February 13, 2012

**VIA EMAIL TO THE ADDRESSES SET FORTH BELOW**

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| Board of Governors of the Federal Reserve System<br>20th Street and Constitution Avenue, NW<br>Washington, DC 20551<br>Attn: Jennifer J. Johnson, Secretary<br>Docket No. R-1432; RIN 7100-AD82<br>regs.comments@federalreserve.gov | Office of the Comptroller of the Currency<br>250 E Street, SW, Mail Stop 2-3<br>Washington, DC 20219<br>Docket ID OCC-2011-14;<br>RIN 1557-AD44<br>regs.comments@occ.treas.gov |
| Federal Deposit Insurance Corporation<br>550 17th Street, NW<br>Washington, DC 20429<br>Attn: Comments<br>Robert E. Feldman, Executive Secretary<br>RIN No. 3064-AD85<br>comments@fdic.gov | Securities and Exchange Commission<br>100 F Street, NE<br>Washington, DC 20549-1090<br>Attn: Elizabeth M. Murphy, Secretary<br>Release No. 34-65545; File No.S7-41-11; RIN 3235-AL07<br>rule-comments@sec.gov |

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

Ladies and Gentlemen:

The Affordable Housing Investors Council ("AHIC") appreciates the opportunity to comment on the above referenced proposal (the "Volcker Proposal") that would implement Section 13 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq. (the "BHC Act"), as added by Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" and Section 619 thereof, the "Volcker Rule"). AHIC is a non-profit organization comprised of corporations, primarily financial institutions, engaged in investing in affordable housing properties that qualify for low-income housing tax credits ("LIHTC") under section 42 of the Internal Revenue Code of 1986 (the "Code").[1] AHIC's mission is to increase knowledge of the benefits of investing in affordable housing tax credit properties, educate corporate investors on all aspects of affordable housing, and discuss issues of importance to investors in the affordable housing industry.[2] In light of its mission and membership, AHIC is keenly interested in how the Volcker Proposal may affect the LIHTC market.

AHIC is pleased that the Volcker Proposal expressly states that a banking entity may acquire an ownership interest in, or act as sponsor to, a LIHTC fund provided that such fund qualifies as a small business investment company, a public welfare investment or a qualified rehabilitation expenditure, but

[1] Section 47 of the Code also provides tax credits for certain costs incurred for the rehabilitation or reconstruction of certain historic buildings. Historic tax credits are often used in conjunction with LIHTCs in connection with the rehabilitation of a historic building to be used for affordable housing. For ease of reference, this comment letter only refers to LIHTC investments, but should be read to also include historic tax credit investments.

[2] Additional information on AHIC and its mission can be found at http://www.ahic.org.

believes that the better approach would be to exclude LIHTC-related funds from the definition of a "covered fund" entirely. Furthermore, AHIC is concerned that the portion of the Volcker Proposal implementing Section 13(f) of the BHC Act, which prohibits a banking entity from engaging in certain transactions with covered funds, has the potential to create uncertainty among participants in the LIHTC market who are subject to the Volcker Rule regarding whether they may continue providing financial guarantees to investors in LIHTC funds. The guaranteed LIHTC fund market is an important component of the overall LIHTC market because guaranteed LIHTC funds can bring non-financial institution corporate investors into the LIHTC market and thereby significantly increase the amount of capital available for the financing of affordable housing properties. AHIC also has a concern that Section 13(f) of the BHC Act creates needless ambiguity about a banking entity's ability to provide certain types of lending products to LIHTC funds in which the entity is an equity investor.

This comment letter first provides a brief summary of the LIHTC program and market and describes the general structure of guaranteed LIHTC funds. It then explains AHIC's recommendations with respect to the items referenced in the preceding paragraph.

**Background: The LIHTC Program and Market for LIHTC Investments**

The LIHTC program creates market incentives for the acquisition and development or rehabilitation of affordable rental housing. Corporate investors participate in the LIHTC program by making equity investments in affordable rental housing projects in exchange for receiving an allocation of tax credits generated by the projects. In general, a corporate investor's return on its equity investment in an affordable rental housing project is almost entirely attributable to the tax benefits generated by such investment.[3] The equity capital that the project's sponsor/developer is able to raise due to the tax credits significantly lowers the project's debt burden, thereby making it financially feasible for developers to offer lower, more affordable rents.[4] Over the past 25 years, the LIHTC program has become a critical tool for addressing the nation's growing affordable housing needs, with over two million affordable rental units having been built or rehabilitated to house low- and moderate-income households.[5]

In general, corporate investors make equity investments in affordable rental housing projects either directly, by investing in the project-level limited partnership that owns the property, or indirectly, by investing in an "upper-tier" limited partnership (an "Upper-Tier LIHTC Fund") that owns 99% limited partner interests in multiple underlying project-level limited partnerships. Upper-Tier LIHTC Funds generally are organized, offered and managed by third-party syndication/asset management firms that specialize in the LIHTC market. Some banking entities active in the LIHTC market have an in-house LIHTC syndication business and team, which originates and manages LIHTC investment opportunities both for the entity's own portfolio and for third-party investors.

To qualify for an allocation of LIHTCs, an affordable rental housing project must, among other criteria, commit to low-income occupancy threshold requirements. Because of these requirements, equity investments in LIHTC projects (including investments made indirectly through an Upper-Tier LIHTC Fund) generally receive consideration as a "qualified investment" under the Community Reinvestment

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[3] The tax benefits attributable to a LIHTC project consist of a dollar-for-dollar reduction to the investor's income tax liability from the allocated tax credits and deductions attributable to tax losses generated by the project.
[4] For a detailed overview of the LIHTC program and banking entities' involvement in the LIHTC market, see "Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks," *Community Development Insights*, Comptroller of the Currency, U.S. Department of the Treasury (February 2008) (hereinafter, the "OCC's LIHTC Summary"), *available at* http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf.
[5] "The Low-Income Housing Tax Credit Program at Year 25: A Current Look at Its Performance," Reznick Group, P.C. (August 2011) (hereinafter, "The Reznick Group LIHTC Report"), p.1, *available at* http://www.reznickgroup.com/sites/reznickgroup.com/files/papers/reznickgroup_lihtc_survey_2011.pdf.

Act of 1977, 12 U.S.C. 2901, and its implementing regulations in 12 C.F.R. part 25 (the "CRA"). Banking entities subject to the CRA constitute a major segment of the LIHTC investor population. For example, according to the OCC, a study of the LIHTC market in 2003 found that 43 percent of LIHTC investors were subject to the CRA.[6]

Independent studies of affordable multifamily housing projects financed with LIHTCs have concluded that such projects historically have performed better than market-rate multifamily housing projects and other real estate asset groups, even during the severe economic downturn of 2008-2010.[7] Nevertheless, investing in LIHTC projects involves certain risks to investors that are unique to the LIHTC market, such as a failure to accurately estimate the amount and timing of the tax benefits and the resulting yield of the investment, a delay in commencement of tax benefits due to construction or lease-up delays, poor asset management by the syndicator in the case of an Upper-Tier LIHTC Fund and failure to comply with the technical requirements of the LIHTC program, which could result in a denial or recapture of allocated tax credits. Additionally, because LIHTC investments generally are financed in part with mortgage debt, they are subject to foreclosure risks similar to other real estate assets. Furthermore, because LIHTC investments are a specialized asset class, investors generally need to have a relatively comprehensive understanding of the LIHTC program, including the technical rules in Section 42 of the Code, and the unique risks associated with such investments.

As noted above, financial institutions comprise a substantial majority of the population of LIHTC investors. Banking entities are largely motivated by CRA objectives. Insurance companies tend to be attracted to the LIHTC market because the long-term nature of the asset class matches well with their long-term liabilities.[8] Because of the importance of the LIHTC market to these investors, they typically have internal groups focused on LIHTC investing and therefore have the necessary institutional knowledge about the LIHTC program and market to be efficient, active and prudent investors.

One structure that has been developed by LIHTC market participants to attract non-financial institution investors is the guaranteed LIHTC fund. Under this structure, a guarantor entity (typically an insurance company or investment grade-rated banking entity) acquires limited partner interests in one or more Upper-Tier LIHTC Funds, aggregates such interests in an "upper-upper-tier" limited partnership (the "Guaranteed LIHTC Fund"), issues a guaranty in favor of the Guaranteed LIHTC Fund in exchange for a guaranty fee and sells limited partner interests in the Guaranteed LIHTC Fund to third-party investors. The guaranty issued in favor of the Guaranteed LIHTC Fund requires the guarantor to make a payment to the Guaranteed LIHTC Fund if the fund's investors do not achieve a minimum yield on their investment. An investor in a Guaranteed LIHTC Fund is effectively assuming the guarantor's credit risk instead of the specific risks associated with LIHTC investments. The guarantor, because it typically is a banking entity or insurance company with a substantial LIHTC investing business, is better able than the non-financial institution investor to assess and mitigate the risks of the underlying LIHTC investments and therefore is willing to assume such risks in exchange for a fee.

The Guaranteed LIHTC Fund market is an important component of the overall LIHTC market because such funds attract non-financial institution corporate investors into the LIHTC market and significantly increase the amount of capital available for the financing of affordable rental housing properties. Additionally, by opening the LIHTC market to non-financial institution corporate investors, the Guaranteed LIHTC Fund structure can enhance secondary market liquidity for the LIHTC portfolios of financial institutions, thereby freeing capital to be deployed to new affordable rental housing projects.

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[6] *See* the OCC's LIHTC Summary at p.5.
[7] *See* The Reznick Group LIHTC Report.
[8] Benefits from LIHTC investments generally are earned over a 17-year period, which consists of the initial two-year construction/rehabilitation and lease-up period and the 15-year tax credit compliance period.

**Recommendations for Improvements to Ensure No Adverse Impact on LIHTC Market**

**1. Exclude LIHTC-Related Funds from the Definition of a "Covered Fund"**

The Volcker Rule's approach of defining "a hedge fund or a private equity fund" as any issuer of securities that would be an investment company, as defined in the Investment Company Act of 1940 (the "1940 Act"), but for section 3(c)(1) or 3(c)(7) of the 1940 Act results in Upper-Tier LIHTC Funds and Guaranteed LIHTC Funds potentially being included within the purview of the Volcker Rule. Because these funds own limited partner interests in other limited partnerships that in turn own real estate properties, securities lawyers generally advise that such funds be structured to comply with the section 3(c)(1) or 3(c)(7) exceptions rather than relying on the exception in section 3(c)(5) of the 1940 Act, which provides an exception for certain issuers "primarily engaged in [the business of] . . . purchasing or otherwise acquiring mortgages and other liens and interest in real estate."[9]

Question 225 of the Volcker Proposal requests comment on the issue of whether there are any entities that are captured by the proposed rule's definition of a "covered fund" the inclusion of which does not appear to be consistent with the language and purpose of the statute. AHIC notes that the Financial Stability Oversight Council's January 2011 white paper on the Volcker Rule (the "FSOC White Paper")[10] directed the Agencies to consider providing exceptions with respect to certain funds that are technically within the scope of hedge fund and private equity fund definitions but that Congress may not have intended to capture in enacting the statute.

AHIC respectfully submits that Upper-Tier LIHTC Funds and Guaranteed LIHTC Funds are not the type of entities that Congress intended to bring within the coverage of the Volcker Rule. The underlying purpose of the Volcker Rule is to prevent banking entities from using the benefit from federal insurance on customer deposits and access to the Federal Reserve's discount window to engage in certain activities that are perceived to be unduly risky and not a core activity to a banking entity's primary role as a financial intermediary and credit and liquidity provider.[11] Banking entities' participation in the LIHTC market is clearly not the type of activity that Congress intended to address through the Volcker Rule. In fact, the CRA, which was enacted over 30 years ago, effectively mandates that banking entities use the benefit from federal insurance on customer deposits to invest in affordable rental housing properties and to make other community development-oriented investments. Many Presidential administrations and sessions of Congress, as well as the Agencies, have consistently taken actions to expand the development and availability of affordable housing properties in the United States, including through the creation of LIHTC program over 25 years ago. It would be completely contradictory with these actions for the Agencies to include LIHTC-related funds within the definition of a "covered fund" and subject them to restrictions set forth in the Volcker Rule and its implementing regulations.

Furthermore, as outlined in the FSOC White Paper, one of the primary purposes of the covered fund activities and investment prohibition is to ensure that banking entities do not invest in or sponsor such funds as a way to circumvent the Volcker Rule's restrictions on proprietary trading. AHIC notes that banking entities do not engage in "proprietary trading" of LIHTC investments—these investments are long-term and, as previously noted, banking entities are driven to invest in them to a significant extent

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[9] AHIC understands from informal discussions with securities lawyers that the SEC has issued No-Action Letters indicating that a limited partnership interest in a real estate entity is not considered to be an "interest in real estate" for purposes of section 3(c)(5) of the 1940 Act.

[10] "Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds," Financial Stability Oversight Council (January 2011) (hereinafter, the "FSOC White Paper"), *available at* http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[11] *See* the FSOC White Paper at p.1.

because of CRA objectives and therefore do not seek to profit from speculative near-term price movements. In fact, secondary sales require a significant amount of due diligence by the prospective purchaser and are time consuming to complete and, therefore, market realities effectively make it impossible for LIHTC investors to trade on short-term price movements. Accordingly, including LIHTC-related funds within the definition of a covered fund does not in any way further the purpose of the Volcker Rule's covered fund activities and investments prohibition.

Lastly, the inclusion of Upper-Tier LIHTC Funds and Guaranteed LIHTC Funds within the definition of a covered fund leads to the anomalous result that a banking entity's investment in a project-level limited partnership that directly owns a LIHTC project (i.e., a direct investment) would not be within the purview of the Volcker Rule,[12] but the banking entity's investment in an Upper-Tier LIHTC Fund that has an ownership interest in multiple project-level partnerships (i.e., an indirect investment) would be included. This result is particularly perplexing given that an indirect investment could be considered to be even less risky than a direct investment because the banking entity's risk exposure is spread among multiple properties.

AHIC acknowledges that the inclusion of LIHTC-related funds within the definition of a covered fund would not prohibit banking entities from continuing to invest in and sponsor LIHTC-related funds because such investments qualify for the public welfare investment exemption set forth in Section 13(d)(1)(E) of the BHC Act.[13] In this regard, AHIC applauds the Agencies for including the language in footnote 296 of the Volcker Proposal expressly stating that a banking entity may acquire an ownership interest in, or act as sponsor to, a LIHTC fund if such fund qualifies as a small business investment company, public welfare investment or qualified rehabilitation expenditure. This language is important to avoid any ambiguity as to whether the public welfare investment exemption applies to exempt investments in Upper-Tier LIHTC Funds and Guaranteed LIHTC Funds from the covered fund activities and investments prohibition. However, AHIC considers the approach of including LIHTC-related funds within the purview of the Volcker Rule but permitting investments in and sponsorship of such funds through an exemption as only a second-best approach. Under this approach, the other restrictions set forth in the Volcker Rule, such as the "Super 23A" provision in Section 13(f) of the BHC Act, would unnecessarily apply to LIHTC-related funds. Furthermore, AHIC is concerned that additional regulations and related guidance could be issued by the Agencies in the future that would apply to all covered funds and could unintentionally adversely affect the LIHTC market.

For the foregoing reasons, AHIC respectfully requests that the Agencies adopt a final rule that specifically excludes any LIHTC-related fund from the definition of a covered fund. If, however, the Agencies do not adopt this recommendation, AHIC encourages the Agencies to include the language in footnote 296 of the Volcker Proposal in the final rule.

## 2. Exempt LIHTC-Related Funds from Application of the Super 23A Provision

Section 13(f) of the BHC Act, which was added by the Dodd-Frank Act, separately prohibits a banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a covered fund, and any affiliate of such a banking entity, from entering into any transaction

[12] Because the project-level partnership owns real estate directly rather than limited partnership interests (which are securities), the project-level partnership is not an investment company under the 1940 Act.

[13] Equity investments in LIHTC projects (including investments made indirectly through an Upper-Tier LIHTC Fund) generally receive consideration as a "qualified investment" under the CRA, and an investment that would receive consideration as a "qualified investment" under 12 C.F.R. 25.23 of the CRA is considered to be an investment that meets the public welfare criteria under 12 C.F.R. 24.3. *See* "Part 24 Community Development Investments," *Community Developments Fact Sheet*, Comptroller of the Currency, U.S. Department of the Treasury (April 2010), p.4, *available at* http://www.occ.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-part-24-community-development-investments.pdf.

with the fund, or any other covered fund controlled by such fund, that would be a "covered transaction" as defined in section 23A of the Federal Reserve Act, as if such banking entity or affiliate were a member bank and the covered fund were an affiliate thereof, subject to certain exceptions.

Question 280 of the Volcker Proposal asks whether the proposed rule unduly constrains a banking entity's ability to meet the convenience and needs of the community through CRA or other public welfare investments. Additionally, Question 316 requests comment on what types of transactions or relationships that currently exist between banking entities and a covered fund would be prohibited under the proposed rule and what the effect of such prohibition would be.

In response to these questions, AHIC notes that, as discussed in the previous section, if LIHTC-related funds are included within the definition of a covered fund, then they would be subject to the other sections of the Volcker Rule. In such case, AHIC is concerned that Section 13(f) of the BHC Act—commonly referred to as the Super 23A provision—could apply to prevent banking entities from organizing and sponsoring Guaranteed LIHTC Funds because issuing a guarantee to such fund would constitute a "covered transaction." AHIC believes that this outcome would be inconsistent with the purpose of the Volcker Rule and could adversely impact the efficient functioning of the LIHTC market.

AHIC observes that there is significant ambiguity under the Volcker Proposal, as currently drafted, as to whether the Super 23A provision would apply only to a covered fund organized and sponsored by a banking entity pursuant to the exemption set forth in Section 13(d)(1)(G), which permits a banking entity to organize and offer a covered fund pursuant to a bona fide trust, fiduciary or investment advisory services business, or whether the Super 23A provision applies to any covered fund in which a banking entity may invest or sponsor pursuant to any of the exemptions set forth in Section 13(d), including the public welfare exemption. AHIC does not believe that applying the Super 23A provision to covered funds that banking entities invest in or sponsor pursuant to the public welfare investment, qualified rehabilitation expenditure or small business investment company exemption is necessary to further the purposes of the Volcker Rule. Furthermore, AHIC believes that this application could have an adverse impact on the LIHTC market by decreasing the amount of guaranteed product available, which would reduce the amount of equity invested in LIHTC projects by non-financial institution corporate investors.

AHIC also notes that the LIHTC program has allowed banking entities to offer lending products related to tax credit projects, such as bridge loans and warehouse loans. Bridge loans, which are also known as subscription obligation financing, are short-term credit facilities provided by banking entities to LIHTC investors to cover their capital contributions during the construction period. These credit facilities are often used by syndicators to improve internal rates of returns for LIHTC investors, thereby attracting additional investors to the LIHTC market, as well as to better manage the capital contribution process. Banking entities also provide warehouse lines of credit to syndicators, allowing them to acquire LIHTC properties pending receipt of capital contributions from LIHTC investors.[14] These lending products are another avenue through which banking entities participate in the LIHTC market and achieve CRA objectives. Although AHIC does not believe that the Super 23A provision is intended to prohibit or in any way limit a banking entity's ability to offer these important lending products to LIHTC funds in which the banking entity is an equity investor,[15] it is concerned there is needless ambiguity based on the current language of the Volcker Proposal, particularly with respect to those banking entities that have an in-house LIHTC syndication business and sponsor/manage non-Guaranteed LIHTC Funds. Again, AHIC believes that this ambiguity potentially could have an adverse impact on the LIHTC market without furthering the Volcker Rule's overall objectives.

[14] These products are discussed in the OCC's LIHTC Summary, at p.4.
[15] A banking entity typically offers these LITHC-related lending products to funds in which it is an equity investor because it is already familiar with the structure and proposed portfolio composition of the LIHTC fund.

For the foregoing reasons, AHIC respectfully requests that, if the Agencies do not modify the Volcker Proposal to exclude LIHTC-related funds from the definition of a covered fund, they clarify the final rule to make it clear that the Super 23 provision in Section 13(f) of the BHC Act does not apply to transactions between a banking entity and a covered fund that a banking entity invests in or sponsors pursuant to the public welfare investment, qualified rehabilitation expenditure or small business investment company exemption.

**Conclusion**

In light of the significant need for an increasing supply of affordable housing and the budgetary challenges currently faced by all levels of government, AHIC believes it is critically important that the LIHTC market not be disrupted by the Volcker Rule. The structure of the LIHTC market has developed over the past 25 years in a manner that encourages significant equity and debt investment by financial institutions and other corporate investors in a specialized asset class that is critical to the important national goal of having an adequate supply of quality, safe affordable housing for low- and moderate-income families. AHIC encourages the Agencies to carefully evaluate the impact that the final rule may have on the efficiency of the LIHTC market and the number of investors willing to participate in the market. AHIC believes that the Volcker Proposal, as currently drafted, may have an adverse impact on the LIHTC market without actually furthering the rule's overall objective of promoting and protecting the safety and soundness of the banking system and the financial stability of the United States.

For the reasons discussed above, AHIC respectfully requests that the Agencies: (1) adopt a final rule that specifically excludes any LIHTC-related fund from the definition of a covered fund; (2) as a second-best approach if the first recommendation is not adopted, include the language in footnote 296 of the Volcker Proposal within the text of the final rule; and (3) if the first recommendation is not adopted, modify the language in the final rule to make it clear that the Super 23 provision in Section 13(f) of the BHC Act does not apply to a covered fund that a banking entity invests in or sponsors pursuant to the public welfare investment, qualified rehabilitation expenditure or small business investment company exemption.

AHIC appreciates the opportunity to comment on the Volcker Proposal's impact on the LIHTC market. If you have any questions or wish to discuss the above comments further, please contact the undersigned at (347) 392-9983.

Respectfully,

**THE AFFORDABLE HOUSING INVESTORS COUNCIL**

Julie H Hertzog

Julie H. Hertzog

Executive Director