



December 31, 2013

The Honorable Ben Bernanke  
Chairman  
Board of Governors of the Federal Reserve  
System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

The Honorable Martin J. Gruenberg  
Chairman  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

The Honorable Thomas Curry  
Comptroller of the Currency  
Office of the Comptroller of the Currency  
400 7<sup>th</sup> Street, SW  
Washington, DC 20219

The Honorable Gary Gensler  
Chairman  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

The Honorable Mary Jo White  
Chair  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

RE: Supplemental Letter on “Ownership Interests” in Connection with Certain CLO  
Debt Securities

Dear Chairman Bernanke, Comptroller Curry, Chairman Gensler, Chairman Gruenberg, and  
Chair White:

The undersigned organizations submit this letter as a follow-up to our letter of December 24, 2013 (“December 24 Letter”).<sup>1</sup> That letter requested confirmation that the term “ownership interest” as defined in §\_\_.10(d)(6) of the final rule implementing the Volcker Rule<sup>2</sup> does not include debt securities of collateralized loan obligation (“CLO”) issuers that are covered funds where these CLO debt securities have a contingent right to remove a manager “for cause” or to nominate or vote on a nominated replacement upon a manager’s removal for cause or resignation, but contain none of the other indicia of ownership interests listed in the definition. For the following reasons, we respectfully request that the Agencies consider our request for confirmation that the CLO debt securities described in the December 24 Letter are not “ownership interests” at the same time, and in the same administrative proceeding, that it considers relief for debt security holders of collateralized debt obligations (“CDOs”) backed by trust preferred securities (“TruPS”).<sup>3</sup>

On December 24, the ABA filed largely identical emergency petitions on behalf of its member banking entities in both the United States Court of Appeals and District Court for the District of Columbia (the “Complaint”) to stay agency action pending judicial review of the same provision of the Final Rule that we addressed in the December 24 Letter.<sup>4</sup> Specifically, the Complaint requests a stay of the Final Rule’s definition of “other similar interests” in §\_\_.10(d)(6).

The issues raised by the Complaint are nearly identical to those faced by holders of CLO debt securities. Although the Complaint only addresses ownership interests in CDOs backed by TruPS, the points made in the Complaint are equally applicable to CLO debt securities and therefore should be considered together.

As the Complaint asserts, the definition of “ownership interest” under the Final Rule goes far beyond the statutory prohibition against a banking entity’s acquiring or retaining “any equity, partnership, or other ownership interest in” a covered fund.<sup>5</sup> The statutory phrase “other ownership interest” “must be construed as an interest that is *similar to* an ‘equity’ or ‘partnership’ interest.”<sup>6</sup> We agree with the Complaint that “applying basic principles of statutory interpretation, ‘ownership interest’ requires an equity-like interest in the sense of taking on risk

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<sup>1</sup> The undersigned organizations are the Loan Syndication Trading Association (“LSTA”), the Securities Industry and Financial Markets Association (“SIFMA”), the Structured Finance Industry Group (“SFIG”), the American Bankers Association (“ABA”), and the Financial Services Roundtable (“FSR”). The December 24 Letter, including the description of each of our organizations, is incorporated herein by reference.

<sup>2</sup> Final Rule, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Dec. 10, 2013) (“Final Rule”).

<sup>3</sup> The Agencies issued a joint statement on December 27, 2014 that they intend to address the issue of ownership interests in TruPS CDOs by no later than January 15, 2014. Joint Release, Statement regarding Treatment of Certain Collateralized Debt Obligations Backed by Trust Preferred Securities under the Rules implementing Section 619 of the Dodd-Frank Act, NR 2013-199, Dec. 27, 2013 (Joint Statement). The CFTC did not participate in the Joint Statement.

<sup>4</sup> Complaints in *American Bankers Association, et al. v. Federal Deposit Insurance Corp., et al.*, Civ. No. 13-1310 (D.C. Cir. filed Dec. 24, 2013) [Portions Under Seal]*American Bankers Association, et al. v. Federal Deposit Insurance Corp., et al.*, Civ. No. 1:13-cv-02050-RJL (D.D.C. filed Dec. 24, 2013) [Portions Under Seal].

<sup>5</sup> Complaint at 10; 12 U.S.C. §1851(a)(1)(B).

<sup>6</sup> Complaint at 10.

and participation in profits and losses.”<sup>7</sup> While the proposed rule would have included certain debt instruments with “substantially the same characteristics” as equity in the term “ownership interests,”<sup>8</sup> the Final Rule provides that any single characteristic, without more, is enough to turn an interest in a debt security into an ownership interest. When one of these interests is the right to participate in the removal and/or replacement of a manager, and when that, without any other equity-like characteristic, is enough to subject debt security holders to the covered fund prohibition, we agree with the Complaint that the Final Rule has “distort[ed] the phrase ‘ownership interest’ beyond recognition.”<sup>9</sup>

Accordingly, we reiterate our request that the Agencies confirm that “ownership interest” as defined in § \_\_.10(d)(6) of the Final Rule does not include debt securities of CLO issuers that are covered funds where these CLO debt securities have a contingent right to remove a manager “for cause” or to nominate or vote on a nominated replacement upon a manager’s removal for cause or resignation, but contain none of the other indicia of ownership interest listed in the definition.

In the absence of the requested relief, the potential negative impact on CLO debt security holders is enormous. While analysts estimate that banking entities hold approximately \$3 billion in the debt securities of TruPS CDOs, banking entities hold an estimated \$60-70 billion in debt securities of CLOs.<sup>10</sup> The confusion surrounding whether CLO debt securities may be ownership interests has already started to affect the CLO market, and could precipitate a significant market disruption.<sup>11</sup>

Should you decline to provide the guidance we requested in the December 24 Letter, we ask that, at a minimum, you provide guidance that debt securities of CLOs in existence as of [the date of your determination] whose holders have the creditor rights described in the December 24 Letter but do not have any of the indicia of ownership under subsections (B) through (G) of § \_\_.10(d)(6) of the Final Rule, not be deemed to be “ownership interests” under the Final Rule. Like TruPS CDO debt security holders, CLO debt security holders were not given adequate notice by the proposed rule that their protective creditor rights by themselves would subject their debt security ownership to the covered fund prohibition of the Volcker Rule. CLO debt security holders that are banking entities will face many of the same harms as TruPS CDO debt holders if they are forced to divest their interests because of the definition of “ownership interest” and it would be arbitrary and capricious to provide relief to existing TruPS CDOs without providing similar relief to existing CLOs.

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<sup>7</sup> *Id.* at 11.

<sup>8</sup> Notice of Proposed Rulemaking, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68846, 68897 (Nov. 7, 2011).

<sup>9</sup> Complaint at 10.

<sup>10</sup> *See, e.g.*, Wells Fargo Securities LLC, The CLO Salmagundi: A Volcker Rule Update, Dec. 20, 2013.

<sup>11</sup> In the secondary CLO market, over \$1B in CLO debt securities traded between December 16-20. This is twice the average trading volume for these securities and is particularly troubling given that volumes are usually suppressed in the week before Christmas. *See* Bank of America Merrill Lynch, US CLO 2.0 Equity Returns, CLO Weekly, Dec. 20, 2013.

Please feel free to contact Elliot Ganz, LSTA's General Counsel, at (212) 880-3003 if you have any questions regarding this letter.

Sincerely,



R. Bram Smith  
Executive Director  
Loan Syndication and Trading Association [LSTA]



Christopher Killian  
Managing Director  
Securities Industry and Financial Markets Association [SIFMA]



Richard Johns  
Executive Director  
Structured Finance Industry Group [SFIG]



Richard Foster  
Senior Counsel for Regulatory &  
Legal Affairs  
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