers and consumers and enhance financial stability by minimizing the risk that insured depository institutions and the affiliates of insured depository institutions will engage in unsafe and unsound activities;
> (C) limit the inappropriate transfer of Federal subsidies from institutions that benefit from deposit insurance and liquidity facilities of the Federal Government to unregulated entities;
> (D) reduce conflicts of interest between the self-interest of banking entities and nonbank financial companies supervised by the Board, and the interests of the customers of such entities and companies;
> (E) limit activities that have caused undue risk or loss in banking entities and nonbank financial companies supervised by the Board, or that might reasonably be expected to create undue risk or loss in such banking entities and nonbank financial companies supervised by the Board;
> (F) 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; and
> (G) appropriately time the divestiture of illiquid assets that are affected by the implementation of the prohibitions under subsection (a).

12 U.S.C. § 1851(b)(1).

[5] Financial Stability Oversight Council, *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds* (Jan. 2011).

> The Volcker Rule applies to domestic banking operations of foreign institutions. However, because of U.S. extra-territorial regulatory constraints, the statute does not restrict proprietary trading conducted by non-U.S. entities outside the United States. These entities are not eligible for discount window loans or federal deposit insurance.[6]

Concerns about the Volcker Rule's Extraterritorial Reach

While we do not disagree with the basic principles or the statements in the FSOC study, we believe that neither these principles nor the related statements are reflected in the Proposed Regulations. In particular, we believe that the Proposed Regulations inappropriately extend to foreign banks and their non-U.S. affiliates. For example, the Singaporean Banks have little banking presence in the U.S., do not benefit in any material way from U.S. subsidies in the form of federal deposit insurance or Federal Reserve discount window loans, and pose no meaningful risk to the stability of the U.S. financial system. We also believe that the Volcker Rule and the Proposed Regulations are inconsistent with principles of international regulatory comity and fail to give due regard to the role of the home country regulator – in the case of the Singaporean Banks, the MAS – as the primary prudential regulator of foreign banking organizations. The Proposed Regulations, in their current form, reflect a significant intrusion into the non-U.S. activities of foreign banks and their affiliates.

This point is best understood by considering how the Volcker Rule applies to the activities of the Singaporean Banks. By way of illustration, the Singaporean Banks collectively operate five agency offices in the U.S. These agency offices engage primarily in commercial lending activities supporting the Singaporean Banks' global customers and their customers' U.S. subsidiaries. These agency offices do not accept deposits insured by the Federal Deposit Insurance Corporation. While these agency offices may legally obtain advances from the Federal Reserve discount window,[7] the advances are of course subject to the Federal Reserve's full collateralization requirements. Although these five agency offices may access the discount window for their U.S. operations, neither the home offices of the Singaporean Banks or any of their affiliates have access to the discount window or otherwise benefit from the implied federal subsidies of FDIC insurance or window access. ***Yet the Volcker Rule, as applied by the Proposed Regulations, would apply to the Singaporean Banks and all of their affiliates,***

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[6] *Id.*, at p. 46.

[7] *See* 12 U.S.C. § 347d.

in Singapore, throughout Asia, and wherever else located throughout the world. While the Proposed Regulations afford exemptions for activities "outside of the United States," these exemptions are subject to significant conditions and render inapplicable only certain aspects of the Volcker Rule, as discussed later.

National Treatment

We also believe that the sweeping reach of the Volcker Rule is inconsistent with principles of "national treatment." Although the Agencies state on several occasions that the Proposed Regulations generally preserve the concept of "national treatment," we do not believe this to be the case with respect to foreign banking organizations' offshore operations. "National treatment" refers to the uniform application of local law to domestic and foreign organizations alike ***when operating side-by-side in domestic markets***.[8] "National treatment" does not justify the exportation of U.S. regulatory principles to entities operating outside U.S. markets merely because these entities happen to be affiliated with a bank that has a U.S. branch or agency office.

Further, even by the most liberal understanding of "national treatment," the Volcker Rule discriminates against certain non-U.S. banks and non-U.S. economies. By way of example, the Volcker Rule would permit U.S. banking entities operating in Singapore to engage in proprietary trading of U.S. government securities, but would prohibit a Singaporean bank acting in the United States from proprietary trading in Singaporean government securities.

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[8] As summarized by Federal Reserve Governor Susan Schmidt Bies:

> Global companies operate across many countries and must adapt their business and strategy to local regulatory and supervisory requirements. It is now generally accepted in the U.S. and internationally that a foreign firm *that conducts business in a local market* should receive national treatment, that is, the foreign firm should be treated no less favorably than a domestic firm operating in like circumstances. The United States adopted a specific policy of national treatment for foreign banks operating in this country with the enactment of the International Banking Act of 1978.

Testimony of Susan Schmidt Bies, Governor of the Federal Reserve Board, Before the House Committee on Financial Services (May 13, 2004) (emphasis added).

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Risks to the U.S. Economy

Subjecting foreign banks and all of their affiliates to the constraints of the Volcker Rule would arguably *increase* systemic risk. Nearly 160 foreign banks operate roughly 250 branches or agency offices in the U.S.[9] These foreign bank branches and agencies are significant employers of U.S. citizens, and they also hold $523 billion in commercial loans.[10] In all, nearly 8% of the commercial loan assets in the U.S. are held by foreign banks.[11] Subjecting the global operations of foreign banks to the restrictions of the Volcker Rule provides no benefit whatsoever to the U.S. financial system. Many of these foreign banks may consider shuttering their U.S. branches and agencies to avoid subjecting all of their global affiliates to the Volcker Rule, particularly as the Rule impedes their ability to trade in local securities and injures their local economies. A foreign bank without a U.S. branch or agency office will be reluctant to establish such an office in order to avoid the Volcker Rule's impact on the bank's global operations. Moreover, the Proposed Regulations invite foreign jurisdictions to retaliate by imposing restrictions on the *U.S.* activities of *U.S.* banks merely because those banks choose to establish a branch in the foreign jurisdiction.

We urge the Agencies to reconsider the extraterritorial implications of the Volcker Rule and the Proposed Regulations in light of the purposes behind the Volcker Rule, the traditional structure of multinational banking regulation, and the comity and deference traditionally afforded to foreign regulators (and by foreign regulators to U.S. regulators.) ***We suggest that the Agencies narrow the extraterritorial reach of the Proposed Regulations (either by adopting a narrow definition of "banking entity" or, in the alternative, by using their exemptive authority under subsection (d)(1)(J)). Specifically, we encourage the Agencies to narrow the scope of the Volcker Rule such that it applies solely to a U.S. branch or agency office of a foreign bank, or at least to exempt any affiliate of the foreign bank that does not maintain an office in the United States.***[12]

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[9] *See* Board of Governors of the Federal Reserve System, *Structure and Share Data for U.S. Banking Offices of Foreign Entities* (Sept. 2011).

[10] *See* Board of Governors of the Federal Reserve System, *Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks* (Dec. 2011).

[11] *See* Board of Governors of the Federal Reserve System, *Assets and Liabilities of Commercial Banks in the United States* (Jan. 2011).

[12] Subsection (d)(1)(J) authorizes the Agencies to establish additional exemptions for "[s]uch other activity as [the Agencies] determine, by rule ... would promote and protect the safety and soundness of the banking entity and the financial stability of the United States." 12 U.S.C. § 1851(d)(1)(J). In light

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We now turn to comments regarding specific aspects of the Proposed Regulations.

Proprietary Trading

The proprietary trading provisions of the Volcker Rule prohibit a banking entity from engaging in "proprietary trading," which is generally defined as engaging as principal to purchase or sell a "covered financial position" in a "trading account" of the banking entity. There are several exemptions to the prohibition, including exemptions for market-making, underwriting, risk-mitigating hedging transactions, transactions involving certain federal or state obligations, or transactions that are outside the United States.

Non-U.S. Trading Exemption. Our primary concern relates to the scope of the exemption for trading outside the United States (the "Non-U.S. Trading Exemption") as reflected in the Proposed Regulations. The statutory language of the Volcker Rule exempts transactions by a foreign banking organization provided that such a transaction is "solely outside the United States."[13] However, the Proposed Regulations add a number of additional conditions to the Non-U.S. Trading Exemption:

- No party to the purchase or sale is a "resident of the U.S." (as that term is defined in the Proposed Regulations;
- No personnel of the banking entity who is directly involved in the purchase or sale is physically located in the U.S.; and
- The purchase or sale is executed "wholly outside of the U.S."

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of the foregoing, we suggest the Agencies take into consideration the risks posed by an overbroad extraterritorial application of the Volcker Rule against the risk posed by the foreign bank to the stability of the U.S. financial system. For example, the Volcker Rule could be limited to apply to non-U.S. operations of foreign banks solely if the foreign bank itself is determined to be systemically important to the U.S. financial system.

[13] In addition, the statutory language limits the scope of the Non-U.S. Trading Exemption to "qualified foreign banking organizations" and requires that the banking entity conducting the trading to not be "directly or indirectly controlled by a banking entity that is organized under" U.S. federal or state law. 12 U.S.C. § 1851(d)(1)(H). These conditions are reflected in the Proposed Regulations as well. The Singaporean Banks have no comments or concerns regarding these aspects of the Non-U.S. Trading Exemption.

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None of these additional conditions is found within the statutory language, and the addition of these additional conditions does nothing to enhance the safety and soundness of the U.S. financial system or otherwise to further the objectives of the Volcker Rule. Rather, these additional conditions have the effect of expanding the extra-territorial reach of the Volcker Rule, and several of these conditions create substantial uncertainty regarding whether a specific transaction is or is not "solely outside the United States."

To illustrate: before deciding to proceed with a transaction, a non-U.S. affiliate of the Singaporean Banks would have to determine whether any party to the transaction is a "resident of the United States" using the unique definition of that term found in the Proposed Regulations. For example, with respect to transactions with natural persons, the affiliate would have to determine whether that individual has a sufficient nexus to the United States to have established residency, notwithstanding the fact that the individual is currently located outside the United States or may even be a citizen of a foreign country. For transactions with a trust, the Proposed Regulations would require the Singaporean Banks to determine whether any of the beneficiaries of that trust have established U.S. residency.

In any case, we do not believe that the "residency" of the counterparty should be a relevant factor in determining whether the transaction should be subject to the Volcker Rule. The primary purpose of the Volcker Rule is to prevent financial institutions that have access to the U.S. federal safety net from engaging in proprietary trading – not to prevent *U.S. residents* from engaging in securities transactions with foreign banks. The "residency" of the counterparty simply bears no relationship to the risk posed to either the banking entity or the U.S. financial system.

With respect to the added condition that the transaction must be "executed wholly outside the United States," we note that this phrase is not defined in the Proposed Regulations, and thus we are uncertain as to what this refers.

We also do not believe that the principles of national treatment justify the addition of any of these non-statutory conditions. Principles of national treatment would require a foreign banking organization, ***when transacting from a location within the United States,*** to comply with the same legal standards as applicable to U.S. banking organizations. National treatment does not warrant applying U.S. regulatory requirements to foreign banking organizations engaging in transactions on a cross-border basis or merely because, for example, the counterparty is a non-U.S. trust of which just one beneficiary is a U.S. resident.

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We urge the Agencies to revise the Proposed Regulations to establish a bright-line standard for which transactions are "solely outside the United States" that is consistent with the underlying purposes of the Volcker Rule and concepts of national treatment. We recommend that the Agencies define a transaction to be "solely outside the United States" when two conditions are met:

> (i) the transaction is recorded by, booked into, or otherwise legally entered into by a banking entity that is not organized under U.S. federal or state law (or, in the case of foreign banks operating a branch or agency office in the U.S., not recorded as an asset or liability of the U.S. branch or agency office); and
>
> (ii) the transaction is not marketed from, negotiated at, entered into or closed in an office or location of the banking entity situated in the United States.

Such a standard would be consistent with the purposes of the Volcker Rule, would provide clear guidance regarding which transactions are subject to its requirements, and would be consistent with concepts of national treatment.[14]

Sovereign Obligations. We are also concerned about the narrow exemption from the proprietary trading ban that is afforded only to transactions in U.S. government or state obligations or their respective agencies. This provision would effectively make it illegal for a foreign banking organization that has a U.S. branch or agency office to trade in non-U.S. sovereign obligations – including its home country debt – unless the transaction meets some *other* exemption from the trading ban. For example, in their current form, the Volcker Rule and the Proposed Regulations would prohibit the Singaporean Banks (and all of their affiliates) from trading in obligations of the Republic of Singapore, unless the transaction met another exemption, such as the Non-U.S. Trading Exemption discussed above. Not only does this presume that all U.S. federal and state obligations are safer than any foreign sovereign obligations, it also interferes with the sovereignty of foreign governments by restricting the ability of the banks they charter to trade in home country obligations, substantially reduces the liquidity of non-U.S. sovereign debt by limiting its ability to be traded by U.S. financial

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[14] Such an approach would also be consistent with the Federal Reserve's longstanding distinction between its regulatory regime applicable to activities within the U.S. (Regulation Y) and its regulatory regime applicable to activities outside the U.S. (Regulation K). *See, e.g.,* 12 C.F.R. § 211.2(g).

institutions and foreign banks with U.S. branches or agency offices,[15] and invites foreign governments to impose similar strictures on U.S. banks operating abroad.

We urge the Agencies to adopt an exemption in the Final Regulations that would permit a foreign banking organization to trade in all sovereign obligations, or at least those of the countries in which it operates, regardless of whether the trading activity is "solely outside the United States" or otherwise meets another exemption from the proprietary trading ban. We also urge the Agencies to expand the scope of exempted obligations to include sovereign issuers having governmental responsibilities similar to those of the U.S. federal and state governments and their agencies.

Reporting and Recordkeeping. The Singaporean Banks collectively maintain agency offices in the U.S. that engage primarily in credit related activities. These agency offices do not engage in material trading activity and therefore the Volcker Rule or Proposed Regulations will likely not materially impact them standing alone. Nonetheless, we are gravely concerned about the sweeping scope of the reporting and recordkeeping provisions of the Proposed Regulations, which appear to apply not only to the trading activities of the agency offices but also to the worldwide trading activities of the Singaporean Banks.

Although not mandated by the statute, the Agencies proposed to impose reporting and recordkeeping requirements in the Proposed Regulations. The Proposed Regulations appear to require that a banking entity relying on *any* of the exemptions must report certain trading information to the Agencies on a monthly basis. Specifically, Section 7 of the Proposed Regulations states that:

> A covered banking entity engaged in any proprietary trading activity permitted under §§__.4 through __.6 shall comply with:
>
> > (a) The reporting and recordkeeping requirements described in Appendix A to this part, if the covered banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which (on a worldwide consolidated basis) is, as measured as of the last

[15] In that regard, we note the several foreign regulators have raised concerns regarding the Volcker Rule's impact on sovereign debt liquidity, and we agree with those concerns. *See, e.g.,* Letter from George Osborne, Chancellor of the Exchequer, to Ben Bernanke, Chairman of the Board of Governors of the Federal Reserve System (January 23, 2012).

> day of each of the four prior calendar quarters, equal to or greater than $1 billion ....[16]

As written, this provision appears to require a foreign banking entity to file reports with the Agencies and maintain Volcker-compliant records even with respect to transactions that are "solely outside the United States" and thus within the Non-U.S. Trading Exemption of Section 6(d). In effect, this would require the Singaporean Banks and all of their affiliates to provide periodic reports to the Agencies and maintain Volcker-compliant records with respect to *all* of their worldwide trading activities.

We see no statutory purpose in mandating reports to the Agencies, or recordkeeping, with respect to a foreign bank's trading activity that is outside the U.S. and therefore poses no risk to the U.S. financial system or to any of the bank's U.S. offices. Subjecting a foreign bank's worldwide reporting activities to U.S.-based reporting and recordkeeping would represent an unprecedented expansion of U.S. regulators' supervisory powers into the non-U.S. operations of foreign banking organizations and would intrude into the role of the home country regulator. There are no perceivable benefits to U.S. safety and soundness or financial stability that could justify such an approach. ***Thus, we urge the Agencies to clarify that the reporting and recordkeeping requirements do not apply to banking entity trading transactions that fall within the Non-U.S. Trading Exemption of Section 6(d) of the Proposed Regulations.***

As noted above, under the Proposed Regulations, the reporting and recordkeeping requirements apply only if the banking entity's trading volume exceeds $1 billion *globally*. ***We urge the Agencies to clarify that this $1 billion global threshold does not include transactions falling within the Non-U.S. Trading Exemption.*** The Singaporean Banks' agency offices do not engage in any material trading activity. We see no reason that, if the U.S. agencies do engage in *de minimis* trading activity, the scope of the agency office's reporting and recordkeeping obligations should be determined by the volume of trading conducted by the Singaporean Banks and their affiliates completely outside the United States.

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[16] 76 FED. REG. 68846, 68949; 77 FED REG. ___, ___. On the other hand, Appendix A itself specifically refers to reporting obligations by banking entities that rely on the exemptions relating to market-making, underwriting, risk-mitigating hedging, or trading in government obligations (*i.e.*, Sections 4(a), 4(b), 5, and 6(a) of the Proposed Regulations), but is silent regarding the Non-U.S. Trading Exemption (*i.e.*, Section 6(d)), and in this regard, the Proposed Regulations appear to be internally inconsistent.

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Compliance. We have similar concerns regarding the potential extraterritorial scope of the compliance obligations applicable to trading activities. Section 20 of the Proposed Regulations provides that the compliance obligations apply to "each covered banking entity" and must encompass activities "permitted under [Sections 4 through 6]" of the Proposed Regulations.[17] This language suggests that foreign banking organizations may be obligated to develop and maintain compliance programs even with respect to transactions that are outside the United States and thus fall within the Non-U.S. Trading Exemption in Section 6(d). On the other hand, certain of the exemptions enumerated in the Proposed Regulations – such as the market-making, underwriting, and risk mitigating hedging exemptions – expressly require the banking entity to comply with the compliance obligations as a condition to relying on the exemption, while no such express requirement appears in the Non-U.S. Trading Exemption in Section 6(d).

We urge the Agencies to clarify that the compliance obligations do not apply to any banking entity that engages in trading obligations solely outside the United States and thus exempted under the Non-U.S. Trading Exemption of Section 6(d). Any other construction would require the Singaporean Banks and all of their global affiliates to develop and maintain compliance programs meeting the requirements of the Proposed Regulations merely because they engage in trading anywhere in the world. We do not believe that Congress intended the Agencies to deviate from the traditional constraints on extra-territorial regulation by imposing compliance obligations on non-U.S. entities that do business solely outside the U.S. Moreover, imposition of compliance obligations on such non-U.S. entities would do nothing to reduce risk to the U.S. financial system or further the purposes of the Volcker Rule, and would needlessly impose U.S. regulatory standards on entities and activities already subject to home-country prudential regulation.

Covered Funds

The covered funds provisions of the Volcker Rule prohibit a banking entity from acquiring or retaining an ownership interest in, or sponsoring, a "hedge fund or private equity fund." In the statute, a "hedge fund or private equity fund" is defined as:

> an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), but for section 3(c)(1) or 3(c)(7) of that Act, or such similar funds as the appropriate Federal banking agencies, the

[17] 76 FED. REG. 68846, 68955; 77 FED. REG. ___, ___.

> Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule, as provided in subsection (b)(2), determine.[18]

There are several statutory exemptions to the prohibition on owning or sponsoring a "hedge fund or private equity fund," including an exemption for fund activity that occurs outside the United States.

We have several concerns about the fund aspects of the Proposed Regulations.

Non-U.S. Funds Exemption. One concern relates to the scope of the exemption for fund ownership or sponsoring activity outside the United States (the "Non-U.S. Funds Exemption") as reflected in the Proposed Regulations. The statutory language of the Volcker Rule provides that its restrictions do not apply to:

> The acquisition or retention of any equity, partnership, or other ownership interest in, or the sponsorship of, a hedge fund or a private equity fund by a banking entity pursuant to paragraph (9) or (13) of section 4(c) solely outside of the United States, 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 and that the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States.[19]

The Non-U.S. Funds Exemption is reflected in Section 13(c) of the Proposed Regulations. Our primary concern with the Non-U.S. Funds Exemption is that it fails to explain the statutory requirement 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 believe that this language was intended to prevent a foreign banking organization from circumventing the Volcker Rule by organizing a fund (either in the United States or offshore) and then marketing the fund's shares to U.S. residents. ***Thus, we suggest that the Agencies clarify that this language refers to offerings or sales by the banking entity itself.***

This language should *not* be construed to prevent a foreign banking organization from investing in a fund merely because *another person* (such as the fund itself, or a fund's

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[18] 12 U.S.C. § 1851(h)(2).

[19] 12 U.S.C. § 1851(d)(1)(I).

shareholder) may have offered or sold shares to a U.S. resident. Whether another person has offered or sold such shares to U.S. residents bears no relationship to the risk either to the foreign banking organization or to the U.S. financial system. Again, the purpose of the Volcker Rule is not to prevent *U.S. residents* from purchasing shares in a private equity fund or hedge fund, but rather to prevent *banking entities that benefit from the implied federal backstops* from investing in (or sponsoring) private equity funds or hedge funds. Seen in that light, it should be irrelevant whether a banking entity that does *not* benefit from the implied federal backstop (such as the home offices of the Singaporean Banks or any of their non-U.S. affiliates) has invested in a fund that happens to have U.S. investors.[20]

Any other construction would create an impossible standard. If one were to construe this language to apply to third party offers or sales, the Singaporean Banks (and all of their affiliates) would need to determine whether *the fund, its organizer, or any current or former fund shareholders* have ever offered or sold shares to a U.S. resident (or in the case of a shareholder, offered to resell or has resold shares to a U.S. resident). We do not believe an entity could make such a determination with any degree of certainty. Moreover, because the Singaporean Banks would not be able to prevent third party offers or sales, such offers or sales might occur *after* the Singaporean Banks have invested; under such a construction, the Proposed Regulations would require the Singaporean Banks to divest their ownership.

Attempting to restrict the types of funds in which the home offices of the Singaporean Banks and their non-U.S. affiliates may invest, and requiring divestiture of nonconforming funds, would significantly interfere with the role of the home country regulator, and would constitute a significant extension of U.S. banking law abroad. ***For all of these reasons, we believe that the appropriate interpretation of the Non-U.S. Funds Exemption is that it requires only that fund shares not be offered or sold <u>by the banking entity</u>, and we urge the Agencies to reflect this clarification in the Final Regulations.***

Foreign Funds. We are also concerned about a separate provision of the Proposed Regulations that expands the scope of "private equity fund or hedge fund" beyond the statutory language and, in doing so, vastly expands the extraterritorial impact of the Volcker Rule. The Proposed Regulations use the term "covered fund" in lieu of the more cumbersome phrase used in the

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[20] Such a construction would also be completely consistent with principles of national treatment. The U.S. agency offices could not avail themselves of the Non-U.S. Fund Exemption because the Exemption is limited to activities "pursuant to" Section 4(c)(9). As a result, the Non-U.S. Fund Exemption would be unavailable to the U.S. agency offices, and the fund activities of the U.S. agency offices would be subject to the exact treatment as applicable to a U.S. banking organization.

statute, "private equity fund or hedge fund." Section 10(b)(1) of the Proposed Regulations defines "covered fund" as follows:

> (i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));
> (ii) A commodity pool, as defined in section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10));
> ***(iii) Any issuer, as defined in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)), that is organized or offered outside of the United States that would be a covered fund as defined in paragraphs (b)(1)(i), (ii), or (iv) of this section, were it organized or offered under the laws, or offered to one or more residents, of the United States or of one or more States;*** and
> (iv) Any such similar fund as the appropriate Federal banking agencies, the SEC, and the CFTC may determine, by rule, as provided in section 13(b)(2) of the BHC Act.[21]

In particular, subsection (iii) deviates from the statutory language because it would deem a "covered fund" to include an offshore fund that is not subject to the Investment Company Act at all, does not rely on section 3(c)(1) or 3(c)(7) to avoid registration, and therefore is not a "private equity fund or hedge fund" as defined in the statute. We anticipate that subsection (iii) was added by the Agencies to prevent *U.S.* banking organizations from circumventing the Volcker Rule by using its offshore subsidiaries to invest in or sponsor an offshore fund which would not be subject to the Investment Company Act because the offshore fund's shares are not distributed in the U.S. The Singaporean Banks do not dispute the authority of the Agencies to regulate the overseas fund sponsoring and investing activities of U.S. banking organizations.

The Singaporean Banks believe it is inappropriate, however, for the Agencies to attempt to regulate the overseas fund sponsoring and investing activities of foreign banks conducted abroad. Nothing in the legislative history indicates that Congress intended such a massive exportation of U.S. legal constructs. Rather, the opposite is true – Congress intended that the Agencies would conform to existing bank regulatory frameworks and would respect traditional constraints on the extraterritorial reach of U.S. regulation. As one U.S. Senator remarked on the floor of the Senate:

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[21] 76 FED. REG. 68846, 68950; 77 FED. REG. ___, ___ (emphasis added).

> For consistency's sake, I would expect that, apart from the U.S. marketing restrictions, [the Non-U.S. Fund Exemption] will be applied by the regulators in conformity with and incorporating the Federal Reserve's current precedents, rulings, positions, and practices under sections 4(c)(9) and 4(c)(13) of the Bank Holding Company Act so as to provide greater certainty and utilize the established legal framework for funds operated by bank holding companies outside of the United States.[22]

The approach taken in the Proposed Regulations presents very real practical problems as well. Under the Proposed Regulations, any entity located anywhere in the world is potentially a "covered fund." To ensure compliance with the Volcker Rule, the Singaporean Banks (and all of their affiliates) would have to engage in a hypothetical exercise of determining how a fund would be regulated if it happened to be located in the U.S., or if its shares were offered to U.S. residents. For example, before the Singaporean home office could invest in an entity located in Singapore, the home office would be required to determine:

- First, whether the entity would be considered an "investment company" under the U.S. Investment Company Act of 1940 if it happened to be located in the U.S.; and if so
- Second, what exemptions might apply if it happened to be located in the U.S.[23]

Foreign banking organizations are simply not equipped to engage in this type of hypothetical application of U.S. law to foreign funds. Moreover, many of the exemptions from the Investment Company Act are intertwined with concepts of U.S. law that are difficult to transpose to foreign funds, such as the exemptions applicable to bank collective funds, nonprofits, fiduciaries, and small loan companies. And, of course, it is entirely possible that if the foreign fund were to have its shares offered in the U.S., the fund might proceed to register as an investment company. Thus, one would find it very difficult to determine with any degree of certainty whether a foreign fund would be a covered fund if it were located in the U.S.[24]

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[22] 156 Cong. Rec. S5889-S5890 (daily ed. July 15, 2010) (statement of Sen. Hagan).

[23] In addition, unless the Agencies clarify the scope of the Non-U.S. Funds Exemption, as part of this hypothetical exercise, the Singaporean home office would be required to determine whether any shares in the entity have ever been offered or sold to any U.S. resident.

[24] It is equally unclear how subsection (iii) would treat a foreign fund that is offered to the public and fully regulated under home country law, but is not itself a registered investment company under the Investment Company Act of 1940 because its shares are not offered for sale in the U.S. For example, Subsection (iii) would seem to treat a Singapore registered mutual fund as a "covered fund" subject to restrictions under the Volcker Rule, thus prohibiting a Singaporean bank from sponsoring such a fund.

Attempting to restrict a foreign bank's sponsorship of or investment in a foreign fund does little to advance the policies underlying the Volcker Rule, is inconsistent with existing concepts on the extraterritorial boundaries of U.S. regulation, and poses very serious practical problems for foreign banking organizations. ***Thus, we urge the Agencies to amend the Proposed Regulations either to remove Section 10(b)(1)(iii), or to make it clear that this provision does not apply to foreign banks and their affiliates operating abroad.***

Compliance. The Proposed Regulations' covered funds provisions also impose compliance obligations and, as in the case of the proprietary trading provisions, it is unclear whether the compliance obligations apply to foreign banking organizations that are operating outside the U.S. and therefore relying on the Non-U.S. Funds Exemption. ***For the reasons set forth in our discussion above regarding proprietary trading, we urge the Agencies to clarify that the compliance obligations do not apply to any banking entity that engages in covered fund activities solely outside the United States and thus exempted under the Non-U.S. Funds Exemption of Section 13(c).***

Super 23A

The Volcker Rule establishes special restrictions on transactions between a private equity fund or hedge fund and any banking entity that serves as an investment manager, investment adviser, organizer, or sponsor to that fund (or transactions between the fund and any affiliate of such banking entity) – *regardless* of whether the banking entity has invested in the fund. The Volcker Rule flatly bars any transaction between such a fund and the banking entity (or its affiliate) if such a transaction would be considered a "covered transaction" within the meaning of Section 23A of the Federal Reserve Act,[25] with the banking entity (or its affiliate) treated as if it were a "bank" and the fund treated as if it were a nonbank "affiliate." Generally speaking, this provision effectively bars the ability of the banking entity (or its affiliate) to purchase assets from, extend credit to, issue a guarantee on behalf of, or invest in, the private equity fund or hedge fund. This provision of the Volcker Rule is commonly referred to as "Super 23A."

To the extent that Super 23A prohibits a banking entity from investing in a fund that it advises, Super 23A is, on its face, inconsistent with other provisions of the Volcker Rule that expressly permit a banking entity to invest in such a fund. In particular, it is inconsistent with certain

[25] 12 U.S.C. § 371c.

provisions that permit a banking entity to organize and offer, and thereafter maintain a *de minimis* investment in, a fund established for its bona fide trust, fiduciary, and investment advisory services. Likewise, Super 23A is inconsistent with the Non-U.S. Fund Exemption, which expressly permits a foreign banking organization both to sponsor and invest in a private equity fund or hedge fund outside the U.S.

The inconsistency between Super 23A and the "organized and offered" exemption was resolved in the Proposed Regulations. Under Section 16(a)(2) of the Proposed Regulations, the Agencies clarified that investments made under the "organized and offered" exception were excluded from the reach of Super 23A:

> This clarification is proposed in order to remove any ambiguity regarding whether the section prohibits a banking entity from acquiring or retaining an interest in securities issued by a related covered fund in accordance with the other provisions of the rule, since the purchase of securities of a related covered fund would be a covered transaction as defined by section 23A of the [Federal Reserve] Act. There is no evidence that Congress intended [Super 23A] to override the other provisions of [the Volcker Rule] with regard to the acquisition or retention of ownership interests specifically permitted by the section. Moreover, a contrary reading would make these more specific sections that permit covered transactions between a banking entity and a covered fund mere surplusage.

Yet, the Agencies did not resolve the inherent conflict between Super 23A and the Non-U.S. Funds Exemption. The Non-U.S. Funds Exemption expressly *permits* a foreign banking organization to both sponsor and invest in a covered fund, subject to the conditions of the Non-U.S. Funds Exemption. Super 23A specifically *prohibits* a banking entity from both sponsoring and investing in a covered fund.

We believe that the only plausible conclusion is that Congress did not intend that Super 23A should apply to foreign banking organizations operating outside the U.S. The application of Super 23A to foreign banking organizations' non-U.S. funds activities simply cannot be reconciled with the authority granted under the Non-U.S. Funds Exemption.

Moreover, applying Super 23A to the overseas funds activities would amount to U.S. law mandating that a foreign banking organization either cease certain transactions with a non-U.S. fund or cease acting as its adviser, manager, or sponsor. In either case, U.S. law would be superseding the home country authority and interfering with the role of the home country regulator to regulate the fund-related activities of its home country banks occurring outside the

U.S. – even within the home country.[26] If applied to such overseas funds, Super 23A would be highly disruptive to existing arrangements, as existing investments and loans would need to be unwound and/or advisory and management relationships terminated.

Thus, as in the case of the "organized and offered" exemption, we urge the Agencies to recognize that application of Super 23A to non-U.S. funds is flatly inconsistent with the Non-U.S. Funds Exemption and equally inconsistent with existing concepts of limited U.S. regulatory jurisdiction, and therefore to exempt a foreign banking organization's non-U.S. fund activities from the scope of Super 23A.

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DBS Bank Ltd, Oversea-Chinese Banking Corporation, United Overseas Bank Limited, and the Association of Banks in Singapore appreciate the opportunity afforded by the Agencies to comment on the Proposed Regulations, and thank the Agencies for their consideration.

If you have any questions, please do not hesitate to contact me at (704) 348-5363.

Sincerely,

Scott A. Cammarn

[26] Regulation of related party transactions historically has been subject to home country supervisory standards. For instance, neither Section 23A, Section 23B, restrictions on loans to insiders (*i.e.*, Regulation O), nor lending limits apply to non-U.S. operations of a foreign banking organization.