

Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, DC 20219

Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, N.W.
Washington, D.C. 20551

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549

Commodities Futures Trading Commission
1155 21st Street, N.W.
Washington DC 20581

VIA ELECTRONIC DELIVERY

Brussels, 1 April 2020

Dear Ladies and Gentlemen:

Re: ***Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (the “Proposal”):***
Comments on OCC Docket No. OCC-2020-0002 and RIN 1557–AE67; FRB Docket No. R-1694 and RIN 7100–AF 70; FDIC RIN 3064–AF17; SEC File No. S7–02–20 and RIN 3235–AM70; and CFTC RIN 3038–AE93

Questions Addressed: 1 - 5 (Qualifying Foreign Excluded Funds) and 6 – 12 (Foreign Public Funds)

This letter is respectfully submitted by the European Fund and Asset Management Association (“EFAMA”) ¹ in response to a request by the Office of the Comptroller of the Currency (“OCC”), Board of Governors of the

¹ EFAMA is the representative trade association for the European investment management industry at large. Originally founded in 1974 under the name “European Federation of Investment Funds and Companies” (“FEFSI” was its French acronym), EFAMA today represents 28 member associations, 59 corporate members and 22 associate members.

At end Q3 2019, total net assets of European investment funds reached EUR 17.2 trillion. These assets were managed by more than 62,500 investment funds, of which almost 34,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). The contributing national associations are located in Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. EFAMA’s corporate members include large and mid-sized asset managers located in Europe, including European affiliates of a number of major U.S. asset management groups.

Federal Reserve System (“Board”), Federal Deposit Insurance Corporation (“FDIC”), U.S. Securities and Exchange Commission (“SEC”), and Commodity Futures Trading Commission (“CFTC”) (individually, an “Agency,” and collectively, the “Agencies”) for comments regarding the Proposal, which seeks to amend the regulations (the “Regulations”) implementing Section 13 of the Bank Holding Company Act (“BHC Act”), commonly known as the Volcker Rule.²

The Proposal seeks to improve and streamline the covered fund provisions of the Regulations and provide clarity to banking entities so that they can offer financial services and engage in other permissible activities in a manner that is consistent with the requirements of the Volcker Rule. EFAMA strongly supports the intent of the Proposal and generally believes that the specifics set forth in the Proposal will mitigate a number of unintended consequences and generally improve the functioning of the Regulations with respect to the covered fund activities of U.S. and non-U.S. banking entities.

Qualifying Foreign Excluded Funds (Questions 1 – 5)

EFAMA is particularly pleased that the Proposal addresses the treatment of qualifying foreign excluded funds, which has been a concern of EFAMA’s membership since the initial adoption of the Regulations.

The key term underlying the Volcker Rule and the Regulations is that of a “banking entity” to which the prohibitions and restrictions on proprietary trading and sponsoring or investing in hedge funds and private equity funds will apply absent an exemption or exclusion. The term banking entity is defined broadly to include any company that controls, is controlled by or is under common control with, a banking entity will be deemed to be a banking entity absent an exemption or exclusion. The net result of the broad definitions of banking entity and control under the BHCA is that many, if not most, investment funds, both in the United States and in Europe, are at risk of being deemed to be controlled by their banking entity sponsor, investment adviser or investment manager due to their organizational and governance structure, and, thus, deemed banking entities subject to the Volcker Rule’s restrictions on proprietary trading.

Since investment funds are organized for the express purpose of investing in securities, deeming an investment fund that is controlled by a banking entity to itself be a banking entity would effectively prevent that investment fund from achieving its purpose and deny investors in the investment fund the opportunity to benefit from the banking entity sponsor, investment adviser or investment manager’s investment advisory services and expertise. Recognizing the negative and unintended consequences that banking entity status would have on investment funds, the Agencies in the Regulations provided an express exclusion for covered funds from the definition of banking entity, but unfortunately did not provide a similar exclusion for other investment funds that definitionally were not treated as covered funds.

To address this concern, EFAMA recommended in response to the Agencies’ July 2018 Notice of Proposed Rulemaking that, if a broad exemption for bank affiliated investment funds was not possible, the Agencies exempt from banking entity status those foreign excluded funds that are controlled by non-U.S. banking entities as part of their bona fide asset management activities, liquidity management, regulatory requirements (such as LCR in the EU) or in connection with bona fide customer-facing derivatives activities or other similar hedging purposes.³ EFAMA further suggested that this could easily be accomplished by making permanent the

² Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, Notice of Proposed Rulemaking, 85 Fed. Reg. 12,120 (February 28, 2020).

³ See Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Covered Funds 83 Fed. Reg. 33,432 (July 17, 2018); and EFAMA Comment Letter dated October 17, 2018 (“2018 Comment Letter”).

temporary relief provided to foreign excluded funds by the FRB, FDIC, and OCC in a policy statement released on July 21, 2017 (the “Policy Statement”).

The Proposal effectively follows this approach, utilizing substantially the same definition of qualifying foreign excluded fund as the Policy Statement. Although there are a few distinctions – for example, rather than exempting qualifying foreign excluded funds from banking entity status as EFAMA had contemplated, the Proposal treats such funds as banking entities but would amend the Regulations to exempt them from the Volcker Rule’s restrictions on both proprietary trading and covered fund activities – the end result is substantially the same.

EFAMA supports the Proposal’s proposed treatment of qualifying foreign excluded funds because it mitigates the negative consequences of treating such funds as banking entities and effectively limits the extraterritorial impact of the Volcker Rule.

Foreign Public Funds (Questions 6 – 12)

EFAMA is also pleased that the Proposal seeks to streamline and simplify the conditions for reliance on the “foreign public fund” exclusion from the definition of covered fund.

As explained in the Proposal, the foreign public fund exclusion was intended to treat UCITS and other regulated, non-U.S. funds similarly to U.S. investment companies registered under the Investment Company Act of 1940 (“1940 Act”) for purposes of the Volcker Rule’s covered fund restrictions, and also to limit the extraterritorial application of those restrictions. Nevertheless, as recognized in the Proposal, certain of the very specific and detailed requirements for a foreign fund to qualify for the exclusion, which do not apply to U.S. registered investment companies, significantly undermine this intent, are unnecessarily limiting and effectively place non-U.S. funds at a competitive disadvantage to U.S. registered investment companies.

For this reason, in its 2018 Comment Letter, EFAMA recommended that the Agencies eliminate the requirement that the foreign public fund be sold primarily (i.e., at least 85%) to non-U.S. investors as well as the requirement that the fund must be available to retail investors in the jurisdiction where the fund is organized. Consistent with EFAMA’s recommendations, the Proposal would replace those two requirements with a requirement that the fund is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings. Accordingly, EFAMA supports the Proposal’s proposed simplification and clarification of the foreign public fund exclusion.

The Proposal would also modify the definition of “public offering” currently in the Regulations to add a new requirement that the distribution is subject to substantive disclosure and retail investor protection laws or regulations, to help ensure that funds qualifying for this exclusion are sufficiently similar to U.S. registered investment companies. EFAMA believes this proposed requirement is consistent with the intent of the Proposal to treat UCITS and other non-U.S. funds similarly to U.S. mutual funds registered with the SEC under the 1940 Act, while also limiting the extraterritorial impact of the Volcker Rule.

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In closing, EFAMA appreciates very much the opportunity to comment on the Proposal and supports the Agencies’ proposed amendments to the Regulations relating to the treatment of qualifying foreign excluded funds and the simplification and clarification of the conditions for reliance on the covered fund exclusion for

foreign public funds. These issues are of great importance to EFAMA's membership. EFAMA would be happy to answer any questions and provide further information in support of these proposals.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. van de Werve', with a long horizontal line extending to the right.

Tanguy van de Werve

Director General