



Frankfurt am Main,
31 March 2020

BVI comments concerning the Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

BVI¹ gladly takes the opportunity to comment on the Proposal issued by the Office of the Comptroller of the Currency (“OCC”), Board of Governors of the Federal Reserve System (“Board”), Federal Deposit Insurance Corporation (“FDIC”), U.S. Securities and Exchange Commission (“SEC”), and Commodity Futures Trading Commission (“CFTC”), hereafter referred to as the “Agencies”, which seeks to amend the regulations (the “Regulations”) implementing Section 13 of the Bank Holding Company Act, commonly known as the Volcker Rule.²

We strongly support the Agencies’ intent to limit the extraterritorial impact of the Volcker Rule by providing clarity for the operations of foreign banking entities and improving and streamlining the covered fund provisions of the Regulations. Since the eventual legal clarification of these issues is of great importance for BVI members, we are grateful to the Agencies for tabling this Proposal and would like to encourage its timely adoption.

Our views on the matters most pertinent to our members are as follows:

1. Qualifying Foreign Excluded Funds (Questions 1 – 5)

We welcome and entirely agree with the proposed treatment of qualifying foreign excluded funds as regards their exemption from the proprietary trading prohibition and covered fund provisions of the Volcker Rule.

Since the term “banking entity” is defined broadly to include any company that controls, is controlled by or is under common control with, a banking entity, many, if not most, investment funds, both in the United States and in Europe, are currently at risk of being deemed to be controlled by their banking entity sponsor, investment adviser or investment manager due to their organizational and governance structure, and, thus, deemed banking entities subject to the Volcker Rule’s restrictions on proprietary trading. Since investment funds are organized for the express purpose of investing in securities, deeming an investment fund that is controlled by a banking entity to itself be a banking entity would effectively prevent that investment fund from achieving its purpose and deny investors in the investment fund the opportunity to benefit from the banking entity sponsor, investment adviser or investment manager’s investment advisory services and expertise.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI’s 114 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22%, Germany represents the largest fund market in the EU. BVI’s ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

² Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, Notice of Proposed Rulemaking, 85 Fed. Reg. 12,120 (February 28, 2020).



Recognizing the negative and unintended consequences that banking entity status would have on investment funds, the Agencies in the Regulations provided an express exclusion for covered funds from the definition of banking entity, but unfortunately did not provide a similar exclusion for other investment funds that did not fall under the definition of covered funds. To address this concern and to prevent unintended consequences for business activities by investment funds, the Agencies have issued policy statements that provide for a temporary relief from enforcement actions for foreign banking entities based on the activities and investments of any of their foreign excluded funds that meet certain criteria, known as qualifying foreign excluded funds³.

The Proposal at hand would provide for permanent regulatory relief by generally exempting qualifying foreign excluded funds from the proprietary trading prohibition and covered fund provisions of the Volcker Rule. The proposal would define a qualifying foreign excluded fund using the same eligibility criteria as set forth in the policy statements.

BVI supports the proposed treatment of qualifying foreign excluded funds because it avoids the negative consequences of treating such funds as banking entities and effectively limits the extraterritorial impact of the Volcker Rule.

2. Foreign Public Funds (Questions 6 – 12)

We support the Agencies' intent to streamline and simplify the conditions for reliance on the "foreign public fund" exclusion from the definition of covered fund.

It is indeed true that the current conditions for the exclusion create significant difficulties in terms of practical compliance. This pertains in particular to the condition for a foreign public fund to be sold "predominantly" (i.e., at least 85%) through one or more public offering, given that fund distribution generally takes place through third-party intermediaries and the details of the individual sales are not fully traceable for fund management companies.

Therefore, we agree with the proposed replacement of this condition by a more general requirement that the fund is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings. In addition, the Agencies propose to modify the definition of "public offering" to add a new requirement that the distribution be subject to substantive disclosure and retail investor protection laws or regulations in the jurisdiction where it is made. This approach appears consistent with the general intent of the Proposal to treat UCITS and other non-U.S. funds similar to U.S. mutual funds registered with the SEC under the 1940 Act, while also limiting the extraterritorial impact of the Volcker Rule. As regards the German fund market, we are convinced that the rules applying to public distribution of retail funds in Germany warrant substantive disclosure and protection of retail investors.

³ See Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017), available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20170721a1.pdf>; Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019), available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20190717a1.pdf>.