PRIVATE EQUITY GROWTH CAPITAL COUNCIL

SUBMITTED ELECTRONICALLY

February 13, 2012

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

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

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

Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20219

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

Re: Notice of Proposed Rulemaking on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

Dear Sir or Madam:

These comments are submitted by the Private Equity Growth Capital Council (the "PEGCC"). The PEGCC is an advocacy, communications and research organization established to develop, analyze and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy. Established in 2007 and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The members of the PEGCC are 36 of the world's leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest.[1]

[1] The members of the PEGCC are: American Securities; Apax Partners; Apollo Global Management LLC; ArcLight Capital Partners; The Blackstone Group; Brockway Moran & Partners; The Carlyle Group; CCMP Capital Advisors, LLC; Crestview Partners; Francisco Partners; General Atlantic; Genstar Capital; Global Environment Fund; GTCR; Hellman & Friedman LLC; Irving Place Capital; The Jordan Company; Kelso & Company; Kohlberg Kravis Roberts & Co.; KPS Capital Partners; Levine Leichtman Capital Partners; Madison Dearborn

We are submitting this letter to the above-named agencies (the "Agencies") with respect to the notice of proposed rulemaking on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (the discussion included in the notice is hereinafter referred to as the "Preamble" and the proposed rules in the notice as the "Proposed Rules") implementing the new Section 13 (the "Volcker Rule") of the Bank Holding Company Act of 1956 (the "BHC Act") adopted by Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[2] The PEGCC previously submitted comments to the Financial Stability Oversight Council (the "FSOC") regarding the study required by Section 13(b) of the BHC Act (the "FSOC Study")[3] and also to the Agencies in advance of the Proposed Rules. Copies of the PEGCC's comment letters are attached.

Although the PEGCC's members are not themselves directly subject to the Volcker Rule, the Volcker Rule will impact the ability of private equity firms to raise capital from certain groups of investors. The PEGCC believes that the Agencies have appropriately interpreted certain aspects of the Volcker Rule in the Preamble and the Proposed Rules, particularly with respect to (*i*) the exclusion of funds organized and offered under BHC Act Section 13(d)(1)(G) from the definition of "banking entity," (*ii*) the interpretation that qualified pension plans for banking entity employees are not subject to the covered fund investment prohibitions of the Volcker Rule and (*iii*) the permission of U.S. private equity firms to act as sponsors (manage, organize or advise) to covered funds that satisfy the exemption in Section _.13(c) of the Proposed Rules.

However, the PEGCC would like to comment on the ability of the following entities to invest in private equity funds that are sponsored by private equity firms that are not banking entities ("Third Party Private Equity Funds"): (*i*) insurance companies through their general accounts and separate accounts; (*ii*) banking entity employees and employee vehicles (including pension plans); (*iii*) other covered funds in which banking entities are permitted to sponsor or invest; and (*iv*) non-U.S. banking entities.

Partners; MidOcean Partners; New Mountain Capital; Permira; Providence Equity Partners; The Riverside Company; Silver Lake; Sterling Partners; Sun Capital Partners; TA Associates; Thoma Bravo; Thomas H. Lee Partners; TPG Capital (formerly Texas Pacific Group); Vector Capital; and Welsh, Carson, Anderson & Stowe.

[2] 76 Fed. Reg. 8,265 (Nov. 7, 2011).

[3] FSOC, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds (Jan. 2011).

I. Insurance Company General Accounts and Separate Accounts Should Be Permitted to Invest in Third Party Private Equity Funds.

As we have argued in our prior comment letters, the Volcker Rule was not intended to restrict traditional insurance activities.[4] The Proposed Rules properly include exemptions for insurance company general accounts (Section _.6(c)) and separate accounts (Section _.6(b)(iii)) with respect to the proprietary trading prohibition in Section _.3 of the Proposed Rules; however, the Proposed Rules do not explicitly include equivalent exemptions from the covered fund investment prohibition in Section _.10 of the Proposed Rules.

The PEGCC respectfully requests that the Agencies clarify that the exemptions in Section _.6(c) and _.6(b)(iii) also exempt insurance company general accounts and separate accounts, respectively, from the covered fund investment prohibition in Section _.10 of the Proposed Rules based on (*i*) the clear congressional intent and statutory language that investment activities of insurance company general and separate accounts should not be impacted by the Volcker Rule and (*ii*) the Agencies' authority under BHC Act Section 13(d)(1)(J), which allows the Agencies to exempt activities that promote and protect the safety and soundness of banking entities (including insurers that fall within the term "banking entity") and the financial stability of the United States.

A. *Congressional Intent and Statutory Language*

Congress was clear: "The Volcker Rule was never meant to affect the ordinary business of insurance."[5] To this end, Congress specifically required that the FSOC Study include recommendations on how to "appropriately accommodate the business of insurance within an insurance company, subject to regulation in accordance with the relevant insurance company investment laws."[6] The FSOC Study included recommendations to the Agencies to provide exemptions for insurance company general accounts, because they are subject to extensive regulation and oversight by insurance regulators, and insurance company separate accounts,

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4 *See* PEGCC Comment Letter in Advance of Notice of Proposed Rulemaking Implementing the Private Funds Portion of the Volcker Rule (May 10, 2011) ("PEGCC Comment Letter in Advance of Proposed Rules") at Section II; and PEGCC Comment Letter Re: Financial Stability Oversight Council Request for Public Input for the Study Regarding Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (Nov. 5, 2010) ("PEGCC Comment Letter in Advance of FSOC Study") at 5-6. *See also* FSOC Study, *supra* note 3, at 71.

5 156 Cong. Rec. S5896 (statement of Sen. Merkley).

6 BHC Act Section 13(b)(1)(F).

because they are transactions on behalf of customers.[7] There is no discussion in the legislative history or in the FSOC Study that would suggest that insurance company general or separate accounts should be permitted to engage in proprietary trading but not invest in covered funds. Accordingly, the PEGCC urges the Agencies to follow the congressional intent and the recommendations of the FSOC Study to accommodate the business of insurance companies by exempting insurance company general accounts and separate accounts from the covered fund investment restrictions in Section _.10 of the Proposed Rules.

In addition, the PEGCC believes that the statutory language of BHC Act Section 13(d)(1)(D) (which allows transactions on behalf of customers) and Section 13(d)(1)(F) (which allows transactions by insurers) is clear that the acquisition by insurance company general and separate accounts of limited partner interests, limited liability company interests or other interests in Third Party Private Equity Funds are intended to be excluded from the Volcker Rule. Section 13(d)(1)(D) permits "[t]he purchase, sale, acquisition, or disposition of securities and other instruments *described in* subsection (h)(4) on behalf of customers"[8] (emphasis added), and Section 13(d)(1)(F) permits "[t]he purchase, sale, acquisition, or disposition of securities and other instruments *described in* subsection (h)(4) by a regulated insurance company directly engaged in the business of insurance for the general account of the company and by any affiliate of such regulated insurance company"[9] (emphasis added).

The securities and other instruments that are "described in" BHC Act Section 13(h)(4) include, among other things, "any security, any derivative, any contract of sale of a commodity for future delivery, any option on such security, derivative, or contract, or any other security or financial instrument." Interests in private equity and hedge funds are, and have long been recognized as, "securities," whether those funds are organized as corporations, limited liability companies or, as is most often the case,

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7 FSOC Study, *supra* note 3, at 73-74.

8 With respect to insurance company separate accounts, as the Preamble notes and as we argued in our prior comment letters, activities in insurance company separate accounts are "transactions on behalf of customers because such insurance-related transactions are generally customer-driven and do not expose the banking entity to gains or losses on the value of separate account assets, even though the banking entity may be treated as the owner of those assets for certain purposes." Preamble, *supra* note 2, at 68,879; PEGCC Comment Letter in Advance of Proposed Rules, *supra* note 4, at Section II; PEGCC Comment Letter in Advance of FSOC Study, *supra* note 4, at 6.

9 The PEGCC also notes that these two provisions provide exemptions from both the proprietary trading prohibition and the covered fund investment prohibition. See BHC Act Section 13(d)(1) (saying that these activities are permitted "[n]otwithstanding the restrictions under subsection (a)," *i.e.*, both the proprietary trading and covered fund investment prohibitions).

limited partnerships.[10] Therefore, a straightforward reading of BHC Act Sections 13(d)(1)(D) and 13(d)(1)(F) would permit the acquisition of securities (including the acquisition of interests in Third Party Private Equity Funds) by both insurance company general accounts and separate accounts.[11] The fact that Section 13(h)(4) defines "proprietary trading" activity does not change the nature of the securities that are described in that definition. Accordingly, the PEGCC urges the Agencies to follow the statutory text of the Volcker Rule and exempt insurance company general accounts and separate accounts from the covered fund investment restrictions in Section _.10 of the Proposed Rules.

B. *Promotion of the Safety and Soundness of Insurance Companies*

If the Agencies conclude that the Agencies must interpret the statutory language differently than discussed above, then the PEGCC respectfully requests that the Agencies use their authority under BHC Act Section 13(d)(1)(J) to provide an exemption from the Volcker Rule's restrictions on investments by insurance company general and separate accounts in Third Party Private Equity Funds in order to prevent an absurd result and to promote the safety and soundness of insurance companies.[12]

The covered fund prohibition was in large part included as a means to prohibit the avoidance of the proprietary trading prohibition of the Volcker Rule.[13] Therefore,

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[10] *See, e.g.*, Loss, Seligman and Paredes, Securities Regulation § 2(a)(1) (discussing definition of "security" under U.S. securities laws); Securities Act of 1933, Section 2(a)(1) (defining "security" to include, among other things, any stock or investment contract); SEC v. W.J. Howey Company, 328 U.S. 293, 298-299 (1946) (stating that an "investment contract" for purposes of the U.S. federal securities laws includes "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party"); Rule 3a11-1 under the Securities Exchange Act of 1934 (defining "equity security" to include any "limited partnership interest").

[11] The PEGCC notes that, with respect to insurance company general accounts, the Preamble states that the exemption in Section _.6(c) is a straightforward implementation of BHC Act Section 13(d)(1)(F). Preamble, *supra* note 2, at 68,880.

[12] The PEGCC notes that the Agencies took a similar approach with respect to the exemption in Section _.13(d) of the Proposed Rules, Preamble, *supra* note 2, at 68,912, because the Agencies were concerned that the exemption included in BHC Act Section 13(h)(2) for the sale and securitization of loans did not adequately cover all activities relating to securitization. Therefore, the Agencies relied in part on their authority under BHC Act Section 13(d)(1)(J) to ensure that all necessary activities are exempted in Section _.13(d) of the Proposed Rules. The PEGCC believes that, if necessary, a similar justification could be used to ensure that all insurance company general and separate account activities are exempted from the prohibitions of the Volcker Rule.

[13] See 156 Cong. Rec. S5894 (statement of Sen. Merkley) ("Clearly, if a financial firm were able to structure its proprietary positions simply as an investment in a hedge fund or private equity fund, the prohibition on proprietary trading would be easily avoided, and the risks to the firm and its subsidiaries and affiliates would continue."). PEGCC also notes that the other risk mentioned by

it would be an absurd result if insurance company general and separate accounts were permitted to engage in proprietary trading but prohibited from making covered fund investments.

In addition, the imposition of covered fund investment restrictions on insurance company general accounts and separate accounts could negatively impact their safety and soundness since Third Party Private Equity Funds provide important benefits, *i.e.*, diversification (due to their low historical correlation with other typical insurance company investments) and asset-liability duration matching (from matching a long-term investment with a long-term liability).

Accordingly, the PEGCC urges the Agencies to use, if necessary, their authority in BHC Act Section 13(d)(1)(J) to permit investments by insurance company general accounts and separate accounts in Third Party Private Equity Funds because it promotes the safety and soundness of insurance companies and promotes the financial stability of the United States.

II. Bank Employees and Employee Vehicles Should Be Permitted to Invest in Third Party Private Equity Funds.

A. *Direct Engagement Requirement*

The PEGCC believes that employees of banking entities should not face any restrictions with respect to their personal investments in Third Party Private Equity Funds. There is nothing in the statutory text of the Volcker Rule or in the Proposed Rules that would prohibit investments by banking entity employees in Third Party Private Equity Funds. However, certain language in the Preamble could be read to imply that an employee of a banking entity is permitted to invest in a covered fund only if the employee is directly engaged in providing advisory or other services to that fund (the "Direct Engagement Requirement").[14] The PEGCC notes that there is nothing in the statutory text of the Volcker Rule or in the Proposed Rules, themselves, that would impose such a requirement.

The Direct Engagement Requirement might be appropriate for banking entity employees investing in a covered fund sponsored by their banking entity employer. The PEGCC does not believe, however, that the Direct Engagement Requirement should apply to investments by banking entity employees, in their personal capacities, in Third Party Private Equity Funds. The PEGCC believes that, in such cases, the Direct Engagement Requirement would unreasonably restrict the investment options

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Sen. Merkley, related to the bail out of bank-sponsored funds, does not exist with respect to Third Party Private Equity Funds.

[14] Preamble, *supra* note 2, at 68,896.

available to banking entity employees and would not promote the safety and soundness of the banking entity or the financial stability of the United States. Accordingly, the PEGCC respectfully requests that the Agencies clarify that the Direct Engagement Requirement does not apply to investments by banking entity employees, in their personal capacities, in Third Party Private Equity Funds.

B. *Employee Pension Plans and Investment Vehicles*

The PEGCC supports the interpretation in the Preamble that would permit investments in covered funds by (*i*) qualified pension plans for banking entity employees and (*ii*) any other entity where the banking entity is only acting in a fiduciary capacity (including, for example, where the banking entity is acting as a general partner or trustee of an employee investment vehicle). The PEGCC agrees that a prohibition on covered fund investments by such entities is not required by the statutory text of the Volcker Rule, and that such a prohibition would not promote the safety and soundness of the banking entities or the financial stability of the United States.

III. All Covered Funds that Banking Entities May Sponsor or in Which They May Invest Should Be Excluded from the Definition of Banking Entity.

A. *Exclusion of Covered Funds Organized and Offered under Section 13(d)(1)(G)*

The PEGCC supports the exclusion of covered funds organized and offered under BHC Act Section 13(d)(1)(G) from the definition of "banking entity." As noted in the Preamble, there would be several internal inconsistencies without such an exclusion.[15] In addition, as noted in our prior comment letters, the PEGCC believes that without such an exclusion, customers of banking entities would be deprived of investment opportunities, including investments in Third Party Private Equity Funds, that banks have traditionally offered as part of their asset management services.[16]

B. *Exclusion of Other Covered Funds*

The PEGCC believes that all covered funds in which a banking entity is permitted to sponsor or invest should be excluded from the definition of "banking entity" in the same fashion as covered funds organized and offered under BHC Act Section 13(d)(1)(G). In particular, the PEGCC believes that a fund that satisfies Section _.13(c) of the Proposed Rules (a "Section _.13(c) fund") that is sponsored by

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[15] Preamble, *supra* note 2, at 68,855-68,856.

[16] PEGCC Comment Letter in Advance of Proposed Rules, *supra* note 4, at Section III; PEGCC Comment Letter in Advance of FSOC Study, *supra* note 4, at 4-5.

a non-U.S. banking entity should be permitted to act as a feeder fund or a fund of funds that invests in Third Party Private Equity Funds, and should not be treated as a "banking entity." The PEGCC believes that prohibiting a feeder fund or a fund of funds that is a Section _.13(c) fund from investing in U.S. Third Party Private Equity Funds (that do not themselves satisfy the exemption in Section _.13(c)) would hurt the competitive standing of U.S. Third Party Private Equity Funds compared to non-U.S. funds without reducing risk in the U.S. financial system.[17] Accordingly, the PEGCC urges the Agencies to exclude all covered funds in which a banking entity is permitted to sponsor or invest from the definition of "banking entity" in the same fashion as covered funds organized and offered under BHC Act Section 13(d)(1)(G).

IV. Non-U.S. Banking Entities Should Be Permitted to Invest in Third Party Private Equity Funds Managed by U.S. Private Equity Firms and Investing in U.S.-Based Assets.

The Agencies have noted that BHC Act Section 13(d)(1)(I) (as implemented in Section _13(c) of the Proposed Rules) "limits the extraterritorial application of the statutory restrictions on covered fund activities and investments to foreign firms that, in the course of operating outside of the United States, engage in activities permitted under relevant foreign law outside of the United States, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States."[18]

The PEGCC believes that the restrictions in the Proposed Rules on the non-U.S. operations of non-U.S. banking entities are inconsistent with this stated intention. Such extraterritorial restrictions should be avoided (and the regulation of such activities left to the non-U.S. banking entities' home country regulators) to the fullest extent possible, consistent with the need to protect the safety and soundness of U.S. banking entities. The PEGCC understands that this view is shared by a number of non-U.S. regulators and commenters.[19] In addition, the PEGCC believes, as noted in

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[17] The competitive standing of U.S. Third Party Private Equity Funds (particularly, those whose investors consist primarily of U.S. persons) would be impacted because U.S. Third Party Private Equity Funds are likely to find it more difficult to attract capital from Section _.13(c) funds sponsored by non-U.S. banking entities than non-U.S. Third Party Private Equity Funds, which may not be as reliant on capital from U.S. persons. The PEGCC notes that certain aspects of this competitive disadvantage could be cured to the extent the Agencies adopt the interpretations suggested in Section IV of this comment letter.

[18] Preamble, *supra* note 2, at 68,852.

[19] For example, in his February 8, 2012 letter to Federal Reserve Chairman Ben Bernanke concerning the Volcker Rule (and the Proposed Rules), Michel Barnier, the European Commissioner for Internal Market and Services, writes: "[T]he proposed regulation raises ... a number of concerns and would appear to have implications that are disproportionate in light of the objective that the rule is trying to achieve. First of all, the draft rules as presented have an

our May 10, 2011 comment letter, that it is important for the competitive equality of the global private equity market that U.S. private equity firms be able to offer their private equity funds to non-U.S. banking entities.[20] For these reasons, the PEGCC requests that the Agencies ensure that Section _.13(c) of the Proposed Rules does not place any restrictions on the ability of U.S. private equity firms to offer Third Party Private Equity Funds to non-U.S. persons, including non-U.S. banking entities.

The PEGCC understands that Section _.13(c) of the Proposed Rules would allow a qualifying foreign banking organization to invest in a covered fund so long as three conditions are met: (*i*) the banking entity engaged in the investment activity is not organized under the laws of the United States or a U.S. state; (*ii*) no subsidiary, affiliate or employee of the banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States; and (*iii*) no ownership interest in the covered fund is offered for sale or sold to a resident of the United States.

The PEGCC generally supports this interpretation of Section _.13(c) of the Proposed Rules. In particular, the PEGCC supports the language of Section _.13(c), which we read not to place any restrictions or limits on the ability of Section _.13(c) funds to invest in U.S.-based assets or to be managed from the United States. However, the PEGCC respectfully requests that the Agencies clarify and, if required, modify the Proposed Rules to preserve the ability of U.S. private equity firms to offer Third Party Private Equity Funds to non-U.S. persons, including non-U.S. banking entities, in the manner proposed below.

A. *Investments by Private Equity Firms and Receipt of Carried Interest*

The PEGCC requests clarification that the limit on the offer and sale to U.S. residents in Section _.13(c) does not restrict the ability of U.S. private equity firms (and their affiliates and employees), so long as they are not banking entities, to make investments in (and receive carried interest from) Section _.13(c) funds that are

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extensive, global scope. This would seem to lead to a number of unintended, non justifiable consequences for non-US banks, markets and institutions. ... [T]he current exemption for non-US banks as well as for activities outside of the US would appear very restrictive. As a consequence, it would appear that the rule would be applied well beyond the US activities of non-US banks, without any justification being provided."

See also Letter from Masamichi Kono, Vice Commissioner for Internal Affairs of the Japanese Financial Services Agency, and Kenzo Yamamoto, Executive Director of the Bank of Japan, Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Dec. 28, 2011) (commenting on the need to limit extraterritorial application of the Volcker Rule).

[20] PEGCC Comment Letter in Advance of Proposed Rules, *supra* note 4, at Section I.

sponsored by such firms. Investors typically request (or require) that a private equity firm (or its affiliates and employees) invest in funds being organized by that firm in order to align the interests of that firm with those of the investors.[21]

Furthermore, the PEGCC requests clarification that the definition of "carried interest" in Section _.10(b)(ii)(A) was not intended to be limited to carried interest received by banking entities, and that such definition includes carried interest received by any person, including private equity firms (and their affiliates and employees) that sponsor Third Party Private Equity Funds.

Unless Section _.13(c) and Section _.10(b)(ii)(A) are interpreted as requested above, U.S. private equity firms would be unreasonably restricted from sponsoring, and from competing effectively with non-U.S. private equity firms that sponsor, Third Party Private Equity Funds offered to non-U.S. banking entities without any benefit to the safety and soundness of the non-U.S. banking entities or the financial stability of the United States.

B. *U.S. Offering Restriction*

The PEGCC requests that the Agencies clarify that the restriction on offers and sales to U.S. residents in a Section _.13(c) fund applies only to offerings made by banking entities and their employees and not to offerings of Third Party Private Equity Funds made by private equity firms that are not banking entities. In fashioning this marketing restriction, Congress sought to ensure a "level playing field" by prohibiting non-U.S. banking entities from improperly offering hedge fund and private equity fund services to U.S. persons.[22] Expanding the offering restriction to cover offering activities of private equity firms that are not banking entities in connection with Third Party Private Equity Funds does not further this purpose or otherwise help ensure the safety and soundness of any banking entities or the financial stability of the United States. In particular, the PEGCC does not believe that investment by U.S. investors that are not banking entities increases the risks faced by non-U.S. banking entities that invest in Third Party Private Equity Funds or otherwise affect the financial stability of the United States. Furthermore, additional compliance burdens would be placed not only on such private equity firms, but also on non-U.S. banking entities investing in Third Party Private Equity Funds, because non-U.S. banking entities do not control the offering activities of the private equity firms offering Third Party Private Equity Funds.

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[21] Such investment may also be desirable for tax reasons.

[22] 156 Cong. Rec. S5987 (statement of Sen. Merkley).

C. *Other Interpretations Related to the U.S. Offering Restriction*

1. Offerings Made Prior to the Effective Date

The Proposed Rules reflect the fact that the offering restrictions only apply to offerings made after the effective date of the Volcker Rule.[23] Therefore, the PEGCC believes that a Third Party Private Equity Fund offered only to non-U.S. persons after the effective date of the Volcker Rule would still qualify as a Section _.13(c) fund even if U.S. persons were admitted to such Third Party Private Equity Fund prior to the effective date of the Volcker Rule. The PEGCC respectfully requests that the Agencies confirm this straightforward interpretation of the Proposed Rules and the related statutory text in BHC Act Section 13(d)(1)(I) in order to reduce the compliance burdens on private equity firms.

2. Parallel Investment Vehicles

As discussed at the beginning of this Section IV, the PEGCC believes that, to the fullest extent possible and consistent with the statutory language of the Volcker Rule, (*i*) the extraterritorial application of the Proposed Rules should be limited and (*ii*) the Proposed Rules should not infringe on the non-U.S. operations of non-U.S. banking entities. Otherwise, the Proposed Rules will have the effect of dictating where non-U.S. banking entities acting offshore may invest their funds, which is a decision that the Dodd-Frank Act leaves to the non-U.S. banking entities' home country regulators. As discussed below, the PEGCC believes that parallel investment vehicles offered only to non-U.S. persons by U.S. or non-U.S. private equity firms are an appropriate and customary means by which non-U.S. banking entities may invest in U.S. and non-U.S. private equity opportunities, consistent with the requirements of the Volcker Rule.

Section _.13(c) of the Proposed Rules is clear that non-U.S. banking entities may invest in a Third Party Private Equity Fund so long as no ownership interest in such Third Party Private Equity Fund is offered for sale or sold to a resident of the United States *and* no U.S. subsidiary, affiliate or employee of the banking entity is involved in (*i.e.*, makes or effects) such offer or sale. As discussed in Section IV.B above, the PEGCC believes that the provisions of Section _.13(c) that prohibit offering interests in covered funds to U.S. persons if those covered funds are also offered to non-U.S. banking entities should apply only to offers made by non-U.S. banking entities, and not to offers made by private equity firms (that are not banking

[23] Section _.13(c)(3)(iiii) of the Proposed Rules states "No ownership in such covered fund *is* offered for sale or sold to a resident of the United States" (emphasis added). This language in the Proposed Rules reflects BHC Act Section 13(d)(1)(I), which states "no ownership interest in such hedge fund or private equity fund *is* offered for sale or sold to a resident of the United States" (emphasis added).

entities). However, even if this U.S. offering restriction is deemed by the Agencies to apply to offerings by private equity firms (that are not banking entities) of interests in Third Party Private Equity Funds, the PEGCC believes (*i*) that the Proposed Rules would permit a private equity firm (that is not a banking entity) to sponsor one or more investment funds offered solely to U.S. persons and certain non-U.S. persons as well as one or more investment funds that satisfy the requirements of Section _.13(c) and (*ii*) that even if those funds invest in parallel (as described below), non-U.S. banking entities would be permitted to invest in the Section _.13(c) fund(s).

Private equity firms, and other types of investment firms, in the ordinary course of their businesses, frequently organize (and for decades have organized) so-called "parallel funds": two or more separate investment entities that typically invest side-by-side and are structured and offered to different types of investors (such as U.S. and non-U.S. investors) to permit and facilitate investment by those investors in private equity investment opportunities.[24] The PEGCC believes that the Proposed Rules permit a private equity firm (that is not a banking entity) to organize parallel funds, one or more of which is a Section _.13(c) fund, in this manner and that, under the Proposed Rules, non-U.S. banking entities would be permitted to invest in the parallel Section _.13(c) fund(s).

The PEGCC believes that this straightforward reading and application of the Proposed Rules furthers the goal, described above, of avoiding unnecessary extraterritorial application of the Volcker Rule to the investment activities of non-U.S. banking entities outside the United States. The PEGCC also believes that this reading and application of the Proposed Rules is appropriate because it eliminates a possible negative impact on the competitive position of U.S. private equity firms (particularly, those whose investors consist primarily of U.S. persons) vis-à-vis their non-U.S. counterparts (particularly, those whose investors consist primarily of non-U.S. persons). Finally, and importantly, the PEGCC believes that this reading and application of the Proposed Rules is appropriate because it would have no negative impact on (*i*) the safety and soundness of U.S. banking entities, (*ii*) the safety and soundness of the non-U.S. banking entities that invest in the Section _.13(c) fund(s) offered by private equity firms in parallel with other Third Party Private Equity Funds that such firms offer to U.S. investors or (*iii*) the financial stability of the United States.

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[24] Parallel funds may or may not be organized in different jurisdictions (such as Delaware and a non-U.S. jurisdiction), or take different forms (*e.g.*, corporations and limited partnerships), or contain somewhat different terms (such as restrictions on investment in certain geographies or types of businesses, or different investor voting arrangements).

3. Definition of Resident of the United States

Finally, the PEGCC requests that the definition of "resident of the United States" for purposes of Section _.13(c) funds incorporate the definition of "U.S. person" under Regulation S of the Securities Act of 1933. The Agencies have not provided any explanation of why they have deviated from this definition. Reliance on the Regulation S definition of "U.S. person" has two important advantages: first, there is a well developed body of SEC guidance as to its meaning, and, second, in practice, sponsors of Third Party Private Equity Funds who offer interests in those funds to non-U.S. investors often rely on Regulation S. Therefore, to the extent that sponsors of Third Party Equity Funds are required to monitor whether U.S. persons are admitted to Section _.13(c) funds, it would be helpful if such sponsors are not required to monitor multiple definitions of U.S. persons.

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The PEGCC appreciates the fact that the Agencies have lengthened the comment period. We note that many U.S. and non-U.S. banking entity investors are awaiting final resolution of the issues relating to the Volcker Rule prior to investing in Third Party Private Equity Funds. Accordingly, the PEGCC urges the Agencies to adopt final implementing rules, with the amendments and clarifications proposed above, in a timeframe that will reduce this period of uncertainty without sacrificing quality and practicality of the final rules.

The PEGCC appreciates the Agencies' consideration of this letter and is available to discuss any questions that the Agencies may have concerning this letter or the private equity industry generally.

Respectfully submitted,

Steve Judge
President and CEO
Private Equity Growth Capital Council