



VIA ELECTRONIC SUBMISSION

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. R-1694; RIN 7100-AF70

Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581
RIN 3038-AE93

Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
Docket ID OCC 2020-0002

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AF17

Securities and Exchange Commission
100 F Street, NE
Washington, DC 2054
File Number S7-02-20

Brussels, 1 April 2020

SUBJECT: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Dear Sir, Madam,

The European Banking Federation ("EBF") appreciates the opportunity to comment on the joint notice of proposed rulemaking (the "Proposal")¹ issued by the Board of Governors of the Federal Reserve System (the "FRB"), the Commodity Futures Trading Commission (the "CFTC"), the Federal Deposit Insurance Corporation (the "FDIC"), the Office of the

¹ Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 Fed. Reg. 12, 120 (Feb. 28, 2020)

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Comptroller of the Currency (the “OCC”), and the Securities and Exchange Commission (the “SEC,” and, collectively with the FRB, the CFTC, the FDIC, and the OCC, the “Agencies”) to revise the regulations² implementing Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)³, commonly known as the “Volcker Rule”.

Launched in 1960, the EBF is the voice of the European banking sector from the European Union and European Free Trade Association countries. The EBF - uniting 32 national banking associations – represents the interests of some 3,500 banks, large and small, wholesale and retail, local and cross-border financial institutions, employing in total about two million people.

The EBF supports the Agencies’ efforts in proposing amendments that would simplify and streamline the rule, reduce compliance burdens and reduce unintended consequences while preserving the core policy purpose of the Volcker Rule, which is to protect U.S. banks and the U.S. financial system from exposure to the risks of speculative proprietary trading activity, either directly or indirectly through funds. Most importantly for our members, the Proposal would appropriately limit the Volcker Rule’s extraterritorial application in a manner more consistent with the Dodd Frank Act by exempting the activities of non-U.S. funds offered to non-U.S. investors –long recognized as an unintended consequence of the 2013 Rule⁴.

We mostly echo and support the comments expressed in more detail by other trade associations and industry participants, in particular, the letter submitted by the Institute of International Bankers (“IIB”) and the Securities Industry and Financial Markets Association (“SIFMA”). We also refer to our letters submitted during prior rounds of rulemaking under the Volcker Rule, which addressed many of the same issues in detail⁵.

In this letter, we address the issues of particular relevance and concern to European-headquartered banks with U.S. banking operations, by explaining the reasons why we support the changes proposed by the Agencies. Moreover, we have proposed further adjustments for simplifying and streamlining the Rule’s covered funds provisions that we believe should be adopted.

² See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (Jan. 31, 2014) (setting forth the “2013 Rule”); Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61,974 (Nov. 14, 2019) (setting forth the “2019 Amendments” and, together with the unamended portions of the 2013 Rule, the “Current Rule”

³ Codified as Section 13 of the Bank Holding Company Act of 1956 (the “BHCA”), 12 U.S.C. § 1851

⁴ See Proposal at § _____.13(d). See also Federal Reserve, OCC and FDIC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017) (the “Foreign Fund Guidance”) (“[a] number of foreign banking entities, foreign government officials, and other market participants have expressed concern about the possible unintended consequences and extraterritorial impact of the Volcker Rule. . . . The staffs of the Agencies are considering ways in which the implementing regulation may be amended, or other appropriate action may be taken, to address any unintended consequences of the Volcker Rule for foreign excluded funds in foreign jurisdictions.”); Statement by Federal Reserve Governor Lael Brainard on the Proposal (Jan. 30, 2020) (“I am supportive of the proposal to address the unintended application of the Volcker rule to certain funds organized outside of the United States and offered to foreign investors, known as foreign excluded funds.”)

⁵ See e.g. EBF_034264 Comment Letter to the Agencies (Oct. 17, 2018)

1. Permanent exemption for qualifying foreign excluded funds

The EBF has consistently supported an implementation and interpretation of the Volcker Rule which respects the envisioned scope of the Volcker Rule's statutory exemptions for overseas activities and is consistent with the FRB's conventional approach to the overseas application of U.S. banking laws. Relevant limits to the extraterritorial scope of the Volcker Rule's proprietary trading restrictions were already introduced by the 2019 Amendments. The principal remaining concern for European banks is setting a more appropriate extraterritorial limit of the Current Rule regarding the activities of, and relationships with, overseas funds.

We support the aspects of the Proposal addressing this longstanding concern. The Agencies should adopt the proposed exemptions for qualifying foreign excluded funds, subject to important modifications – including, aligning the Proposal with the guidance that it is intended to codify – that would more appropriately respect the extraterritorial limits of the Volcker Rule.

The Proposal largely codifies the relief first provided in the Foreign Fund Guidance that operated as an enforcement stay. We strongly support the intended codification. To more fully achieve this stated goal, EBF recommends the following changes regarding aspects in which the Proposal diverges from the approach taken in the Foreign Fund Guidance.

- First, the Proposal would not provide a complete exclusion from “banking entity” status for qualifying foreign excluded funds. The EBF supports the replacement of the exemptions with a clean exclusion from the “banking entity” definition for qualifying foreign excluded funds.
- Second, the Proposal would change one of the criteria for a “qualifying foreign excluded fund.” The Proposal would require that the fund is not operated in a manner that enables “*any other* banking entity” to evade the requirements of the Volcker Rule⁶, while the Foreign Fund Guidance specifically references the foreign banking entity itself. The change could be read to impose an obligation on one banking entity to monitor the Volcker Rule compliance obligations of another, unaffiliated entity. This would be inconsistent with the well established practice and principle under the Volcker Rule pursuant to which banking entities are responsible for their own Volcker Rule compliance programmes and not for the compliance obligations of third parties. The Agencies should revise this anti-evasion prong of the “qualifying foreign excluded fund” definition to match the Foreign Fund Guidance.

2. Foreign Public Funds

We strongly support that Proposal's clarifications regarding the exclusion of “foreign public funds” from the definition of covered fund. Foreign public funds are more similar to U.S. registered investment companies (“RICs”) than to private equity and hedge funds, and

⁶ Section ____ .13(d)(v) of the Proposal.

should benefit from a similarly clean exemption.⁷ Instead, the Current Rule imposes several complex conditions that make the exclusion challenging to apply in practice. Some of the conditions required to satisfy the definition are unclear or require information that can be impossible to obtain, including in the case of third party foreign public funds.

The Proposal addresses a number of challenges posed by the Current Rule -- which requires that a foreign public fund be authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction (the "home jurisdiction requirement") and must sell ownership interests predominantly through one or multiple public offerings outside the United States (the "predominantly through public offering requirement"). Moreover, the Current Rule appears to require that a qualifying issuer has to sell some interests to retail investors, while the Current Rule's treatment of RICs has no such requirement.

We strongly support the proposed adjustments to the foreign public funds exclusion. In particular, EBF supports the Agencies' proposal to eliminate the "home jurisdiction" and particularly the "predominantly" requirements.

In addition, EBF requests that the final rule release clarify that there is no need to evidence sales to retail, just as there is no such requirement for RICs.

While we believe that the matter is clear in the Proposal, EBF would also welcome an express acknowledgment in the final rule preamble that UCITS qualify as foreign public funds, as will any issuers whose securities are sold under the EU regulation for packaged retail insurance-based and investment products (PRIIPs).

3. Changes to Super 23A

EBF welcomes the additional exclusions to Super 23A in the Proposal. However, the Agencies should further clarify that Super 23A is subject to the same territorial limits as Section 23A itself, and does not apply extraterritorially to transactions between the non-U.S. affiliates of international banks and non-U.S. covered funds, where the risk of these transactions lies entirely outside the United States.

In the absence of such a clarification, the extraterritorial limits to the statutory Volcker Rule still would seem not fully realized in the implementing regulations, which could result in overbreadth of extraterritorial application. Specifically, without such clarification, the Super 23A prohibition could be interpreted as prohibiting extensions of credit and other covered transactions outside the United States, between a non-U.S. affiliate of a foreign bank and a covered fund organized and established outside the United States for which the foreign bank serves as investment manager, investment adviser, or sponsor, or that the banking entity organizes and offers (a "non-U.S.-related covered fund"). Importantly, the EBF believes that this should not be the interpretation. Applying Super 23A outside the U.S., in this way, would represent an unjustifiable extraterritorial expansion of the Volcker Rule's intended scope. It would also be in contrast with traditional bank regulatory principles, the approach taken with respect to the proprietary trading prohibitions in the 2019 Amendments and the Proposal's treatment of foreign excluded funds, which all focus

⁷ See 2013 Preamble at 5677-79.

on addressing risks to banking organizations in the United States. Implementation of Super 23A should, consistent with the policy objectives of the Volcker Rule and the scope of Section 23A and the Federal Reserve's Regulation W, focus on the activities of banking entities inside the United States and not apply to the activities of international banks acting outside the United States.

Specifically, the Agencies should clarify that the Super 23A prohibition does not apply to covered transactions between a non-U.S. affiliate of an international bank and a non-U.S.-related covered fund. This clarification would be necessary even in the presence of certain new exclusions to Super 23A contained in the Proposal, as it would for example allow for prime brokerage relationships between such non-U.S. related covered funds and the foreign bank outside the US, a relationship the Volcker Rule has no regulatory interest in. This clarification would not have any impact on the safety and soundness of U.S. institutions or U.S. financial stability.

4. Codification of time-tested FAQs

We firmly endorse the issuance of FAQs relating to implementation of and compliance with the Volcker Rule as the Agencies' effort to offer greater clarity to market participants. Such FAQs and other interpretive guidance and no-action relief are especially important when implementing a law and regulation as complex as the Volcker Rule.

We further appreciate that the Agencies have clarified in the Proposal that the rule changes "would not modify or revoke any previously issued staff FAQs, unless otherwise specified"⁸. Because FAQs and other interpretive guidance lack the force of law,⁹ EBF requests that the Agencies codify certain important FAQs in the implementing regulations, particularly FAQ 5 (relating to the covered fund treatment of certain vehicles that will become foreign public funds),¹⁰ FAQ 14 (relating to the banking entity status of foreign public funds sponsored by a banking entity)¹¹ and FAQ 16 (relating to the banking entity status of RICs and foreign public funds during their seeding periods),¹² each of which is of particular interest for European banks.

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⁸ Preamble to Proposal at 12,123.

⁹ See the Agencies, Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018).

¹⁰ See Volcker Rule Frequently Asked Question # 5, Foreign Public Fund Seeding Vehicles (June 10, 2014).

¹¹ See Volcker Rule Frequently Asked Question # 14, Foreign Public Funds Sponsored by Banking Entities (June 12, 2015) ("FAQ 14").

¹² See Volcker Rule Frequently Asked Question # 16, Seeding Period Treatment for Registered Investment Companies and Foreign Public Funds (July 16, 2015).

Thank you for considering these comments. Should you have any questions, please do not hesitate to contact Sébastien de Brouwer, Chief Policy Officer at or [REDACTED]

Respectfully submitted,

Yours faithfully,

Sébastien de Brouwer
Chief Policy Officer
European Banking Federation

cc: The Honourable Steven T. Mnuchin, Secretary, Department of the Treasury, 1500 Pennsylvania Avenue, NW Washington, D.C. 20520