ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

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Delivered Via Email

Board of Governors of the Federal Reserve System
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Washington, DC 20551
regs.comments@federalreserve.gov

Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219
regs.comments@occ.treas.gov

Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581
Via website: https://comments.cftc.gov

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
comments@FDIC.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
rule-comments@sec.gov

Dear Sirs/Mesdames:

Re: Proposed Revisions to Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds
Federal Reserve Docket No. R-1694 and RIN 7100-AF70, OCC Docket No. OCC-2020-0002 and RIN 1557-AE67, FDIC RIN 3064-AF17, SEC File no. S7-02-20 and RIN 3235-AM70, and CFTC RIN 3038-AE93

The Canadian Bankers Association ("**CBA**") appreciates the opportunity to comment on the joint notice of proposed rulemaking that proposes amendments to the regulations implementing Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the "Volcker Rule" under the Bank Holding Company Act of 1956 ("**BHCA**"). The CBA is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals.

We want to thank the agencies for their willingness over time to hear our input with respect to the treatment of foreign excluded funds under the Volcker regime. Overall, we are supportive of the agencies' proposals to improve and streamline the covered fund provisions 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 Volcker Rule while restricting the Rule's extraterritorial reach.

We echo the comments provided by the Institute of International Bankers ("**IIB**") in its comment letter dated March 23, 2020, in particular with respect to the codification of relief provided to "qualifying foreign excluded funds" ("**QFEF**"), changes to the definition of "foreign public funds" ("**FPF**"), clarifying the territorial limits of Super 23A, clarification of compliance program requirements, and codification of certain important FAQs in the guidance.

Along with affirming our above support for the IIB's submission, we would also like to raise some issues of particular concern to our members, as follows.

Excluding Qualifying Foreign Funds from "Banking Entity" Definition

Under the current Volcker Rule, some QFEFs of foreign banking entities could fall within the definition of "banking entity" under the implementing regulations and therefore be subject to the Rule. However, within the 2017 and 2019 foreign fund guidance, the agencies provided temporary relief for foreign banking entities in cases where the entity's acquisition or retention of any ownership interest in, or sponsorship of, a QFEF would meet the requirements for permitted covered fund activities and investments solely outside the United States, as provided in section 13(d)(1)(I) of the BHCA and the implementing rules.

As indicated in the IIB comment letter and as suggested previously by the CBA, we believe a clean exclusion from the "banking entity" definition as is currently provided under the foreign fund guidance (rather than the provision of an exemption from the covered fund restrictions) is the most effective way to address the foreign excluded fund issue and to prevent disruption of our members' non-U.S. asset management businesses.

Along with a clean exclusion, we are supportive of the proposal to codify the QFEF relief as first provided in the foreign fund guidance in order to address the banking entity concerns related to international banks' investments in, and sponsorship of, foreign excluded funds. With respect to meaning of a QFEF, our members share in the IIB's interpretation of the bona fide asset management condition as including hedging investments for fund-linked products to non-U.S. customers that are written on bank-sponsored or third party foreign excluded funds, as well as other situations where an international bank has acquired a controlling interest in a foreign excluded fund that is managed by a third party as part of the third party's bona fide asset management business (for example, in connection with managing the international bank's treasury assets).

Clarification of "Foreign Public Fund" Definition

Under the implementing regulations (section 248.10), FPFs are excluded from the definition of covered fund where it can be established that the fund meets certain qualifying criteria, including that the fund is authorized to be offered and sold to retail investors in the issuer's home jurisdiction and that the fund is sold predominantly through one or more public offerings outside of the U.S.

The agencies provided that an offering is made predominantly outside of the U.S. if 85% or more of the fund's interests are sold to non-U.S. investors. In addition, "public offering" is defined to mean a distribution of securities outside the U.S. to investors, including retail investors, provided that: (A) the distribution complies with the applicable requirements of the jurisdiction in which it is being made; (B) the distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and (C) the issuer has filed with the jurisdiction's regulatory authority publicly available offering disclosure documents. An additional requirement was subsequently introduced to the predominance criteria requiring that the fund's ownership interests (85% or more) are sold predominantly to persons other than the sponsoring banking entity, issuer (or affiliates), and employees and directors of such entities.

With respect to the above, we are supportive of the position the IIB takes in its comment letter regarding obtaining clarity and reducing unwarranted burdens under the current definitions for "foreign public funds" and "public offerings".

With respect to the scope of what constitutes a "public offering", we would like to note our concern with the impact of the requirement under paragraph (B) above which restricts a distribution to investors having a minimum level of net worth or net investment assets. In certain cases, our members are distributing public fund products, including mutual funds, solely to individuals as reporting issuers pursuant to Canadian prospectus disclosure requirements. Although such distributions are subject to substantive disclosure and retail investor protection laws or regulations, the current restriction means that these distribution activities would not fall within the definition of "public offering" and therefore allow for an exemption from the Volcker requirements for banking entities. We believe that the same objectives of achieving equivalency to U.S. registered investment companies (RIC) requirements could apply to these public fund offerings.

We also have some concerns regarding the treatment of FPFs. Under section 248.12(b)(1)(ii), FPFs (as well as RICs and SEC-regulated business development companies) will not be considered to be an affiliate of a banking entity for purposes of the covered fund investment limit aggregation rule in section 248.12(b)(1)(i) so long as the banking entity: (A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and (B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order or other authority. Similarly, FAQ 14 contemplates that where the test in section 12(b)(1)(ii) is satisfied: (a) a foreign public fund will not be considered to be a banking entity solely by virtue of its relationship with a sponsoring banking entity, and (b) the activities and investments of the foreign public fund will not be attributed to the banking entity.

As it is currently written, the test in section 248.12(b)(1)(i)(A) and (B) does not expressly apply to affiliate situations where investment advisory services are provided by one affiliate but investments in the fund (e.g. seed capital) are made by a different affiliate. As a result, it is possible that such structures could be interpreted as not meeting the "non-banking entity status test" under section 248.12(b)(1)(ii). We see no policy reason for this provision not applying when investment advisory services and ownership of voting

shares are undertaken by different entities within an affiliated banking group – particularly given the context of section 248.12(b)(1) which is an interpretive rule that applies for purposes of aggregating ownership interests in covered fund across all affiliates within a banking group.

To address the above concerns, we recommend adding the words "The banking entity, or an affiliate" to paragraph(B), as noted with underlining as follows:

> *(B) The banking entity, or an affiliate, [p]rovides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order or other authority.*

In addition, we recommend that the preamble to the final rule include an acknowledgment that the above-noted situations would also be considered to satisfy the requirements set out in FAQ 14 (and be reflected in any codification of the FAQ), such that affiliate-managed foreign public funds are not considered to be banking entities and the activities and investments of such funds are not attributed to a banking entity that satisfies the requirements proposed above.

In addition, we support the IIB's position that exchange-trade funds (ETFs) that are traded on internationally recognized stock exchanges in retail denominations should be treated as FPFs. We should also be entitled to rely on the policy guidance provided in the FAQs (Nos. 5, 14 and 16) in connection with seeding and designated ETF market making activities such that an ETF is not treated as a banking entity and its activities and investments are not attributed to banking entities that seed or act as designated market makers to the ETF.

Clarifying Territorial Limits of Super 23A

Under the current Super 23A restrictions of the Volcker Rule, a banking entity that sponsors or advises a covered fund is prohibited from entering into transactions that would result in the banking entity having credit exposure to the covered fund. The CBA shares the IIB's concern that the current prohibition could be interpreted as prohibiting extensions of credit and other covered transactions outside of the U.S. by a non-U.S. affiliate of an international bank. We believe that such an interpretation goes against the goal of limiting the extraterritorial reach of the Volcker Rule. We agree with the IIB that the rule should focus on the activities of banking entities inside the U.S., not those of international banks acting outside the U.S. We recommend that the scope of Super 23A be expressly stated as not applying to transactions that do not have a U.S. nexus. Such clarification would reduce the disruption to non-U.S. asset management businesses where the risks of the covered transactions exist outside, not inside, the U.S.

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Thank you for considering our comments. Please do not hesitate to contact me with any questions you may have.

Sincerely,