



Proposed EU Regulation on Bank Structure

Comparison of Volcker Rule and proposed EU ban on proprietary trading and investment in AIFs

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C L I F F O R D
C H A N C E

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Introduction

The proposed EU Regulation on Bank Structure (BSR) includes prohibitions on banking groups engaging in proprietary trading and investing in alternative investment funds (AIFs).

The European Commission's proposal for a prohibition on proprietary trading was designed to be narrower than the corresponding restriction under the US Volcker Rule and the ban on investment in AIFs was intended to prevent circumvention of that prohibition. However, the proposed EU rules would prohibit or restrict many activities in banking groups that would be permitted under the corresponding US rules, including own account and (in relation to funds) client-related activities that are consistent with the safety and soundness of a banking group and do not adversely affect its resolvability.

Under the European Commission's proposed text of the BSR, the **EU ban on proprietary trading** would only apply if the trading is for the sole purpose of making an own account profit, is not connected to client activity (or hedging risks arising from client activity) and is carried on through dedicated desks, units, divisions or individuals. These conditions narrow the scope of the proposed EU ban as compared with the corresponding US rules.

However, unlike the EU rules, the US rules provide a range of exemptions specifically addressing a number of different kinds of activity commonly carried on in banking groups. There is a risk that the EU prohibition could restrict a broad range of important own account activities, such as long-term investment in portfolio companies or subsidiaries, the use of financial instruments to hedge group foreign exchange or other risks, on-exchange market-making or liquidity provision, securities lending or repo for inventory management and the investment activities of insurance subsidiaries (all of which are specifically addressed by the US rules). In many cases, these activities will be carried on through dedicated desks, units, etc. and it may be difficult to rely on the argument that the activity is not for the purpose of making an own account profit given that companies generally aim to make an own account profit from their activities (even if this is only to offset a potential loss from other activities).

The proposed **EU ban on investment in AIFs** would apply to any investment in AIFs (even a single share or unit) made for the sole purpose of making an own account profit, with limited exemptions. Unlike the corresponding US rules, there are no de minimis or other exemptions for investments that are an integral part of the business of providing asset management services to clients (e.g. for positions held in the course of distributing or operating funds or carried interests or in non-EU public funds).

Similarly, the proposed broad **EU anti-circumvention rule** (which has no direct analogue under the US rules) would make it difficult for an EU banking group company to own a single share or unit in any entity of any kind (even in the course of client related equities business) unless it can determine that the entity's activities do not include proprietary trading or investment in AIFs.

The following comparative tables highlight some differences between the US regulations implementing the Volcker Rule and the corresponding EU rules set out in the European Commission's proposal for the BSR, focusing on areas where the EU rules may be more restrictive than the US rules. We also identify possible areas where the BSR could be aligned with the US rules to address the main issues highlighted in the tables below.

Introduction (Continued)

The European Parliament and the EU Council are now considering amendments to the European Commission's proposal for the BSR.

If the Parliament and the Council can each reconcile their members' divergent views, they will then seek to negotiate and agree the final text of the BSR. The Commission's proposal provides that the ban on proprietary trading and investment in AIFs would come into force 18 months after the publication of the agreed final text in the Official Journal.

The relevant Parliamentary committee (ECON) and the Council working group are considering a range of amendments to the European Commission's proposal. Some of these would further broaden the proposed prohibitions on proprietary trading and investment in AIFs, including amendments to expand the scope of the proprietary trading ban to cover trading which is not through dedicated desks, units, etc. and trading whose purpose (even if not its sole purpose) is an own account profit. However, other amendments also recognise that the scope of these prohibitions is too broad. In particular, the Council is also considering amendments under which the ban on proprietary trading and investment in AIFs would only apply to certain core credit institutions (so long as other group entities covered by the BSR which conduct relevant activities are separated from the core credit institution) as well as significantly extending the range of exemptions (albeit subject to extensive compliance and reporting requirements relating to the use of the exemptions). Nevertheless, even the extended range of exemptions does not address all the issues highlighted in the tables below.

The proposed BSR also includes provisions requiring core credit institutions within the scope of the regulation to move their trading activities into a structurally separate trading entity within the group. These proposals have generated even more extensive debate in the Parliament and the Council, in particular given existing national initiatives on bank structural reform (e.g. in France, Germany and the UK).

There had been speculation that the European Commission might withdraw the proposal given the difficulties in reaching agreement in the legislative process. However, ECON and the Council Presidency are actively continuing the discussions on the BSR - with the support of the Commission - aiming to achieve agreement during 2015.

This discussion below is based on the European Commission's proposal for the BSR and the final US rules implementing the Volcker Rule. The text of the Commission's proposal for the BSR is available at [link](#) (see Recitals (15) to (19) and Articles 3, 5(4), 6 and 7) and the text of the final US regulations is available at [link](#) (see pages 5779-5804).

When would the proposed EU rules apply?

The BSR would apply to:

- An EU credit institution or an EU parent, including all its EU and non-EU branches and subsidiaries, when it is identified as a global systemically important institution (G-SII) under Article 131 Capital Requirements Directive (2013/63/EU)*
 - The following entities:
 - an EU credit institution which is neither a parent undertaking nor a subsidiary, including all its EU and non-EU branches
 - an EU parent, including all its EU and non-EU branches and subsidiaries, where one of the group entities is an EU credit institution*†
 - an EU branch of a non-EU credit institution‡if for a period of three consecutive years it has:
 - total assets of at least €30bn; and
 - “trading activities” of at least €70bn or 10% of its total assets
- Excludes non-EU subsidiaries if subject to a local regime deemed “equivalent” (and reciprocal) by the European Commission.
- † Thresholds for these groups are calculated on a consolidated basis.
- ‡ Thresholds for EU branches of non-EU credit institutions are calculated on the basis of EU activities. Excludes EU branches of non-EU credit institutions if subject to a home state regime deemed “equivalent” (and reciprocal) by the Commission.

Notes:

Based on the Commission proposal for the BSR.

Assets and liabilities of insurance and reinsurance undertakings and other non-financial undertakings are excluded when calculating thresholds.

Competent authorities may also exempt non-EU subsidiaries of in-scope EU parents from the requirements on separation of trading activities where there is an appropriate resolution strategy agreed and certain other conditions are met.

The BSR does not apply to certain credit institutions exempted from the application of the Capital Requirements Directive.

How to calculate “trading activities”

$$\text{Trading Activities} = (\text{TSA} + \text{TSL} - \text{DA} - \text{DL})/2$$

Where:

Trading Securities Assets (TSA)	Assets that are part of a portfolio managed as a whole and for which there is evidence of a recent actual pattern of short-term profit taking, excluding derivative assets
Trading Securities Liabilities (TSL)	Liabilities taken with the intent of repurchasing in the near term, part of a portfolio managed as a whole, and for which there is evidence of a recent actual pattern of short-term profit-taking, excluding derivative liabilities
Derivative Assets (DA)	Derivatives with positive replacement values not identified as hedging or embedded derivatives
Derivative Liabilities (DL)	Derivatives with negative replacement values not identified as hedging instruments

Comparative tables

Entity scope

	Volcker Rule	Proposed BSR	Comment
Non-bank entities	<p>The US rules only restrict trading and investment by "banking entities". They do not apply to every entity within a group controlled by a bank holding company e.g. there are exceptions for:</p> <ul style="list-style-type: none"> ■ subsidiaries that are portfolio companies acquired under the merchant banking authority; and ■ certain covered funds that a banking entity is permitted to own (e.g. foreign public funds) even if controlled by a banking entity. 	<p>The EU rules would apply to EU banks, EU branches of non-EU banks and every EU and non-EU subsidiary of an EU parent within the scope of the BSR, including private equity portfolio companies and fund entities (even UCITS funds or unleveraged AIFs) if they meet the test for a subsidiary.</p>	<p>The EU rules would require bank controlled private equity portfolio companies to comply with the same investment restrictions as banks and would make it difficult to provide seed finance to UCITS or unleveraged funds where the fund is initially a subsidiary within the group.</p> <p>There are discussions in the EU Council on limiting the ban to core credit institutions within a banking group.</p> <p>The US financial regulators have indicated that they may further narrow the definition of banking entity to exclude controlled foreign funds that are not covered funds (involving non-US banking entities and not offered to US persons).</p>
Insurance subsidiaries	<p>The US rules provide exemptions from the ban on proprietary trading and the ban on investment in and sponsorship of covered funds for own-account investment activities of regulated insurance companies.</p>	<p>There are no corresponding EU exemptions.</p> <p>(Asset and liabilities of group insurance companies are excluded when determining whether a group is in-scope of the BSR. However, if a group meets the threshold tests for coverage by the BSR, the ban on proprietary trading and investment in AIFs would apply to group insurance companies.)</p>	<p>Groups subject to the EU rules may need to divest ownership of insurance company subsidiaries as these may be unable to comply with the ban on investment for own account (in particular, since the exemptions for client related activity are not easy to apply to insurance companies which largely invest for own account and there is no available exemption to allow own account investment in AIFs).</p>

Ban on proprietary trading

	Volcker Rule	Proposed BSR	Comment
Long-term investments	<p>The US rules cover purchases or sales of financial instruments as principal for a trading account, defined to cover:</p> <ul style="list-style-type: none"> ■ trading for short-term profit making; ■ trading in connection with activities as a regulated dealer; and ■ trading within the "trading book" for regulatory capital purposes. <p>Positions held for less than 60 days are presumed to be for the trading account.</p>	<p>The EU rules would apply to any taking of positions in transactions to acquire or dispose of financial instruments or commodities if:</p> <ul style="list-style-type: none"> ■ it is for the sole purpose of making an own account profit; ■ it is not connected to actual or anticipated client activity or hedging risk resulting from that client activity; and ■ it is through use of desks, units, divisions or individual traders specifically dedicated to such position taking and profit-making, including through the use of dedicated web-based proprietary trading platforms. 	<p>The EU rules would ban in-scope entities making long term investments to make an own account profit if they use dedicated desks, units, etc.</p> <p>The EU rules also appear to restrict a desk, unit, etc. which is not dedicated to proprietary trading executing otherwise permissible transactions on web-based trading platforms provided by third parties.</p>
Commodities and FX	<p>The US rules do not apply to trading in physical commodities or "spot" foreign exchange transactions.</p>	<p>The EU rules would apply to physical commodities in the same way as financial instruments but also do not apply to "spot" foreign exchange transactions.</p>	<p>There are likely to be differences between the US and EU definitions of "spot" foreign exchange transactions.</p>

Exemptions from proprietary trading ban

	Volcker Rule	Proposed BSR	Comment
Market-making	The US rules exempt activity by trading desks that routinely stand ready and are willing and available to trade, if their market-maker inventory is designed not to exceed the reasonably expected near-term demands of clients, customers or counterparties.	The EU rules would exempt trading connected to actual or anticipated client activity (client is undefined).	The EU rules do not provide a clear exemption for trading with counterparties that are not clients (unless it is for the purposes of hedging client related activities or is not conducted by dedicated desks, units, etc. – see introduction). For example, this could prevent market-making or liquidity provision on exchanges or trading platforms.
Underwriting	The US rules exempt a position where an entity is acting as an underwriter for a distribution of securities, the position is related to the reasonably expected near-term demands of clients, customers or counterparties and efforts made to reduce the position (including unsold allotments) in a reasonable time.	The EU rules would exempt trading connected to actual or anticipated client activity (client is undefined).	The EU rules do not provide a clear exemption for underwriting activity or related stabilisation activity, although some activities would be likely to be regarded as connected to actual or anticipated client activity or hedging risk resulting from that client activity;
Hedging	The US rules exempt hedging activity whether it is to hedge risks arising from own account activities or customer activity if it involves the demonstrable reduction of specific, identifiable risks.	<p>The EU rules would only exempt hedging of risks arising from actual or anticipated client activity.</p> <p>The EU rules do not address hedging by one entity of another group company's risks.</p>	<p>The EU rules do not provide a clear exemption for hedging of risks arising from own account activities or of group risks. In-scope entities would need to show that either:</p> <ul style="list-style-type: none"> ■ this is not for sole purpose of making an own account profit; or ■ this is not through dedicated desks, units, etc. <p>See discussion in introduction.</p>

Exemptions from proprietary trading ban (Continued)

	Volcker Rule	Proposed BSR	Comment
Government bonds	The US rules allow investments in US government, agency and municipal obligations. They also allow US affiliates of non-US banking entities and non-US bank affiliates of US banking entities to invest in certain foreign sovereign and multinational central bank securities.	The EU rules would allow investment in bonds of EU governments and specified multilateral development banks. The Commission could extend this to 0% risk weighted bonds issued by “equivalent” non-EU governments and to EU regional governments.	The EU rules do not automatically allow EU subsidiaries or branches of non-EU banks or non-EU subsidiaries of EU banks to invest in relevant non-EU government securities (or agency or municipal securities) as may be necessary for risk management purposes. ¹
Liquidity management	The US rules provide an exemption for trading in accordance with a documented liquidity management plan meeting specified requirements, including no expectation of short-term price movements.	The EU rules have a narrow cash management exemption e.g. this only covers investment of own capital, investments in the entity's capital base currency, investments in a limited class of liquid securities (not exceeding 397 days maturity) with “insignificant risk of change of value” and where the return is capped at the 3 month government bond yield.	Under the EU rules, in-scope entities engaging in liquidity management beyond the narrow exemption would need to show that either: <ul style="list-style-type: none"> ■ this is not for sole purpose of making an own account profit; or ■ this is not through dedicated desks, units, etc. See discussion in introduction.

¹ The BSR does have provisions providing general exemptions where “equivalent” rules apply in a non-EU jurisdiction, but these are limited to non-EU subsidiaries of an EU parent and EU branches of non-EU banks (e.g. they do not apply to EU subsidiaries of non-EU banks) and the Commission must determine that the relevant non-EU state has equivalent binding requirements on proprietary trading and investment in funds and separation of banking and trading activities and provides an effective equivalent system for the reciprocal recognition of EU and other countries’ structural measures.

Exemptions from proprietary trading ban (Continued)

	Volcker Rule	Proposed BSR	Comment
Other exemptions	<p>The US rules provide exemptions for:</p> <ul style="list-style-type: none"> ■ securities lending and repo/reverse repo activities; ■ certain activities of clearing members of clearing agencies, organisations or financial market utilities (including default management); ■ activities through employee compensation plans; ■ securities acquired in reorganisations and rescues; ■ transactions to satisfy existing delivery obligations (e.g., to prevent or close out a failure to deliver); ■ transactions solely as agent, broker, or custodian. 	<p>There are no corresponding EU exemptions, where the activities are not connected to actual or anticipated client activity,.</p>	<p>Under the EU rules, in-scope entities engaging in these activities otherwise than where it is connected with actual or anticipated client activity would need to show that either:</p> <ul style="list-style-type: none"> ■ this is not the for sole purpose of making an own account profit; or ■ this is not through dedicated desks, units, etc. <p>See discussion in introduction.</p>

Ban on investment in funds

	Volcker Rule	Proposed BSR	Comment
Prohibition	The US rules prohibit a banking entity acquiring an ownership interest (including synthetic interests) in or sponsoring a covered fund (subject to exceptions). Closed-ended funds, unleveraged funds and private equity, venture capital and other long-term investment funds are all within scope.	The EU rules would prohibit an-scope entity acquiring or retaining units or shares of AIFs or investing in derivatives or other financial instruments linked to shares or units in AIFs for the purposes of making a profit for own account (subject to exceptions).	The EU rules would have a significant effect on client services involving non-UCITS funds (e.g. fund-linked derivatives business), the use of AIFs (e.g. non-UCITS exchange traded funds or money market funds) as hedging instruments for equities or other business or cash management as well as asset management businesses relating to those funds (especially as there are no exemptions for client or hedging activity or de minimis exemption).
Covered funds	<p>The definition of covered funds applies to certain “private” funds exempted from US investment company requirements, covered commodity pools and covered foreign funds subject to exclusions for certain:</p> <ul style="list-style-type: none"> ■ registered investment funds and business development companies; ■ excluded private funds (e.g. certain REITs, bank trust funds, eligible ABS issuers.) ■ foreign pension funds; ■ wholly-owned subsidiaries, joint ventures and acquisition vehicles; ■ loan securitisations, ABCP conduits and covered bond vehicles; ■ small business investment companies or public welfare investment funds; ■ insurance company separate accounts and bank owned life insurance accounts. 	<p>The definition of AIF refers to the definition in the AIF Managers Directive (AIFMD) which excludes UCITS funds.</p> <p>The EU rules would provide exemptions for certain:</p> <ul style="list-style-type: none"> ■ EU and non-EU closed-ended unleveraged funds (but non-EU funds must actually be marketed in the EU); ■ venture capital funds, social entrepreneurship funds and long-term investment funds governed by the relevant EU legislation. 	<p>There will be significant differences between the funds eligible for investment between the two rule sets.</p> <p>The EU rules may prohibit investment in entities that fall within the definition of an AIF but are covered by the exclusion in Article 2(3) AIFMD, e.g.:</p> <ul style="list-style-type: none"> ■ holding companies; ■ pension funds; ■ employee participation schemes or employee savings schemes; ■ securitisation special purpose entities.

Ban on investment in funds (Continued)

	Volcker Rule	Proposed BSR	Comment
Foreign public funds	The US rules provide an exemption for foreign public funds that are sold into the United States and hence rely on an exemption from US investment company requirements.	There is no corresponding EU exemption (except for non-EU closed-ended unleveraged funds marketed in the EU)	The EU rules do not exempt investments in non-EU open-ended unleveraged public funds, even where the interest is held by a non-EU branch or subsidiary of an in-scope entity.
Other exemptions	<p>The US rules provide exemptions for:</p> <ul style="list-style-type: none"> ■ certain carried interests held by managers; ■ ownership interests held by asset managers that organise and offer covered funds to customers or issues of ABS as securitiser; ■ underwriting and market making activities, <p>subject to certain de minimis per fund and aggregate ownership caps (exceptions from the per fund cap allow the seeding of funds to attract unaffiliated investors).</p> <p>The US rules also provide exemptions to allow investment in certain funds to hedge specific and identifiable employee compensation risks.</p>	There are no corresponding EU exemptions (see above in relation to securitisation special purpose entities).	<p>Under the EU rules, in-scope entities would need to show that they are engaging in these activities not for the sole purpose of making an own account profit.</p> <p>Given the specific references to meeting client activity and hedging in relation to proprietary trading it is unclear whether it would be possible to rely on those objectives to show that the rule does not apply.</p> <p>The EU rules are triggered by ownership of a single share or unit in a fund with no de minimis exception.</p>

Other

	Volcker Rule	Proposed BSR	Comment
Anti-circumvention	The US rules include a backstop prohibition aimed at requiring disclosure or information barriers where there are material conflicts and regulating certain material high risk exposures.	The EU rules would prohibit an in-scope entity holding <u>any</u> shares or units in an entity which engages in proprietary trading or acquires shares or units in AIFs (regardless of the size of the holding and even if the in-scope entity would itself be permitted to engage in those activities by virtue of an exemption e.g. the cash management exemption). There is no exemption for shares or units held to meet client activity or for hedging purposes.	The EU rules would prohibit in-scope entities engaging in activities even if they do not give rise to any material risk (and even if they have no means of identifying whether the issuers of shares conduct impermissible activity). The EU rules are triggered by ownership of a single share or unit in an entity with no de minimis exception.
Flexibility	<p>The US rules are set by the regulatory agencies subject to the constraints of the Dodd-Frank Act. The agencies have some flexibility to amend the rules to address unintended consequences (or to use interpretative guidance or similar relief).</p> <p>The Dodd-Frank Act was adopted in 2010 and provided an initial conformance period ending in July 2014, extendible by up to a further three years at regulators' discretion, in particular to take account of existing positions.</p>	<p>The EU rules would provide very limited flexibility to address issues arising under the rules other than through an amendment of the Level 1 Regulation. The BSR does not give the Commission any powers to adapt or modify the rules (other than with respect to foreign government bonds).</p> <p>The EU rules would apply 18 months after entry into force, including to certain existing positions, and there is no provision for extending this period.</p>	<p>The EU rules would require a significant implementation exercise to identify all affected dealings in financial instruments and holdings of AIFs and restructure affected business (particularly for global banks with an EU parent).</p> <p>Any relief from the EU rules from equivalence determinations may only be available at a late stage (if at all) after banks have had to restructure their business to comply with the new rules.</p> <p>There is limited grandfathering of existing positions under the EU rules.</p>

Territorial scope

	Volcker Rule	Proposed BSR
Domestic banks	✓	✓
Foreign branches of domestic banks	✓	✓
Foreign subsidiaries of domestic banks or bank holding companies	✓ (Foreign sovereign bonds relief)	✓ (Possible equivalence relief)
Local branches of foreign banks	✓	✓ (Possible equivalence relief)
Local bank and other subsidiaries of foreign banks or bank holding companies	✓ (Foreign sovereign bonds relief)	✓
Foreign branches and subsidiaries of foreign banks or holding companies which have a local branch or bank subsidiary	✓ (SOTUS relief)	x

Notes:

Volcker Rule:

- References to domestic or local entities/branches are to US entities/branches (and references to foreign entities/branches are to non-US entities/branches).
- The US rules allow US affiliates of non-US banking entities and non-US bank affiliates of US banking entities to invest in certain foreign sovereign and multinational central bank securities (see exemptions from proprietary trading ban above).
- The Volcker Rule provides relief for certain trading and fund-related activities of certain non-US banking entities and their subsidiaries taking place solely outside the US (SOTUS).

Proposed BSR:

- References to domestic or local entities/branches are to EU entities/branches (and references to foreign entities/branches are to non-EU entities/branches).
- The proposed EU rules would only apply to entities and groups which meet certain threshold requirements (see the introduction).
- See the introduction for when equivalence relief would be available to non-EU subsidiaries of in-scope EU groups and to EU branches of non-EU banks.

Possible areas for alignment of the BSR with US rules



Entity scope

- Limit the entity scope e.g. by restricting the prohibitions to core credit institutions (or at least to entities included in consolidated supervision).
- Exclude UCITS funds and other permitted fund entities from the prohibition even if they are subsidiaries of an in-scope entity.
- Exclude insurance and reinsurance companies from the prohibitions even if they are subsidiaries of an in-scope entity.

Definition of proprietary trading

- Limit the definition to “trading book” transactions (to allow long term investment).
- Remove specific ban on use of web platforms.

Exemptions from proprietary trading ban

- Extend:
 - the hedging exemption to cover hedging the group's own activities;
 - the exemption for investment in government bonds to cover non-EU government and agency securities;
 - the cash management exemption to cover liquidity management plans approved by supervisors.
- Include exemptions for:
 - market making and underwriting;
 - securities lending and repo/reverse repo activities;
 - activities of clearing members of CCPs (including default management);
 - activities through employee compensation plans;
 - securities acquired in reorganisations and rescues.

Ban on investment in funds

- Definition of restricted funds:
 - Include a definition of AIF that specifically excludes entities falling within Article 2(3) AIFMD (e.g. holding companies, securitisation SPVs);
 - Include a definition of non-EU public funds to allow investment in non-EU open-ended UCITS-like funds;
 - Extend exemption for non-EU unleveraged funds to allow investment in funds not actually marketed in the EU.
- Include exemption to cover positions connected with asset management activities and an exemption for de minimis holdings.

Anti-circumvention rule

- Restrict prohibition e.g. to cases where an in-scope entity holds a “participation” in a “financial institution” that engages in activities not permissible for the in-scope entity.

Flexibility

- Include powers to allow the Commission to adjust the rules, at least to reflect developments in financial markets, new products and services and new EU legislation.
- Provide an extended conformance period (with powers to extend the period).

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