




Via Internet: www.regulations.gov

February 13, 2012

Office of the Comptroller of the Currency
250 E Street, S.W., Mail Stop 2-3
Washington, D.C. 20219

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds

Ladies and Gentlemen:

By letter dated January 19, 2012 ("January 19 Comment Letter"), Bank of Montreal, The Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada, and The Toronto-Dominion Bank provided comments to the Agencies[1] regarding the Notice of Proposed Rulemaking ("Proposed Rule") to implement section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), commonly referred to as the

[1] For purposes of this Supplemental Letter, "Agencies" refers to the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Federal Deposit Insurance Corporation ("FDIC"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC"). Although the CFTC separately issued its own version of the Proposed Rule for institutions for which it is the primary federal regulator, any differences that may exist in the CFTC version of the Proposed Rule are not material for the issues addressed in this Supplemental Letter.

"Volcker Rule." National Bank of Canada subscribes to the positions set forth in the January 19 Comment Letter and joins with its fellow organizations (together, the "Canadian Banks"; for purposes of this comment letter, this term also includes all affiliated "banking entities" of each, including particularly, the asset management and broker-dealer affiliates) in submitting this supplemental comment letter ("Supplemental Letter").

The Canadian Banks have more than C$555 billion dollars under management in a mix of Canadian regulated mutual funds ("Canadian Public Funds"), private pooled investment vehicles ("Canadian Private Funds") and segregated account mandates. Canadian Public Funds and Canadian Private Funds are collectively referred to herein as "Canadian Funds."

I. Recommendations

As more fully analyzed and discussed below, the Canadian Banks via this Supplemental Letter urge the Agencies to take the following steps in the final rule:

- First, we reiterate our request to exclude Canadian Public Funds (and other non-U.S. equivalents of registered investment companies) from the definition of "covered fund," which would also have the effect of excluding them from the extraterritorial effects of the so-called "Super 23A" prohibition of Proposed Rule Section _.16.

- Second, without regard to the outcome on the first request, provide an exemption from Super 23A for all Canadian Funds that a Canadian Bank may sponsor or hold an ownership interest in under Proposed Rule Section _.13(c), the exemption for fund-related activities of non-U.S. banks that are conducted solely outside of the United States ("foreign fund exemption"), which, by definition, have no U.S. investors and no nexus with the United States.

- Third, exempt Canadian Funds that a Canadian Bank may sponsor or hold an ownership interest in which are either not covered funds or are within the foreign fund exemption from the definition of "affiliate" – and, thus, from the definition of "banking entity."

II. Discussion

We are submitting this Supplemental Letter primarily to address the extraterritorial issues raised by Super 23A with respect to Canadian Funds.[2] The Super 23A prohibition would apply to any Canadian Fund for which a Canadian Bank acts as sponsor, investment adviser or investment manager or that a Canadian Bank organizes and offers pursuant to the exemption in Proposed Rule Section __.11. This Supplemental Letter refers to any fund

[2] Our January 19 Comment Letter made three substantive requests. First, we urged the Agencies to exclude Canadian Public Funds from the proposed definition of "covered fund." Second, we asked the Agencies to exclude from the definition of "resident of the United States," as used in the foreign fund exemption, Canadian "snowbirds" and others who are temporary U.S. residents. Third, we asked the Agencies to exclude all permissible funds from being treated as "affiliates" of banking entities.

advised, sponsored, managed or organized and offered by a Canadian Bank as an "Advised Canadian Fund" to identify the Canadian Funds that would be affected by Super 23A.[3]

Should the Agencies fail to exclude Canadian Public Funds from the definition of "covered fund" as requested in our January 19 Comment Letter, each Canadian Bank would be subject to the proposed Super 23A prohibition with respect to each of its Advised Canadian Public Funds – including those with respect to which the Volcker Rule expressly permits investment and sponsorship via the foreign fund exemption. In addition, each Canadian Bank would be subject to the Super 23A prohibition with respect to each of its Advised Canadian Private Funds – again, including those covered by the foreign fund exemption. Neither result could possibly have been intended by the statute. Finally, the impact of Super 23A provides another reason to exclude any fund in which a Canadian Bank may have any permitted ownership or sponsorship interest from being treated as an "affiliate" of a banking entity. Otherwise, Super 23A would prohibit Advised Canadian Funds that are affiliated through a common Canadian Bank sponsor (including those Advised Canadian Funds with no U.S. nexus or U.S. investors) from buying securities from and selling securities to each other for their own portfolios. Again, this result could not have been intended by the statute.

As proposed, the Super 23A prohibition and overbroad definition of "banking entity" would yield the following extraterritorial results, each of which would disrupt Canadian markets and the investment activities of Advised Canadian Funds without providing any material benefit to the stability of the U.S. banking system:

- A Canadian Bank (as defined above, a "Canadian Bank" encompasses all affiliates, including broker-dealers) could not purchase Canadian government or other securities on a principal basis from an Advised Canadian Fund.

- A Canadian Bank could not provide liquidity support to an Advised Canadian Fund in the event of market disruption or under other conditions.

- A Canadian Bank could not engage in derivative transactions resulting in credit exposure to an Advised Canadian Fund.

- Advised Canadian Funds that are "affiliates" of a Canadian Bank could not engage in in specie transactions and cross trades with each other.

Although subject to regulatory constraints and requirements, these activities or analogous activities are generally permissible in Canada.[4] In the view of the Canadian Banks, the

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[3] We note that the class of Advised Canadian Funds is different from the class of Canadian Funds that are subject to the prohibition on sponsorship or the holding of an ownership interest because an Advised Canadian Fund would include any covered fund for which a Canadian Bank acts as investment manager or investment adviser.

[4] As stated in the "Background on the Canadian Fund Industry" section of our January 19 Comment Letter, "the investment management affiliates of Canadian Banks are subject to various Canadian affiliated transaction and conflict of interest rules, including rules regarding cross trading, trading with affiliates, trading in securities of the affiliated bank, investing in new issuances of an affiliate and, particularly with

unprecedented extraterritorial application of Super 23A to business relationships and transactions that have little or no connection to the United States and are self-evidently not within the scope of activity that the Volcker Rule is intended to cover requires correction in the final rule. The Proposed Rule's extraterritorial application of Super 23A is inconsistent with other aspects of the Volcker Rule, improperly intrudes upon the Canadian legal and regulatory framework that is properly within the purview of Canadian authorities, would impose substantial costs on Advised Canadian Funds and other Canadian market participants, and could severely hamper the Canadian securities markets (debt, equity and derivatives) without achieving any corresponding benefit to the financial stability of the United States.

A. Extraterritorial Overreach of Super 23A

The extraterritorial application of Super 23A to transactions that have little or no relationship with the United States is inconsistent with the clear intent of the Volcker Rule. It also departs from decades of precedent in terms both of international comity/recognition of home country supervision and U.S. regulation of affiliate transactions. The application of Super 23A to transactions between, for example, a Canadian broker-dealer affiliate of a Canadian Bank and an Advised Canadian Fund sponsored by the Canadian Bank would impose costs without any plausible claim that such extraterritorial overreach furthers the underlying purpose of the Volcker Rule.

The Volcker Rule reflects the clear intent of Congress to limit the extraterritorial impact of its restrictions to that which is necessary in order to protect the financial stability of the United States and ensure that banking entities backed by the U.S. "safety net" not engage in high-risk activities and investments.[5] There is no evidence that Congress intended for Super 23A to

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respect to Canadian Public Funds, purchasing securities underwritten by an affiliate." The Canadian Banks may generally engage in the transactions listed above in accordance with the terms and conditions set out in applicable law or pursuant to exemptive relief. For example, the Canadian Banks have obtained from the Ontario Securities Commission a group statutory exemption to permit Canadian Public Funds to "purchase from or sell to a related person or company … that is a principal dealer in the Canadian debt securities market, debt securities of an issuer other than the federal or a provincial government . . . or debt securities issued or fully and unconditionally guaranteed by the federal or a provincial government in the secondary market." *See In the Matter of the Securities Legislation (the Legislation) of British Columbia, Alberta, Saskatchewan, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador (the Jurisdictions), et al.* (including the Mutual Reliance Review System for Exemptive Relief Applications), November 1, 2007.

[5] As characterized by the Financial Stability Oversight Council ("FSOC"), "[t]he Volcker Rule prohibits banking entities, which benefit from federal insurance on customer deposits or access to the discount window, from engaging in proprietary trading and from investing in or sponsoring hedge funds and private equity funds, subject to certain exceptions." *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds* at 1 (Jan. 2011) (emphasis added). Thus, foreign banking entities are expressly permitted under the statute to engage in proprietary trading and to sponsor and invest in covered funds "solely outside of the United States" pursuant to sections 4(c)(9) or 4(c)(13) of the Bank Holding Company Act. *See also* 156 Cong. Rec. S5897 (July 15, 2010) (colloquy between Sen. Merkley and Sen. Levin) (noting that the Volcker Rule's foreign fund exemption and foreign proprietary trading exemption "recognize rules of international regulatory comity by permitting foreign banks, regulated and backed by foreign taxpayers, in the course of operating outside of the United States to engage in activities permitted under relevant foreign law.").

apply to transactions between a non-U.S. banking entity and a non-U.S. fund that it advises or sponsors. On the contrary, the statute provides a blanket exemption for the fund-related activities of non-U.S. banks that are conducted solely outside of the United States. Congress simply could not have intended to exempt from the Volcker Rule investments in and sponsorship of covered funds that occur solely outside of the United States, and at the same time, to prohibit transactions between non-U.S. banking entities and their funds, such as the Advised Canadian Funds, in a manner that substantially undermines the exemption.[6]

Extraterritorial application of Super 23A would not only conflict with the structure and intent of the Volcker Rule, but would also represent a significant departure from precedent that should not be undertaken in the absence of clear legislative intent. Section 23A of the Federal Reserve Act has never been deemed to apply to a non-U.S. bank's branches abroad. Rather, existing section 23A applies only to the U.S. branches and agencies of non-U.S. banks and only with respect to a narrow subset of affiliates that are engaged directly in the United States in certain enumerated activities. Restrictions on transactions between a Canadian Bank and an Advised Canadian Fund are properly the subject of Canadian supervision and regulation. Longstanding principles of deference to home country supervision and regulation also counsel against the Proposed Rule's dramatic extraterritorial expansion of U.S. law.

Finally, the extraterritorial application of Super 23A to transactions between a Canadian Bank or one of its non-U.S. affiliates and an Advised Canadian Fund simply does not promote or serve the stated purpose of the Volcker Rule. Thus, it would impose substantial costs on Advised Canadian Funds and other Canadian market participants without any corresponding benefit to the safety and soundness of U.S. financial institutions or the financial stability of the United States. Advised Canadian Funds and their Canadian affiliates are not subject to the U.S. "safety net" and these measures, which affect Advised Canadian Funds adversely, do nothing to promote U.S. financial stability.

B. Impact on Canadian Securities Markets

As has been noted by Canadian and other foreign government authorities, the Proposed Rule would have a pronounced adverse impact on markets for non-U.S. government securities due to the Agencies' decision not to include a proprietary trading exemption for non-U.S. government securities to match the exemption afforded U.S. government securities.[7] The

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[6] Notwithstanding the clear intent of the statute, due to various ambiguities, its text might be read as authorizing, on the one hand, the acquisition of ownership interests in covered funds pursuant to the foreign fund exemption, but prohibiting, on the other hand, covered transactions with such covered funds – which would include the acquisition of ownership interests. The Agencies recognized in developing the Proposed Rule that this clearly could not have been intended and exercised their interpretive authority to implement the statute in a manner that is internally consistent. For the same reason, the Agencies should adopt the same approach to the extraterritorial application of Super 23A.

[7] *See, e.g.*, Letters from Julie Dickson, Office of the Superintendent of Financial Institutions of Canada (Dec. 28, 2011), available at http://www.federalreserve.gov/SECRS/2012/January/20120111/R-1432/R-1432_122811_88639_481623396475_1.pdf; Mark Carney, Bank of Canada (Feb. 13, 2012), available at http://www.bankofcanada.ca/wp-content/uploads/2012/02/volcker_rule_130212.pdf; James Flaherty, Department of Finance Canada (Feb. 13, 2012), available at http://www.fin.gc.ca/n12/data/12-016_1-eng.asp; Gadi Mayman, Ontario Financing Authority (Jan. 31, 2012), available at

extraterritorial application of Super 23A in Canada will especially exacerbate the adverse impact of the Volcker Rule in the Canadian securities markets. Unlike the United States which has a broader and more diverse market of securities broker-dealers and market-makers, the role of market-making in debt and equity securities within Canada is filled to a significant degree by brokerage affiliates of the Canadian Banks.[8]

The sources of liquidity for an Advised Canadian Fund of a particular Canadian Bank seeking to execute trades would be severely disrupted if a broker-dealer affiliate is precluded by Super 23A from acquiring securities held by the Advised Canadian Fund and is one of just a handful of potential counterparties. This potential market disruption would be particularly acute if, for example, an Advised Canadian Fund were attempting to sell debt securities for which an affiliate of the advising Canadian Bank were one of a small number of market-makers (or even the only market-maker for the security) or if the Advised Canadian Fund were attempting to sell a highly illiquid security. This potential effect could be particularly relevant to provincial government and corporate securities. Thus, Super 23A, which was drafted based on U.S. markets and the U.S. regulatory framework, if applied extraterritorially to Canada, could negatively impact Advised Canadian Funds and the Canadian securities markets while doing nothing to protect the financial safety net in the United States.

C. Potential Conflict with Canadian Law

Finally, the extraterritorial application of Super 23A to Advised Canadian Funds may well conflict with the legal obligation of the Canadian Bank to seek "best execution" for securities transactions under Canadian law.[9] As noted above, Advised Canadian Funds looking to sell securities from its portfolio may often have a limited number of potential counterparties for certain types of transactions. By prohibiting a Canadian broker-dealer affiliate of a Canadian Bank from purchasing securities from an Advised Canadian Fund, Super 23A is likely to create scenarios in which an Advised Canadian Fund will be denied access to the dealer that would provide best execution and, in turn, impact the obligation of the Advised Canadian Fund's investment manager to seek best execution. Similarly, Advised Canadian Funds that wish to seek best execution by conducting cross trades and in species transactions in the circumstances permitted by Canadian securities authorities would be prohibited by Super 23A from engaging in such transactions. This exemplifies the type of conflict in regulatory regimes that has traditionally counseled in favor of deference to home country law and regulatory oversight.

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http://www.federalreserve.gov/SECRS/2012/February/20120207/R-1432/R-1432_013112_88706_314957757205_1.pdf ("OFA Letter"); Luc Monty, Quebec Ministère des Finances (Feb. 9, 2012); Bank of Japan and the Japanese Financial Services Agency (Dec. 28, 2011), available at http://www.fsa.go.jp/en/news/2012/20120112-1/01.pdf; George Osborne, Chancellor of the Exchequer, United Kingdom (Jan. 23, 2012) available at http://www.sec.gov/comments/s7-41-11/s74111-92.pdf; and Michel Barnier, European Commissioner for Internal Market and Services (Feb. 8, 2012).

[8] *See, e.g.,* OFA Letter, *supra* n. 7.

[9] Under Canadian National Instrument 23-101, best execution is the responsibility of the investment manager and, thus, applies to all products and accounts managed by them. In the case of the Canadian Banks, the investment manager is usually an affiliated investment adviser.

III. Conclusion

On the basis of the foregoing, the Canadian Banks urge the Agencies to:

- Exclude Canadian and other Public Funds from the definition of "covered fund." This would also exclude any Advised Canadian Public Fund from the application of Super 23A and eliminate its substantial and unjustified extraterritorial overreach. As described in the January 19 Comment Letter, there is ample reason why this step should be taken separate and apart from the Super 23A concerns addressed in this Supplemental Letter.[10] The adverse impact of Super 23A on Canadian markets and market participants without any attendant benefit to the stability of the U.S. financial system commands the same result.

- Provide an exemption from Super 23A for transactions with any Advised Canadian Fund that is covered by the foreign fund exemption or otherwise permitted under the Volcker Rule. The Agencies have already recognized that the application of Super 23A to covered funds permitted by the exemption in Proposed Rule Section _.11 or otherwise leads to illogical results that could not have been intended by the Volcker Rule. However, the Proposed Rule does not go far enough to correct all of the ambiguities related to the application of Super 23A.

- Exempt Advised Canadian Funds from the definition of "affiliate" – and, thus, the definition of "banking entity." Just as there is no sound basis for subjecting permissible funds to the proprietary trading and covered fund restrictions of the Volcker Rule, there is no reason to subject transactions between Advised Canadian Funds to the Super 23A prohibition on the grounds that they are "affiliates." In light of the Canadian securities market dynamics described above, cross trades and in specie transactions between "affiliated" Canadian Funds should especially be exempt from any extraterritorial overreach of the Volcker Rule.

[10] We understand that there may be some concern regarding whether the SEC should undertake any comparability analysis of non-U.S. laws and regulations to determine whether Canadian or other Public Funds should be excluded from the Volcker Rule. Since foreign public funds are not, and cannot be, publicly offered in the United States, regardless of their treatment under the Volcker Rule, and given that Dodd-Frank does not contain any requirement to conduct a "comparability" analysis, we submit that it is not necessary for any Agency to determine whether Canadian Public Funds or any other foreign public funds are regulated in exactly the same manner as U.S.-registered investment companies. The issue is whether such funds are subject to regulation in their home jurisdictions, are essentially retail "mutual funds" and are not "private equity funds" or "hedge funds" as those terms are commonly understood in the United States and should, therefore, be treated the same under the Volcker Rule as U.S.-registered investment companies.

Should you have any questions about this Supplemental Letter, please contact Elizabeth M. Knoblock, 202-263-3263, or David Sahr, 202-263-3332, at Mayer Brown LLP.

Respectfully submitted on the above-referenced date, on behalf of:

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