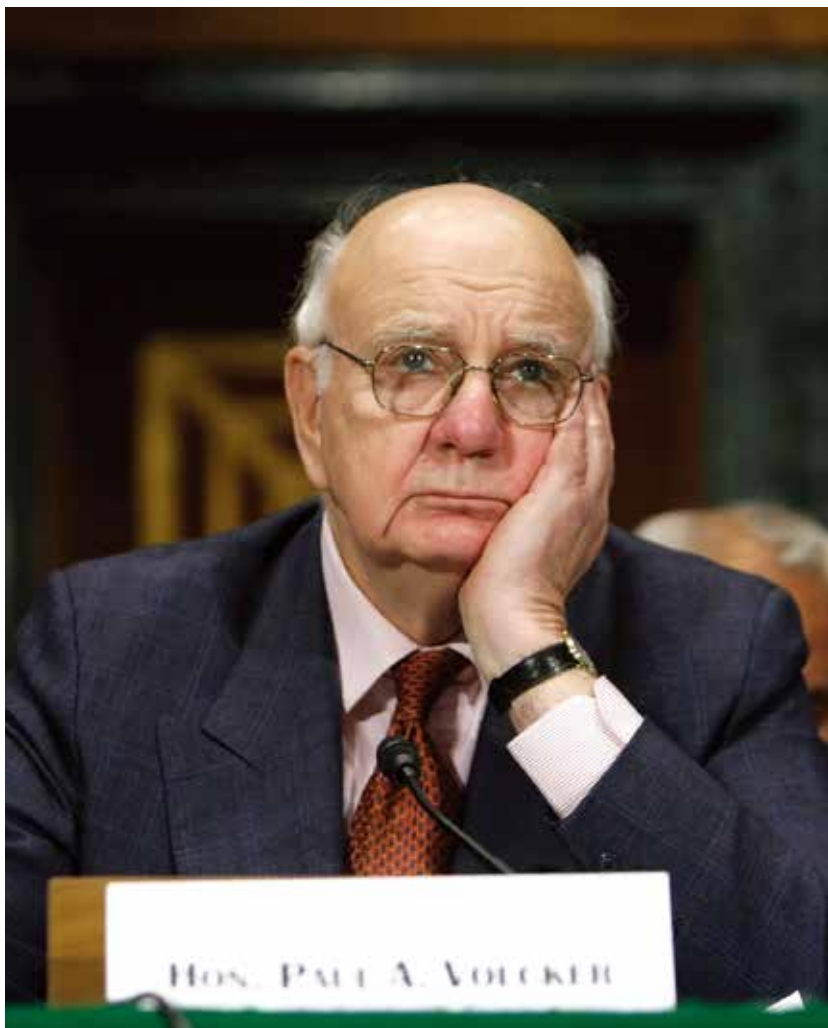


# The Volcker Rule's

## Impact on Foreign Banking Organisations



### Introduction

Effective 21 July 2015, the United States' Volcker Rule will prohibit banking entities from engaging in proprietary trading and from sponsoring or investing in hedge funds or private equity funds (so-called "covered funds"), absent an exemption. Foreign banking organizations (FBOs), i.e., non-US banks that maintain a bank branch, agency office or subsidiary in the US, are caught by the Volcker Rule, including all the FBO's bank branches and affiliates globally. Final regulations issued in December 2013 by the five US federal agencies responsible for implementing the Volcker Rule provide some relief for offshore proprietary trading and private fund activities engaged in by FBOs, but they must meet the conditions specified in the final regulations, and also must undertake the reporting, compliance and documentation burdens imposed by the Rule.

### Trading By Foreign Banking Entities

There are a number of important exemptions to proprietary trading – including underwriting, market

making, risk-mitigating hedging, trading in US government obligations and trading in foreign home country government obligations – which are available to certain banking entities wherever located. For an FBO and its non-US affiliates, however, perhaps the most important proprietary trading exemption is the one available to a foreign banking entity if the transaction is conducted offshore, specifically, if the following conditions are met:

1. the banking entity is not organised or directly or indirectly controlled by a banking entity that is organised under the laws of the US or of any US state;
2. the banking entity<sup>1</sup> is a "qualified banking organization" under the US Federal Reserve Board's Regulation K<sup>2</sup> or meets certain predominance tests regarding the nature and source of its global assets and revenues;
3. the banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange,

negotiate or execute such purchase or sale) is not located in the US or organised under the laws of the US or of any US state;

4. the banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the US or organised under the laws of the US or of any US state;
5. the purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the US or organised under the laws of the US or of any US state;
6. no financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the US or organised under the laws of the US or of any US state; and
7. the purchase or sale is not conducted with or through any "US entity" other than: (a) the foreign operations of a US entity; (b) a US entity that is an unaffiliated market intermediary acting as principal, provided the transaction is promptly cleared and settled; or (c) a US entity that is an unaffiliated market intermediary acting as agent, provided the transaction is conducted anonymously on an exchange and promptly cleared and settled. (For purposes of the foregoing, a "US entity" is any entity that is, or is acting on behalf of, or at the direction of, any other entity that is located in the US or organised under the laws of the US or of any US state, and a US branch, agency or subsidiary of a foreign banking entity is considered to be located in the US.)

In short, the aforesaid exemption allows an FBO and its non-US affiliates to engage in proprietary trading notwithstanding the Volcker Rule, provided that certain conditions are met; i.e., the transaction is not arranged, negotiated, executed, decided, booked or financed by any of the FBO's or its non-US affiliates' branches, affiliates or personnel located or organised in the US, and the transaction is not conducted with or through a US entity other than its foreign operations or other than unaffiliated market intermediaries. However, if the above exemption applies, the FBO remains subject to the Volcker Rule's compliance requirements (discussed below).

## Foreign Private Funds

There are likewise important exemptions in respect of

funds which are available to all banking entities – both in terms of exemptions from the definition of "covered fund" and in terms of exemptions from the prohibition on sponsoring or investing in covered funds. Again, for an FBO and its non-US affiliates, there is an exemption available if its private fund activities are conducted offshore, specifically, if the following conditions are met:

1. the banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the fund, is not itself, and is not controlled directly or indirectly, by a banking entity that is located in the US or organised under the laws of the US or of any US state;
2. banking entity is a "qualified banking organization" under the US Federal Reserve Board's Regulation K or meets certain predominance tests regarding the nature and source of its global assets and revenues;
3. the banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the fund is not located in the US or organised under the laws of the US or of any US state;
4. the ownership or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the US or is organised under the laws of the US or of any US state;
5. no financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the US or





- is organised under the laws of the US or of any US state; and
6. no ownership interest in the fund is offered for sale or sold to a “resident of the United States.” (For this purpose, a “resident of the United States” has the meaning given to the term “U.S. person” under Regulation S promulgated by the US Securities and Exchange Commission).<sup>5</sup>

If a fund meets all of the aforesaid conditions (referred to as the “solely outside of the United States” or “SOTUS” conditions), then an FBO or any of its non-US affiliates would be allowed to acquire and retain an ownership interest in such fund and/or to sponsor such fund.

More importantly, however, if a fund is organised under the laws of a jurisdiction other than the US or any US state and its shares are not available for investment or held by US residents, as far as a FBO is concerned, such a fund may not be subject to the Volcker Rule at all because such a fund does not meet the Volcker Rule’s definition of a “covered fund.” In this regard, it is important to note that the definition of “covered fund”

is narrower for FBOs than it is for US banking entities. The point is, for FBOs wishing to invest in or sponsor a fund, it may be unnecessary to resort to the SOTUS conditions if the fund is organised outside the US and unavailable for investment by US residents, because the fund is not a “covered fund” as far as the FBO is concerned and thus the investment or fund sponsorship arrangement is not subject to the Volcker Rule.

As the above discussion indicates, it is important to carefully consider the ownership structure of any fund and its investors. For example, if a foreign private fund is held via the FBO’s US affiliate, then such a fund would still be a covered fund and subject to the Volcker Rule (although other exemptions may still be available). Also, master-feeder structures must be carefully analysed to ensure that they are not set up in such a way that exposes them to “look through” treatment by the US regulatory agencies and thus deemed impermissible for investment under Volcker.

## Administrative Requirements

Despite the relief provided to foreign banking entities

under the various exemptions described above, FBOs and their non-US affiliates are nevertheless subject to the Volcker Rule. As such, if FBOs and their non-US affiliates engage in any proprietary trading or private fund activities, then not only must they meet the conditions for any exemptions availed of, but they must also adhere to several administrative requirements.

Banking entities engaged in proprietary trading will be subject to reporting requirements. FBOs who have “trading assets and liabilities” in the US: (i) of US\$50 billion or more must begin trade metrics reporting on 30 June 2014 on a monthly basis, 30 days in arrears (becoming 10 days in arrears in January 2015); (ii) of US\$25 billion or more must begin trade metrics reporting on 30 April 2016 on a quarterly basis, 30 days in arrears; and (iii) of US\$10 billion or more must begin trade metrics reporting on 31 December 2016 on a quarterly basis, 30 days in arrears.

Banking entities engaged in proprietary trading and/or private fund activities will be subject to compliance requirements. FBOs who have consolidated US assets: (i) of US\$10 billion or less must adopt compliance procedures merely by incorporating appropriate Volcker Rule requirements in their existing policies and procedures; (ii) of more than US\$10 billion but less than US\$50 billion must adopt standard, standalone Volcker Rule compliance procedures; and (iii) of US\$50 billion or more must adopt far more elaborate “enhanced” compliance procedures. All compliance procedures must involve six elements comprising (i) written policies and procedures, (ii) internal controls, (iii) management framework, (iv) independent testing and audit, (v) training and (vi) retention of records.

Finally, banking entities engaged in private fund activities will be subject to fund documentation requirements. FBOs with global consolidated assets of US\$10 billion or more must retain records documenting certain exemptions with respect to the FBO’s fund sponsorship activities.

## Conclusion

Under the final regulations of the Volcker Rule, FBOs and their non-US affiliates will remain free to pursue their offshore proprietary trading and private funds businesses in a relatively unrestricted manner, provided those trading and funds activities have no nexus to the US. This may well result in their having a competitive advantage over US banking entities, which are subject

to Volcker Rule restrictions with respect to their global activities. However, given the conditions which pertain to the offshore and other exemptions, as well as the administrative burdens imposed by US regulators, the cost of conducting such businesses will increase for FBOs and their non-US affiliates who wish to continue engaging in them. ☐

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### Notes:

- 1 “Banking entity” is broadly defined in the Volcker Rule to mean any FDIC-insured bank, any US bank holding company (including a foreign bank that is regulated under US law as if it were a bank holding company because it has a US branch or agency office), and an affiliate of the foregoing, wherever located. Thus, if a non-US bank maintains a branch or agency office in the US, every affiliate of that bank, wherever located, is a “banking entity” under the Volcker Rule.
- 2 The Federal Reserve Board’s Regulation K regulates the activities of foreign banks in the US and, in this regard, confers somewhat greater powers on “qualified foreign banking organizations” (QFBOs). Regulation K defines a QFBO as an organisation the worldwide activities of which are predominantly banking and financial, and prescribes a mathematical test to determine whether a foreign bank is a QFBO.
- 3 Examples of “covered funds” include: foreign public funds, joint ventures, loan securitisations, qualifying asset-back commercial paper (ABCP) conduits, and qualifying covered bond entities.
- 4 Examples include: organised and offered funds, organised and offered asset-back securities (ABS) funds, market making, and underwriting.
- 5 The SEC’s Regulation S defines the term “U.S. person” for purposes of defining the class of investors (or potential investors) to whom the protections of US securities laws apply. “U.S. person” includes, for example, natural persons who are residents of the US and legal entities incorporated in or organized under the laws of the US.

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## 引言

根据美国的「沃尔克规则」，银行机构除非获得豁免，否则从2015年7月21日起不得从事自营交易，也不得就对冲基金或私募股权基金（即所谓的「受涵盖基金」）作出保荐或投资。「外国银行机构」（以下简称 Foreign Banking Organisation (FBO)）（亦即在美国设立了分行、代理处或子公司的非美国银行）均须遵守「沃尔克规则」，包括所有FBO的全球分支机构和联属机构。负责执行「沃尔克规则」的五个美国联邦机构于2013年12月发出了最终规例，当中为FBO所从事的离岸自营交易及私募基金业务提供了宽免，但前提是其业务必须符合最终规例所订的条件，也必须履行「沃尔克规则」所规定的报告、合规及文件编制责任。

## 外国银行机构所进行的交易

在自营交易方面（包括承销、做市、降低风险对冲、买卖美国政府债务、买卖外国的本国政府债务），某些银行机构不论其在哪儿经营得享若干豁免。然而，对于FBO及其非美国联属机构来说，最重要的自营交易豁免，也许是符合以下条件情况下，外国银行机构在离岸进行的交易所得享的豁免：

1. 该银行机构<sup>1</sup>并非由依据美国或其任何州份之法律成立的银行机构所设立，又或是直接或间接地受该等银行机构控制；
2. 根据「美国联邦储备委员会」《规例K》<sup>2</sup>的规定，该银行机构是一个「合格银行机构」，或是在其环球资产及收入的性质与来源方面，通过了某些优势测试；
3. 在有关买卖中作为主事人的银行机构（包括负责安排、商议或执行有关交易的银行机构或其联属机构的人员），并非位于美国或是根据美国或其任何州份之法律成立；
4. 以主事人身份作出有关买卖决定的银行机构（包括相关人员），并非位于美国或是根据美国或其任何州份之法律成立；
5. 有关买卖（包括为所买卖的金融工具进行降低风险对冲而作出的任何交易）并不被位于美国、或是根据美国或其任何州份之法律成立的分支机构或联属机构直接地或在合并的基础上列为主事人；
6. 该银行机构所进行的买卖，并未获得位于美国、或是根据美国或其任何州份之法律成立的分支机构或联属机构直接或间接地提供融资；及

7. 有关买卖并非与或通过任何「美国机构」进行，但下述机构除外：(a) 该美国机构的海外业务；(b) 该作为主事人的美国机构，其自身为无关联市场中介人，前提是有关交易必须迅速清算和结算；或(c) 该作为代理人的美国机构，其自身为无关联市场中介人，前提是有关交易必须以不具名方式在交易所进行，并必须迅速清理和结算。(就上述目的而言，「美国机构」指任何位于美国、或是根据美国或其任何州份之法律成立的机构；又或是，指代表位于美国、或根据美国或其任何州份之法律成立的其他任何机构行事或受其指示的机构。外国银行机构的美国分支机构、代理机构或子公司视为位于美国。)

简而言之，上述豁免允许FBO及其非美国附属机构从事自营交易，而不受「沃尔克规则」所规限，前提是必须符合若干条件，即：该项交易并非由该FBO或其非美国附属机构位于美国或在美成立的任何分支机构、附属机构或人员作出安排、商议、执行、决定、记账或提供资金，而该项交易并非与美国机构或是通过美国机构进行，但其海外业务或无关联市场中介人除外。即使上述豁免适用，该FBO仍须受「沃尔克规则」的合规要求所规限（见下文）。

## 外国私募基金

同样，所有银行机构在基金方面也享有重要豁免——无论是就「受涵盖基金」<sup>3</sup>的定义所享的豁免，还是就禁止保荐或投资于受涵盖基金<sup>4</sup>方面所享的豁免。同样，FBO及其非美国附属机构的私募基金业务尚于离岸进行，并符合以下条件，它们将得享豁免：

1. 在取得或保留基金的所有权权益中，作为保荐人或主事人的银行机构，其本身并非位于美国、或是根据美国或其任何州份之法律成立；也并非由位于美国、或是根据美国或其任何州份之法律成立的银行机构所直接或间接控制；
2. 根据美国联邦储备委员会《规例K》的规定，该银行机构是「合格银行机构」，或是在其环球资产及收入的性质与来源方面，通过了某些优势测试；
3. 作出决定以取得或保留所有权权益或作为基金保荐人的银行机构（包括相关人员），并非位于美国、或是根据美国或其任何州份之法律成立；
4. 有关的所有权或保荐（包括为进行所有权权益的降低风险对冲而进行的任何交易）并不被任何位于美国、或是根据美国或其任何州份之法律成立的分支机构或附属机构在合并的基础上直接或间接地列为主事人；
5. 位于美国、或是根据美国或其任何州份之法律成立的分支机构或附属机构，并无直接或间接地，为该银行机构的所有权或保荐提供融资；及

6. 该基金的所有权权益并无向任何美国居民提供出售或出售。(就这一目的而言，「美国居民」的定义以「美国证券交易委员会」颁布的《S规例》<sup>5</sup>为准。)

任何基金尚符合上述所有条件（称为「完全在美国以外」或「SOTUS」(solely outside of the United States)条件），则FBO或其非美国附属机构将获准取得及保留在该基金的所有权权益及/或为该基金作出保荐。

然而，更重要的是，任何基金尚根据美国或其任何州份以外的司法管辖区之法律成立，而其股份并非供美国居民投资或持有，则就FBO而言，由于该基金并非处于「沃尔克规则」的「受涵盖基金」定义范围内，故不受该规则所规限。因此，值得我们关注的地方是，「受涵盖基金」对FBO的适用范围，较对美国银行机构的来得狭窄。这意味，对于欲投资于基金或为其作出保荐的FBO来说，如果该基金是在美国以外成立，而并非供美国居民投资，则可以无需诉诸SOTUS条件，因为对该FBO来说，该基金并非「受涵盖基金」，因此有关的投资或基金保荐安排不受「沃尔克规则」所规限。

正如上述讨论所表明的，我们必须对任何基金及其投资者的所有权结构详加审视。例如，一个外国私募基金假如是通过FBO的美国附属机构被持有，它依然属于受涵盖基金，受「沃尔克规则」所规限（尽管仍可享有其他豁免）。此外，我们还必须仔细分析主基金结构，以确保其设立，不致面对美国监管机构的「对应法」，并根据「沃尔克规则」，被视为不可提供予投资者作投资。

## 行政上的要求

虽然外国银行机构根据上述各项豁免而获得提供资助，但FBO及其非美国附属机构仍受「沃尔克规则」所规限。因此，FBO及其非美国附属机构尚从事任何自营交易或私募基金业务，它们不仅需要符合得享豁免的条件，也必须遵守若干行政上的要求。

从事自营交易的银行机构须遵守报告要求。FBO在美国拥有的「交易性金融资产及负债」金额：(i) 如在500亿美元或以上，便必须从2014年6月30日开始，每月提交交易指标报告（滞延30天（而2015年1月后则滞延10天））；(ii) 如在250亿美元或以上，便必须从2016年4月30日开始，每季提交交易指标报告（滞延30天）；及(iii) 如在100亿美元或以上，便必须从2016年12月31日开始，每季提交交易指标报告（滞延30天）。

从事自营交易及/或私募基金业务的银行机构须遵守合规要求。FBO拥有的综合美国资产金额：(i) 如在100亿美元或以下，其必须将适当的「沃尔克规则」要求纳入其现有政



策及程序中以遵循合规程序；(ii) 如在 100 亿美元与 500 亿美元之间，其必须遵循标准、独立的「沃尔克规则」合规程序；及 (iii) 如在 500 亿美元或以上，其必须遵循「强化的」合规程序。所有合规程序均涉及六项要素，即：(i) 书面政策及程序；(ii) 内部控制；(iii) 管理框架；(iv) 独立测试与审核；(v) 培训；及 (vi) 保留记录。

最后，从事私募基金业务的银行机构皆需要遵守基金文件的编制要求。

FBO 所拥有的全球合并资产金额如在 100 亿美元或以上，便必须保留若干载有与 FBO 的基金保荐业务相关的豁免记录。

## 结论

根据「沃尔克规则」的最终规例，倘有关的交易与资金业务并不涉及美国，则 FBO 及其非美国附属机构可继续不受限制地，自由从事离岸自营交易及私募基金业务。此举可能使得其竞争优势，较全球业务须受「沃尔克规则」规限的美国境内银行机构为佳。然而，由于受到离岸及其他豁免条件的规限，加上美国监管机构所施加的行政责任，有意继续从事此等业务的 FBO 及其非美国附属机构，其经营成本势将有所增加。<sup>51</sup>

## 注释

- 1 在「沃尔克规则」中，「银行机构」广泛定义为指任何受联邦存款公司所保险的银行、任何美国境内银行控股公司（包括受美国法律规管的外国银行，而由于

它在美国设有分支机构或代理处，因此它有如是一家银行控股公司），以及前述的附属机构，不论其位于何处。因此，根据「沃尔克规则」，非美国境内银行如在美国设有分支机构或代理处，该银行的任何附属机构皆为「银行机构」，不论其位于何处。

- 2 美国联邦储备委员会的《规例 K》规管外国银行在美国的活动，并在这方面，赋予「合格境外银行机构」（qualified foreign banking organizations）（QFBO）更大的权力。《规例 K》界定 QFBO 为一个主要从事银行和金融环球业务的组织，并制订了一个计算验证，以确定一家外国银行是否为 QFBO。
- 3 「受涵盖基金」的例子包括：外国公共基金、合资企业、贷款证券化、以合资格资产支持的商业票据（ABCP）管道、合资格资产担保债券实体。
- 4 例子包括：成立及提供各项基金；成立及提供以资产支持的证券（ABS）基金；做市；承销。
- 5 美国证券交易委员会的《S 规例》为了界定受美国证券法保护的投资者（或潜在投资者），乃为「美国人」一词提供定义。「美国人」包括，例如，本身为美国居民的自然人，以及根据美国法律注册成立或组建的法人实体。

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