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Memorandum

Summary of Proposed Volcker 2.0 for Fund Activities

February 6, 2020

On Jan. 30, 2020, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission (collectively, the "Agencies") approved a notice of proposed rulemaking ("Proposed Rule") to simplify and tailor the "covered fund" provisions of the regulations implementing section 13 of the Bank Holding Company Act, commonly known as the "Volcker Rule."[1]

The Proposed Rule spans more than 160 pages (in its original format) and poses 87 separate questions on which it solicits comments (many with multiple subparts). A copy of the Proposed Rule is available at https://www.federalreserve.gov/aboutthefed/boardmeetings/files/volcker-rule-fr-notice-20200130.pdf. Comments are due by April 1, 2020.

The day the Proposed Rule was approved, we published an *Alert* that provided an executive summary.[2] This *Memorandum* supplements that *Alert* by examining each of the Proposed Rule's provisions in detail.

Background

Under the Volcker Rule, a banking entity[3] is generally barred from acquiring or retaining, as principal, an ownership interest in a "covered fund," subject to certain exceptions. Further, a banking entity generally cannot sponsor a covered fund unless (i) it abides by a series of requirements or (ii) the sponsorship falls within an exception for non-U.S. activities.

In November 2019, the Agencies finalized numerous amendments to the "proprietary trading" provisions of the Volcker Rule regulations, but only relatively minor changes to the "covered fund"

[1] The Volcker Rule was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and restricts the proprietary trading and private investment fund activities of U.S. banks and their worldwide affiliates, as well as foreign banks with banking operations in the United States and their worldwide affiliates. Regulations implementing the Volcker Rule were initially finalized and jointly promulgated by the Agencies in December 2013. In July 2019, the Agencies adopted certain amendments to the regulations to reflect changes made to the statutory language of the Volcker Rule in May 2018. Those changes excluded certain community banks and their affiliates from the Volcker Rule and permitted an investment adviser that is a banking entity to share its name with any covered fund that it organizes and offers. In November 2019, the Agencies adopted more substantive amendments, effective Jan. 1, 2020, mostly to the "proprietary trading" provisions of the Volcker Rule. *See infra* note 4 and accompanying text.

[2] See Agencies Publish Proposed Volcker 2.0 for Fund Activities (Jan. 30, 2020), https://www.srz.com/resources/agencies-publish-proposed-volcker-2-0-for-fund-activities.html.

[3] Banking entities are U.S. banks and their affiliates, as well as foreign banks with a branch or agency office in the United States and their affiliates.

provisions.[4] The Agencies, however, stated that they would propose a separate rulemaking regarding the "covered fund" provisions (i.e., the Proposed Rule).

While the Proposed Rule does not offer sweeping changes, as many in the banking and fund industries would have preferred, it does proffer several important changes designed to eliminate aspects of the current Volcker Rule regulations ("Current Rule") that were deemed to be unduly complex or burdensome, unnecessarily broad or the cause of unintended consequences.

While the Proposed Rule would retain the basic structure and principles of the Current Rule's covered fund provisions, it would (1) add new exclusions for certain types of funds; (2) add additional flexibility for certain existing exclusions; (3) eliminate certain extraterritorial outcomes; (4) permit low-risk transactions with sponsored covered funds; (5)provide greater flexibility for debt relationships with covered funds; and (6) increase the ability to co-invest with sponsored covered funds.

New Categories of Funds Would Be Made Exempt

The Proposed Rule would add four new exclusions to the definition of "covered fund" — credit funds, venture capital funds, family wealth management vehicles and customer facilitation vehicles — thereby exempting them from the scope of the Volcker Rule.

Credit Funds

The Proposed Rule would exempt a fund whose assets consist solely of (1) loans; (2) debt instruments; (3) rights and other assets that are related or incidental to acquiring, holding, servicing or selling such loans or debt instruments[5]; and (4) certain interest rate or foreign exchange derivatives.[6] Qualifying credit funds would not be able to engage in proprietary trading (as defined under the Current Rule) or issue asset-backed securities. The following criteria must also be satisfied for a banking entity to rely on the credit fund exclusion:

- If the banking entity sponsors or serves as investment manager or commodity trading advisor to the fund, the banking entity must (i) provide certain disclosures to prospective and actual investors as if the fund were a covered fund ("Disclosure Requirement"); and (ii) ensure that the activities of the fund are consistent with safety and soundness standards;

[4] *See* FDIC and OCC Approve Volcker 2.0 — Summary of Amendments to Fund Activity Provisions (Aug. 23, 2019), https://www.srz.com/resources/fdic-and-occ-approve-volcker-2-0-summary-of-amendments-to-fund.html. These amendments affected covered fund activities in several ways: (i) provided greater capacity for banking entities to engage in underwriting and marketing making of third-party covered funds; (ii) provided greater flexibility for a banking entity to invest in a covered fund as a hedge; (iii) removed the "financing prong" from the "SOTUS" exemption to permit financing from U.S. affiliates for certain non-U.S. fund activity by non-U.S. banks; (iv) codified prior Agency guidance giving non-U.S. banks greater flexibility for "SOTUS" activity; (v) codified prior Agency guidance on the deadline for the annual CEO certification for the prime brokerage exception to "Super 23A"; and (vi) eliminated special documentation obligations for banking entities without significant trading activities.

[5] Each right or asset that is a security must be either (i) a cash equivalent; (ii) a security received in lieu of debts previously contracted with respect to such loans or debt instruments; or (iii) an equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments. Rights or other assets would not include commodity forward contracts.

[6] The written terms of the derivative must directly relate to the loans, debt instruments or other rights or assets and must reduce the interest rate and/or foreign exchange risks related to the loans, debt instruments or other rights or assets.

- The banking entity must not, directly or indirectly, guarantee, assume or otherwise insure the obligations or performance of the fund or of any entity to which the fund extends credit or in which such fund invests ("Anti-Guarantee Requirement");
- Any debt instruments or equity securities (or rights to acquire equity securities) that the fund holds must be among those the banking entity would be permitted to acquire and hold directly;
- The banking entity must comply with (i) the "Super 23A" prohibitions of the Current Rule and (ii) the requirements of Section 23B of the Federal Reserve Act as if the fund were a covered fund ("Transaction Restrictions"); and
- The banking entity's investment in, and relationship with, the fund must comply with the rules regarding material conflicts of interest, high-risk investments, safety and soundness and financial stability as if the fund were a covered fund ("Prudential Backstop Requirement") and be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

The Agencies are seeking comment regarding any quantitative limit on the amount of equity securities (or rights to acquire equity securities) held by the credit fund and the method for calculating such limit.

Venture Capital Funds

The Proposed Rule would exempt an issuer that meets the definition of venture capital fund in 17 CFR § 275.203(*l*)-1.[7] A banking entity would only be able to invest in such funds to the extent the banking entity is permitted to engage in such activities under applicable law.[8] The following criteria must also be satisfied for a banking entity to rely on the venture capital fund exclusion:

- The fund must not engage in proprietary trading (as defined under the Current Rule);

[7] Under 17 CFR § 275.203(*l*)-1, a "venture capital fund" is any private fund that (1) represents to investors and potential investors that it pursues a venture capital strategy; (2) immediately after the acquisition of any asset, other than qualifying investments or short-term holdings, holds no more than 20% of the amount of the fund's aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments, valued at cost or fair value, consistently applied by the fund; (3) does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15% of the private fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days, except that any guarantee by the private fund of a qualifying portfolio company's obligations up to the amount of the value of the private fund's investment in the qualifying portfolio company is not subject to the 120 calendar day limit; (4) only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and (5) is not registered under section 8 of the Investment Company Act of 1940 and has not elected to be treated as a business development company pursuant to section 54 of the Investment Company Act of 1940.

A "qualifying investment" is defined as (i) an equity security issued by a qualifying portfolio company that has been acquired directly by the private fund from the qualifying portfolio company; (ii) any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company described in (i); or (iii) any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, as defined in section 2(a)(24) of the Investment Company Act of 1940, or a predecessor, and is acquired by the private fund in exchange for an equity security described in (i) or (ii). Further, a "qualifying portfolio company" means any company that (i) at the time of any investment by the private fund, is not reporting or foreign traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is reporting or foreign traded; (ii) does not borrow or issue debt obligations in connection with the private fund's investment in such company and distribute to the private fund the proceeds of such borrowing or issuance in exchange for the private fund's investment; and (iii) is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by 17 CFR § 270.3a-7 or a commodity pool.

[8] A banking entity that has elected to be treated as a financial holding company may be permitted to make an investment in a venture capital fund pursuant to its merchant banking investment authority, provided the banking entity complies with applicable merchant banking investment requirements.

- If the banking entity sponsors or serves as investment manager or commodity trading advisor to the fund, the banking entity must (i) satisfy the Disclosure Requirement and (ii) ensure that the activities of the fund are consistent with safety and soundness standards;
- The banking entity must satisfy the Anti-Guarantee Requirement;
- The banking entity must comply with the Transaction Restrictions; and
- The banking entity's investment in, and relationship with, the fund must satisfy the Prudential Backstop Requirement and applicable banking laws and regulations, including applicable safety and soundness standards.

While not in the Proposed Rule, the Agencies are seeking comment on whether the exclusion should be limited to funds that do not invest in companies that, at the time of the investment, have more than a specified dollar amount of total annual revenue, calculated as of the last day of the calendar year (e.g., $50 million).

Family Wealth Management Vehicles

The Proposed Rule would exempt an entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities. If the entity is organized as a trust, the grantor(s) of the entity must all be family customers.[9] If the entity is not organized as a trust, (i) a majority of the voting interests in the entity must be owned (directly or indirectly) by family customers; and (ii) the entity must be owned only by family customers and up to three closely related persons[10] of the family customers. In addition, to rely on the family wealth management vehicle exclusion, a banking entity (or any affiliate of the banking entity) must also:

- Provide bona fide trust, fiduciary, investment advisory or commodity trading advisory services to the entity;
- Satisfy the Disclosure Requirement;
- Satisfy the Anti-Guarantee Requirement;
- Not acquire or retain, as principal, an ownership interest in the entity, other than up to 0.5% of the entity's outstanding ownership interests that may be held by entity and its affiliates for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency or similar concerns;
- Comply with the requirements of section 23B of the Federal Reserve Act as if the entity were a covered fund;
- Comply with the requirements of section 23A of the Federal Reserve Act regarding the prohibition on purchases of low-quality assets as if such banking entity and its affiliates were a

[9] A "family customer" is (i) a family client, as defined in 17 CFR § 275.202(a)(11)(G)-1(d)(4); or (ii) any natural person who is father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, spouse or spousal equivalent of any of the foregoing.

[10] A "closely related person" means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

member bank and the issuer were an affiliate thereof (but not the requirements of Super 23A of the Current Rule); and

- Satisfy the Prudential Backstop Requirement.

Customer Facilitation Vehicles

The Proposed Rule would exempt an issuer that is formed by or at the request of a customer of a banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy or other services provided by the banking entity. A banking entity must also maintain documentation outlining how it intends to facilitate the customer's exposure to such transaction, investment strategy or service. In order to rely on the customer facilitation vehicle exclusion, a banking entity (or any affiliate of the banking entity) must also satisfy each of the bullet points listed above for family wealth management vehicles, except the requirement to provide bona fide trust, fiduciary, investment advisory or commodity trading advisory services.

Certain Existing Exemptions Would Be Made More Available

The Proposed Rule contains modifications to three existing covered fund exclusions — foreign public funds, loan securitizations and public welfare and small business funds — to simplify the eligibility criteria and make it easier for banking entities to use and confirm compliance with these exclusions.

Foreign Public Funds

Under the Proposed Rule, the foreign public fund exclusion would be modified to provide more consistent treatment between U.S. registered investment companies (which are not covered funds) and their foreign equivalents.

Current Rule	Proposed Rule
A foreign public fund is a public fund organized and established outside the United States, provided that: (a) It is authorized to offer and sell ownership interests to retail investors in its home jurisdiction; and (b) It sells such interests "predominantly" through one or more public offerings outside the United States. (c) For any U.S. banking entity (or any non-U.S. banking entity that is directly or indirectly controlled by a U.S. banking entity) to rely on this exemption to sponsor a non-U.S. public fund, the fund's ownership interests must be sold "predominantly" to persons other than (i) the banking entity; (ii) the issuer; (iii) their	The home jurisdiction requirement in (a) would be removed. Authorization in any non-U.S. jurisdiction will suffice. Moreover, the "predominantly" requirement in (b) would be removed. While the fund's interests still must be offered and sold, through one or more public offerings, there is no outcome test. For U.S. banking entities (or any non-U.S. banking entity that is directly or indirectly controlled by a U.S. banking entity) that sponsor the fund, the "predominantly" requirement would remain in (c). However, (iv) would be amended to only count interests held by senior executive officers and directors, instead of all employees and directors.

affiliates or (iv) employees or directors of such entities. "Predominantly" means 85% or more of the fund's ownership interests. A "public offering" is any distribution of securities in any jurisdiction outside the United States to investors, including retail investors, provided that the public offering must (i) comply with all applicable requirements in the applicable jurisdiction; (ii) not be restricted based on investor net worth; and (iii) include the filing of publicly available disclosure documents.	The definition of "public offering" would also be modified to add a new requirement that the distribution be subject to substantive disclosure and retail protection laws or regulations. The requirement that the distribution complies with all applicable requirements in the applicable jurisdiction would only apply to a banking entity that serves as the investment manager, commodity trading advisor, commodity pool operator or sponsor of the fund.

Loan Securitizations

The Proposed Rule would amend two requirements of this exclusion, one of which would codify prior Agency guidance.

Current Rule	Proposed Rule
A loan securitization is an issuer of asset-backed securities provided that it holds only loans, certain rights and assets ("servicing assets"), and a small set of other financial instruments.	Would also permit a loan securitization to hold "any other assets," provided that such other assets did not exceed 5% of the value of its total assets. Clarifies that servicing assets may include assets other than securities, but any servicing assets that are securities must meet additional eligibility requirements.[11]

Public Welfare and Small Business Funds

The Proposed Rule does not make any modifications to the exclusion for public welfare funds,[12] but does ask for comments on the public welfare fund exclusion. With respect to the exclusion for small business investment companies ("SBICs"), the Proposed Rule would make certain changes to clarify how the exclusion would apply to SBICs that surrender their licenses as part of wind-downs.

[11] This modification in the Proposed Rule regarding "servicing assets" codifies the "Loan Securitization Servicing Assets" FAQ. *See,* e.g., FAQ 4, Frequently Asked Questions, https://www.federalreserve.gov/supervisionreg/faq.htm#4. Permitted securities include cash equivalents. The Proposed Rule also codifies the meaning of "cash equivalents" as set forth in the FAQ.

[12] "Public welfare funds" are issuers that are (i) "designed primarily to promote the public welfare" under section 24(Eleventh) of the National Bank Act; or (ii) "qualified rehabilitation expenditures" with respect to a qualified rehabilitation building or certified historic structure under section 47 of the Internal Revenue Code of 1986.

Current Rule	Proposed Rule
An SBIC is an issuer that holds a SBIC license from the Small Business Administration or has received a notice therefrom to proceed to qualify for a license, which notice or license has not been revoked.	Proposed Rule clarifies that exclusion would still be available if the SBIC voluntarily surrendered its license in accordance with 13 CFR § 107.1900 and does not make new investments (other than investments in cash equivalents) after such voluntary surrender.

Foreign Excluded Funds Would Be Granted Permanent Relief from Potential Extraterritoriality

Under the Current Rule, certain foreign funds that are organized and offered outside the United States are excluded from the definition of a covered fund. The Current Rule, however, has the unintended consequence of treating certain qualifying foreign excluded funds as "banking entities" if they are affiliates or subsidiaries of a foreign banking entity. As such, the funds themselves would be subject to the Volcker Rule, including its restrictions on proprietary trading and investing in covered funds. To address this issue, the Agencies issued a moratorium on enforcement against a foreign banking entity if the qualifying foreign excluded fund met certain criteria.[13] The Proposed Rule would codify this moratorium by exempting a foreign fund from the proprietary trading prohibition and restrictions on investments in the sponsorship of covered funds (and would not attribute the foreign fund's activities to a foreign banking entity that invests in or sponsors the fund), so long as the fund is:

- Organized or established outside of the United States and does not offer or sell its ownership interests in the United States;
- Structured such that it (i) would be a covered fund if it were organized or established in the United States or (ii) raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;
- Only a banking entity on account of the foreign banking entity's ownership interest in, or sponsorship of, the fund;
- Established and operated as part of a "bona fide asset management business"; and
- Not operated in a way that allows the foreign banking entity to evade the requirements of the Volcker Rule.

Further, to qualify for this exemption, a foreign banking entity's acquisition or retention of any ownership interest in, or sponsorship of, the qualifying foreign excluded fund must meet the requirements for permitted covered fund activities and investments outside the United States (commonly referred to as the "SOTUS" exemption).

[13] *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; *see also* Volcker Rule Update: Agencies Announce They Will Not Enforce Rule for Foreign Funds Until July 2021 (July 18, 2019), https://www.srz.com/resources/volcker-rule-update-agencies-announce-they-will-not-enforce-rule.

The Limits on a Banking Entity's Transactions with Related Covered Funds Would Be Relaxed

The Proposed Rule would permit a banking entity to enter into certain limited, low-risk transactions (currently prohibited by Super 23A) with covered funds it sponsors, manages or advises (or third-party covered funds, in which such related funds hold a "controlling" investment).

Current Rule	Proposed Rule
Banking entities generally are prohibited from entering into a transaction with a covered fund for which it serves as sponsor, investment manager, investment adviser, commodity trading advisor, or which it otherwise organizes or offers (or any other covered fund, in which such fund holds a "controlling" investment) if such transaction would be a "covered transaction" under Section 23A of the Federal Reserve Act, without regard to whether such transactions would generally be exempt from the limits, requirements or prohibitions under Section 23A by its own terms or by Regulation W, its implementing regulation. (These provisions of the Current Rule are commonly referred to as "Super 23A.")	Proposed Rule would exempt from Super 23A: (i) covered transactions that would be permissible without limit for a state member bank to enter into with an affiliate under Section 23A of the Federal Reserve Act or Regulation W; and (ii) short-term extensions of credit (or asset purchases) in connection with payment, clearing and settlement transactions. Any transaction or activity permitted by these exemptions in the Proposed Rule must comply with the Prudential Backstop Requirement.

The "Ownership Interest" Definition Would Be Modified to Exclude Certain Debt Relationships

The Agencies are proposing to clarify that a debt relationship with a covered fund would typically not constitute an "ownership interest" and, therefore, would not be subject to the Volcker Rule.[14]

Current Rule	Proposed Rule
An "ownership interest" is any equity or partnership interest, or any other interest, that exhibits certain features or characteristics on a current, future or contingent basis (such as the right to participate in the selection or removal of a fund's general partner, managing member, directors, investment manager, etc.). Under the Volcker Rule, a debt interest in a covered fund can be an ownership interest if it has the same characteristics as an equity or other ownership interest.	Rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event, which includes the right to participate in the removal of an investment manager for cause or to nominate or vote on a nominated replacement manager upon an investment manager's resignation or removal, would not be considered an ownership interest.

[14] Additionally, in the Proposed Rule the Agencies are proposing modifications to the manner in which a banking entity calculates its ownership interest for purposes of complying with the per fund limit, the aggregate fund limit and the covered fund deduction with respect to the attribution of an employee or director's restricted profit interest in a covered fund organized or sponsored by the banking entity.

	Any senior loan or other senior debt interest that meets all of the following characteristics would not be considered to be an ownership interest: • The holders of such interest do not receive any profits of the covered fund but may only receive: (i) interest payments which are not dependent on the performance of the covered fund; and (ii) fixed principal payments on or before a maturity date. • The entitlement to payments on the interest is absolute and may not be reduced because of the losses arising from the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reduction in the principal and interest payable; and • The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

Parallel Investments and Co-Investments

The Proposed Rule would add a new rule of construction to clarify that certain direct investments made by a banking entity alongside a covered fund should not be treated as an investment in the covered fund as long as certain conditions are met.

Current Rule	Proposed Rule
For any covered fund that a banking entity organizes and offers, (i) the aggregate investments of the banking entity and its affiliates cannot exceed 3% of the total number or value of that fund's outstanding ownership interests (i.e., the "per-fund limit"); and (ii) the aggregate value of all covered fund ownership interests held by the banking entity and its subsidiaries cannot exceed 3% of the tier 1 capital of the banking entity (i.e., the "aggregate limit").	A banking entity would not be required to include in the calculations for the per-fund limit and the aggregate limit any investment the banking entity makes alongside a covered fund (and is not restricted in the amount of any such investment) as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards. Direct investments (whether a series of parallel investments or a co-investment) by a director or employee of a banking entity (or affiliate thereof) made alongside a covered fund in compliance

The preamble to the Current Rule provides that if a banking entity makes investments side by side in substantially the same positions as the covered fund, then the value of such investments shall be included for purposes of determining the value of the banking entity's investment in the covered fund. Further, the preamble notes that a banking entity that sponsored the covered fund should not itself make any additional side-by-side co-investment with the covered fund in a privately negotiated investment unless the value of such co-investment is less than 3% of the value of the total amount co-invested by other investors in such investment. An investment by a director or employee of banking entity who acquires an ownership interest in his or her personal capacity in the covered fund sponsored by the banking entity is attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the fund.	with applicable laws and regulations would not be treated as an investment by the director or employee in the covered fund and not be attributed to the banking entity as an investment in the covered fund, regardless of whether the banking entity arranged the transaction on behalf of the director or employee or provided financing for the investment.

If you have any questions concerning this *Memorandum*, or would like help drafting or submitting any comments, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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