



January 30, 2012

Via Electronic Mail

Office of the Comptroller of the Currency
U.S. Department of the Treasury
Docket No. OCC-2011-0014
250 E Street, SW
Washington, DC 20219

Board of Governors of the Federal Reserve System
Docket No. R-1432; RIN 7100 AD 82
20th and C Streets, NW
Washington, DC 20551

Federal Deposit Insurance Corporation
RIN 3064-AD85
550 17th Street, NW
Washington, DC 20429-0002

Securities and Exchange Commission
RIN 3235-AL07
100 F Street, NE
Washington, DC 20549

<http://www.regulations.gov>

Re: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Dear Sirs and Madams:

Union Bank, N.A. (“Union Bank” or the “Bank”) submits this comment letter in response to the above-cited proposed rule regarding Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds issued by the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Board”), the Federal Deposit Insurance Corporation, and the

Securities and Exchange Commission (collectively, the “Agencies”).¹ The proposed rule (referred to herein as the “Proposed Rule” or the “Rule”) implements Section 619 (the “Volcker Rule”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”), which itself adds a new Section 13 to the Bank Holding Company Act (“BHC Act”).² The Agencies have requested public comments on the Rule.

Although the Agencies invite comments on all aspects of the Proposed Rule, this letter is intended principally to address a critical issue related to the detrimental effect the Rule would have on the market for low-income housing tax credit (“LIHTC”) investments, and on the ability of banks to satisfy their obligations under the Community Reinvestment Act (“CRA”), if the Rule is adopted in its proposed form, in particular in response to Questions 276-279 and 316 in the Supplementary Information accompanying the Proposed Rule.

The Federal government’s LIHTC program is a highly successful engine for the generation of housing units dedicated to low- and moderate-income families. At relatively modest cost to the Treasury through foregone tax revenues, the LIHTC program has harnessed the private sector housing and finance industries to produce millions of units of low-income housing. Banks and bank holding companies play a critical role in the LIHTC market, as investors in and syndicators of LIHTC funds. In particular, Union Bank, with its wholly-owned subsidiary, UBOC Community Development Corporation (the “CDC”), has for many years been a leader in originating LIHTC investments for its own proprietary portfolio and for syndication to third parties. In recognition of the vital function performed by Union Bank and its peers in this regard, the Proposed Rule contains an express exemption for “public welfare” investments by banking entities, which clearly would include LIHTC transactions. The Bank commends the Agencies for appropriately incorporating the statutory exemption for “public welfare” investments in the Proposed Rule and for further specifying that the exemption covers the act of sponsorship of, as well as investment in, such “public welfare” funds. For the reasons articulated in our comment letter to the Financial Stability Oversight Counsel dated November 8, 2010, both public policy and the structure of the Act support the view that Congress did not intend to preclude banks and their affiliates from continuing to perform their historic roles in packaging LIHTC investments for the market.

Notwithstanding the express exemption in the statute and Proposed Rule, however, the language of the Proposed Rule contains restrictions that, if not revised prior to adoption of the final Rule, would threaten to significantly undermine bank participation in the LIHTC market. Specifically, the Proposed Rule contains an overbroad implementation of the Volcker Rule’s

¹ See 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011).

² Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1624 (2010) (codified at 12 U.S.C. § 1851).

“Super-23A” prohibition against “covered transactions” involving a hedge fund or private equity fund advised or sponsored by a bank or its affiliates.³ While the Proposed Rule appropriately exempts both investment in and sponsorship of LIHTC investments, it does not yet extend that exemption to the ability of banking entities to guarantee certain obligations of the financing vehicles that are used to provide assurance to LIHTC investors that the investment has been properly structured to enable the investor to receive the tax benefits on which the investments are sold. By treating such guarantees as “covered transactions” pursuant to the prohibitions set forth in section __.16(a) of the Rule, the Agencies would effectively preclude banks and their affiliates from providing such guarantees in transactions in which the bank or its affiliate acts as sponsor. Failure of the Agencies to address this oversight would significantly damage this important segment of the market.

Regional bank investors rely on the Bank’s expert knowledge in the product, ongoing portfolio management and accounting services. Given their investment volume, it does not make economic sense for these investors to establish a fully-functional structure internally to manage the assets. Their reliance on the Bank’s guarantee is the most efficient way to access public welfare investment in the market and, hence, the most effective way to utilize bank capital. Corporate and large bank investors are sensitive to return to shareholder value, which is enhanced by the favorable accounting treatment available for guaranteed investments. These investors tend to leverage the bank guarantor’s knowledge, experience, and developer relationships to access this product. Without bank guarantees, this segment of investors will likely exit the market. In recent years, bank guarantors have represented over 80% of the guaranteed LIHTC investment volume in the industry. The lack of a guaranteed market segment will result in material pricing adjustments in the industry. Consequently, there likely would be increased reliance on government funding as opposed to private equity in order to continue the viability of the affordable housing program.

Accordingly, as explained below, we believe it is essential that the Agencies exercise the interpretive authority granted to them by Congress to implement the exemption for these guarantees contained in the Volcker Rule itself in a manner that is consistent with past practice in the LIHTC industry under interpretations previously promulgated by the Board in Regulation W under Federal Reserve Act (the “FRA”) Section 23A. Should the Agencies decide not to make such revisions to the Rule, we believe that the Rule should be clarified to apply only to new guarantees that are entered into after the effectiveness of the final Rule.

Background

³ *Id.* at § 619 (inserting section 13(f) of the BHC Act).

Union Bank and the CDC operate an LIHTC syndication program (the “Program”) under which the CDC organizes and sells to third parties interests in special purpose vehicles that provide financing for the development of affordable housing (the “Transactions”) and provide Federal tax credits to the investors (each, an “Investor”). Specifically, the Program involves the creation of financing vehicles (each, a “Financing Vehicle”) that are organized in limited liability company (“LLC”) or limited liability partnership (“LLP”) form and that acquire interests in lower tier affordable housing project operating companies that also take an LLC or LLP corporate form (each, an “Operating Company”). The Bank or the CDC serves as the managing member or non-member manager of the Financing Vehicle if structured as an LLC, or as general partner if structured as an LLP.⁴ In either case, the Bank or the CDC undertakes a variety of structuring, management and servicing functions in connection with the Transactions, and controls the operations of the Financing Vehicle, either through an LLC agreement that effectively gives the manager complete and exclusive discretion to manage and operate the business of the LLC, or as the general partner of an LLP.

Interests in a Financing Vehicle (the “Interests”) are privately placed with “qualified investors” in private placements exempt from registration under the Securities Act of 1933. The Financing Vehicles also are exempt from registration under the Investment Company Act of 1940, generally pursuant to Section 3(c)(1) or 3(c)(7) of that Act. In order to facilitate the sale of Interests, the Bank in some instances provides a guarantee (“Guarantee”) of the after-tax return (including both principal and return on investment) of the Interests to the Investor. The Bank’s Guarantee protects the Investor against the failure of the investments to accrue the projected tax credits, which credits form the basis for the entirety of the return of principal as well as return on investment in such Transactions. Similarly, the Bank’s Guarantee protects the Investor against liability incurred by the Investor as a result of its status as an investor in the Financing Vehicle. While each of these commitments is styled as a “guarantee” of the direct obligations of the Financing Vehicle itself, those obligations are in reality much more akin to direct commitments of the Bank itself – i.e., that through the CDC it has structured an investment that (i) will produce the tax effects that form the basis for the investment⁵ and (ii) will not create ancillary liability for the Investor.

⁴ Neither the Bank nor the CDC act as the managing member or general partner of the operating level LLCs or LLPs, which are controlled by the developers of the low-income housing properties. Historically, the Bank has had only one Financing Vehicle structured as an LLP while all of its other Financing Vehicles have been structured as LLCs.

⁵ The guarantee of the return of principal and interest on the Interests also is coupled with a put option that, in specified circumstances affecting the Interest return, would enable the Investor to put the Interest to the Bank as guarantor. Since the repurchase of the Interests is just another way to give effect to the guarantee, it should be analyzed the same way as the guarantee.

Discussion

1. Guarantees for LIHTC Transactions Should Not be Considered “Covered Transactions” for Purposes of the Rule.

The Proposed Rule prohibits a “covered banking entity” from engaging in proprietary trading and maintaining certain relationships with covered funds. Specifically, Section 10 of the Rule provides as follows:

- (a) Except as otherwise provided in this subpart, a covered banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.⁶

The Rule provides certain exceptions to the foregoing prohibitions, including a list of “permitted activities.” One of the activities expressly permitted under the Proposed Rule is that

[t]he prohibition contained in § __.10(a) does not apply with respect to acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund by a covered banking entity or an affiliate or subsidiary thereof:

- ...
(2) That is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24).⁷

We refer to these transactions herein as “public welfare investments.” The OCC has determined that national bank investments in entities such as the Financing Vehicles that invest in affordable housing projects approved for low-income housing tax credits under Internal Revenue Code Section 42 are public welfare investments permitted under 12 U.S.C. Section 24(Eleventh).⁸

⁶ 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 44, 12 C.F.R. pt. 248, 12 C.F.R. pt. 351, 17 C.F.R. pt. 255) § 10(a).

⁷ 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 44, 12 C.F.R. pt. 248, 12 C.F.R. pt. 351, 17 C.F.R. pt. 255) § 13(a)(2).

⁸ See, e.g., OCC, *Activities Permissible for a National Bank*, Cumulative (April 2009), at p. 92, citing Letter from Janice A. Booker, Director, Community Development Division, to Yasumasa Gomi, Chairman of the Board, President, and CEO, The Bank of California (Dec. 22, 1992); 12 C.F.R. §§ 24.4(b)(limited liability requirement); 24.6(a)(4)(LIHTC projects as an example of qualifying public welfare investments).

As an initial point, it is clear that Congress intended for the Volcker Rule to exempt syndication of LIHTC investments from any restrictions contained therein. Given the critical role that institutions like the Bank play in promoting financing for this form of low-income housing stock, it is hard to imagine that Congress, having gone out of its way to provide a public welfare investment exemption, intended to undercut the ability of banks to continue to syndicate those very investments without any specific discussion or public policy justification. Consequently, we support the reference in section __.13(a) of the Proposed Rule to permitting covered banking entities to sponsor public welfare investments and thereby facilitate syndication of these socially beneficial products.⁹

In addition to the above-referenced limitations on investments in and sponsorship of covered funds, the Proposed Rule also prohibits a banking entity that acts as investment manager, investment adviser, commodity trading advisor or sponsor to a covered fund from entering into transactions with the fund that would be “covered transactions” for purposes of FRA Section 23A, a restriction that has been referred to as “Super 23A.” Specifically, Section __.16(a)(1) of the Proposed Rule provides that:

no covered banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § __.11, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in [FRA Section 23A], as if such covered banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.¹⁰

Accordingly, the Bank is prohibited from entering into covered transactions with the Financing Vehicles that it or its affiliates sponsor or advise. FRA Section 23A and the Board’s Regulation W thereunder define a “covered transaction” with respect to an affiliate to include, among other things, the issuance of a guarantee on behalf of an affiliate or the purchase of affiliate securities.¹¹ As with the basic question of the scope of the Volcker Rule’s sponsorship limitations, it should not be presumed that Congress, having adopted an express exemption for LIHTC investments, intended to put an end to this critical element of many LIHTC transactions

⁹ See 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 44, 12 C.F.R. pt. 248, 12 C.F.R. pt. 351, 17 C.F.R. pt. 255) § 13(a).

¹⁰ 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 44, 12 C.F.R. pt. 248, 12 C.F.R. pt. 351, 17 C.F.R. pt. 255) § 16(a)(1); see 12 U.S.C. § 371c.

¹¹ See 12 U.S.C. § 371c(b)(7)(B), (E); 12 C.F.R. § 223.3(h)(2), (5).

without any indication that its public welfare exemption was so limited. Indeed, the structure of the Volcker Rule and the historic treatment of LIHTC guarantees by the Agencies both support this view.

First, it must be noted that Congress specifically identified in Section 13(d)(1) of the Volcker Rule which of the exempt investment types would be subject to Section 13(f)'s Super-23A provisions. Subsection (G), the exemption for covered fund sponsorship in connection with bona fide trust, fiduciary or investment advisory services, contains the condition that banking entities relying on such exemption must comply with Section 13(f). Subsection (E), the exemption for public welfare investments, contains no such cross-reference. If Section 13(f) were read as applying to all of the exempt investment types, it would render the cross-reference at Subsection (G) superfluous. A fundamental tenet of statutory construction is that a statute must be read so as to give effect to each of its clauses.¹² Accordingly, the proper reading of Section 13(f) is that it applies to the covered funds referenced in Section 13(d)(1) only where there is an express cross-reference to Section 13(f). To the extent that the Agencies believe that Section 13(f) should apply to any other fund covered by Section 13(d)(1), they clearly have the authority to do so under Section 13(b)(2), however, they should do so only by express exercise of that authority and not by an erroneous application of Section 13(f) that ignores the Congress' decision in Section 13(d)(1) not to insert a cross-reference to the Super-23A limits with respect to public welfare investments. Moreover, in exercising such authority, the Agencies should not extend Section 13(f) to public welfare investments in light of the public policy goals of the public welfare exemption and the historic exemption of guarantees of LIHTC investments from Section 23A discussed below.

Guarantees issued on behalf of the Financing Vehicles are not "covered transactions" today under FRA Section 23A because the Financing Vehicles are not "affiliates" within the meaning of the term as implemented by the Board under Regulation W. Regulation W provides that an "affiliate" with respect to a member bank "does not include . . . any company that is a subsidiary of the member bank."¹³ "Subsidiary" is defined "with respect to a specified company" as "a company that is controlled by the specified company."¹⁴ As explained above, whether it is through an LLC agreement that effectively gives the manager complete and

¹² See 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:6 (7th ed., 2007).

¹³ See 12 C.F.R. § 223.2(b)(1). Certain types of subsidiaries, including financial subsidiaries, are not eligible for this exemption. A "financial subsidiary" is a subsidiary of the Bank that engages in any activity in which a national bank is not permitted to engage directly and that is not a subsidiary that the Bank is expressly authorized by Federal statute to own or control. See *Id.* § 223.3(p). The Bank is expressly authorized by 12 U.S.C. § 24(Eleventh) to own the CDC as an investment "primarily designed to promote public welfare." Accordingly, the CDC should not be considered a financial subsidiary.

¹⁴ See 12 C.F.R. § 223.3(ii).

exclusive discretion to manage and operate the business of the LLC, or through acting as general partner of an LLP, the CDC controls the Financing Vehicles in these Transactions, and therefore the Financing Vehicles are “subsidiaries” within the meaning of Regulation W.¹⁵ This line of analysis was confirmed by the Board in the Supplementary Information accompanying its adoption of Regulation W. There the Board discussed the definition of “affiliate” in Regulation W as follows:

Several commenters expressed concern that this interpretation of section 23A would eliminate bank funding of legitimate commercial and community development transactions. This concern of commenters is unwarranted. Although partnerships for which a member bank serves as a general partner are on the section 223.2(a) list of entities that generally are affiliates, such partnerships typically will be excluded from the definition of affiliate in section 223.2(b) as subsidiaries of their parent bank.¹⁶

Thus, in directly analogous circumstances, the Board concluded that such community development vehicles should not be treated as “affiliates” because the bank “controls” the investment vehicle and therefore, guarantees of such vehicles are permissible. Presumably Congress was aware of this accommodation of the guarantee structure used to promote public welfare investments when it enacted the Dodd-Frank Act, but chose not to insert a cross-reference to the Super-23A provision in Section 13(d)(1)(E). Accordingly, the Agencies should not take action to reverse their historic positions in the face of a statute that does not compel them to do so.

Finally, it should be noted that permitting Guarantees would not create the types of risk the Proposed Rule was intended to prevent. A national bank’s public welfare investments are subject to percentage of capital and surplus restrictions as well as comprehensive OCC oversight. Specifically, a national bank’s aggregate public welfare investments are limited by statute to 5 percent of the bank’s capital and surplus, unless the bank is at least adequately capitalized and the OCC determines, by written approval of a written request by the bank to exceed the 5 percent limit, that a higher amount of investments will not pose a significant risk to the deposit insurance fund. In no event, however, may a bank’s aggregate outstanding investments exceed 15 percent of its capital and surplus.¹⁷ Further, a national bank’s public welfare investments are subject to

¹⁵ Id. at § 223.3(g)(i),(iii). In making a “control” determination under Regulation Y, the FRB will presume that a company controls another if the first company enters into an agreement such as a management contract pursuant to which it “exercises significant influence over the general management or overall operations” of the other company. 12 C.F.R. § 225.31(d)(2)(i).

¹⁶ See 67 Fed. Reg. 76,566; see 12 C.F.R. § 223.2(b)(1).

¹⁷ See 12 U.S.C. Section 24(Eleventh); 12 C.F.R. § 24.4

OCC notice or prior approval requirements, OCC examination, and remedial action in the event that the OCC finds that a public welfare investment is inconsistent with the safe and sound operation of the bank, or poses a significant risk to a Federal deposit insurance fund.¹⁸ Through acting as sponsor, a bank can control a fund's investments and risk, thus enabling it to limit the exposure it has in providing a Guarantee. That exposure is primarily the amount of the guaranteed return, and the risk to that guaranteed return is limited by the work of the Bank, through its CDC, in properly structuring the Transactions so that the tax benefits accrue as expected. Through careful underwriting and tax planning, the Bank therefore is able to ensure that its exposure in these Transactions is minimal. To underscore this point, the Bank has never experienced a claim under its Guarantees.

In light of the foregoing, it follows that Congress would not have limited, without some clearer statement of intent, the ability of national banks to provide Guarantees that are an important part of the community development financing industry that Congress specifically excepted from the Proposed Rule's prohibitions. Therefore, we believe that the Agencies should specifically address Guarantees¹⁹ as being exempt from the Proposed Rule.

2. The Proposed Rule Should Not Apply to Guarantees Already in Effect.

If, notwithstanding the statutory and public policy justifications above, the Agencies determine that Guarantees are within the Proposed Rule's prohibition on covered transactions, we urge the Agencies to clarify that the Rule does not apply retroactively to existing Guarantees. This interpretation is supported by the text of Section 13(f) of the BHC Act as well as previous guidance from the Board in analogous circumstances. The restriction in the statute provides that "no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a hedge fund or private equity fund, or that organizes and offers a hedge fund or private equity fund . . . may enter into a transaction with the fund."²⁰ The Proposed Rule implements the statutory language nearly verbatim. A natural reading of the provision indicates that it is prospective in nature.

This reading is bolstered by longstanding Board interpretations of Section 23A. For example, under Regulation W, a bank engages in a credit transaction with an affiliate for purposes of FRA Section 23A at the time during the day that "[t]he member bank becomes

¹⁸ *Id.* at §§ 24.5, 24.7.

¹⁹ As noted above, the same analysis applies to the put options associated with the Guarantees. Although the repurchase of the Interests would be considered the purchase of a security of an affiliate, if the Investment Vehicle were treated as an affiliate for the purpose, the Investment Vehicles should continue to be treated as not affiliates in accordance with the discussion in the text.

²⁰ 12 U.S.C. 1851(f)(1) (emphasis added).

legally obligated to make an extension of credit, issue a guarantee, acceptance, or letter of credit on behalf of, or confirm a letter of credit issued by, an affiliate.”²¹ In adopting Regulation W, the Board commented that “[t]his timing rule also clarified that a covered transaction occurs at the moment that the member bank executes a legally valid, binding, and enforceable credit agreement or guarantee.”²² Therefore, the bank “enters into” a transaction with a fund at the time it initially executes a guarantee and undertakes a contractual obligation that creates an exposure covered by the statute.²³ A banking entity that has an outstanding guarantee obligation at the time the final Rule takes effect does not “enter into” a new transaction even if there is a draw on the Guarantee. Payment on an existing Guarantee then, is merely the performance by the Bank of an existing obligation that pre-dated the Rule’s effectiveness.

As contractual obligations that were fundamental to the underlying Transactions, the Guarantees generally are not assignable without consent of the Investor. Thus, if the Rule is determined to apply to existing Guarantees, the Bank and other banking entities with similar Guarantees in place, run the risk of non-compliance with the Rule for having engaged in transactions that historically were encouraged by Congress and the Agencies and were designed to promote the public welfare and satisfy Bank CRA obligations.²⁴ Congress could not have intended for the Act to punish banks for promoting its policy objectives. Accordingly, if the Agencies do not confirm the exemption requested in section 1 above, we believe that it would be essential that the Agencies clarify that Section 13(f) does not affect Guarantees in place prior to the effectiveness of the Rule.

Conclusion

If the Agencies fail to give effect to the foregoing interpretations, banks would no longer be able to act as a sponsor to Financing Vehicles that carry a guaranteed return, an essential aspect of an important segment of the LIHTC market at a time when public funding for low-income housing remains increasingly constrained. Neither the Dodd-Frank Act nor the public policy supporting it require such a result. We therefore request that the Agencies clarify that Guarantees will not be considered subject to the Super-23A provision of the Proposed Rule. Congress created an explicit exemption from the Volcker Rule for public welfare investments and did not choose to apply the Super-23A limitations to those investments as it expressly did for certain other exempt investments. Accordingly, nothing in the statute requires the expansion of

²¹ 12 C.F.R. § 223.21(b)(1)(i).

²² 67 Fed. Reg. 76,560, 76579 (Dec. 12, 2002).

²³ Similarly, the associated put option is “entered” at the time of the original transaction, not when it is exercised (if at all) years later.

²⁴ See CRA Comment __.12(t)-4 (LIHTC investments are “qualified investments” for CRA purposes).

the Super-23A provision as provided in the Proposed Rule. Since the Guarantees historically have been exempt from Section 23A, the Agencies should not reverse this existing regime in the absence of clear direction from Congress to that effect. Also, the Guarantees and the LIHTC transactions that they facilitate do not give rise to the types of risk that the Volcker Rule sought to minimize since they are subject to existing regulatory limits and oversight and are carefully structured to minimize banks' exposure. For these reasons, Guarantees should be excluded from the meaning of "covered transactions" so as to permit the LIHTC market to continue to operate as it has historically. In any event, the statutory language of the Volcker Rule permits only a forward-looking application of these standards. We therefore respectfully urge the Agencies to follow the recommendations set out in this letter and implement the Proposed Rule in a manner that is consistent with the policy objectives set forth by Congress and the continuation of role of the banking industry in promoting low-income housing.

Sincerely,


Annette Billingsley
Senior Vice President
Community Development Finance Group Head
Union Bank, N.A.

cc: David E. Teitelbaum, Esq.