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Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2020-0002

Securities and Exchange Commission
Vanessa A. Countryman, Secretary
100 F Street NE
Washington, DC 20549-1090
File No. S7-02-20

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

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

Federal Deposit Insurance Corporation
Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
550 17th Street, NW
Washington, DC 20429
RIN: 3064-AF17

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

Ladies and Gentlemen:

The Investment Adviser Association¹ (**IAA**) appreciates the opportunity to comment on the five Volcker Agencies'² request for public comment³ on proposed amendments to the final

¹ The IAA is the largest organization dedicated to advancing the interests of SEC-registered investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than \$25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

² The Volcker Agencies are the Office of the Comptroller of the Currency (**OCC**), the Board of Governors of the Federal Reserve System (**Board**), the Federal Deposit Insurance Corporation (**FDIC**), the Securities and Exchange Commission (**SEC**), and the Commodity Futures Trading Commission (**CFTC**).

rule implementing the Volcker Rule Statute.⁴ We commend the Agencies for issuing the Proposed Amendments, which will streamline and simplify the covered fund provisions of the Volcker Rule Regulations. Specifically, we support (i) the proposed modifications to the treatment of foreign public funds (FPFs), qualifying foreign excluded funds (QFEFs), and loan securitizations; (ii) the proposed exclusions for family wealth management vehicles, customer facilitation vehicles, qualifying venture capital funds, and credit funds; (iii) the proposed treatment of an “ownership interest”; and (iv) the proposed changes to the so-called Super 23A provisions.⁵

We write to reiterate certain recommendations that the Agencies have not yet addressed and make additional recommendations to address concerns of bank-affiliated asset managers arising from implementation of the Volcker Rule Regulations related to: (i) our request that FAQ 16⁶ be integrated into final Agency guidance; (ii) automatic extensions of the seeding period for covered funds operating under a written plan to become a regulated fund; (iii) our recommendation relating to fund life cycle events; (iv) streamlining the covered fund seeding period extension process; (v) clarification that the Volcker Rule Regulations govern in the event of a conflict with the Board’s control regulations; and (vi) the treatment of certain real estate funds.

³ *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), available at <https://www.govinfo.gov/content/pkg/FR-2020-02-28/pdf/2020-02707.pdf>. Docket ID OCC-2020-0002; Board Docket No. R-1694; RIN 7100-AF70; FDIC RIN 3064-AF17; SEC File Number S7-02-20; CFTC RIN 3038-AE93 (**Proposed Amendments or Proposal**).

⁴ Section 13 of the Bank Holding Company Act of 1956 (12 U.S.C. 1851); *Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, 79 Fed. Reg. 5,536 (Jan. 31, 2014); and *Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds*, 79 Fed. Reg. 5,808 (Jan. 31, 2014) (**Volcker Rule Regulations**).

⁵ These proposed changes reflect many of the recommendations previously made by the IAA. See Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to the Agencies re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Oct. 16, 2018) (**2018 Letter**), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/IAA_Volcker_Proposed_Amendments_Comment_Letter_FINAL.pdf.

⁶ See Volcker Rule Implementation Frequently Asked Questions, Question No. 16, *Seeding Period Treatment for Registered Investment Companies and Foreign Public Funds*, available at <https://www.federalreserve.gov/supervisionreg/faq.htm>.

1. The Agencies should confirm staff FAQ 16 to make clear that a seeding period for a regulated fund may exceed three years.

We again urge the Agencies to formally integrate the Agency staff's guidance in FAQ 16 to make clear that a seeding period for a regulated fund, *i.e.*, a U.S.-registered investment company or business development company or a "foreign public fund," as that term is defined in the Volcker Rule Regulations, may exceed three years.⁷ Agency staff issued guidance in 2015 that regulated funds should not be treated as banking entities during the period in which the bank-affiliated asset manager is testing the fund's investment strategy, establishing a track record of the fund's performance for marketing purposes, and attempting to distribute the fund's shares, *i.e.*, the seeding period. The staff recognize that the seeding period for a regulated fund may take some time. Because it is not uncommon for the seeding period to last for three or more years, the staff issued FAQ 16 to clarify that they would not consider a regulated fund to have become a banking entity if a seeding period lasts "for example" for three years. FAQ 16 also clarifies that the staff do not require regulated funds to submit any application to the Board for extension of the exemption from being regarded as a banking entity during the seeding period. Formalizing this FAQ in the release accompanying final rule amendments will provide important clarity to bank-affiliated asset managers establishing regulated funds.

2. Covered funds that will become regulated funds should be treated the same as regulated funds with respect to their seeding periods.

We further request that the Agencies apply this treatment consistently by extending the guidance in FAQ 16 to covered funds that operate under a written plan to become a regulated fund. These covered funds face the same seeding timeline challenges as regulated funds and we believe that their seeding period should be treated the same.

Under the Volcker Rule Regulations, a vehicle that is a covered fund during its seeding period and that is formed and operated pursuant to a written plan to become a regulated fund must apply to the Board for an extension of the one-year seeding period that is automatically granted to such covered funds,⁸ and there is no guidance permitting covered funds to exceed the three-year seeding period even though the seeding period for a covered fund may take just as much time as that for a regulated fund. Because covered funds may rely on the seeding period and the potential for extensions of that period only if they are operating in good faith under a

⁷ While we continue to believe that regulated funds do not raise the types of short-term and speculative trading concerns that the Volcker Rule is intended to address and should thus be excluded from the definition of "banking entity" altogether, to the extent that they are not excluded we support the approach to the seeding period set forth in FAQ 16.

⁸ See 12 CFR 44.10(c)(12), 12 CFR 44.12(a)(2)(i)(B), 12 CFR 44.12(e), and 12 CFR 44.20(e).

written plan to become a regulated fund, we believe that the Agencies should treat them the same as regulated funds with respect to their seeding periods. We also believe such an approach would be consistent with the Agencies' efforts to streamline and simplify the extension process generally.

3. The Agencies should address regulated fund life-cycle events to allow bank-affiliated asset managers to exceed 25 percent ownership temporarily during or in anticipation of certain events and as a result of certain limited types of event-driven mid-life re-seeding scenarios.

As we discussed in our 2018 Letter,⁹ the risk that a regulated fund will become a banking entity under the Volcker Rule exists even after the seeding period because of certain common life cycle events. We again ask that the Agencies provide bank-affiliated asset managers with the flexibility to contribute additional seed investments to a sponsored regulated fund as long as the sponsor has evaluated the economics and determined it is the most appropriate course for the fund, its investors, and the manager to do so, and that it periodically (at least annually) revisits whether to retain or redeem those additional investments.

Similarly, bank-affiliated asset managers should have the opportunity to inject additional capital in the event of an economic downturn or disruption, such as that caused by the current COVID-19 pandemic, especially if such action by the bank-affiliated asset manager would align with actions taken by the prudential regulators to facilitate the flow of credit to households and businesses and promote safety and soundness within the U.S. economy.

4. The Agencies should streamline the covered fund seeding period extension process.

The Volcker Rule Statute permits banking entities to seed covered funds, and authorizes the Board to grant up to two one-year extensions of the seeding period for covered funds. As the Board has recognized for regulated funds, it is common to need longer than one year to test a new investment strategy, establish a performance track record, and distribute fund shares. The same challenges apply to covered funds – both those that operate under a written plan to become a regulated fund and those that intend to divest their ownership to under three percent. However, the procedure for covered funds to apply for seeding period extensions is extremely onerous. As discussed above, we ask that the Agencies extend the position in FAQ 16 to covered funds that intend to become regulated funds. With respect to other types of covered funds, we ask the Board to re-issue its guidance on requesting seeding period extensions¹⁰ to provide for a more

⁹ See 2018 Letter at p. 11.

¹⁰ SR 17-5: *Procedures for a Banking Entity to Request an Extension of the One-Year Seeding Period for a Covered Fund*, available at <https://www.federalreserve.gov/supervisionreg/srletters/sr1705.htm>.

streamlined process under which the Board will automatically grant a requested extension of up to two years¹¹ unless it or the banking entity's primary federal agency objects.

We believe that a seeding extension process such as the following would be a meaningful way for the Agencies to recognize the practical challenges inherent in bringing new funds to market and simplify the current complicated and burdensome process to make it more workable, without increasing risks to the safety and soundness of banking entities:

Federal Reserve Banks may automatically approve extension requests if the following conditions are met:

- The banking entity notifies the Board that it is applying for an extension of the fund's seeding period of up to two years;
- No significant issues have been identified regarding the banking entity's compliance program required under section __.20 of the Volcker Rule Regulations designed to help ensure and monitor compliance with the prohibitions and restrictions of the Volcker Rule;
- The banking entity represents that it has a plan for reducing the permitted investment in a covered fund through redemption, sale, dilution, or other methods by the end of the extension period; and
- The Board or the banking entity's primary federal agency does not object to the extension within 30 days of the request.

5. The Agencies should clarify that the Volcker Rule Regulations shall govern in the event of a conflict between the Volcker Rule Regulations and the Board's Control Rule regarding the seeding period in the investment adviser presumption.

The Board's regulations related to determinations of whether a company has the ability to exercise a controlling influence over another company (**Control Rule**) go into effect as of September 30, 2020.¹² The Control Rule states that "[t]he one-year seeding period in the final rule does not alter the rules applicable to hedge fund and private equity fund investments under

¹¹ We request an automatic extension of up to two years but urge the Agencies, at a minimum, to allow for an automatic one-year extension to allow covered funds to benefit from a more effective seeding period.

¹² *Control and Divestiture Proceedings*, 85 Fed. Reg. 12,398 (Mar. 2, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-03-02/pdf/2020-03398.pdf>; see also the Board's delay of effective date at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200331a1.pdf>.

the Volcker Rule, including the rules addressing permissible seeding periods for such funds.”¹³ However, because the Control Rule only references the preceding twelve months, there is some ambiguity about the application of the Control Rule in the event that the seeding period extends beyond one year. Absent clarification, it would be very complicated for banking entities to have to monitor two different standards for presumptions of control and seeding periods. We therefore ask the Agencies to expressly confirm that the final amended Volcker Rule Regulations will govern in the event of a conflict with the Control Rule.

6. The Agencies should clarify that real estate funds that rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act are not covered funds.

As noted above, we support the additional proposed exclusions for certain types of funds from the Volcker Rule’s covered fund provisions. We recommend that the Agencies clarify that real estate funds are also excluded. These types of funds, which in 2019 represented 9.4 percent (3,583) of all reported private funds on Form ADV,¹⁴ are critically important to the capital, securities, and private offering markets.

The Agencies confirm in the Proposal that “[f]unds that rely on any exclusion or exemption from the definition of ‘investment company’ under the Investment Company Act, other than the exclusion contained in section 3(c)(1) or 3(c)(7), such as real estate and mortgage funds that rely on the exclusion in section 3(c)(5)(C), are not covered funds under the 2013 rule.” Many real estate funds, however, are not set up to rely on section 3(c)(5)(C) even if they may be eligible to do so. Therefore there may be some ambiguity as to whether these funds are subject to the covered funds provisions. We thus ask that the Agencies clarify in the release accompanying final rule amendments that real estate funds that rely on section 3(c)(1) or 3(c)(7) are not covered funds.

* * *

¹³ Control Rule at 12,409, n. 48.

¹⁴ See *2019 Evolution Revolution, A Profile of the Investment Adviser Profession*, available at <https://www.investmentadviser.org/publications/evolution-revolution>.

We commend the Agencies for proposing additional amendments to the Volcker Rule Regulations and we appreciate the opportunity to provide comments on the Proposed Amendments. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

cc: Honorable Jerome H. Powell, Chairman
Board of Governors of the Federal Reserve System

Joseph M. Otting, Comptroller of the Currency
Office of the Comptroller of the Currency

Honorable Jelena McWilliams, Chairman
Federal Deposit Insurance Corporation

Honorable Jay Clayton, Chairman
Securities and Exchange Commission

Honorable Heath Tarbert, Chairman
Commodity Futures Trading Commission

Honorable Hester M. Peirce, Elad L. Roisman, and Allison Herren Lee, Commissioners,
Securities and Exchange Commission

Dalia Blass, Director, Division of Investment Management, Securities and Exchange
Commission