October 17, 2018

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219
Docket ID OCC–2018–0010

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Docket No. R–1608

Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AE67

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
File No. S7–14–18

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581
RIN 3038–AE72

VIA ELECTRONIC MAIL: VolckerReg.Comments@occ.treas.gov; regs.comments@federalreserve.gov; comments@FDIC.gov; rule-comments@sec.gov; https://comments.cftc.gov

Re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (OCC Docket ID OCC–2018–0010; Federal Reserve Docket No. R–1608; FDIC RIN 3064-AE67; SEC File No. S7–14–18; CFTC RIN 3038–AE72)

Dear Sir or Madam:

The Committee on Capital Markets Regulation (the "**Committee**") is grateful for the opportunity to comment on the proposed revisions to the prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds (the "**Proposal**"),[1] released jointly by the Office of the Comptroller of the Currency (the "**OCC**"), the Board of Governors of the Federal Reserve System (the "**Board**"), the Federal Deposit Insurance Corporation (the "**FDIC**"), the Securities and Exchange Commission (the "**SEC**"), and the Commodity Futures Trading Commission (the "**CFTC**" and, together with the OCC, the Board, the FDIC and the SEC, the "**Volcker Agencies**").

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes thirty-seven leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

This letter proceeds in three parts. We begin by providing a brief overview of the final regulations implementing the Volcker Rule,[2] which were adopted in 2014 (the "**Current Regulation**").[3] Then, we summarize the material amendments contained in the Proposal. Finally, we set forth the Committee's analysis of the Proposal and our recommendations.

Our letter identifies areas where the Proposal falls short in achieving the Volcker Agencies' stated purpose in the Proposal: reducing the burdens and complexity of the Current Regulation. However, we believe that the Proposal could accomplish its stated goals with a few changes. First, the Proposal should eliminate the "accounting" test, which could otherwise expand the scope of prohibited activities beyond short-term trading activities. Second, the Volcker Agencies should eliminate the presumption in the Current Regulation that all trades held for less than 60 days are impermissible proprietary trading. Third, the proposed additional reporting metrics should be dropped. Fourth, although the Volcker Agencies should *retain* the Proposal's approach to determining whether short-term trades are permitted market making or underwriting activities, which requires a banking

[1] Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018) (the "**Proposal Release**").

[2] 12 U.S.C. § 1851 (the "**Volcker Rule**").

[3] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5,536 (Jan. 31, 2014); Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5,808 (Jan. 31, 2014). Citations to the Current Regulation in this letter will be to the Board's Current Regulation, 12 C.F.R. Part 248.

entity to adopt internal risk limits for market making and underwriting activities that bank supervisors evaluate and monitor, we further recommend that supervisors adopt a flexible approach in evaluating banks' internal risk limits. In general, we believe that the distinction between permitted activities and prohibited short-term trading is best addressed by effective supervision rather than by excessively prescriptive regulations. Finally, we set forth other recommendations to address: the extraterritorial application of the rule, the overly expansive covered funds restrictions, and the need for improved coordination amongst the Volcker Agencies in implementing the Volcker Rule.

### *1. The Current Regulation*

The Current Regulation contains two major restrictions: (1) a ban on proprietary trading (the "**Proprietary Trading Ban**") and (2) a prohibition against banking entities acquiring or retaining ownership interests in or sponsoring certain investment funds (the "**Covered Fund Restriction**"). These restrictions are described below, along with the compliance requirements under the Current Regulation.

*Proprietary Trading Ban*

The Proprietary Trading Ban prohibits a banking entity from engaging as principal for a "trading account" in any purchase or sale of financial instruments, absent an exemption.[4] A banking entity is defined broadly to include any insured depository institution, any company that controls an insured depository institution, any foreign bank that controls a U.S. branch or U.S. commercial lending company, and any affiliate or subsidiary of those entities.[5] A trading account is defined under the Current Regulation as any account that meets one of three tests: the "**short-term intent test**", the "**market risk capital test**" and the "**dealer test**."

Under the short-term intent test, an account is a trading account if it is used by a banking entity to purchase or sell financial instruments principally for the purpose of short-term resale, benefitting from short-term price movements, realizing short-term arbitrage profits, or hedging any of such purchases or sales.[6] Notably, there is a rebuttable presumption that the short-term intent test is met—and thus a banking entity is engaged in proprietary trading—if it holds a financial instrument for fewer than 60 days.[7]

Under the market risk capital test, an account is a trading account if it is used to purchase or sell financial instruments "that are both market risk capital rule covered

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[4] 12 C.F.R. § 248.3(a). Under the Current Regulation, "financial instrument" means "(i) [a] security, including an option on a security; (ii) [a] derivative, including an option on a derivative; or (iii) [a] contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery." However, this does not include loans, certain commodities or foreign exchange or currency. *Id.* at (c).
[5] 12 C.F.R. § 248.2(c)(1).
[6] 12 C.F.R. § 248.3(b)(1)(i).
[7] 12 C.F.R. § 248.3(b)(2).

positions and trading positions" and the banking entity calculates risk-based capital ratios under the market risk capital rule.[8]

Under the dealer test, an account is a trading account if it is used to purchase or sell financial instruments and the banking entity is licensed to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed as such.[9]

The definition of a trading account is broad and, as a result, many activities not intended to be prohibited by the statute are covered by it. In order to address the broad scope of the trading account definition, certain limited activities are permitted by the Current Regulation, subject to significant internal governance requirements. These include underwriting, market making, risk-mitigating hedging and certain trading activities by foreign banks that occur outside the United States. To allow for these activities, the Current Regulation provides exemptions to the Proprietary Trading Ban, subject to certain requirements ("**Permitted Trading Activities**").[10]

With respect to the underwriting and market making exemptions, the Current Regulation requires that positions be designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties ("**RENTD**").[11] The Current Regulation provides two factors for assessing the RENTD requirement for market making: (i) the liquidity, maturity, and depth of the market for the relevant type of financial instruments, and (ii) a demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks of or associated with positions in the financial instruments.[12]

*Covered Funds Restriction*

The Covered Funds Restriction generally prohibits banking entities from acquiring or retaining any ownership interest in or sponsoring a "covered fund."[13] Importantly, the Current Regulation defines covered fund broadly to include certain commodity pools and any fund that would be an "investment company" under the Investment Company Act of 1940 but for Section 3(c)(1) or 3(c)(7) of the Act.[14] To address the broad scope of the covered funds definition, the Current Regulation allows banking entities to acquire and retain ownership interests or sponsor covered funds in certain limited circumstances (the "**Permitted Fund Activities**"), including—subject to conditions—underwriting and market making in ownership interests of a covered fund and engaging in very limited risk-

[8] 12 C.F.R. § 248.3(b)(1)(ii).
[9] 12 C.F.R. § 248.3(b)(1)(iii).
[10] *See* 12 C.F.R. §§ 248.4, 248.5 & 248.6(e).
[11] 12 C.F.R. § 248.4(a)(2)(ii) & (b)(2)(ii).
[12] 12 C.F.R. § 248.4(b)(2)(ii).
[13] *See* 12 C.F.R. § 248.10(a).
[14] 12 C.F.R. § 248.10(b)(1).

mitigating hedging activities.[15] In addition, a banking entity may seed a covered fund, provided that (a) within one year of the fund's establishment the investment in the fund does not exceed three percent of the value or outstanding ownership interest of the fund, and (b) the aggregate value of all of the banking entity's ownership in all covered funds does not exceed three percent of its tier 1 capital.[16]

*Compliance Requirements*

Lastly, the Current Regulation imposes extensive requirements to ensure and monitor compliance with the Proprietary Trading Ban and the Covered Fund Restriction. Generally, any banking entity with total consolidated assets of more than $10 billion that engages in Permitted Trading Activities or Permitted Fund Activities must establish a stand-alone Volcker Rule compliance program that includes written policies and procedures, internal controls, independent testing and auditing, training for trading personnel and managers and recordkeeping.[17] In addition, any banking entity engaged in Permitted Trading Activities and having more than $10 billion in gross trading assets and liabilities must report multiple quantitative metrics set forth in the Current Regulation's Appendix A to its Volcker Agency for each trading desk engaged in the covered activity.[18] If a banking entity has total consolidated assets of $50 billion or more or is required to report metrics, its compliance program must meet enhanced requirements listed in the Current Regulation's Appendix B.[19] An enhanced compliance program under Appendix B must, among other things (1) be reasonably designed to identify, document, monitor, and report the banking entity's Permitted Trading Activities and Permitted Funds Activities; to identify, monitor and promptly address the risks of these activities; and to prevent activities prohibited by the Volcker Rule and the Current Regulation; (2) establish and enforce appropriate limits on the covered activities, including limits on the size, scope, complexity, and risks of the individual activities; (3) subject the effectiveness of the compliance program to periodic independent review and testing; (4) make senior management accountable for the effective implementation of the compliance program, ensure that the board of directors and chief executive officer review the effectiveness of the compliance program, and require a chief executive officer certification to the appropriate Volcker Agencies; and (5) facilitate supervision and examination by the Volcker Agencies of the banking entity's Permitted Trading Activities and Permitted Funds Activities.[20]

### ***2. The Proposal***

The preamble of the Proposal states that the intent of the Proposal is to revise the Current Regulation to "allow banking entities to more efficiently provide services to clients," to "streamline and clarify" requirements, and "reduce metrics reporting, recordkeeping, and compliance program requirements."[21] The Proposal largely focuses on

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[15] *See* 12 C.F.R. § 248.12 & 248.13.
[16] 12 C.F.R. § 248.12(a)(2).
[17] *See* 12 C.F.R. § 248.20(b) & (f).
[18] *See* 12 C.F.R. § 248.20(d).
[19] 12 C.F.R. § 248.20(c).
[20] Appendix B, 12 C.F.R., Part 248.
[21] Proposal Release at 33,436.

changes to the Proprietary Trading Ban. Primarily, it would: (a) revise the definition of trading account; (b) modify the RENTD requirement for the underwriting and market making exemptions; and (c) reduce the Current Regulation's compliance requirements. It would also modify the requirements for foreign banks covered by the Current Regulation that engage in trading outside the United States. These changes are described in more detail below.

*Short-Term Intent Test and the Accounting Test*

The Proposal would eliminate the short-term intent test, including the 60-day rebuttable presumption, from the definition of trading account. It would replace the short-term intent test with a test under which any account used by a banking entity to purchase or sell financial instruments that must be recorded at fair value on a recurring basis under applicable accounting standards would be considered a "trading account" (the "**accounting test**").[22] The Proposal would also add a presumption that a banking entity's trading desk is in compliance with the Proprietary Trading Ban, so long as it is below a certain profit and loss threshold and not subject to the market risk capital test or the dealer test.[23]

*RENTD and the Underwriting and Market Making Exemptions*

The Proposal would also modify the requirement that positions not exceed the RENTD of clients to qualify for the underwriting and market making exemptions. It would provide that the purchase or sale of a financial instrument by a banking entity is consistent with the RENTD requirements if, among other things, the banking entity establishes underwriting and market-making internal risk limits for each trading desk and implements, maintains, and enforces those limits.[24] These internal risk limits would have to be designed "not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's [underwriting or market making] activities."[25] In addition, the limits would be subject to supervisory review and oversight on an ongoing basis, and a banking entity would be required to "promptly report" to the Volcker Agencies in the event a risk limit is exceeded or is temporarily or permanently increased.[26]

*Compliance Requirements*

The Proposal seeks to decrease banking entities' compliance burden. It would remove certain of the reporting metrics in Appendix A while adding others and eliminate entirely the enhanced minimum compliance requirements of Appendix B (except for its CEO attestation requirement).[27] The Proposal would also tailor the application of the

[22] Proposal Release at 33,447-8.
[23] *Id.* at 33,449. The threshold would be set at $25 million and based on the aggregate sum of the absolute values of gains or losses for each trading date in any 90-calendar-day period. *Id.* at 33,450.
[24] Proposal Release at 33,456 & 33,459.
[25] *Id.* at 33,456 & 33,460.
[26] *Id.* at 33,598-99.
[27] *Id.* at 33,491.

Volcker Rule by establishing three categories of banking entities based on their level of trading activity. The first category, banking entities with "significant trading assets and liabilities,"[28] would be required to comply with the full panoply of Volcker Rule requirements.[29] The second category, banking entities with "moderate trading assets and liabilities,"[30] would be able to satisfy the regulation's compliance requirements by including in their existing compliance policies and procedures appropriate references to the requirements of the Volcker Rule and its implementing regulations and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity, although this category would continue to be subject to the CEO attestation requirement.[31] The third category, banking entities with "limited trading assets and liabilities,"[32] would be given a presumption of compliance under which they would have no obligation to demonstrate compliance with the Proprietary Trading Ban or the Covered Fund Restriction on an ongoing basis.[33]

### *3. Analysis of the Proposed Rule*

*Accounting Test and 60-Day Presumption*

Under the new "accounting test," the scope of the captured transactions is unequivocally expanded, contrary to the Volcker Agencies' intent to address the overbreadth of the Current Regulation. The trading account definition is expanded to encompass activities that are clearly not short-term trades. More specifically, under the accounting test, equity investments of any kind would meet the definition of trading account,[34] as would certain medium- to longer-term debt security investments,[35] hedges and certain traditional lending executed in security form. That is because the new accounting test would functionally apply the Proprietary Trading Ban to any account of a banking entity that purchases or sells any financial instruments that are not held-to-maturity debt securities, including financial instruments a banking entity intends to hold for an *indefinite period of time*, such as securities used for asset-and-liability management activities or pure investment purposes. Likewise, because all of the exemptions and

[28] This is defined by the Proposal to include those banking entities with trading assets and liabilities equal to or exceeding $10 billion. *Id.* at 33,565.
[29] *Id.* at 33,570.
[30] This is defined by the Proposal to include those banking entities with trading assets and liabilities greater than or equal to $1 billion, but less than $10 billion. *Id.* at 33,564.
[31] *Id.* at 33,570.
[32] This is defined by the Proposal to include those banking entities with trading assets and liabilities less than $1 billion. *Id.* at 33,564.
[33] *Id.* at 33,570.
[34] *See* Accounting Standards Update No. 2016-01. We note, however, that the fair value rule for equity investments has an exception for significant equity investments that are accounted for under the "equity method." *Id.* However, equity method investments are typically greater than 20% of a company.
[35] *See* Accounting Standards Codification 320-10-35-1. There are three classifications of debt securities. If a debt security is acquired with the intent of selling it within hours or days, the security is classified as a "trading security." If an entity has the positive intent and ability to hold a debt security to maturity, such security is classified as a "held-to-maturity security." Debt securities that are not classified as trading securities or held-to-maturity securities are classified as "available-for-sale securities." *See* Accounting Standards Codification 320-10-25-1. Debt securities in the "trading" and "available for sale" categories are accounted for at fair value.

exclusions relate to short-term trading activities (consistent with the statutory intent), there is not an exemption or exclusion available for many of the longer-term activities captured by the accounting test.

We therefore believe that the accounting test would make the Volcker Rule more, not less, burdensome. For trading accounts already subject to the market risk capital test or the dealer test, we recommend that the Volcker Agencies not adopt the accounting test. With respect to trading accounts not captured by those prongs, the Volcker Agencies should consider alternatives to the accounting test which are necessary to capture proprietary trading activities. We understand that other commenters have offered various alternatives to the Volcker Agencies to capture the trading activities of those banking entities that are not otherwise subject to the market risk capital test or the dealer test.

We further recommend that if the Volcker Agencies retain the short-term intent test, then they should eliminate the Current Regulation's existing presumption that the purchase or sale of a financial instrument held for less than 60-days is prohibited proprietary trading, because this time limit is over-inclusive, capturing both instruments and investments that are not for the purpose of proprietary trading.

We believe that the Volcker Agencies are generally well-positioned to abandon the accounting test and eliminate the 60-day negative presumption, as the Proposal is otherwise well-designed to ensure that banking entities do not engage in proprietary trading while being able to continue to engage in permitted market making and underwriting activities. The Proposal does so by presuming that customer-facilitation trades entered into by a banking entity are legitimate market making and underwriting activities so long as the banking entity has adopted internal risk limits that are evaluated and monitored by bank supervisors and intended to comply with the statutory RENTD requirement.

However, we suggest two further changes to the internal risk limits approach. First, the Volcker Agencies should clarify that that supervisors and examiners should not impose one-size-fits-all requirements on banks when overseeing the implementation of these risk limits. Banks have diverse business models, client bases, and market functions that should be considered on an individualized basis when internal risk limits are reviewed by bank examiners and supervisors, and deference should be provided to the businesses and risk managers that have intimate knowledge of the markets. Second, the Volcker Agencies should eliminate the requirement that banking entities promptly report to the Volcker Agencies when an internal risk limit is exceeded or changed, as doing so would pose an excessive regulatory burden on banking entities. As market conditions and client demand constantly change, internal risk limits are likely to require constant changes. Given that banking entities are otherwise subject to extensive reporting and recordkeeping requirements and bank examiners have access to such records, banks should be required to record (but not "promptly report") when internal risk limits are modified or exceeded. That is the approach generally taken in the Current Regulations, and it would otherwise be inconsistent with the intent of the Proposal to reduce compliance burdens by replacing a recordkeeping requirement with a duty to report.

*Reporting Metrics*

We are concerned about the proposed changes with respect to the reporting metrics that banks must provide to the Volcker Agencies. As noted above, the Proposal eliminates some metrics but also creates new metrics. The Proposal presents no analysis showing that the benefit of eliminating some metrics outweighs the costs of imposing new metrics. Banks have developed processes, systems, and programs to capture, record and report the existing metrics. The costs of complying with the new metrics will be substantial and imposing such new requirements is contrary to the Proposals intent of streamlining the Current Regulation, reducing burdens, and increasing efficiency. We support the removal of current metrics that are unnecessary or unhelpful, but the proposed new reporting metrics should be dropped.

*Extraterritorial Application of the Volcker Rule*

Because of the Current Regulation's expansive definition of "banking entity," foreign banks that have branches or subsidiaries in the United States, as well as their subsidiaries and affiliates, are "banking entities" under the Current Regulation. As a result, foreign banks and their geographically far-flung non-U.S. subsidiaries, which have no U.S. operations or trading activities, are subject to compliance requirements, including the development and administration of Volcker Rule compliance programs.[36] Not only are these requirements costly, but they unnecessarily expand the reach of U.S. jurisdiction for activities that have little nexus to the United States. Therefore, we believe that the Current Regulation should be revised to limit and tailor any extraterritorial application of the Volcker Rule to foreign banks' non-U.S. operations, as long as the risk of proprietary trading activities remains outside of the United States.

*Covered Funds*

The Committee is also concerned that although the Proposal poses a number of questions on the Current Regulation's provisions relating to the Covered Fund Restriction, it contains few concrete changes. Market participants submitted extensive comments to the Volcker Agencies prior to the finalization of the Current Regulation and to the OCC in connection with its 2017 Request for Public Input on the Volcker Rule.[37] As the Committee previously noted in its 2017 Roadmap for Regulatory Reform, the Current Regulation's definition of covered funds (including its existing exclusions) is not sufficiently tailored to focus solely on entities that engage in impermissible proprietary trading and interferes with traditional banking activities and asset management, including lending and long-term investing alongside clients.[38]

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[36] 12 C.F.R. § 248.20(a).

[37] *See* OCC, Public Comments in Response to OCC Notice Seeking Input on the Volcker Rule: Detailed Summary of Key Issues and Recommendations, *available at* https://occ.gov/topics/capital-markets/financial-markets/trading-volcker-rule/volcker-notice-comment-summary.pdf.

[38] COMMITTEE ON CAPITAL MARKETS REGULATION, ROADMAP FOR REGULATORY REFORM 22 (May 2017), http://www.capmktsreg.org/wp-content/uploads/2017/05/CCMR-Roadmap-for-Regulatory-Reform-1.pdf.

To address this, the Volcker Agencies should expand the exclusions from the definition of "covered fund." For example, under the Current Regulation family wealth and single-investor facilitation vehicles managed by a banking entity or its affiliate are considered covered funds even though managing such funds is a traditional service provided by diversified banking institutions. In addition, long-term investment and lending vehicles that do not engage in short-term trading are also captured by the definition. Exclusions should be created for those types of funds. Finally, foreign public funds should be treated the same as U.S. public funds. While U.S. funds offered to the public are completely excluded from the definition of a "covered fund," foreign public funds are only excluded if they satisfy narrow conditions that are not similar to the criteria for being a U.S. registered investment company.[39]

*Coordination*

Finally, the Proposal does not include any changes to the Volcker Agencies' coordination efforts. As we have previously noted, the Volcker Agencies should adopt a more centralized and formal approach to implementing the Volcker Rule.[40] Any such arrangement should ensure that questions of implementation are dealt with in a timely and systematic fashion that gives banking entities predictable outcomes.

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Thank you very much for your consideration of our views. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Prof. Hal S. Scott [redacted]), or Executive Director, John Gulliver [redacted]), at your convenience.

Respectfully submitted,

Robert Glenn Hubbard

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| John L. Thornton | Hal S. Scott | R. Glenn Hubbard |
| CO-CHAIR | DIRECTOR | CO-CHAIR |

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[39] 12 C.F.R. §248.10(b), (c)(1).

[40] COMMITTEE ON CAPITAL MARKETS REGULATION, APPLYING THE VOLCKER RULE (2014), https://www.capmktsreg.org/wp-content/uploads/2014/02/CCMR-2014-Volcker-Statement-1.pdf.