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March 23, 2020

By Electronic Mail

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20th Street and Constitution Avenue, NW
Washington, DC 20551

Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Joint Notice of Proposed Rulemaking Implementing Revisions to the Volcker Rule: 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 Institute of International Bankers ("IIB") appreciates the opportunity to comment on the joint notice of proposed rulemaking[1] that proposes amendments to the regulations[2] implementing Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[3] commonly known as the "Volcker Rule". The IIB represents internationally headquartered financial institutions from over 35 countries around the world doing business in the United States. The IIB's members consist principally of international

1 85 Fed. Reg. 12,120 (Feb. 28, 2020). In this letter, we refer to the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission (the "CFTC") collectively as the "Agencies", and to the text of the proposed rules as the "Proposal".

2 See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (Jan. 31, 2014) (setting forth the "2013 Rule"); Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61,974 (Nov. 14, 2019) (setting forth the "2019 Amendments" and, together with the unamended portions of the 2013 Rule, the "Current Rule").

3 Codified as Section 13 of the Bank Holding Company Act of 1956 (the "BHCA"), 12 U.S.C. § 1851.

banks that operate branches and agencies, bank subsidiaries and broker-dealer subsidiaries in the United States ("international banks").

The IIB supports the changes included in the Proposal as common sense revisions to the current regulations that would simplify and streamline the rule, reduce compliance burdens and reduce unintended consequences while continuing to serve the core policy purpose of the Volcker Rule, which is to protect U.S. banks and the U.S. financial system from exposure to the risks of speculative proprietary trading activity, either directly or indirectly through funds. Most important for our members, the Proposal would reduce the Volcker Rule's extraterritorial application by exempting the activities of non-U.S. funds offered to non-U.S. investors, which has long been recognized as an unintended consequence of the 2013 Rule.[4] The proposed changes would also increase banking entities' flexibility to serve their customers through sponsorship of, investments in and relationships with fund vehicles in ways that do not materially implicate the risks intended to be addressed by the Volcker Rule.

In this letter, we have summarized the reasons why we believe the proposed changes in the Proposal should be adopted, and we have highlighted further opportunities for simplification and streamlining the Rule's covered funds provisions that we believe should be adopted. We also refer to our comment letters on prior rounds of rulemaking under the Volcker Rule, which addressed many of these same issues in detail.[5]

We have focused our comments on the issues of particular relevance and concern to internationally headquartered banks with U.S. banking operations. Many important issues are being addressed in detail by other trade associations and industry participants. The IIB generally supports the industry comments on the Proposal included in the letters submitted by the Bank Policy Institute ("BPI") and the Securities Industry and Financial Markets Association ("SIFMA"), and in Section VII of this letter, we have highlighted certain specific comments and recommendations that the IIB endorses as particularly important for our international bank members.

4 See Proposal at § ___.13(d). See also Federal Reserve, OCC and FDIC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017) (the "Foreign Fund Guidance") ("[a] number of foreign banking entities, foreign government officials, and other market participants have expressed concern about the possible unintended consequences and extraterritorial impact of the Volcker Rule. . . . The staffs of the Agencies are considering ways in which the implementing regulation may be amended, or other appropriate action may be taken, to address any unintended consequences of the Volcker Rule for foreign excluded funds in foreign jurisdictions."); Statement by Federal Reserve Governor Lael Brainard on the Proposal (Jan. 30, 2020) ("I am supportive of the proposal to address the unintended application of the Volcker rule to certain funds organized outside of the United States and offered to foreign investors, known as foreign excluded funds.").

5 See, e.g., IIB Letter to Federal Reserve General Counsel Mark van der Weide (July 26, 2019) (the "2019 Letter"); IIB Comment Letter to the Agencies (Oct. 17, 2018) (the "2018 Comment Letter"); IIB Letter to the Office of the Comptroller of the Currency (Sept. 21, 2017) (the "IIB OCC Recommendations").

Summary of Key Recommendations

1. In relation to qualifying foreign excluded funds, the Agencies should adopt the proposed relief for controlled foreign funds offered solely outside the United States with the following modifications:
   a. Replace the exemptions with a clean exclusion from the "banking entity" definition for qualifying foreign excluded funds.
   b. Revise the final prong of the "qualifying foreign excluded fund" definition to match the definition as set forth in the Foreign Fund Guidance.
2. In relation to foreign public funds, the Agencies should:
   a. Adopt the proposal to eliminate the "home jurisdiction" and "predominance" requirements.
   b. Adopt the proposed changes to the "public offering" definition.
   c. Revise the "public offering" requirement to look solely to a foreign fund's qualification as eligible for sale to retail investors.
   d. Specifically identify, in the final rule or its preamble, a list of common retail fund products, such as UCITS and funds subject to the EU's "PRIIPs" regulation, that are presumed to qualify as foreign public funds.
   e. Confirm that foreign funds that are listed on an internationally recognized stock exchange and available in retail-level denominations qualify as foreign public funds.
   f. For foreign public funds sponsored by U.S. affiliates of international banks, exclude non-U.S. affiliates of the sponsoring banking entity, and their employees and directors, from the restrictions on sales to affiliated entities in the "public offering" definition.
3. In relation to Super 23A, the Agencies should:
   a. Clarify that Super 23A is subject to the same territorial limits as Section 23A itself and does not apply extraterritorially to transactions between the non-U.S. affiliates of international banks and non-U.S. covered funds where the risk of these transactions lies entirely outside the United States.
   b. Adopt the proposal to incorporate additional exemptions into Super 23A, including:
      i. Those transactions that would be exempt covered transactions under Section 23A(d) or Section 223.42 of Regulation W.
      ii. Short-term extensions of credit and asset purchases conducted in the ordinary course of business in connection with payment transactions, settlement services, or futures, derivatives, and securities clearing.
4. In addition, the Agencies should:
   a. Permit banking entities to hold investments in non-U.S. securitizations that are covered funds to the extent mandated by European or other, substantially similar non-U.S. risk retention rules.

b. Exempt international banks with limited assets or trading operations in the United States from the Volcker Rule.

c. Codify time-tested FAQs, including:

   i. FAQ 5 relating to the covered fund treatment of certain vehicles that will become foreign public funds.

   ii. FAQ 14 relating to the covered fund treatment of foreign public funds sponsored by a banking entity.

   iii. FAQ 16 relating to the banking entity treatment of registered investment companies and foreign public funds during their seeding period.

I. Finalize and Codify Relief for Controlled Foreign Funds

The IIB has consistently advocated for the Volcker Rule to be interpreted and implemented in a manner that respects the intended scope of the Volcker Rule's statutory exemptions for overseas activities and is consistent with the Federal Reserve's traditional approach to the overseas application of U.S. banking laws. The 2019 Amendments took an important step in this regard by limiting the extraterritorial scope of the Volcker Rule's proprietary trading restrictions.

The central remaining issue of particular concern for international banks is limiting the extraterritorial impact of the Current Rule on overseas funds activities. For international banks, foreign funds that are not offered or sold to U.S. investors (referred to herein as "foreign excluded funds") generally fall outside the definition of a covered fund under the Current Rule.[6] This appropriately reflects the statutory text and the intent of Congress to limit the extraterritorial scope of the Volcker Rule, as well as longstanding principles of international bank supervision that limit unwarranted extraterritorial application of U.S. banking laws and accord appropriate deference to home country bank supervision. While international banks may freely invest in and sponsor these funds outside of the United States, the entities may themselves become "banking entities" subject to the Volcker Rule's proprietary trading and covered fund restrictions if they are controlled by a banking entity for purposes of the BHCA. As a result, the operations of controlled foreign excluded funds are restricted in an unintended, back-door fashion.

The 2019 Amendment's revisions to the "trading outside of the United States" ("TOTUS")[7] exemption helpfully alleviate some of the burdens on controlled foreign excluded funds. But requiring that a foreign excluded fund's activities comply with exemptions such as the TOTUS and the "solely outside of the United States" ("SOTUS")[8] funds exemptions would still impose limits on that entity's activities, potentially impose compliance program obligations and result in the further need to look through to controlled subsidiaries of such funds. The result is unnecessarily complex and creates possibilities for unintended gaps in the relief. It creates particularly unwarranted burdens in the context of investments in third-party funds, where the banking entity may be unable to prescribe specific compliance measures and limits.

We strongly support the aspects of the Proposal that would address this concern. **The Agencies should adopt the proposed exemptions for controlled foreign funds offered solely outside the United States, subject to important changes—including to align the**

6 See Current Rule § ___.10(b)(iii) (including foreign funds that have been exclusively been offered outside the United States in the definition of covered fund only with respect to U.S. banking entities).

7 Current Rule § ___.6(e)(3).

8 Current Rule § ___.13(b).

Proposal with the guidance that it is intended to codify—that would more appropriately respect the extraterritorial limits of the Volcker Rule.

This issue is extremely important to our international member banks, many of which have extensive non-U.S. investments and asset management businesses that would be significantly affected if they were required to apply the Volcker Rule's proprietary trading and covered fund restrictions to foreign excluded funds. We and other trade associations, individual banks and foreign government officials have raised this issue with the staffs of the Agencies on many occasions since the 2013 Rule was published, and have provided data on the scope of the issue.[9] We appreciate that the banking agencies in July of 2017 acknowledged the issue and provided temporary relief,[10] most recently extended in July of 2019 (until July 21, 2021).[11]

We believe that the scope of the relief provided in the Foreign Fund Guidance appropriately addresses the banking entity concerns related to international banks' investments in, and sponsorship of, foreign excluded funds. The definition of a "qualifying foreign excluded fund" eligible for relief essentially incorporates the requirements of the SOTUS exemption, which ensures that the banking entity's investment and sponsorship activities are conducted wholly outside the United States, and that the risk of such activities remains outside the United States.

The Foreign Fund Guidance added an additional condition that a qualifying foreign excluded fund be "established and operated as part of a bona fide asset management business". While the Guidance did not elaborate on the scope of this condition, based on the plain language and the extensive discussions with the Agencies prior to issuance of the Guidance, our members understand it to include hedging investments for fund-linked products to non-U.S. customers that are written on bank-sponsored or third party foreign excluded funds,[12] 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

9 *See, e.g.*, 2018 Comment Letter; IIB OCC Recommendations; IIB-SIFMA Letter to Federal Reserve General Counsel Scott Alvarez (July 1, 2015); Letter from the EBF, Japanese Bankers Association, Canadian Bankers Association and Australian Bankers' Association to the Volcker Rule Working Group (June 9, 2015); IIB-SIFMA Letter and Outline to the Volcker Rule Working Group (May 20, 2015); Letter from SIFMA to Federal Reserve General Counsel Scott Alvarez (Oct. 20, 2014); IIB 2014 Letter.

10 *See* Foreign Fund Guidance.

11 *See* Federal Reserve, OCC and FDIC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019).

12 This also ensures the relief is aligned with the decision in the 2019 Amendments to allow fund-linked products involving hedges in covered funds and to revisit the statements in the preamble to the 2013 Rule (the "2013 Preamble") on the treatment of such fund-linked product structures under the Volcker Rule's backstop prohibitions.

treasury assets).[13] As discussed in our letter to the Federal Reserve dated July 26, 2019, the Agencies have ample statutory authority to provide permanent relief, both under the extraterritorial exemptions in BHCA Sections 13(d)(1)(H) and (I) and under the Agencies' residual exemptive authority under Section 13(d)(1)(J).[14]

To the extent that the Proposal would codify the relief first provided in the Foreign Fund Guidance, we support it as an effective measure to address the IIB's concerns about controlled foreign excluded funds. However, the Proposal diverges from the approach taken in the Foreign Fund Guidance in two respects. We address our concerns with these divergences below:

- First, the Proposal would not provide a complete exclusion from "banking entity" status for qualifying foreign excluded funds. Providing an exemption from the Volcker Rule's proprietary trading and covered funds restrictions goes a long way to addressing the IIB's concerns, but it leaves some ambiguities regarding the treatment of qualifying foreign excluded funds in the context of the Volcker Rule. For example, it is not clear whether, and how, a qualifying foreign excluded fund (as opposed to the controlling or sponsoring banking entity) would implement specific compliance policies to satisfy the Volcker Rule's compliance program requirements. Nor is it clear how such a fund would operate in compliance with the Volcker Rule's "prudential backstop" provisions.[15] **The IIB continues to believe that a clean exclusion from the banking entity definition would be the most effective and permanent way to address the foreign excluded fund issue.**

- Second, the Proposal would change one of the criteria for a "qualifying foreign excluded fund" in a manner that could impose an obligation on one banking entity to monitor the Volcker Rule compliance obligations of another, unaffiliated entity. The Foreign Fund Guidance includes a requirement that a qualifying foreign excluded fund not be operated in a manner that enables "the foreign banking entity" to evade the requirements of the Volcker Rule.[16] But the Proposal would change this prong to require that the fund is not operated in a manner that enables "any other banking entity" to evade the requirements of the Volcker

13 Consistent with the requirements of the Foreign Fund Guidance, such investments comply with the requirements of the SOTUS exemption and the risk of the investments are wholly outside the United States. Such investments do not create banking entity issues where a fund managed by a third party has U.S. investors, because it becomes a "covered fund" and thus is not a banking entity. It would not be logical to conclude that the same investment in a fund that did not have U.S. investors would create a more restrictive result, applying the Volcker Rule to the third-party manager's management of the fund.

14 See 2019 Letter.

15 See Current Rule §§ ___.7 and ___.15.

16 Foreign Fund Guidance at 3.

Rule.[17] This appears to have been an inadvertent change, given the preamble's statement that a qualifying foreign excluded fund under the Proposal "has the same meaning as in the 2017 and 2019 policy statements."[18] If not, it would be a departure from a decade of practice and experience under the Volcker Rule, under which banking entities are responsible for their own Volcker Rule compliance programs and not for the compliance obligations of third parties. **The Agencies should revise the final, anti-evasion prong of the "qualifying foreign excluded fund" definition to match the definition as set forth in the Foreign Fund Guidance.**

II. Amend the Definition of Foreign Public Fund to Provide Clarity and Simplify Compliance

The Current Rule appropriately excludes "foreign public funds" from the definition of covered fund, reasoning that these funds are more equivalent to U.S. registered investment companies ("RICs") than to private equity and hedge funds and do not present the same risks that the covered fund provisions were meant to address.[19] However, the Current Rule imposes multiple, complex conditions that have undermined the effectiveness of the exclusion. Some of the conditions required to satisfy the definition are ambiguous and require information which is often burdensome (or impossible) to obtain or ascertain, particularly when the fund is sponsored, advised or distributed by third parties.

In particular, the Current Rule requires that a foreign public fund be authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction and must sell ownership interests predominantly (i.e., 85%) through one or more public offerings outside of the United States. In addition, as interpreted by the Agencies, the Current Rule appears to require that a qualifying issuer actually sell some (unspecified) portion of its interests to retail investors, all of which goes far beyond the Current Rule's treatment of RICs. **We support the Agencies' proposal to eliminate the "home jurisdiction" and "predominance" requirements, which will provide welcome clarity and reduce unwarranted burdens for banks seeking to rely on this exclusion.**

- The "home jurisdiction" requirement unnecessarily prevents many publicly registered funds from qualifying as foreign public funds, because it fails to account for the relatively common practice of organizing a fund in one jurisdiction (for example, Luxembourg or Cayman) to be sold principally in another jurisdiction (including in some cases being listed for sale on a public stock exchange in another jurisdiction). Business considerations, tax treatment, or

17 Section ___.13(d)(v) of the Proposal.

18 Preamble to the Proposal at 12,125.

19 See 2013 Preamble at 5677-79.

client-driven preferences frequently lead market participants to domicile an entity in one jurisdiction, even while it is offered or conducts business in another. As long as the foreign public fund complies with the investor protection and other laws in the jurisdiction where it is qualified for sale to retail, that should be sufficient; requiring the fund to qualify to sell to retail investors in a jurisdiction where it does not plan to sell to investors would not further the Volcker Rule's policy goals.

- The "predominance" requirement imposes a complicated, fact-specific assessment about the manner and extent to which a fund has actually been offered to or held by the public at various stages of its existence or distribution, even when the fund is publicly registered. A banking entity's empirical information regarding completed, as well as future, marketing efforts for any foreign public fund will be very limited—particularly so with respect to unaffiliated funds or where a fund is sold through a foreign exchange or a third-party distribution platform. It may be difficult or impossible for a banking entity to obtain sufficient information on ownership of fund interests to determine whether 85% or more of a particular fund has been (or will be) sold to non-U.S. residents, or whether the fund has in fact been sold to retail investors.

- We also support the Agencies' change to the "public offering" definition to include a requirement that the distribution be "subject to substantive disclosure and retail investor protection laws or regulations."[20] In our view, this condition should give the Agencies appropriate flexibility to exclude as ineligible any jurisdictions or specific regulatory schemes where the resulting regulation is determined over time to be insufficiently similar to those of the Investment Company Act and thus to create risks that warrant application of the Volcker Rule. Any attempt to further specify at a more granular level what specific restrictions should apply would make the rule too prescriptive and complex to implement. The multiple other requirements of the definition, with the addition of this general standard, should provide sufficient limits. The proposed general language of this additional requirement will provide a clear basis for further Agency guidance if, based on experience implementing the rule, they believe there is a need to expand on what is required to meet this condition.

Although we support the changes to the foreign public fund definition in the Proposal, the Agencies could do more to provide clarity and simplify compliance for certain

20 Proposal at § ___.10(c)(1)(iii)(A).

common fund structures. **In particular, we believe the Agencies should adopt the following simplifying and efficiency enhancing proposals:**

- The Agencies should revise the "public offering" requirement to look solely to the foreign fund's qualification as eligible for sale to retail investors, and make clear that an inquiry into how the fund's interests were actually offered or sold is not required. The Current Rule's public offering requirement has raised questions about whether a foreign fund authorized and made available for sale to retail investors but sold in significant part to institutional investors could rely on the exclusion. Under the Current Rule, even certain funds that are available to the public by virtue of being listed and traded on a retail-level stock exchange might not qualify as foreign public funds, because the Current Rule's definition of "public offering" is linked to the primary public distribution of a particular fund.[21]

  The Proposal would eliminate the quantitative threshold imposed by the predominance requirement, but it would still require that at least some interests in a foreign public fund be offered through one or more public offerings, raising the question of what level of factual inquiry must be conducted in order to confirm a fund's public status. Based on the plain language of the Proposal and the accompanying preamble discussion, our members understand that the Agencies do not intend for there to be any particular threshold of actual sales that occur through a public offering or any need to engage in a quantitative inquiry into the composition of a particular foreign public fund's investor base. But a standard based on qualification for public sales would be less burdensome and easier to administer, while still providing assurances that the fund is regulated as a public fund.

  U.S. RICs qualify and are regulated as RICs whether or not their shares are actually offered in a public distribution. To provide equivalent recognition for RICs and foreign public funds, our members continue to believe that the "public offering" requirement should look solely to a foreign fund's qualification as eligible for sale to retail investors. Qualification of a foreign fund for sale to retail investors outside the United States—similar to registration with the SEC for RICs—should be sufficient evidence that the foreign fund is subject to regulatory safeguards that make it appropriate to exclude from the covered fund definition, regardless of the sophistication of investors to which foreign fund interests are actually sold.

- Certain common fund products that are offered and sold outside the United States are so clearly designed for retail sales, and subject to local regulatory requirements that are so similar to those applicable to U.S. RICs, that they should

21 See Section ___.10(c)(1)(iii).

presumptively qualify for the foreign public fund exclusion. The Agencies should specifically identify, in the final rule or its preamble, a set of common fund products that are presumed to qualify as foreign public funds. For example, the Agencies should confirm that all Undertakings for Collective Investment in Securities ("UCITS") funds qualify as foreign public funds, as would any issuer whose securities are sold subject to the retail disclosure requirements of the EU's packaged retail insurance-based and investment products ("PRIIPs") regulation.[22] Any such list would not be exclusive, but it would provide clear guidance for common retail products and support the Agencies' goals of efficiency and simplification. As in other areas of the rule, the Agencies would retain flexibility to address any evasion concerns that arise.

- The Agencies should also explicitly confirm that foreign funds that are listed on an internationally recognized stock exchange and available in retail-level denominations qualify as foreign public funds. Providing an express exclusion with respect to foreign funds that are exchange traded would significantly reduce the complexity and burden of applying the exclusion. In many cases a fund becomes "public" not through a particular public distribution of its securities, but by the public listing and trading of its securities on a stock exchange. Any issuer whose securities are traded in retail denominations on an internationally recognized public stock exchange (and thus not listed only on a restricted or professionals-only portion of the exchange) should qualify, as such a listing should be sufficient to demonstrate that the fund is eligible to be sold to retail investors and therefore public in nature.

Finally, we recommend the Agencies make one further revision to the foreign public fund definition to appropriately limit the extraterritorial impact of the Current Rule. The Current Rule imposes an additional limit on foreign public funds that are sponsored by a banking entity that is, or is controlled by a banking entity that is, organized under the laws of the United States or any State. For these funds to qualify as foreign public funds, the ownership interests of such funds must be sold predominantly to persons other than, among others, affiliates of the sponsoring banking entity and such affiliates' directors and senior executive officers.[23]

22 See Regulation (EU) No. 1286/2014 and associated implementing legislation.

23 The net effect of this requirement is to limit the investments of a banking entity and its affiliates and employees to less than 15% of the foreign public fund's ownership interests after a seeding period, rather than the general less than 25% limit required to avoid banking entity status for the foreign public fund. See 2013 Preamble at 5678 ("the Agencies generally expect that a foreign public fund will satisfy this additional condition if 85 percent or more of the fund's interests are sold to persons other than the sponsoring U.S. banking entity and certain persons connected to that banking entity."); Volcker Rule Frequently Asked Question # 14, Foreign Public Funds Sponsored by Banking Entities (June 12, 2015) ("FAQ 14").

Although principally aimed at U.S. banking organizations, this additional restriction also captures foreign public funds that are sponsored by the U.S. asset management affiliates of international banks. As a consequence, the non-U.S. affiliates, directors and employees of the international bank are restricted from investing in the foreign public fund. We believe that this restriction is contrary to the intended territorial limits on application of the Volcker Rule. Where the risk of such affiliate or employee investments are borne solely outside the United States (e.g., where the affiliates are not, and do not parent up to, a U.S. banking entity, and for employees of such entities), there is no U.S. financial stability or safety and soundness benefit to restricting the investments. **To address this extraterritorial impact, the Agencies should amend the requirements for foreign public funds sponsored by U.S. affiliates of international banks by excluding the non-U.S. affiliates of the sponsoring banking entity, and their employees and directors, from the restrictions in Sections ___.10(c)(ii)(A)-(D), provided that the non-U.S. affiliate is not controlled by a U.S. banking entity.**

III. Simplifying Compliance with Super 23A

A. Clarifying the Territorial Limits on Super 23A

The Proposal does not explicitly address the question of whether the Super 23A prohibition could be interpreted to prohibit extensions of credit and other covered transactions outside of the United States between a non-U.S. affiliate of an international bank and a covered fund organized and established outside the United States for which the international bank directly or indirectly serves as investment manager, investment adviser, or sponsor, or that the banking entity organizes and offers (a "non-U.S. related covered fund"). It should not be so interpreted. Applying Super 23A outside the U.S. in this manner would represent an unjustifiable extraterritorial expansion of the Volcker Rule's intended scope. It would also be inconsistent with traditional bank regulatory principles, the approach taken with respect to the proprietary trading prohibitions in the 2019 Amendments and the Proposal's treatment of foreign excluded funds, which all focus on addressing risks to banking organizations in the United States. Implementation of Super 23A should, consistent with the policy objectives of the Volcker Rule and the scope of Section 23A and the Federal Reserve's Regulation W, focus on the activities of banking entities inside the United States and not apply to the activities of international banks acting outside of the United States.

Policy considerations, principles of statutory interpretation, and traditional deference to home country bank regulation in this area each support this conclusion:

- First, limiting the Super 23A prohibition to transactions by U.S. banking entities would be consistent with the intent of Congress and the Agencies to focus on limiting risk for U.S. banking entities. The statutory SOTUS and TOTUS exemptions reflect congressional intent to avoid restricting an international bank's activity outside the United States when the risk of such activity resides outside the United States. The Super 23A prohibition should be interpreted in a manner consistent with those exemptions to apply only to transactions that create risk for U.S. banking entities, and thereby avoid conflict between the intended limits on extraterritorial application of the rule reflected in the statutory SOTUS and TOTUS exemptions and the Super 23A prohibition. The parameters of the SOTUS exemption specifically allow for a non-U.S. affiliate of an international bank to have commercial exposure to covered funds outside the United States. Super 23A should not be construed to prohibit, for example, lending to a non-U.S. covered fund from a non-U.S. affiliate that would be permitted to invest unlimited amounts in the fund under the SOTUS exemption. Just as the Agencies had the authority to clarify in the Current Rule that Super 23A was not intended to prohibit investments in covered funds sponsored pursuant to Section ___.11 of the Current Rule, they should also clarify that Congress did not intend to limit lending or other covered transactions with non-U.S. related covered funds by an international bank acting from outside of the United States.

- Second, the Agencies' interpretations of Super 23A should take into account the presumption against extraterritorial application of U.S. law.[24] Congress must clearly and affirmatively express an intent to apply U.S. law abroad, and it did not do so in the context of the Super 23A prohibition. Nothing in the statutory text of the Volcker Rule suggests that relationships between an international bank and non-U.S. funds (which international banks are expressly permitted to invest in, sponsor and advise) should be limited by Super 23A.

- Third, Congress and the Agencies have historically and consistently adhered to the principle of deference to home country regulation for the non-U.S. operations of international banks with respect to the regulation of credit extensions and other "covered transactions," which are traditionally matters subject to home country risk management standards and requirements. For instance, neither Section 23A itself, nor U.S. lending limits, apply to an international bank's non-U.S. branches, because those prudential standards are intended to protect U.S. depository institutions.[25] More generally, the BHCA provides international banks broad latitude to engage in activities of any kind outside the United States.[26]

24 The Supreme Court reaffirmed this principle in Morrison v. National Australia Bank, 561 U.S. 247 (2010).

25 See, e.g., 12 C.F.R. § 223.61 (affirming that the application of Federal Reserve Act Sections 23A and 23B with respect to international banks is limited to transactions between their U.S. branches and agencies and certain affiliates).

26 For example, BHCA regulations have long permitted qualifying international banks to "[e]ngage in activities of any kind outside the United States", "[e]ngage directly in activities in the United States that are incidental to its activities outside the United States" and "[o]wn or control voting shares of any company that is not engaged, directly or indirectly, in any activities in the United States, other than those that are

The Agencies should clarify that Super 23A is subject to the same territorial limits as Section 23A itself and does not apply extraterritorially to transactions between the non-U.S. affiliates of international banks and non-U.S. covered funds where the risk of these transactions lies entirely outside the United States. Specifically, the Agencies should clarify that the Super 23A prohibition does not apply to covered transactions between a non-U.S. affiliate of an international bank and a non-U.S. related covered fund. This clarification would facilitate ordinary asset management businesses of international banks outside the United States only in situations where the risk of the covered transaction is also located or held outside of the United States. This clarification would be consistent with the Agencies' interpretation of other exemptions for non-U.S. funds activities, and avoid any impact on the safety and soundness of U.S. institutions or U.S. financial stability.

B. Incorporating Additional Exemptions to the Super 23A Prohibition on Covered Transactions

Under the Volcker Rule statute, a banking entity is prohibited from entering into a transaction with certain related covered funds (and their subsidiary covered funds) if the transaction would be a "covered transaction, as defined in section 23A of the Federal Reserve Act".[27] In the 2013 Rule, the Agencies construed this phrase to mean only those transactions specifically listed in Section 23A(b)(7) of the Federal Reserve Act, without regard to the exemptions from the restrictions of Section 23A set forth in Section 23A(d) of the Act, or the complementary exemptions set forth in Section 223.42 of the Federal Reserve's Regulation W.[28]

The IIB has long held the view that the scope of the Super 23A definition of prohibited "covered transaction[s]" should be interpreted to account for the exemptions set forth under Section 23A(d) of the Federal Reserve Act and Section 223.42 of the Federal Reserve's Regulation W, and that this would be well within the scope of the Agencies' interpretive authority.[29] In this respect, we note that the statute specifically states that covered transactions under Super 23A should be analyzed "as if" the banking entity were a member bank and the fund were an affiliate thereof,[30] which evidences an intent to import the entire regulatory scheme applicable to transactions between a member bank and its affiliates, including the exemptions in Section 23A and Regulation W.

Our members support the Agencies' proposal to incorporate additional exemptions into Super 23A for (i) those transactions that would be exempt covered

incidental to the international or foreign business of such company" without being subject to the restrictions of the BHCA. See 12 C.F.R. Part 211, Subpart B, and in particular 12 C.F.R. § 211.23(f)(1)-(3).

27 See 12 U.S.C. § 1851(f)(1).

28 See 2013 Preamble at 5746.

29 See IIB OCC Recommendations at 36-38.

30 See 12 U.S.C. § 1851(f)(1).

transactions under Section 23A(d) or Section 223.42 of Regulation W and (ii) short-term extensions of credit and asset purchases conducted in the ordinary course of business in connection with payment transactions, settlement services, or futures, derivatives, and securities clearing.[31] Interpreting the scope of Super 23A consistently with the exemptions in Regulation W, and providing additional flexibility for payment, settlement and clearing activities, does not create the "bail out" risk that Super 23A was intended to address and would provide flexibility for banking entities to provide a broader array of ordinary course financial services to their related covered funds while reducing operational risk and interconnectedness in the financial system.

IV. Harmonizing the Loan Securitization Exemption with European Risk Retention Rules

European risk retention rules may in some cases require banking entities to hold a greater percentage of the interests of a securitization that is a covered fund than is permitted under the Current Rule, which provides solely for U.S. risk retention requirements.[32] Allowing banking entities to hold investments in order to comply with foreign law is entirely consistent with the policy purposes of the Volcker Rule, as the investment functions only as a legally mandated mechanism to align the sponsor of the securitization with investors by providing "skin in the game". Limiting the scope of relief to European risk retention rules and substantially similar non-U.S. risk retention requirements would provide the Agencies with certainty regarding the potential scope of the exemption.

Banking entities should be permitted to hold investments in non-U.S. securitizations that are covered funds to the extent mandated by European or other, substantially similar non-U.S. risk retention rules, just as banking entities are permitted to hold investments in U.S. securitizations to comply with U.S. risk retention rules.

V. Relief for International Banks with De Minimis U.S. Assets and Trading Activity

In some circumstances, the IIB believes the clarity of a full exemption from the Volcker Rule would be appropriate for certain banks or bank affiliates, based on the nature of the affiliate's relationship to the foreign bank and/or the lack of any risk to U.S. financial stability. One of these proposals—a full exemption from the definition of banking entity for foreign excluded funds—is described in Section I. Another example arises in the case of international banks with de minimis assets or trading activity in the United States, where application of the Volcker Rule creates extraterritorial burdens wholly disproportionate to their relevance to U.S. safety and soundness and financial stability. We believe that a full exemption from the Volcker

31 Section ___.14(a)(2)(iii) of the Proposal.

32 See Regulation (EU) 2017/2402 (Dec. 12, 2017); Credit Risk Retention, 79 Fed. Reg. 77,602 (Dec. 24, 2014).

Rule would be both appropriate and justified for international banks with very limited U.S. assets or trading operations.

We strongly endorse the recommendations of the U.S. Treasury Department, partially implemented by Congress in the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018) ("EGRRCPA"), to exclude smaller banking organizations from the scope of the Volcker Rule.[33] **We urge that the threshold for such an exclusion be applied to international banks based on their U.S. assets and operations, thereby completely exempting international banks with limited assets or trading operations in the United States**.

Limiting the scope of the Volcker Rule to those international banks that have significant U.S. assets and U.S. covered activities would, consistent with the Treasury Report's rationale for excluding smaller banking organizations, reduce the excessive burden on international banks with minimal assets and operations in the United States. Excluding these entities would, by definition, not materially increase potential risks to the United States given their very limited U.S. footprints.

A full exclusion would more appropriately concentrate regulatory resources on those banking entities that present the most risk to the U.S. financial system and relieve burdens on international banks with limited U.S. operations. It would also be consistent with the congressional decision in EGRRCPA to exempt small banks and bank holding companies from the Volcker Rule altogether. To further the principles of national treatment and competitive equality, similar relief should be afforded to international banks based on the size of their U.S. operations.

VI. Codification of Important FAQs

We are supportive of the Agencies' effort to provide greater clarity to market participants through the issuance of FAQs relating to implementation and compliance with the Volcker Rule. We further appreciate the Agencies' confirmation that the Proposal "would not modify or revoke any previously issued staff FAQs, unless otherwise specified".[34] The flexibility for the Agencies to issue FAQs and other interpretive guidance and no-action relief is especially important when implementing a law and regulation as complex as the Volcker Rule. However, FAQs and other interpretive guidance lack the force of law,[35] and it would provide more certainty and clarity for banking entities subject to the Volcker Rule if the Agencies were to codify those FAQs in the regulatory text, particularly where the Agencies' experience with the FAQs over time has demonstrated their efficacy. The Agencies took this approach in the 2019

33 See U.S. Dep't of the Treasury, A Financial System That Creates Economic Opportunities – Banks and Credit Unions (June 2017) (the "Treasury Report") at 72.

34 Preamble to Proposal at 12,123.

35 See the Agencies, Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018).

Amendments to codify FAQ 13, and the Proposal would codify the Foreign Fund Guidance. **We encourage the Agencies to codify other time-tested FAQs, including FAQ 5 (relating to the covered fund treatment of certain vehicles that will become foreign public funds),[36] FAQ 14 (relating to the banking entity status of foreign public funds sponsored by a banking entity)[37] and FAQ 16 (relating to the banking entity status of RICs and foreign public funds during their seeding periods),[38] each of which is of particular interest for international banks.**

VII. Other Issues of General Applicability

In this letter we have focused our comments on the issues of particular relevance and concern to international banks. Other trade associations and industry participants are addressing in detail issues of general applicability to both U.S. and internationally headquartered banking organizations. The IIB generally supports the industry comments on the Proposal included in the letters submitted by BPI and SIFMA.

More specifically, and of particular interest to international banks, the IIB supports the comments and recommendations in the SIFMA and BPI letters relating to:

- The proposed exclusions for credit funds, venture capital funds, customer facilitation vehicles, and family wealth management vehicles.
- The expansion of the proposed venture capital fund exclusion to include all qualifying long-term investment funds.
- The expansion of the public welfare investment fund exemption, including to provide an express banking entity exemption for public welfare investment funds excluded from the definition of covered fund.
- Providing an express banking entity exemption for employees' securities companies.
- The expansion of the loan securitization exemption to include a 10% basket for non-loan assets.
- The proposed changes to the ownership interest definition to create a safe harbor for senior loans and debt and to clarify and expand the types of "for-cause"

36 See Volcker Rule Frequently Asked Question # 5, Foreign Public Fund Seeding Vehicles (June 10, 2014).

37 See FAQ 14.

38 See Volcker Rule Frequently Asked Question # 16, Seeding Period Treatment for Registered Investment Companies and Foreign Public Funds (July 16, 2015).

removal rights that would not cause an interest to be classified as an ownership interest.

- The proposed new rule of construction on parallel investment attribution.

- Eliminating the requirement that ownership interests in sponsored or advised covered funds acquired or retained in an underwriting or market-making capacity must be counted towards the per-fund and aggregate fund investment limits and the covered fund capital deduction.

- The option for a banking entity to voluntarily comply, in whole or in part, with a final rule implementing the Proposal, even before the final rule's effective date.

* * *

We appreciate your consideration of our comments on the Proposal. If we can answer any questions or provide any further information, please contact the undersigned (646-213-1147, bpolichene@iib.org) or our General Counsel, Stephanie Webster (646-213-1149, swebster@iib.org).

Very truly yours,

Briget Polichene

Briget Polichene
Chief Executive Officer

cc: Secretary of the Treasury Steven T. Mnuchin
U.S. Department of the Treasury