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September 25, 2013

Mr. Robert de V. Frierson
Secretary
Board of Governors of the
Federal Reserve
20th Street and Constitution Avenue
Washington, DC 20551

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Office of the Comptroller of the
Currency
250 E Street, SW
Washington, DC 20219

Ms. Melissa Jurgens
Secretary
Commodities Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds. Docket ID OCC-2011-0014, RIN 1557-AD44; Docket No. R-1432, RIN 7100 AD 82; RIN 3064-AD85; Release No. 34, RIN 3235-AL07; File Number S7-41-11.

Dear Mr. de V. Freierson, Mr. Feldman, Ms. Murphy, Ms. Jurgens and To Whom It May Concern:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation representing the interests of over three million companies of every size, sector and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for the capital markets to fully function in a 21st century economy. The CCMC has commented

extensively[1] to the Board of Governors of the Federal Reserve ("Federal Reserve"), Federal Deposit Insurance Corporation ("FDIC"), Securities and Exchange Commission ("SEC"), Office of the Comptroller of the Currency ("OCC") (also collectively as the "regulators"), and also to the Financial Stability Oversight Council ("FSOC") on the proposed ***Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds*** (the "Volcker Rule Proposal").

Although the comment period on the Volcker Rule Proposal closed on February 13, 2012, the CCMC respectfully requests that the below comments be considered as work continues on final Volcker Rule regulations. Our comments reflect concerns about developments that have arisen since the comment period ended on the Volcker Rule. These developments were not foreseeable prior to this deadline and they materially enhance the scope and force of concerns the CCMC previously raised about the Volcker Rule Proposal.

One such concern that we previously raised is that the Volcker Rule Proposal includes insufficient analysis of the impacts that it could have on companies to which it *will* apply, companies to which it *could* apply and, by extension, on the markets they serve. Two recent developments described below have created additional concerns about the substance of the Volcker Rule Proposal and the adequacy of the rulemaking process in that regard.

First, the Federal Reserve finalized its Proposed Supplemental Rulemaking on the definition of "activities that are financial in nature" ("predominantly engaged test") for purposes of designating non-banks as "Systemically Important Financial Institutions" ("SIFI's"). The rules implementing the predominantly engaged test were finalized on April 3, 2013—almost 14 months after the comment period on the Volcker Rule Proposal closed. Until the predominantly engaged test was finalized it was not possible to understand what non-bank financial companies are eligible for designation and

[1] *See* comment letters of October 11, 2011, November 17, 2011, December 15, 2011, January 17, 2012, February 13, 2012, February 14, 2012, April 16, 2012 and November 16, 2012 from the U.S. Chamber of Commerce to the regulators and FSOC.

potentially subject to the ambit of the Volcker Rule. One collateral impact of the predominantly engaged test is the expansion of the potential universe of non-banks to which the Volcker Rule could apply far beyond the limits envisioned by Congress and by commenters during the original comment period on the Volcker Rule Proposal. We believe that the predominantly engaged test magnifies the scope of Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which contains the statutory requirements for the Volcker Rule, to a broader array of non-bank financial companies that had no reason to believe that they could be subject to the Volcker Rule and, accordingly, had insufficient notice and opportunity to comment on the Volcker Rule Proposal during the original comment period.

Second, the FSOC has designated the first non-banks as SIFIs. When the Volcker Rule Proposal was issued, the regulators specifically deferred consideration of how Section 619 of the Dodd-Frank Act would apply to designated non-banks because, at the time, the FSOC had not yet finalized the designation criteria, nor had it designated any non-banks.[2] In the absence of a proposal on how the regulators will apply Section 619 to designated non-banks, these companies, as well as those that could be designated in the future, have no information on the requirements that the regulators will impose and have not been given an opportunity to comment on the record.

Discussion

Section 619 of the Dodd-Frank Act containing the so-called Volcker Rule seeks to ban covered bank entities from engaging in proprietary trading.[3] Under Section 619 (a)(2), non-bank financial companies designated as SIFIs are to be subject to a modified version of the Volcker Rule that would not include an outright ban on proprietary

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[2] *See* Volcker Rule Proposal, fn 4, pp. 66847-66848.

[3] Section 619 of the Dodd-Frank Act defines proprietary trading as: The term 'proprietary trading', when used with respect to a banking entity or nonbank financial company supervised by the Board, means engaging as a principal for the trading account of the banking entity or nonbank financial company supervised by the Board in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract, or any other security or financial instrument that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule as provided in subsection (b)(2), determine.

trading, but that would impose "additional capital requirements for and additional quantitative limits" on proprietary trading.[4] In passing the Dodd-Frank Act, Congress explicitly sought to limit the scope of businesses that could be considered non-bank financial companies and potentially subject to the SIFI designation process and, by extension, the Volcker Rule requirements contained in Section 619 (a) (2)[5].

To this end, Senator David Vitter—a member of the Senate Banking Committee— and Senator Mark Pryor successfully included a bipartisan amendment ("the Amendment") in the Dodd-Frank Act creating the predominantly engaged test to limit the scope of businesses that could be considered for SIFI designation. The Amendment took a "belt-and-suspenders" approach to limit clearly and unambiguously the power of financial regulators to designate non-bank companies as SIFIs and to ensure that they would "leave manufacturing companies, retailers, and other non-financial companies alone."[6]

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[4] When issuing the Volcker Rule Proposal, the agencies acknowledged the different treatment that designated non-banks are to receive pursuant to Section 619. "Section 13 of the BHC Act does not prohibit a nonbank financial company supervised by the Board from engaging in proprietary trading, or from having the types of ownership interests in or relationships with a covered fund that a banking entity is prohibited or restricted from having under section 13 of the BHC Act. However, section 13 of the BHC Act provides for the Board or other appropriate Agency to impose additional capital charges, quantitative limits, or other restrictions on a nonbank financial company supervised by the Board or their subsidiaries and affiliates that are engaged in such activities or maintain such relationships." Volcker Rule Proposal, p. 68849.

[5] NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD—Any nonbank financial company supervised by the Board that engages in proprietary trading or takes or retains any equity, partnership, or other ownership interest in or sponsors a hedge fund or a private equity fund shall be subject, by rule, as provided in subsection (b)(2), to additional capital requirements for and additional quantitative limits with regards to such proprietary trading and taking or retaining any equity, partnership, or other ownership interest in or sponsorship of a hedge fund or a private equity fund, except that permitted activities as described in subsection (d) shall not be subject to the additional capital and additional quantitative limits except as provided in subsection (d)(3), as if the nonbank financial company supervised by the Board were a banking entity.

[6] Press Release, Senator Mark Pryor, Pryor Strengthens Financial Protections for Consumers and Small Businesses (May 21, 2010)(available at http://pryor.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=a6aeda38-103d-491e-8d24-930837c25949&ContentType_id=bc7e67ca-fd50-428e-8894-0c7779e63f05&Group_id=c07c4eaf-f7e9-46ef-94d4-6037533cdee9&MonthDisplay=5&YearDisplay=2010).

The Amendment fulfilled its purpose by imposing both quantitative and qualitative limitations on the authority of the Federal Reserve to classify a company as a non-bank financial company "predominantly engaged in financial activities" such that the FSOC could consider designating it a SIFI under either section 113(a) or 113(b) of the Act. The Amendment quantitatively limited the Federal Reserve's authority by raising the "substantially engaged" in financial activities standard in the original Senate bill to the higher standard of "predominately engaged" in financial activities. And it deprived the Federal Reserve of discretion to set the height of this higher threshold by defining "predominantly engaged" to require that 85% of a non-bank company's revenues or assets arise from activities that are "financial in nature." Furthermore, the Amendment qualitatively precluded regulators from devising a broad, novel definition of "activities that are financial in nature" by expressly requiring that the Federal Reserve give this phrase the well-understood meaning "as defined in section 4(k) of the Bank Holding Company Act of 1956."[7]

The legislative intent to deny the Federal Reserve the authority to define—much less to broadly or creatively define—"activities that are financial in nature" to be in any way different from the activities permissible under section 4(k) and regulation Y is further illustrated by the Senate's handling of the Amendment. The Senate deleted from the Amendment's definition of "predominantly engaged" a clause granting the Federal Reserve the additional discretion to consider activities "incidental to a financial activity" as defined in section 4(k).

On April 10, 2012, the Federal Reserve issued a supplemental proposed rule "clarifying" its view that it may disregard the clear and unambiguous definition Congress provided in the Dodd-Frank Act for "activities that are financial in nature" under section 102(a)(6). The CCMC commented extensively on these proposals by the Federal Reserve and the asserted justifications for it in the context of the non-bank SIFI designation process.[8] We were dismayed when the Federal Reserve finalized this supplemental rule

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[7] 156 Cong. Rec. S4030 (daily ed. May 20, 2010)(statement of Senate Banking Committee Chairman Christopher J. Dodd).

[8] May 25, 2012 Comment letter of CCMC to the Federal Reserve Re: Supplemental Notice of Proposed Rulemaking Regarding Definition of "Predominantly Engaged in Financial Activities," RIN 7100-AD64; See also August 6, 2012 comment letter from the CCMC to the FDIC commenting on the supplementary proposal on the predominantly

to provide that as a matter of its discretion, not statutory command, it would relent on its broad view of its authority only in relation to transactions for commodities in which physical delivery is taken. More recently, we have come to further appreciate the serious impacts of the Federal Reserve's "clarification" of its authority as we have watched the opaque process used for designating the first non-banks as SIFIs.

These developments bear on concerns the CCMC has already expressed about the Volcker Rule Proposal. For instance, the CCMC previously voiced concern about the lack of coordination among regulators issuing proposed regulations to implement the Volcker Rule. The CCMC stated that the manner in which the proposals were released compromised the integrity of the rulemaking process by undermining the ability of the regulated community to provide informed comments.[9]

Now the unexpected expansion of the universe of non-bank companies that could be designated as SIFIs and the failure to publish the modified version(s) of the Volcker Rule that would apply to them further amplify these concerns. At the same time, non-bank financial companies that have already been designated are left wondering how the statutory language of the Volcker Rule and its call for additional capital requirements and quantitative limits may apply to them. They are all entitled to, and still waiting for, a proposal from the regulators and an opportunity to comment on the record. Of course the stakeholders in this matter extend beyond the companies that could be impacted directly. They also include those companies' [shareholders,] customers, counterparties, and fellow market participants.

Likewise, the unexpected expansion of the universe of non-bank entities that may be designated in light of the Board's "clarification" of its authority compounds serious issues and deficiencies the CCMC raised about the economic and cost benefit analysis

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engaged standard; the CCMC has also provide other commentary on the predominantly engaged standard and the Amendment in other proposed rulemakings under Title I and II of Dodd-Frank as well as in testimony before Congress.

[9] *See* October 11, 2011 letter from the CCMC to Treasury Secretary Timothy Geithner requesting that the Financial Stability Oversight Council use its authority to reconcile differences in the various Volcker Rule Proposals issued by the regulators; November 17, 2011 letter from CCMC to the regulators requesting a withdrawal and re-proposal of the Volcker Rule because of the failure of the CFTC to issue its proposed rule.

used by the regulators for their Volcker Rule Proposals.[10] We continue to believe that meaningful cost benefit analyses must still be undertaken and published for comment on the Volcker Rule Proposal. In addition, a separate cost benefit analysis must be published as part of any rulemaking proposing the additional capital requirements and quantitative limits that Section 619 requires for designated non-banks. In view of recent developments, this analysis must now include consideration of the non-bank companies that have already been designated as SIFIs, as well as the expansive universe of non-bank companies that could be designated SIFIs and their stakeholders.

The SIFI designations that have been made and the Board's final publication of a more expansive view of its authority to define activities that are "financial in nature" in relation to the SIFI designation process make much more tangible and far more grave concerns and deficiencies the CCMC already noted about the Volcker Rule Proposal. These developments increase the need for the regulators to perform more serious analysis of the Volcker Rule Proposal. They also argue in favor of additional information regarding the application of the rule to non-bank companies and a new opportunity for public comment in light of these unexpected and concrete twists in the regulatory roadmap. There is no other way to responsibly assess the Volcker Rule Proposal's potential impacts on non-bank SIFIs—which, according to the Federal Reserve, could extend far beyond finance, asset management, and insurance companies to include manufacturing and retail firms. It is now clear that such non-bank entities have been or could now be deemed SIFIs subject to having their essential, everyday business activities hampered by falling under Section 619's proprietary trading prohibition.

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[10] *See* December 15, 2011 letter from the CCMC to the regulators citing flaws with the cost benefit and economic analysis of the Volcker Rule Proposal, and requesting that the proposal be submitted for enhanced economic analysis under OIRA review, that it be considered an economically significant rulemaking and that the regulators coordinate these efforts under Executive Orders 13563 and 13579. This letter also requested that the cumulative impact of other initiatives, such as Basel III, be taken into account when determining the economic impacts of the Volcker Rule Proposal.

Conclusion

In light of recent developments related to the SIFI designation process, the CCMC believes it is necessary for the regulators to notify and solicit comments from the expanded universe of companies that could be subject to the Volcker Rule and to define what it will mean for those companies as well as for non-bank SIFIs that have already been designated. These regulators must carefully consider the impacts that Dodd-Frank Act Section 619 (a) (2) could have on these companies and their shareholders, customers, counterparties and fellow market participants. This is the only way to avoid unforeseen consequences in the application of any final Volcker Rule Proposal to businesses that are or could be designated as non-bank SIFIs. It is now clear that many non-bank companies that are not engaged in the types of activities that the Volcker Rule sought to address may still be subject to it. This may harm their legitimate business models and hobble productive entities that contribute to economic growth and job creation. We do not believe that Congress intended the Volcker Rule to be wielded so broadly or as such a blunt instrument.

The CCMC is ready to meet with you and discuss these issues in greater detail.

Sincerely,

Tom Quaadman