



SUBMITTED ELECTRONICALLY

September 21, 2017

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW., Suite 3E-218
Washington, D.C. 20219

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

Dear Sirs and Madams:

The American Investment Council (the “AIC”) is submitting this letter in response to the Office of the Comptroller of the Currency’s (the “OCC”) request for input on ways to improve the regulations implementing (the “Final Regulations”) Section 13 of the Bank Holding Company Act, commonly known as the Volcker Rule.¹

The AIC is an advocacy, communications and research organization established to advance access to capital, job creation, retirement security, innovation and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes and distributes information about the private equity and growth capital industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC’s members are the world’s leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and its members, please visit our website at <http://www.investmentcouncil.org>.

Although our member private equity and growth capital funds (“private equity funds”) are not directly subject to the Final Regulations, the Final Regulations have affected our members by making it more difficult for us to raise funds from investors – like non-U.S. banks, investing from abroad – that were not intended to be limited by the Volcker Rule. Some, but not all, of these unnecessary burdens have been addressed by the OCC and other Agencies through frequently asked questions and other guidance. We regard that regulatory guidance as a useful step in the right direction, and we encourage

¹ For purposes of this letter, we cite to the common sections of the Final Regulations as adopted by the five implementing agencies (the “Agencies”), which are the Federal Reserve Board, Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, OCC, and Securities and Exchange Commission.

the OCC and the other Agencies both to confirm this guidance in revisions to the Final Regulations and, more broadly, to eliminate requirements and restrictions that do not meaningfully advance the Volcker Rule’s policy objectives.² We offer additional details on both sets of revisions below.

I. Reconsider the Regulatory Approach to Private Equity Funds.

The restrictions on fund activities in the Volcker Rule were, at core, designed to ensure that banks did not engage in prohibited trading activities indirectly through funds. Private equity funds are not a means of evading the Volcker Rule’s proprietary trading prohibitions and should not be treated as such. We urge the OCC and other Agencies to reconsider how the Final Regulations treat private equity funds and, in particular, ensure that restrictions in the Final Regulations do not go beyond what is necessary to achieve the congressional purpose in the Volcker Rule.

In taking this step, we recommend that the OCC and other Agencies keep in mind three important principles:

- *First*, any revisions to the Final Regulations should ensure consistent treatment of pooled vehicles that have long-term investment strategies and in which investors do not have redemption rights. Consistent treatment is necessary to maintain a level playing field and to avoid an outcome where one type of fund or vehicle (merely because of how it is labeled) is arbitrarily, or even unintentionally, favored over another.
- *Second*, revisions to the Final Regulations should create mechanisms that make it easier for banking entities to make permissible investments in third-party sponsored vehicles. For example, the statutory text is clear in permitting non-U.S. banks to make investments, from outside the United States, into private equity funds; barriers to and burdens on such investments should be eliminated. As noted above, private equity funds are not structured in ways that facilitate evasion of the Volcker Rule’s proprietary trading restrictions. Where a banking entity does not sponsor or act as investment adviser to a fund, the risks of the banking entity using that investment vehicle as a means to evade the Volcker Rule’s restrictions on proprietary trading are substantially lower.

² We are not alone in suggesting the Final Regulations require revision and tailoring. *See, e.g.*, Daniel K. Tarullo, Governor of the Federal Reserve System, Departing Thoughts at the Woodrow Wilson School, Princeton University (April 4, 2017) (“several years of experience have convinced me that there is merit in the contention of many firms that, as it has been drafted and implemented, the Volcker Rule is too complicated.”); *see also* U.S. Treasury Department Report, A Financial System that Creates Economic Opportunities: Banks and Credit Unions 71-77 (2017) (arguing that the Final Regulations “far overshot the mark” and suggesting that, among other reforms, regulators adopt “a simple definition” for covered funds).

- *Third*, revisions to the Final Regulations should seek to minimize interference with, and compliance burdens imposed on, non-bank fund sponsors, which were never intended to be affected by the Volcker Rule. For example, under the Final Regulations as they are currently drafted, non-U.S. banks may be limited in investing in private equity funds, special purpose entities or other vehicles that are not offered to U.S. investors because such vehicles could become “banking entities” that are, then, made subject to the Volcker Rule. This overreach imposes structuring and other limits on our members and costs on fund investors, which seem to us entirely unnecessary, given that the Volcker Rule was designed specifically not to affect these types of non-U.S. investment activities.

II. Formalize Existing “FAQ” Guidance on the Marketing Restriction.

One significant issue that emerged after the Final Regulations were adopted involved the ability of non-U.S. banks to invest, from outside the United States, in private equity and other “covered funds.” The Final Regulations permitted such investments so long as “no ownership interest in such . . . fund is offered for sale or sold to a resident of the United States” (the “marketing restriction”).³ What was not clear was whether the marketing restriction only applied to the investing non-U.S. bank (so that the bank could not market fund shares into the United States) or more broadly to third-party sponsors such as our members (in which case, non-U.S. banks would not be able to invest in funds that were offered also to U.S. investors).

After significant time and effort spent by AIC and other industry members to communicate this issue, the OCC and other Agencies issued a “frequently asked question” (Volcker Rule FAQ #13) to clarify that the marketing restriction only applies to the activities of a foreign bank and not of unaffiliated third-party sponsors. The FAQ enables foreign banks to invest in covered funds along side of U.S. investors.

This FAQ should be codified in any revision to the Final Regulations to provide firms with greater clarity and certainty. Interpretive relief, although welcomed, has not provided complete confidence to our members (and foreign bank investors) that this interpretation is here to stay and that long-term strategies will always be able to rely on such guidance. Codification would resolve any remaining doubts.

III. Address the “Banking Entity” Issue for “Foreign Excluded Funds.”

The Volcker Rule was never intended to apply extra-territorially, to investments of non-U.S. banks occurring entirely outside the United States. For this reason, the Volcker Rule contained exceptions that permitted non-U.S. banks to engage in fund investment activities “solely outside the United States.”

³ Final Regulations § .13(b)(1).

One way in which the Final Regulations seek to implement this “solely outside the United States” provision is to allow non-U.S. banks to invest in funds that are not offered to U.S. investors. These funds have come to be called “foreign excluded funds” because they are outside the Volcker Rule’s definition of “covered funds” for non-U.S. bank investors.

The significant issue that has emerged is that a foreign excluded fund, if it is 25% or more owned by a non-U.S. bank, may be treated as an affiliate of the investing bank, in which case the fund itself would be subject to the limits and restrictions of the Volcker Rule.⁴ This treatment is untenable for many funds and, as a result, foreign bank investments in foreign excluded funds and other non-U.S. vehicles may be artificially and unnecessarily limited and/or needless compliance burdens may be foisted on fund sponsors (which need to ensure that funds comply with the Volcker Rule’s limits) and costs imposed on other fund investors. This treatment achieves no legitimate policy purpose and merely thwarts the Volcker Rule’s clear objective of seeking to avoid disruptions to non-U.S. banks’ non-U.S. investment activities.⁵

As the OCC knows, this issue is avoided for “covered funds,” because the Final Regulations expressly carve out those funds from being treated as affiliates of banks. We urge that foreign excluded funds be treated similarly and also receive an express exclusion from the definition of “banking entity.” We appreciate that the Agencies have attempted to address this issue, at least until July 21, 2018, through issuing interpretive relief and allowing non-U.S. banks meeting certain requirements to invest in foreign excluded funds without regard to the 25% limit and without those funds having to comply with the Volcker Rule’s prohibitions. We believe that this relief is the right approach, but that it needs to be made permanent and should be ‘codified’ in any revisions to the Final Regulations.⁶

Making this type of relief permanent is necessary to effect the congressional directive not to disrupt activities of non-U.S. banks acting “solely outside the United

⁴ Id. § 2(a) (referencing the BHC Act definition of affiliate, 12 U.S.C. § 1841(k)).

⁵ We think that this treatment may have been an unintentional consequence of the Agencies’ determination to narrow the definition of “covered fund” for non-U.S. banking entities to include only those funds that are offered to U.S. investors in reliance on certain provisions of the U.S. Investment Company Act. That narrowing of the covered fund definition resulted in certain vehicles – foreign excluded funds – that no longer would benefit from the Final Regulations’ exclusion from the “banking entity” definition for covered funds.

⁶ Although we applaud the Agencies’ determination to grant this relief, we note that the relief was the result of a byzantine, opaque multi-agency process. We encourage the Agencies to devise a mechanism for granting relief and interpretive guidance more expeditiously and to be more transparent in their consideration of issues.

States.” In addition, such relief is necessary to avoid imposing burdens and limits on private equity fund sponsors, which burdens and limits serve no apparent policy purpose.

IV. Clarify the Wholly-Owned Subsidiary Exception to the Covered Fund Definition.

The Final Regulations include a number of exceptions to the term “covered fund” to allow banks to transact with vehicles that otherwise might get picked up by that definition. One of the exceptions applies to wholly-owned subsidiaries – entities that are at least 99.5% owned by an investing bank.⁷ This exception permits banking entities to invest in wholly-owned subsidiaries without regard to the Final Regulations’ covered funds restrictions. Wholly-owned subsidiaries, however, are considered affiliates of the banking entities that invest in them, and the Volcker Rule’s limits apply to the activities engaged in by these subsidiaries.

As noted above, non-U.S. banks may invest in covered funds, provided the marketing restriction and other requirements are met. Sometimes these investments may be in funds-of-one or in special vehicles that are offered exclusively to a particular non-U.S. bank. Non-U.S. banks have, however, been keen to ensure that they do not own more than 99.5% of a particular investment vehicle, for fear that such a stake may make that vehicle a wholly-owned subsidiary of the investing bank. In these cases, the non-U.S. bank investor may ask the fund sponsor to alter the investment structure so that at least 0.6% of the interests in the vehicle are held by another party and, thereby, avoid any wholly owned subsidiary issues. This type of artificial restructuring serves no purpose – it does not address any policy or other issue that the Volcker Rule seeks to advance.

For this reason, we urge the OCC and the other Agencies to clarify the wholly-owned subsidiary exception to the “covered fund” definition. In particular, the Agencies should make clear that this exception does not apply in the case of a bona fide investment, including a 100% investment, made in a pooled investment vehicle that is offered, advised or sponsored by a third-party sponsor.

* * *

We appreciate this opportunity to share our suggested improvements to the Final Regulations, and we applaud the OCC and other Agencies’ willingness to consider revisions that more efficiently and effectively advance the Volcker Rule’s policy objectives. We believe that the above-described revisions to the Final Regulations will eliminate unnecessary burdens for AIC members and their investors.

⁷ Id. § 10(c)(2).

If you have any questions regarding our comments or would like additional information, please feel free to contact me at (202) 465-7700. Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in blue ink that reads "Jason Mulvihill". The signature is written in a cursive style with a large initial 'J'.

Jason Mulvihill
General Counsel
American Investment Council