efama
European Fund and Asset Management Association

September 21, 2017

VIA ELECTRONIC DELIVERY

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

Re: OCC Docket ID OCC-2017-0014: *Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule); Request for Public Input*

Dear Ladies and Gentlemen:

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") for information (the "Request") to assist in determining how the final regulations ("Final Rule") implementing section 13 of the Bank Holding Company Act (commonly referred to as the "Volcker Rule") should be revised to better accomplish the purposes of the statute.[2]

EFAMA appreciates very much the OCC's initiative in seeking to revisit certain aspects of the Final Rule and agrees completely with the assessment that the Final Rule should be improved both in design and application.

The Request seeks comment and poses questions about four areas of the Final Rule: the scope of entities subject to the Final Rule; the definition of and exclusions from the restrictions on proprietary trading; the definition of and exclusions from the restrictions on sponsoring or acquiring ownership interests in covered funds; and the burdens imposed by the Final Rule's

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1 EFAMA is the representative trade association for the European investment management industry at large. EFAMA was founded in 1974 under the name "European Federation of Investment Funds and Companies" ("FEFSI" was its French acronym) and changed its name to EFAMA in 2004 to reflect a focus on representing the interests of European investment funds and asset management firms, as well as those of national industry trade associations.

Today, EFAMA represents 28 member associations, 62 corporate members and 24 associate members who collectively manage over EUR 23 trillion in assets, of which EUR 1412 trillion is managed by 58,400 investments funds as of the end of December 2016. 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, Poland, 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.

2 *See* Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule); Request for Public Input, 82 Fed. Reg. 26,692 (Aug. 7, 2017).

rue Montoyer 47, B-1000 Bruxelles
☎ +32 2 513 39 69 • Fax +32 2 513 26 43 • e-mail : info@efama.org • www.efama.org • VAT Nr BE 0446.651.445

compliance program and metrics reporting requirements. Although all of these areas are worthy of review, we propose to limit our comments to those issues of greatest concern to EFAMA's members, namely, those raised by the scope of entities that are subject to the Final Rule's restrictions and the complexity of certain of the exclusions in the Final Rule that are intended to limit the extraterritorial impact of the Final Rule.

More specifically, as EFAMA and other commentators have previously observed, the broad definition of banking entity in the Final Rule creates the potential for an investment fund that is organized outside the United States, sponsored by a non-U.S. banking entity and exclusively offered to non-U.S. investors, and thus excluded from the definition of covered fund (a "foreign excluded fund"), to be considered a banking entity subject to the Final Rule's proprietary trading and covered fund restrictions because the non-U.S. banking entity's relationships with the foreign excluded fund, which are common throughout the industry, might give it "control" over the fund. Alternatively stated, under the broad definition of banking entity, the *activities* of a foreign *excluded* fund that is controlled by an entity subject to the Volcker Rule would become regulated under the Volcker Rule, a result that the Volcker agencies had expressly avoided for covered funds, recognizing that treating such funds as banking entities would not be consistent with the purpose and intent of the statute.[3]

The consequences to a foreign excluded fund of banking entity status are severe and would significantly limit the investment activities of the foreign excluded fund. None of the exemptions developed to permit certain activities in the trading context can be simply transposed and used in the context of excluded funds for which they were not designed. This is true for broker-dealer type exemptions, such as market making, but is equally true for the so-called TOTUS exemption from the proprietary trading restrictions for trading that takes place solely outside the United States because the requirements of the TOTUS exemption are complex and burdensome. Taken together with the fund investment restrictions that would apply as well, the foreign excluded fund would be placed at a significant competitive disadvantage to other funds that are not subject to these restrictions. These facts, coupled with the fact that none of the Volcker agencies has a bona fide interest in regulating the offshore fund activities of the asset management affiliates of non-U.S. banking entities, strongly support EFAMA's conclusion that the treatment of foreign excluded funds as banking entities would be an "unintended consequence" of the Volcker Rule, a possibility acknowledged by the three banking agencies in their July 21, 2017 statement effectively extending until July 21, 2018 the date for compliance with this aspect of the Final Rule[4].

For these reasons, EFAMA recommended during the consideration of the Final Rule that foreign funds be excluded not only from the definition of covered fund, but also from the definition of banking entity. In light of the clear intent of Congress to limit the extraterritorial impact of the Volcker Rule, such an exclusion from banking entity status for foreign excluded funds is as

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[3]. 76 Fed. Reg. 68,846, 68,855-56 (2011)

[4] *See* the Volcker agencies' joint press release, *Federal regulatory agencies announce coordination of reviews for certain foreign funds under "Volcker Rule"* (July 21, 2017) and the accompanying joint statement by the Volcker banking agencies, *Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act* (July 21, 2017).

appropriate as the exclusion provided for covered funds. In each case, the exclusion from the definition of banking entity is necessary in order to avoid application of the Volcker Rule in ways that are "unintended by the statute and would create internal inconsistencies in the statutory scheme."

EFAMA continues to believe that a general exclusion for foreign excluded funds is appropriate and consistent with Congressional intent. Absent such an exclusion, the traditional investment management and fund activities of non-U.S. banking entities will be unnecessarily and inappropriately limited in light of Congressional intent to minimize the extraterritorial impact of the Volcker Rule.

Theoretical concerns that a non-U.S. banking entity might rely on such a general exclusion to indirectly engage in impermissible proprietary trading or covered fund activities are, in EFAMA's view, largely misplaced. As an initial matter, non-U.S. banking entities have engaged in these same types of asset management activities for years and should not be presumed suddenly to be engaging in them in an effort to avoid the Volcker Rule. In any event, the Final Rule's general anti-evasion restrictions would permit the Volcker agencies to limit any such activity were it to occur.

If, for whatever reason, a general exclusion is not possible, EFAMA would welcome the opportunity to meet with the OCC and other Volcker agencies to discuss alternative approaches that would avoid the unintended and inappropriate consequences of treating foreign excluded funds as banking entities.

In addition to the scope issues just discussed, EFAMA would like to recommend that the Volcker agencies revisit, and simplify, certain of the exclusions and exemptions in the Final Rule that, due to their unnecessary complexity effectively prevent the exclusions from achieving their intended objectives. More specifically, we are primarily referencing the "foreign public fund" exclusion from the definition of covered fund. Although the foreign public fund exclusion was intended to provide for regulated, non-U.S. funds that are available to retail investors treatment that is comparable to the treatment of U.S. investment companies registered under the Investment Company Act of 1940, 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.

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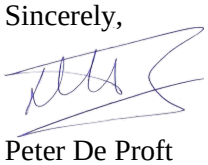
In closing, EFAMA appreciates very much the OCC having opened discussions around possible improvements to the Final Rule, and stands ready to assist the OCC and the other Volcker agencies in any way possible to address the industry's concerns about foreign excluded funds

being treated as banking entities, as well as the unnecessary complexity of the exclusion for foreign private funds, all of which is of great importance to EFAMA's membership.

Sincerely,



Peter De Proft
Director General

cc: Board of Governors of the Federal Reserve System
Commodity Futures Trading Commission
Federal Deposit Insurance Corporation
Securities and Exchange Commission