THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

February 13, 2012

DELIVERED VIA EMAIL

Office of the Comptroller of the Currency
250 E Street, S.W.,
Mail Stop 2-3
Washington, D.C. 20219
regs.comments@occ.treas.gov
Docket ID OCC-2011-14

David A. Stawick, Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
http://comments.cftc.gov
RIN 3038-AD05

Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, N.W.
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regs.comments@federalreserve.gov
Docket No. R-1432 and RIN 7100 AD

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C.
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File Number S7-41-11

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
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RIN 3064-AD85

Dear Sirs/Mesdames:

RE : Restrictions on Proprietary Trading and Certain Interests and Relationships with Hedge Funds and Private Equity Funds (the "Proposals")

We are writing to express our Members' concerns about the likely impact of the Proposals on Canadian mutual fund managers and mutual funds which they sponsor[1], and the resulting broader implications for the Canadian mutual funds industry.

[1] In Canada, the equivalent of a registered U.S. investment company is generally referred to as a "mutual fund" and we will use that term throughout this letter. Mutual funds in Canada are managed by registered "investment fund managers" and are typically structured as trusts or corporations, the interests in which are

The Investment Funds Institute of Canada ("IFIC") is the national association of the Canadian mutual funds industry. Our Members include fund managers, distributors and industry service organizations (including accounting, legal and other service providers). As in the U.S., the Canadian mutual fund industry is comprised of investment fund managers that sponsor, manage and administer funds, and dealer and broker firms that distribute funds' securities. As of December 2011 the mutual fund industry in Canada represented about CAD $770 billion in total assets under management in highly-regulated, publicly offered mutual funds[2]. Funds managed or sponsored by Canadian banks make up over 40% of this total industry figure. The largest Canadian broker/dealer firms are subsidiaries of Canadian banks. In addition, several large Canadian non-bank investment fund managers are directly or indirectly affiliated to a U.S. bank. Accordingly, the Proposals as written would apply to the majority of the Canadian fund industry.

We note that a comprehensive discussion and analysis of the unfortunate implications of the Proposals on the Canadian mutual fund industry, and recommendations to avoid those implications, were set out in a comment letter dated January 19, 2012 filed by the five largest Canadian banks, Bank of Montreal, The Bank of Nova Scotia, Royal Bank of Canada, Canadian Imperial Bank of Commerce and The Toronto-Dominion Bank (the "Bank Letter") [3]. We are aware that the banks intend to submit a supplementary comment letter specifically on Super 23A. We have reviewed a draft of that letter and also endorse the recommendations which will be set out in that letter.

We strongly believe that the impact of the Proposals on the Canadian mutual fund industry (the equivalent of the U.S. registered fund industry which has been expressly exempted from the Proposals) is entirely inadvertent and unintentional and that the Agencies have no desire to cause detriment to our industry. Accordingly, and because we fully support and agree with the analysis, reasoning and recommendations in the Bank Letter, we propose in this letter to document our complete endorsement of the Bank Letter, rather than duplicate its detailed analysis. In addition, we will note how the Proposals affect the Canadian mutual fund industry more broadly.

The Bank Letter stresses the implications of application of the Proposals on Canadian banks, their affiliates and funds, and discusses other far-reaching consequences for the Canadian mutual funds industry. To reiterate, the Proposals create significant issues for more than simply the Canadian banks and the Canadian mutual funds that they sponsor. We are concerned about the consequences of the over-reach of the Proposals and their potential application to the majority of the Canadian mutual funds industry.

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sold through retail distribution channels, that is, through dealers that may be related to or independent of the investment fund managers.

[2] Although many of our Members also sponsor and manage other types of funds, our remarks in this letter will be limited to Canadian fund managers and Canadian publicly offered mutual funds, although may also be applicable to other fund types, and more broadly to non-U.S. funds and non-U.S. managers.

[3] *See* Bank Letter, available at http://www.federalreserve.gov/SECRS/2012/February/20120201/R-1432/R-1432_011912_88668_524559134942_1.pdf

Our Recommendations

We concur with and endorse the following recommendations proposed in the Bank Letter:

a) Canadian mutual funds, whether sponsored by a Canadian bank or other Canadian investment fund manager should be excluded from the proposed definition of "covered fund";

b) for greater certainty, U.S. registered investment companies as well as Canadian and other foreign mutual funds should be excluded from the Proposal's definition of "affiliate" in order to clearly distinguish such public mutual funds from "hedge funds", "private equity funds" and "covered funds" as defined in the Proposal; and

c) Canadian "snowbirds" and other individuals who are temporarily resident in the U.S. should be excluded from the definition of "resident of the United States" as this phrase is used in the exemption of foreign funds from the definition of "covered funds".

We submit that implementing all of these recommendations will not impair the objectives of the Volcker Rule or diminish the legitimate scope of its intended prohibitions over bank proprietary trading and relationships with hedge funds and private equity funds. Conversely, however, to not implement these recommendations would allow the Proposals to create significant and irreparable harm to the legitimate public asset management business activities of Canadian banks, Canadian investment fund managers and to the operations of Canadian mutual funds.

Canadian Mutual Funds Are Not Covered Funds

We acknowledge that Section 619 of the Dodd-Frank Act (the "Volcker Rule") was intended to generally prohibit any "banking entity" (as defined) from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring or having certain relationships with a hedge fund or private equity fund (defined as a "covered fund"), subject to certain exemptions. The Volcker Rule was never intended to either restrict banks from engaging in management and sponsorship of highly regulated, publicly-offered mutual funds or to regulate the activities of their mutual funds. The Proposals recognize this by exempting a "customer fund" from the scope of "banking entity".

However, we believe that, because they are overly broad and extraterritorial in scope, the Proposals to implement the Volcker Rule, as published on November 7, 2011 by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporate, Securities and Exchange Commission and Commodity Futures Trading Commission (collectively, the "Agencies"), go well beyond the intended objectives of the Volcker Rule.

The unfortunate implications of the Proposals for the Canadian mutual funds industry arise out of the combination of the prohibition on a "banking entity" (which includes virtually all large Canadian banks and their affiliates) from investing in and sponsoring a "covered fund" (which, by our interpretation, encompasses Canadian-regulated mutual funds broadly, if not all non-U.S. funds) and the inability of Canadian mutual funds to qualify at all times for the foreign fund exemption from the definition of covered funds (foreign funds qualify if they are only purchased by and sold to persons not deemed to be U.S. residents and they are offered only outside the U.S.). The result is the application of the Proposal's broad and unwarranted restrictions (a) on the ability of Canadian investment fund managers to sponsor and manage Canadian publicly-offered mutual funds (a restriction that is inconsistent with the ability of U.S. banks and U.S.-bank-affiliated asset managers to sponsor and manage mutual funds) and (b) on the activities of Canadian mutual funds due simply to the possible existence of an investment in the funds by a U.S. resident (which restriction again does not apply to U.S. publicly-offered funds). The implications of these restrictions to the Canadian industry would be staggering.[4]

Since, uniquely, Canadian mutual funds are unable practically to meet the foreign fund exemption[5], the Proposals would apply to, and the restrictions would impair, the mutual fund operations of Canadian asset management firms that are affiliated with a U.S. bank and, by extension, would impose all of the Proposals` restrictions to these firms' Canadian investment funds.

Such application would create perverse outcomes for our industry, such as preventing Canadian investment fund managers with a U.S. bank affiliation from sponsoring or selling Canadian funds even in Canada, without full compliance with the Proposals, simply because they are unable to ensure that no U.S residents (including Canadian snowbirds) are invested in such funds. Compliance with the Proposals would, as an example, force Canadian investment fund managers to change the names of all of their Canadian funds to remove all references to the bank to which the manager may be affiliated. Yet to comply with Canadian law, the funds would have to continue to show the affiliation in their disclosure documents. Without Canadian investment fund managers and their Canadian funds being excluded from the Proposals as we recommend, the existence of a single U.S.-resident investor or snowbird in the fund would trigger this draconian outcome. The resulting concerns for Canadian regulators and confusion for investors created by such an event will serve only to trigger instability throughout the Canadian mutual fund industry.

For the reasons noted in the next part of our letter, it may be impossible to determine with certainty at all times that no U.S. residents are invested in a Canadian fund, given the inherent mobility of Canadian snowbirds. Hence, as alternatives to ceasing to sponsor Canadian mutual funds, an affected investment fund manager would have to wind up or divest itself of the fund or, if the manager could identify all U.S.-resident investors, it would have to force those investors to redeem (if it has the ability to do so) and prevent any future investment by U.S. residents in such funds; otherwise the manager could face this situation repeatedly. Either outcome creates immediate loss of investor confidence in the funds and in the manager, destabilizing the mutual fund industry.

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[4] Although many of the same arguments should equally apply to similarly regulated non-Canadian foreign public funds and we would support the exemption of all such funds from the definition of "covered fund," our primary focus is on issues affecting the Canadian mutual fund industry.

[5] Refer to the discussion in the next section of this letter about the relationship between U.S. residents, including Canadian snowbirds, and Canadian mutual funds.

This impact on the Canadian mutual fund industry could not have been within the contemplation of Congress in enacting the Volcker Rule. The express exemptions in the Proposals for U.S. registered funds and for the asset management operations of U.S. banks and their affiliates make it abundantly clear that the Volcker Rule was not at all intended to prohibit banks' asset management operations for third party clients, such as publicly offered mutual funds.

The exclusion of publicly-offered and substantively-regulated U.S. mutual funds from the definition of "covered funds" recognizes that these funds are not the same as hedge funds or private equity funds. As many commentators will point out publicly-offered mutual funds which are continuously offered and redeemable on demand by the investor, whether in the U.S. or Canada or other jurisdictions, are very differently regulated than hedge funds or private equity funds that are intended for sale to a small number and restricted group of investors, typically without the comprehensive registration and investor disclosure regime. As but one example, Canadian mutual funds are tightly restricted in their investments. Notably, National Instrument 81-102 prohibits or severely limits the use of risky or illiquid investments and derivatives for purposes other than hedging, such as short selling, and prohibits borrowing of cash except in a nominal amount for purposes of short term coverage of redemptions or trade settlement. Hedge funds are not subject to such regulatory restrictions.

Given the fundamental equivalence of Canadian and U.S. mutual funds, the comprehensive regulatory regimes that govern them[6], and their clear substantive distinction from hedge funds and private equity funds, Canadian mutual funds should be treated the same as U.S. mutual funds, and not as being similar to hedge funds or private equity funds for purposes of the Proposals. Further, this equivalence between U.S. and Canadian mutual funds, long recognized in U.S. regulatory policy that has accommodated the mobility of Canadian mutual fund investors, demonstrates there is no legitimate policy rationale to treat Canadian mutual funds and the mutual fund management operations of Canadian banks and asset managers differently than U.S. mutual funds and U.S. fund managers for purposes of the exemptions from the Proposal.

Accordingly, to exclude them from application of the Proposals, we respectfully request that Canadian mutual funds be excluded from the proposed definition of "covered fund" and that Canadian mutual funds be excluded from the Proposal's definition of "affiliate" in order to clearly distinguish such public mutual funds from "hedge funds", "private equity funds" and, more generally, "covered funds" as defined in the Proposal.

The Canadian Fund Industry and U.S. Residents

As well as excluding U.S. registered funds, the Proposals clearly mean to exempt foreign funds from the definition of covered funds to the extent they meet the exemption tests (they are purchased by and sold to only persons not deemed to be U.S. residents and they are offered only outside the U.S.). However, Canadian banks and other Canadian fund sponsors that may be

[6] See Bank Letter, *supra* note 3, and IFIC Letter, *infra* note 7, for details.

affiliated with U.S. banks are unable to rely on this exemption if any units/shares of mutual funds they sponsor are sold to or held by any investors who are deemed to be resident of the U.S., or if such funds are sold through affiliated entities that may be located in the United States, even if such sales are made only to non-U.S. residents. As discussed above, without an exemption, the Proposals may prevent Canadian banks and fund sponsors affiliated with U.S. banks from continuing to sponsor or invest in Canadian mutual funds.

As noted in detail in the Bank Letter, and in our previous submissions to the SEC in response to some of its earlier Dodd-Frank rulemaking[7], with our shared border and a deeply-linked business and cultural relationship, Canada and the U.S. have a long history of mutual respect and recognition. For many years the SEC has recognized this relationship in the existing exemptions and no-action relief which have enabled Canadian investors ("snowbirds") to travel to the U.S. without having to divest themselves of their Canadian fund investments, and without triggering a registration requirement in the U.S. for Canadian advisers and their Canadian funds. Similarly, most State regulators also accommodate this mobility by exempting Canadian distribution firms and their representatives from the requirement to register in the State in order to continue to transact trades in existing retirement accounts with Canadian snowbirds, or by imposing only notice filing requirements for firms who have clients temporarily in the State.

Although the majority of IFIC Members do not publicly offer or sell units/shares of their funds in the U.S. due to this mobility it is not uncommon for Canadian mutual funds to have a small number of securityholders who may be resident in the U.S. on a temporary or permanent basis. Unfortunately this ease of mobility makes it very difficult for Canadian funds to verify the presence of any U.S. resident investors at any point in time, which prevents Canadian funds from being exempted as foreign funds, and therefore causes the full brunt of the Proposals to be applicable. This seems like an anomalous result in light of the long history of recognizing the mobility of our citizens. The ease with which Canadian mutual funds would fail to meet the foreign fund exemption together with the massive implications to Canadian funds of having to comply with the Proposals because they are not exempt, can mean only that this is another completely inadvertent result not at all intended by the Agencies, nor remotely contemplated by Congress.

The logical and appropriate resolution of this unintended result is to exclude Canadian "snowbirds" and other individuals who are temporarily resident in the U.S. from the definition of "resident of the United States" as this phrase is used in the exemption of foreign funds from the definition of "covered funds"

[7] *See* IFIC letter dated January 24, 2011 commenting on the SEC's proposed Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets under Management, and Foreign Private Advisers, Investment Advisers Act, available at http://www.sec.gov/comments/s7-37-10/s73710-100.pdf, and the SEC's reference to the IFIC letter and others in the final rule Release No. 3222 (June 22, 2011) [76 Fed. Reg. 39646 (July 6, 2011)] at note 403 and at 39679.

Conclusion

We repeat our strong belief that the application of the Proposals to the Canadian mutual fund industry is entirely unintentional. We believe that incorporating into the Rule the exclusions that our industry has recommended will eliminate this inadvertent result and will focus the Proposals on the true objective of restricting bank proprietary trading and their relationships with hedge funds and private equity funds. We submit the granting of such exemptions would not in any way impair the objectives of the Volcker Rule as the very same exemptions that are proposed for Canadian managers and their mutual funds have already been provided for U.S. banks, U.S. bank affiliate fund managers and their related U.S. mutual funds. Furthermore, there has never been any suggestion that Canadian mutual funds or their managers have contributed to, or might in the future contribute to, any instability of the U.S. financial system.

We would be pleased to provide you with any additional information you may require, and to discuss our comments with you in more detail at your convenience. Please contact me or Ralf Hensel, our General Counsel and Director, Policy – Manager Issues at rhensel@ific.ca or at 1-416-309-2314.

Yours very truly

Joanne De Laurentiis
President and CEO

c.c. Mr. Mark Carney, Governor, Bank of Canada
Hon. James M. Flaherty, Minister of Finance, Government of Canada