March 11, 2020

By electronic submission

Re: Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to comment on the proposed rule (the "**Proposal**")[2] to revise the regulations implementing Section 13 of the Bank Holding Company Act of 1956 ("**Section 13**" of the "**BHC Act**"), otherwise known as the Volcker Rule.

SIFMA strongly supports the Agencies'[3] efforts to "improve and streamline the regulations implementing [Section 13] by modifying and clarifying requirements related to the covered fund provisions."[4] The Proposal is a positive step forward from the 2018 proposed amendments[5] to the final regulations adopted by the Agencies in December 2013 (the "**2013 Final Rule**"),[6] in which the Agencies invited comment on a wide variety of questions as to how

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("**GFMA**"). For more information, visit http://www.sifma.org.

[2] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 Fed. Reg. 12120 (Feb. 28, 2020). The rule identifiers are ***OCC*** Docket No. OCC-2020-0002 & RIN 1557-AE67; ***FRB*** Docket No. R-1694 & RIN 7100-AF70; ***FDIC*** RIN 3064-AF17; ***SEC*** Release No. BHCA-8 & File No. S7-02-20; and ***CFTC*** RIN 3038-AE93.

[3] The Agencies are the Office of the Comptroller of the Currency ("**OCC**"), the Board of Governors of the Federal Reserve System ("**Federal Reserve**"), the Federal Deposit Insurance Corporation ("**FDIC**"), the Securities and Exchange Commission ("**SEC**") and the Commodity Futures Trading Commission ("**CFTC**").

[4] 85 Fed. Reg. at 12120.

[5] 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. 33432 (July 17, 2018).

[6] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds: Final Rule, 79 Fed. Reg. 5536 (Jan. 31, 2014). The 2013 Final Rule was adopted by the Agencies in December 2013, but was not published in the Federal Register until January 2014. The 2013 Final Rule was amended in November 2019, in a set of revisions largely targeted at the proprietary trading provisions of the 2013 Final Rule (the "**2019 Amendments**"). Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61974 (Nov. 14, 2019).

the covered fund provisions could be revised to make them more consistent with the text and purposes of, and more efficient in implementing, Section 13 while minimizing unnecessary burdens. We appreciate the Agencies' consideration of our comment letter on the 2018 proposed amendments to the 2013 Final Rule (the "**2018 Comment Letter**")[7] and our supplemental comment letter on the proposed amendments to the 2013 Final Rule (the "**2019 Supplemental Comment Letter**").[8]

The Proposal appropriately addresses several aspects of the 2013 Final Rule's covered fund provisions that unduly restrict the activities of banking entities. The proposed new exclusions from the covered fund definition, modifications to existing exclusions and proposed changes to the so-called Super 23A provisions would help to reduce the overbreadth and undue complexity of the covered fund provisions and would allow banking entities needed flexibility to provide asset management services, customer facilitation services and financing to U.S. businesses and their customers, including start-ups, through fund structures.

While we strongly support the amendments proposed by the Agencies, we recommend targeted modifications to those proposed amendments and important additional changes to the covered funds provisions of the 2013 Final Rule, to bring them into better alignment with Section 13 of the BHC Act. The table of contents to Annex A summarizes our key recommendations, and a discussion of each recommendation is set out in the pages that follow.

* * *

[7] SIFMA, Comment Letter on the Notice of Proposed Rulemaking Revising the 2013 Final Rule Implementing Section 13 of the BHC Act (the Volcker Rule) (Oct. 17, 2018), https://www.federalreserve.gov/SECRS/2018/November/20181128/R-1608/R-1608_101718_132731_426476269553_1.pdf.

[8] SIFMA, Supplemental Comment Letter on the Notice of Proposed Rulemaking Revising the 2013 Final Rule Implementing Section 13 of the BHC Act (the Volcker Rule) (Dec. 13, 2019), https://www.federalreserve.gov/SECRS/2019/December/20191217/R-1608/R-1608_121319_137117_524716873051_1.pdf.

SIFMA appreciates the opportunity to comment on the Proposal. If you have any questions, please contact Kenneth E. Bentsen, Jr. at 202-962-7400 (kbentsen@sifma.org) or Robert Toomey at 212-313-1124 (rtoomey@sifma.org).

Respectfully submitted,

Kenneth E. Bentsen, Jr.
President and CEO
SIFMA

cc:

Honorable Jerome H. Powell, Richard H. Clarida, Randal K. Quarles, Michelle W. Bowman and Lael Brainard, Chairman, Vice Chairman, Vice Chairman for Supervision and Governors, Board of Governors of the Federal Reserve System
Honorable Jelena McWilliams, Chairman, Federal Deposit Insurance Corporation
Honorable Joseph M. Otting, Comptroller of the Currency, Office of the Comptroller of the Currency
Honorable Jay Clayton, Hester M. Peirce, Allison Herren Lee and Elad L. Roisman, Chairman and Commissioners, Securities and Exchange Commission
Honorable Heath P. Tarbert, Rostin Behnam, Dan M. Berkovitz, Brian D. Quintenz and Dawn DeBerry Stump, Chairman and Commissioners, Commodity Futures Trading Commission

Randall D. Guynn, Gabriel D. Rosenberg, Jai R. Massari and Christopher M. Paridon, Davis Polk & Wardwell LLP

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The exclusion for qualifying long-term investment funds should be subject to the conditions suggested by the Agencies in Question 50 in the Preamble, except that those conditions should be modified to reflect the same two modifications that we propose to the conditions for the proposed exclusion for qualifying venture capital funds. First, for qualifying long-term investment funds that are sponsored by a banking entity, the definition of "proprietary trading" should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule. Second, a banking entity's investment in and relationship with a qualifying long-term investment fund should not be subject to Super 23A.

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additional "for cause" termination events (*e.g.*, insolvency of the investment manager, breach of the investment management or collateral management agreement, etc.).

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Recommendation 19: The Agencies should specifically confirm in the preamble to the final rule that FAQs 5, 14 and 16 are not modified or revoked and that banking entities may continue to rely on them.

Recommendation 20: The Agencies should specifically confirm in the preamble to the final rule that FAQs 5 and 16 are not modified or revoked with respect to ETFs and that banking entities may continue to rely on them with respect to ETFs.

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Recommendation 21: The Agencies should permit banking entities to voluntarily comply, in whole or in part, with amendments adopted by a final rule implementing the Proposal, rather than the 2013 Final Rule, before the compliance date of the final rule implementing the Proposal, starting on its effective date.

I. New Covered Fund Exclusions

We strongly support the proposals to add new exclusions from the definition of covered fund for family wealth management vehicles ("**FWMVs**"), customer facilitation vehicles, qualifying venture capital funds and qualifying credit funds. But some of the conditions to those proposed new exclusions are not justified and should be modified or eliminated. In addition, the Agencies should expand the proposed exclusion for qualifying venture capital funds to apply to all long-term investment funds, subject to the conditions suggested by the Agencies in Question 50 in the Preamble, but with the same two modifications to those conditions as we propose to the conditions for the new exclusion for qualifying venture capital funds.

For the reasons described in our 2018 Comment Letter and our 2019 Supplemental Comment Letter, the Agencies clearly have the statutory authority to establish new exclusions pursuant to the tailoring clause in subsection (h)(2) of Section 13 or the permitted activities authority of Section 13(d)(1)(J) of the BHC Act,[9] provided that the new exclusions are consistent with the purposes of the covered funds provisions of the Volcker Rule.[10] As explained more fully in our 2018 Comment Letter and our 2019 Supplemental Comment Letter, the purposes of the covered funds provisions of the statute are to prevent banking entities from (i) engaging in proprietary trading indirectly through hedge funds or private equity funds to the extent they would be prohibited or restricted from engaging in proprietary trading directly ("**anti-evasion purpose**"), (ii) guaranteeing the performance of or otherwise bailing out the investors of any covered funds they sponsor, organize and offer, or advise ("**anti-bailout purpose**") and (iii) having material conflicts of interest with their clients, while at the same time continuing to permit banking entities to make safe and sound investments indirectly through fund structures, which are in the public interest ("**safety and soundness purpose**").

All of the exclusions proposed by the Agencies from the definition of covered fund, and the additional exclusion we propose for qualifying long-term investment funds, are consistent with these purposes. The exclusions for qualifying credit funds, qualifying venture capital funds and qualifying long-term investment funds would be subject to the conditions that (i) the excluded issuer would not engage in any proprietary trading, (ii) no banking entity that sponsors, organizes and offers, invests in or advises the excluded issuer would guarantee the performance of or otherwise bail out the investors of the excluded issuer and (iii) the excluded issuer would make all investments in compliance with safety and soundness standards (including with respect to material conflicts of interest with clients) substantially similar to those that would apply if a banking entity made the investments directly. The exclusions for FWMVs and customer facilitation vehicles would similarly be consistent with these purposes because they would be subject to the condition that no banking entity that sponsors, organizes and offers, invests in or

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[9] *See* SIFMA 2018 Comment Letter at B-10 to B-15 (describing the tailoring authority of Section 13(h)(2)); SIFMA 2019 Supplemental Comment Letter at 5-8 (describing the permitted activities authority of Section 13(d)(1)(J)).

[10] See SIFMA 2018 Comment Letter at B-10 to B-15; SIFMA 2019 Supplemental Comment Letter at 2-4.

advises the excluded entity would guarantee the performance of or otherwise bail out the investors of the excluded entity. The excluded entity would be limited to specified, customer-facing activities and a banking entity could not own more than a *de minimis* interest in such vehicles.

The proposed new exclusions and the exclusion we recommend for long-term investment funds would also provide additional certainty for banking entities that hold interests in "inadvertent" or "accidental" investment companies. Examples of such companies include special purpose vehicles, special purpose acquisition companies, other intermediary structures that hold investment securities of a single company and operating companies (in particular those in the technology, life sciences or manufacturing industries), whose assets include cash reserves invested in equity securities, debt instruments or other interests that experience fluctuations in value due to market or corporate events. Such vehicles, structures or operating companies may technically be captured by the current broad definition of covered fund, despite typically not engaging in activities associated with or otherwise resembling those of private equity or hedge funds and as such, do not raise the concerns that the Volcker Rule was intended to address.

A. Family Wealth Management Vehicles

Recommendation 1: The Agencies should adopt the proposed exclusion from the definition of covered fund for FWMVs. The conditions to the exclusion for FWMVs proposed by the Agencies are reasonable, with three exceptions. First, an FWMV that is not a trust should be permitted to be owned by up to 10 closely related persons, not only three as proposed. Second, any party that is unaffiliated with the family customers—not only the banking entity and its affiliates—should be permitted to hold up to 0.5% of the outstanding ownership interests of the FWMV. Third, a banking entity should be permitted to purchase assets (including low-quality assets) of an FWMV on a riskless principal basis as part of customary asset management services to family customers.

We strongly support the proposal to add a new exclusion from the definition of covered fund for FWMVs.[11] As described in our 2018 Comment Letter, the current lack of an exclusion for FWMVs creates uncertainty with respect to the status of certain FWMVs as covered funds, even where those vehicles engage only in wealth management and estate planning activities for individuals or families.[12] This uncertainty has led some banking entities to limit the traditional banking, investment management, trust and estate planning services that they offer to these clients. We believe this was an unintended consequence of the Final Rule, given the traditional role of banks providing these wealth management and estate planning services, and we agree with the Agencies that "the proposed exclusion for [FWMVs] would appropriately allow banking entities to structure services or transactions for customers, or to otherwise provide traditional

[11] Proposal § __.10(c)(17).

[12] SIFMA 2018 Comment Letter at B-24 to B-26.

customer-facing banking and asset management services, through a vehicle, even though such a vehicle may rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act or would otherwise be a covered fund under the [Final Rule]."[13]

We believe that the conditions in proposed Section __.10(c)(17) are reasonable, with three exceptions discussed in more detail below: (1) an FWMV should be permitted to be owned by up to 10 closely related persons, not only three as proposed; (2) any party that is unaffiliated with the family customers—not only the banking entity and its affiliates—should be permitted to hold up to 0.5% of the outstanding ownership interests of the FWMV; and (3) a banking entity should be permitted to purchase assets of the FWMV as part of customary asset management services to family customers. These three modifications are designed to allow banking entities to better meet the needs of their wealth management and estate planning customers, without raising concerns about potential evasion.

Limitation on Ownership by Closely Related Persons

The proposed exclusion requires, among other things, that an FWMV that is not a trust be owned only by family customers and up to three closely related persons of the family customers.[14] To ensure that the exclusion for FWMVs is appropriately "designed to capture the types of persons and entities to which banking entities have traditionally provided banking and asset management services,"[15] the Agencies should modify the exclusion to permit an FWMV that is not a trust to be owned by up to 10 closely related persons.

The Agencies offer no justification for why the number of closely related persons should be limited to only three. We believe doing so would unduly restrict the availability of the exclusion for groups of family customers and closely related persons seeking wealth management and estate planning services through a vehicle. The Agencies have recognized that 10 persons is an appropriate number of unaffiliated owners in the context of other exclusions. For instance, in the preamble to the 2013 Final Rule, the Agencies stated with respect to the joint venture exclusion[16] "that a limit of 10 partners allows flexibility in structuring larger business ventures without involving such a large number of partners as to suggest the venture is in reality a hedge fund or private equity fund established for investment purposes."[17] Permitting up to 10 closely related persons to participate in the ownership of an FWMV would grant banking entities sufficient flexibility to provide wealth management and estate planning services to family customers without creating a risk that FWMVs will be used to evade the covered fund provisions because of the anti-bailout and anti-evasion conditions of the proposed exclusion.

[13] 85 Fed. Reg. at 12139.

[14] Proposal § __.10(c)(17).

[15] 85 Fed. Reg. at 12140.

[16] Final Rule § __.10(c)(3).

[17] 79 Fed. Reg. at 5681.

Limitation on De Minimis Ownership

The proposed FWMV exclusion permits a banking entity relying on the exclusion (or an affiliate of the banking entity) to acquire or retain, as principal, up to 0.5% of an FWMV's outstanding ownership interests for the purpose of, and to the extent necessary for, establishing corporate separateness or addressing bankruptcy, insolvency or similar concerns.[18] The Agencies should modify the exclusion to permit any party that is unaffiliated with the family customers—not only a banking entity and its affiliates—to hold up to 0.5% of the outstanding ownership interests of an FWMV.

Permitting a banking entity or an affiliate to own up to 0.5% of the FWMV's ownership interests, as proposed, is an important feature of FWMVs and necessary to help meet customer demand. The Agencies should modify this condition to permit *any* party that is unaffiliated with the family customers to own up to 0.5% of the FWMV's outstanding ownership interests for the purposes described in the proposed condition. Family customers often employ third-party trustees or similar service providers when structuring wealth management vehicles. These third parties may be better placed than the banking entity or an affiliate to own a *de minimis* interest for corporate structuring, separateness or other similar purposes or to select a designee to own the interest. Permitting third parties to hold *de minimis* ownership interests in FWMVs would better enable family customers to structure their assets, estates and other transactions involving wealth management in a way that is convenient and efficient for the customer's needs and consistent with longstanding and customary market practice.

Purchase of Low-Quality Assets

As part of the traditional asset management services, a banking entity may find it either necessary or more efficient to purchase assets from an FWMV on a riskless-principal basis (*i.e.*, the banking entity may buy and sell the same security or other asset contemporaneously) to facilitate the family customer's sale of that asset. This may occur, for instance, when a family customer wishes to sell or transfer an asset from their FWMV to a third party, but the third party prefers to face the banking entity as its counterparty for business reasons. This service can include sales of low-quality assets for purposes of Section 223.15 of Regulation W. If the banking entity acts as riskless principal in purchasing an asset from the FWMV, the banking entity is not exposed to the market or credit risk of the asset.

Allowing banking entities to engage in these types of riskless-principal transactions would more effectively allow banking entities to meet the needs of their family customers who may wish to sell or otherwise transfer assets (including low-quality assets) from an FWMV in a manner that is consistent with the purposes of the covered fund portions of the statute. It is also consistent with the rationale used by the Federal Reserve when it exempted riskless-principal transactions from the low-quality asset prohibitions of Regulation W,[19] the anti-bailout purpose

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[18] Proposal § __.10(c)(17)(ii)(D).

[19] *See* Federal Reserve, Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76560, 76597 (Dec. 12, 2002).

of the covered fund portions of the statute and the Section 23B requirements of Section __.14(b) of the 2013 Final Rule because the sale would involve the immediate purchase of the asset by a third party at a price agreed to by that third party. Similarly, the purchase of a low-quality asset as riskless principal from an FWMV would not be inconsistent with the anti-evasion purpose (banking entities are generally permitted to engage in riskless-principal transactions) and acting as riskless principal in such a transaction would, consistent with the safety and soundness purpose, not result in conflicts of interest with the family customer, especially where the banking entity would be acting as riskless principal with respect to the low-quality asset to assist the customer with their wealth management or estate planning needs.

Were the Agencies to prohibit a banking entity from purchasing low-quality assets as riskless principal from an FWMV, the FWMV would need to obtain the services of a third-party service provider to sell those assets. This result has no meaningful benefit to the family customer and FWMV and would increase costs and operational complexity from the FWMV having to employ another service provider for these transactions. Therefore, the Agencies should permit a banking entity that is sponsor or adviser to an FWMV to purchase as riskless principal low-quality assets from the FWMV.

No Other Conditions Are Necessary or Appropriate

Because the conditions within the proposed FWMV exclusion effectively address the Agencies' potential evasion concerns, no additional conditions are necessary. For example, an FWMV may not be, and may 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.[20] This condition would prevent the exclusion from providing an avenue for banking entities to indirectly engage in proprietary trading or other high-risk activities that Section 13 prohibits them from engaging in directly. In addition, under the proposed exclusion, a banking entity may not directly or indirectly guarantee, assume or otherwise insure the obligations or performance of an FWMV and must comply with the covered fund backstop provisions as if the FWMV were a covered fund.[21] A banking entity must also comply with the Section 23B requirement in Section __.14(b) of the 2013 Final Rule, as well as the restrictions on the purchase of low-quality assets in Regulation W (subject to the limited modification we recommend), as if the banking entity were a bank and the FWMV were an affiliate.[22] As a result, the proposed exclusion is consistent with the purpose of Section 13 to prevent bailouts of related funds, without preventing banking entities from providing traditional banking services to customers.

We also agree with the Agencies' approach of not applying Super 23A to relationships between a banking entity and an FWMV. Applying Super 23A in its current form or as proposed

[20] Proposal § __.10(c)(17)(i).

[21] Proposal § __.10(c)(17)(ii)(B), (E).

[22] Proposal § __.10(c)(17)(ii)(E), (F).

to be amended would prevent banking entities from making ordinary extensions of credit to or entering into a number of other transactions with FWMVs that are critical to the ability of banking entities to provide FWMVs, and thus their family customers, with a full range of wealth management and estate planning services.

B. Customer Facilitation Vehicles

> ***Recommendation 2:*** The Agencies should adopt the proposed exclusion from the definition of covered fund for customer facilitation vehicles. The conditions to the exclusion for customer facilitation vehicles proposed by the Agencies are reasonable, with two exceptions. First, the Agencies should not require that a customer facilitation vehicle be formed at the request of a customer. Second, any party that is unaffiliated with the customer—not only the banking entity and its affiliates—should be permitted to hold up to 0.5% of the outstanding ownership interests of the customer facilitation vehicle.

We strongly support the proposal to add a new exclusion from the definition of covered fund for customer facilitation vehicles.[23] As we explained in our 2018 Comment Letter, some customers, when seeking a variety of common financing, investment or other banking services from a banking entity, prefer to face an independent vehicle rather than to directly face the banking entity.[24] By establishing and providing services through such a vehicle, a banking entity would be merely providing customers with indirect exposure to a transaction, investment strategy or other service that it could do directly, but for the preference of the customer. In the Proposal, the Agencies noted that the Volcker Rule was not "intended to interfere unnecessarily with the ability of banking entities to provide services to their customers simply because the customer may prefer to receive those services through a vehicle or through a transaction with a vehicle instead of directly with the banking entity," and that "these vehicles do not expose banking entities to the types of risks that section 13 was intended to restrict."[25] We agree that the Agencies should adopt the proposed exclusion for customer facilitation vehicles, with the recommended modifications discussed below, because doing so would resolve an unintended consequence of the Final Rule and be consistent with the purposes of Section 13 of the BHC Act.

We believe that the conditions in proposed Section __.10(c)(18) are reasonable, with two exceptions discussed in more detail below: (1) the Agencies should not require that a customer facilitation vehicle be formed at the request of a customer and (2) any party that is unaffiliated with the customer—not only the banking entity and its affiliates—should be permitted to hold up to 0.5% of the outstanding ownership interests of the customer facilitation vehicle. These two modifications are designed to allow banking entities to better meet the needs of their clients, without raising concerns about potential evasion.

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[23] Proposal § __.10(c)(18).

[24] *See* SIFMA 2018 Comment Letter at B-29. We noted that some customers prefer this approach for a variety of legal, counterparty risk management and accounting reasons.

[25] 85 Fed. Reg. at 12141.

Formation by or at the Request of a Customer

The Agencies should not require that a customer facilitation vehicle be formed by or at the request of a customer. This proposed requirement[26] would inhibit banking entities' ability to provide customers with services in an efficient and timely manner. The legal, operational and mechanical steps necessary to form a customer facilitation vehicle can take time, and these steps are largely unrelated to customer-facing discussions regarding the vehicle's intended investment strategy, investment exposure or other key economic aspects of the vehicle. Therefore, a banking entity may seek to engage in standard steps to form a vehicle in advance of offering a particular investment strategy or product to a customer. Taking these steps in advance of a customer's specific request makes the vehicle no less of a customer facilitation mechanism, and requiring a banking entity to wait for a customer to request the vehicle's formation delays the ability of the banking entity to provide services to the customer without any corresponding regulatory benefit. Moreover, the proposed exclusion for customer facilitation vehicles contains other conditions that are sufficient to ensure that the vehicle otherwise does not function as a more broadly offered investment fund. In particular, all of the ownership interests of the customer facilitation vehicle under the proposed exclusion must be owned by the customer for which the vehicle was formed (except that the banking entity and its affiliates and, if the Agencies revise the condition as we propose below, any party that is unaffiliated with the customer for which the vehicle is formed, may acquire up to 0.5% of the vehicle's ownership interests).[27]

Limitation on De Minimis Ownership

Under the proposed exclusion for customer facilitation vehicles, all of a customer facilitation vehicle's ownership interests must be owned by the customer for which the vehicle is formed, except that a banking entity and its affiliates may own up to 0.5% of the vehicle's outstanding ownership interests for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency or similar concerns.[28] We agree that the Agencies should permit a banking entity and its affiliates to hold up to 0.5% of the customer facilitation vehicle's outstanding ownership interests.

For the reasons described in the section above on FWMVs, the Agencies should modify the proposed exclusion for customer facilitation vehicles so that the 0.5% ownership interest may be held by any party that is unaffiliated with the customer for which the vehicle is formed, not just the banking entity and its affiliates. It is customary practice for a customer to request that a third-party service provider or other entity unaffiliated with the banking entity hold a *de minimis* ownership interest of up to 0.5% of a vehicle because it is better placed than the banking entity or an affiliate to hold such an interest for corporate structuring, separateness or other similar

[26] Proposal § __.10(c)(18)(i).

[27] Proposal § __.10(c)(18)(ii)(A), (B)(4).

[28] Proposal § __.10(c)(18)(ii)(A), (ii)(B)(4).

purposes. This modification to the proposed exclusion would facilitate common structures whereby a third-party service provider or other unaffiliated entity holds a *de minimis* ownership interest of up to 0.5% of the customer facilitation vehicle in a manner that is convenient and efficient.

No Other Conditions Are Necessary or Appropriate

Because the conditions within the proposed exclusion effectively address the Agencies' potential evasion concerns, no additional conditions are necessary. First, under the proposed exclusion, customer facilitation vehicles may only provide customers with exposure to a transaction, investment strategy or other services that a banking entity could provide directly. Second, the proposed exclusion includes several additional conditions that further effectively address the Agencies' potential evasion concerns. For example, under the proposed exclusion, a banking entity may not directly or indirectly guarantee, assume or otherwise insure the obligations or performance of a customer facilitation vehicle and must comply with the covered fund backstop provisions as if the vehicle was a covered fund. In addition, a banking entity must comply with the Section 23B requirement in Section __.14(b) of the 2013 Final Rule, as well as the restrictions on the purchase of low-quality assets in Regulation W, as if the banking entity were a bank and the customer facilitation vehicle were an affiliate. As a result, the proposed exclusion is consistent with the purpose of Section 13 to prevent bailouts of related funds, without preventing banking entities from meeting the needs of customers.

We agree that the Agencies should not apply Super 23A in its current form or as proposed to be amended to transactions with customer facilitation vehicles. The fundamental purpose of these vehicles is to allow a customer to face a separate vehicle to gain exposure to a transaction or strategy that the banking entity could have provided directly to that customer but where the customer does not want such direct exposure. This typically requires the banking entity to enter into a transaction with the vehicle to provide the vehicle with the desired exposure, which then passes the exposure on to the customer. Accordingly, requiring a banking entity to comply with Super 23A as if the customer facilitation vehicle were a covered fund would, in many cases, entirely obviate the utility of the proposed exclusion and prevent banking entities from meeting the legitimate needs or wishes of their customers.

The Agencies should not specify the types of transactions, investment strategies or other services that a customer facilitation vehicle could be formed to facilitate, as suggested in the Preamble to the Proposal.[29] Customer needs are often idiosyncratic and markets develop quickly, and we do not believe that it is possible to accurately predict the types of transactions, investment strategies or other services that customers may demand through customer facilitation vehicles in the future. Therefore, we believe that attempting to specify the types of transactions, investment strategies or other services that a customer facilitation vehicle could be formed to

[29] 85 Fed. Reg. at 12142 (Question 64).

facilitate would, contrary to the purpose of the proposed exclusion, prevent banking entities from being able to appropriately respond to customer demand.

C. Qualifying Venture Capital Funds

Recommendation 3: The Agencies should adopt the proposed exclusion from the definition of covered fund for qualifying venture capital funds. The term "venture capital fund" should be defined for purposes of the exclusion as provided in Rule 203(*l*)-1 under the Advisers Act. The conditions to the exclusion for qualifying venture capital funds proposed by the Agencies are reasonable, with two exceptions. First, for qualifying venture capital funds that are sponsored by a banking entity, the definition of "proprietary trading" should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule. Second, a banking entity's investment in and relationship with a qualifying venture capital fund should not be subject to Section __.14 of the Final Rule (*i.e.*, Super 23A).

We strongly support the proposal to add a new exclusion for qualifying venture capital funds.[30] This proposed exclusion is justified by the principle that banking entities should be permitted to invest in the same assets indirectly through a fund vehicle that they are permitted to invest in directly, subject to certain conditions required by the three purposes of the covered funds provisions of the Volcker Rule (the "**equivalence principle**"). The equivalence principle follows from the three purposes of the covered funds provisions of the Volcker Rule, discussed above. The proposed exclusion for qualifying venture capital funds is also supported by statements from various members of Congress.[31]

Definition of Venture Capital Fund

We believe that the term "venture capital fund" should be defined as defined in Rule 203(*l*)-1 under the Advisers Act, as proposed.[32] The Agencies should not add any conditions to the SEC definition or otherwise revise it in the two ways suggested in the Preamble to the Proposal.

First, the Agencies should not impose a limit on the annual revenues of the portfolio companies in which a qualifying venture capital fund may invest, measured as of the time the investments in those portfolio companies are made, as suggested in the Preamble to the Proposal.[33] It is not necessary to limit the investments of a qualifying venture capital fund to the smallest early stage companies. Any investment in an early stage company should qualify, regardless of the company's size. Nor do we believe that there is a different metric, such as the

[30] Proposal § __.10(c)(16).

[31] *See* 85 Fed. Reg. at 12134 & n.110, n.111 (citing legislative history of Section 13).

[32] 17 C.F.R. § 275.203(*l*)-1.

[33] 85 Fed. Reg. at 12136, 12138 (Question 44).

amount of time a portfolio company has been in operation, that would serve as a useful indicator of whether an investment in a portfolio company is appropriate for the proposed exclusion. For the reasons the Agencies described in the Preamble to the Proposal, the SEC definition of venture capital fund already "helps to distinguish the investment activities of venture capital funds from those of hedge funds and private equity funds" and "includes criteria reflecting the characteristics of venture capital funds that the agencies believe may pose less potential risk to a banking entity sponsoring or investing in venture capital funds and to the financial system."[34] Additional conditions on the portfolio companies in which qualifying venture capital funds may invest are unnecessary.

Likewise, the Agencies should not depart from the SEC definition of venture capital fund by requiring that 100% of the fund's holdings, other than short-term holdings, be in qualifying investments instead of the 80% that is required by Rule 203(*l*)-1 under the Advisers Act,[35] as suggested in the Preamble to the Proposal.[36] When the SEC adopted the 20% basket for non-qualifying investments in its definition of venture capital fund, the preamble to the rulemaking described the basket as "provid[ing] advisers to venture capital funds with greater investment flexibility, while precluding an adviser relying on the exemption from altering the character of the fund's investments to such extent that the fund could no longer be viewed as a venture capital fund within the intended scope of the exemption."[37] For example, the 20% basket under the SEC rule allows venture capital funds to "invest small amounts of fund capital in . . . shares of other venture capital funds, non-convertible debt, or publicly traded securities."[38] The 20% basket can also be used for secondary market transactions, including acquisitions from founders, angel investors and current and former employees of a portfolio company.[39] The same flexibility should be preserved for venture capital funds in the context of the Volcker Rule. The other proposed conditions to the qualifying venture capital fund exclusion would ensure that a qualifying venture capital fund could not use the 20% basket to engage in proprietary trading or high-risk activity. As a result, deviating from the SEC definition of venture capital fund by requiring that 100% of a qualifying venture capital fund's holdings, other than short-term holdings, be in qualifying investments is unnecessary.

Other Proposed Conditions

We believe that the other proposed conditions to the proposed new exclusion for qualifying venture capital funds in paragraphs (i) through (iv) of proposed Section __.10(c)(16)

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[34] 85 Fed. Reg. at 12136.

[35] 17 C.F.R. § 275.203(*l*)-1(a)(2).

[36] 85 Fed. Reg. at 12138 (Question 45).

[37] Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 Fed. Reg. 39646, 39650 (July 6, 2011).

[38] 76 Fed. Reg. at 39649.

[39] *See* 76 Fed. Reg. at 39652.

are reasonable and consistent with the equivalence principle and the purposes of the covered funds provisions of the Volcker Rule,[40] with two exceptions described below.

First, for qualifying venture capital funds that are sponsored by a banking entity, the definition of proprietary trading for purposes of proposed Section __.10(c)(16)(i)(B) should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule, rather than applying the short-term intent test to all such funds. Requiring funds sponsored by banking entities that are subject to the short-term intent test for purposes of the proprietary trading provisions to apply the same test for purposes of the covered funds provisions of the Volcker Rule is perfectly reasonable. But under the 2019 Amendments, not all banking entities are subject to the short-term intent test for purposes of the proprietary trading provisions—for example, banking entities that are subject to the market risk capital rule test.[41] Requiring funds sponsored by banking entities that are otherwise subject to the market risk capital rule test to apply the short-term intent test for purposes of the covered funds provisions of the Volcker Rule (*i.e.*, to determine whether a financial instrument is in a trading account such that it may be considered proprietary trading) would introduce unnecessary complexity and compliance costs for these banking entities. It would require them to apply one test for purposes of the proprietary trading provisions of the Volcker Rule and another test for purposes of the covered funds provisions of the Volcker Rule. Such a divergence between the two portions of the Volcker Rule regulations is unreasonable and inconsistent with the principle that regulations should be implemented in a way that achieves their essential purpose in the most cost-effective way.[42]

Second, a banking entity's investment in and relationship with a qualifying venture capital fund should not be subject to Super 23A. The application of Super 23A to qualifying venture capital funds is duplicative because the Proposal, through a separate condition, would already address the anti-bailout purpose of the covered funds provisions of the Volcker Rule by prohibiting the banking entity from directly or indirectly guaranteeing, assuming or otherwise insuring the obligations of performance of the qualifying venture capital fund.[43] Similarly, the proposed condition that a banking entity's investment in and relationships with the qualifying venture capital fund comply with the covered funds backstop provisions as if the fund were a covered fund[44] is consistent with the safety and soundness purpose and would also prevent a banking entity from engaging in high-risk activities or trading strategies indirectly through a qualifying venture capital fund. Applying Super 23A would also be an unnecessary departure

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[40] *See* SIFMA 2018 Comment Letter at B-10 to B-15 (describing the purposes of the covered fund provisions of Section 13 and the statutory authority of the Agencies to further tailor the definition of "covered fund" consistent with those purposes).

[41] Final Rule § __.3(b)(2)(i).

[42] *See* Office of Management and Budget, Circular A-4, at 6-8 (Sept. 17, 2003); Comment Letter of the Bank Policy Institute on the FDIC's Request for Information on a Framework for Analyzing the Effects of FDIC Regulations (Jan. 28, 2020), https://www.fdic.gov/regulations/laws/federal/2019/2019-rfi-framework-for-analyzing-effects-fdic-regulatory-actions-3064-za13-c-013.pdf.

[43] Proposal § __.10(c)(16)(iii).

[44] Proposal § __.10(c)(16)(iv)(A).

from the other existing exclusions from the definition of covered fund that would limit the utility and related benefits of the qualifying venture capital fund exclusion, regardless of the proposed new exceptions to Super 23A. The Agencies could confirm, however, that covered transactions between a banking entity that is an insured depository institution ("**IDI**") and a qualifying venture capital fund that is an affiliate of the banking entity remain subject to the numerical limits, collateral requirements and general safety and soundness conditions of Section 23A of the Federal Reserve Act.[45]

Impact of the Proposed Exclusion

The proposed exclusion for qualifying venture capital funds would help to close gaps in the availability of financing that exist under the Final Rule while promoting and protecting the safety and soundness of banking entities and the financial stability of the United States. We agree with the Agencies that permitting banking entities to invest in qualifying venture capital funds would allow them to make "a more diverse array of long-term investments in a broader range of geographic areas, industries and sectors than the banking entity may be able to access directly."[46] For example, it would facilitate the provision of financing by banking entities to incubators, tech start-ups and emerging-stage companies. This diversification would benefit banking entities by allowing them to "compete more effectively with non-banking entities."[47] It would also benefit the broader economy across the United States, including in developing and underserved areas as well as regions where venture capital financing is less readily available today.[48]

D. Qualifying Long-Term Investment Funds

Recommendation 4: The proposed exclusion for qualifying venture capital funds should be expanded to apply to all qualifying long-term investment funds. The exclusion for qualifying long-term investment funds should be subject to the conditions suggested by the Agencies in Question 50 in the Preamble, except that those conditions should be modified to reflect the same two modifications that we propose to the conditions for the proposed exclusion for qualifying venture capital funds. First, for qualifying long-term investment funds that are sponsored by a banking entity, the definition of "proprietary trading" should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule. Second, a banking entity's investment in and relationship with a qualifying long-term investment fund should not be subject to Super 23A.

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[45] 12 U.S.C. § 371c.

[46] 85 Fed. Reg. at 12137.

[47] 85 Fed. Reg. at 12137.

[48] *See* 85 Fed. Reg. at 12137.

As suggested by Question 50 in the Preamble to the Proposal[49] and for the reasons stated in our 2018 Comment Letter and our 2019 Supplemental Comment Letter, we believe that the Agencies should expand the proposed exclusion for qualifying venture capital funds to apply to all long-term investment funds, subject to the conditions suggested in Question 50 in the Preamble to the Proposal, except that those conditions should be modified to reflect the same two modifications that we propose to the conditions for the proposed exclusion for qualifying venture capital funds.

Like the proposed exclusions for qualifying venture capital funds and qualifying credit funds, an exclusion for qualifying long-term investment funds would be consistent with the equivalence principle. Because banking entities are permitted to make long-term investments in financial and nonfinancial companies directly, with financial holding companies having the broadest authority, they should also be permitted to make such investments indirectly through a qualifying long-term investment fund, subject to the conditions described above. For the reasons more fully set forth in our 2018 Comment Letter and our 2019 Supplemental Comment Letter, the Agencies clearly have the authority to grant an exclusion for qualifying long-term investment funds under their tailoring authority in Section 13(h)(2) or their permitted activities authority in Section 13(d)(1)(J) of the BHC Act.[50]

We agree that qualifying long-term investment funds should be subject to the conditions suggested by Question 50[51]—namely, that: (1) they only make long-term investments that a banking entity is permitted to make directly; (2) they hold themselves out as entities or arrangements that make investments that they intend to hold for a set minimum time period, such as two years; (3) their offering and governing documents reflect a long-term investment strategy; and (4) they meet all other requirements of the proposed qualifying venture capital fund exclusion, subject to the two modifications we describe above to the conditions for qualifying venture capital funds. Such an exclusion for qualifying long-term investment funds would only permit banking entities to make the same long-term investments indirectly through a fund structure that they are already permitted to make directly.

Like the proposed exclusion for qualifying venture capital funds, an exclusion for qualifying long-term investment funds would help to close gaps in the availability of financing that exist under the Volcker Rule while promoting and protecting the safety and soundness of the banking entity and the financial stability of the United States. It would allow banking entities to diversify their assets and income streams, thereby reducing the overall risk of their assets and operations and increasing their resiliency against failure. Consistent with the equivalence principle, such an exclusion would permit banking entities to engage in the same safe and sound,

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[49] 85 Fed. Reg. at 12138 (Question 50).

[50] *See* SIFMA 2018 Comment Letter at B-10 to B-15 (describing the tailoring authority of Section 13(h)(2)); SIFMA 2019 Supplemental Comment Letter at 5-8 (describing the tailoring authority of Section 13(h)(2) and the permitted activities authority of Section 13(d)(1)(J)).

[51] 85 Fed. Reg. at 12138 (Question 50).

long-term investment activities indirectly through fund structures that they are expressly permitted to engage in directly, such as merchant banking activities. Allowing banking entities to make long-term investments through properly structured long-term investment funds would reduce associated risks and enhance banking entities' safety and soundness by allowing banking entities to share the risks of those investments with third parties rather than bear those risks entirely on their own.

An exclusion for qualifying long-term investment funds would also provide additional certainty for banking entities that hold interests in "inadvertent" or "accidental" investment companies. In particular, such an exclusion would provide helpful clarity regarding the treatment of investments by banking entities in operating companies whose assets include cash reserves invested in equity securities, debt instruments or other interests that experience fluctuations in value due to market or corporate events. Such operating companies may technically be captured by the current broad definition of covered fund but do not raise the concerns that the Volcker Rule was intended to address.

E. Credit Funds

Recommendation 5: The Agencies should adopt the proposed exclusion from the definition of covered fund for qualifying credit funds. The conditions to the exclusion for qualifying credit funds proposed by the Agencies are reasonable, with only a few exceptions. First, qualifying credit funds should be permitted to invest in commodity forward contracts to the extent banking entities may invest in those assets directly. Second, qualifying credit funds should be permitted to invest to a limited extent in any assets in which a banking entity may invest directly, subject to a limit equal to 25% of the qualifying credit fund's total assets. Third, for qualifying credit funds that are sponsored by a banking entity, the definition of "proprietary trading" for purposes of the exclusion should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule. Fourth, a banking entity's investment in and relationship with a qualifying credit fund should not be subject to Super 23A.

We strongly support the proposal to add a new exclusion for qualifying credit funds.[52] Like the proposed exclusion for qualifying venture capital funds, the proposed exclusion for credit funds is justified by the equivalence principle that banking entities should be permitted to invest in the same assets indirectly through a fund vehicle that they are permitted to invest in directly, subject to certain conditions required by the three purposes of the covered funds provisions of the Volcker Rule. Experience has shown that neither the exclusion for loan

[52] Proposal § __.10(c)(15).

securitization vehicles nor the exclusion for joint ventures is an adequate substitute for the proposed new exclusion for qualifying credit funds.[53]

Scope of Permitted Assets

Qualifying credit funds should be permitted to invest in all of the assets that are permitted by proposed Section __.10(c)(15)(i), as well as commodity forward contracts to the same extent banking entities may currently invest in those assets directly. Qualifying credit funds should also be permitted to invest in any assets in which banking entities may invest directly, subject to a limit equal to 25% of the qualifying credit fund's total assets. Permitting qualifying credit funds to acquire and hold such assets is consistent with the existing authority of banking entities to acquire and hold those assets directly and thus the equivalence principle.

The Agencies should not limit the types of loans and debt instruments that a qualifying credit fund may hold to "some subset of those assets," as is asked about in the Preamble to the Proposal.[54] The proposed condition that limits the debt instrument and equity holdings of a qualifying credit fund to assets that banking entities are permitted to invest in directly reflects the equivalence principle. Permitting qualifying credit funds to hold only a subset of the instruments that banking entities are permitted to hold directly would depart from the equivalence principle.

The Agencies should, however, permit qualifying credit funds to hold commodity forward contracts to the same extent that banking entities may invest in those assets directly. As proposed, qualifying credit funds may *not* hold commodity forward contracts.[55] We assume this condition was modeled after Section __.10(c)(8)(ii)(C) of the Final Rule, which provides that an excluded loan securitization vehicle may not hold a commodity forward contract. Permitting qualifying credit funds to hold commodity forward contracts to the extent banking entities may hold those assets directly would be more consistent with the equivalence principle because banking entities are permitted to invest in these instruments directly. For instance, a credit fund may, much like a banking entity, find a commodity forward contract to be the most effective and convenient hedge for certain extensions of credit related to agricultural businesses. Prohibiting this type of activity would inhibit safe and sound risk management.

The Agencies should, as proposed, permit qualifying credit funds to hold assets that are related or incidental to acquiring, holding, servicing or selling loans or debt instruments, including an equity security or right to acquire an equity security received on customary terms in connection with such loans or debt instruments, to the same extent that banking entities are permitted to hold such assets directly.[56] In other contexts, banking entities are permitted to

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[53] *See* SIFMA 2018 Comment Letter at B-35 (explaining that the joint venture and loan securitization exclusions have not been sufficient to address the legitimate needs of credit funds and their investors).

[54] 85 Fed. Reg. at 12133 (Question 28).

[55] Proposal § __.10(c)(15)(i)(C)(2).

[56] Proposal § __.10(c)(15)(i)(C)(1)(iii).

invest in or otherwise acquire and hold stock warrants.[57] National banks, for example, are permitted to take as consideration for a loan a share in the profits or a stock warrant issued by a business enterprise of the borrower.[58]

For reasons similar to those described above with respect to qualifying venture capital funds, the Agencies should also permit qualifying credit funds to hold any assets that banking entities may invest in directly, subject to a limit equal to 25% of the qualifying credit fund's total assets. Permitting a qualifying credit fund to own equity securities and other assets, to the extent that a banking entity would be permitted to invest in those assets directly, would be consistent with the equivalence principle. The Proposal contemplates a qualifying credit fund holding equity securities received on customary terms in connection with the credit fund's loans and debt instruments. Providing qualifying credit funds additional flexibility to hold equity securities and other assets more generally (*e.g.*, equity issued by the same entity to which the fund has made a loan or by an affiliate thereof) would both better facilitate the provision of credit and credit intermediation services and enable a qualifying credit fund to manage its exposure to companies to which it has extended credit. Permitting a qualifying credit fund to hold equity securities or other assets as long-term investments that represent 25% or less of the value of its assets would not alter the character of the fund as a credit fund.[59] Qualifying credit funds would still be principally engaged in providing credit and credit intermediation even if granted this additional flexibility. Other proposed conditions to the qualifying credit fund exclusion would ensure that a qualifying credit fund could not use this 25% basket to engage in proprietary trading or high-risk activity, thereby maintaining consistency with the anti-evasion purpose and the safety and soundness purpose of the covered fund provisions of the statute.

Also in furtherance of the equivalence principle, the Agencies should not impose a specific quantitative limit on the amount of equity securities or rights to acquire an equity security in which a qualifying credit fund may invest, as suggested by Question 29, provided that the equity securities or rights to acquire an equity security are received on customary terms in connection with loans or debt instruments.[60] This conclusion follows from the equivalence

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[57] *See* 12 C.F.R. § 225.143 (Federal Reserve policy statement on nonvoting equity investments by bank holding companies); FDIC Decisions on Bank Applications: Equity Securities – Unlisted stock (describing authority of an insured state bank indirectly through a wholly owned subsidiary to continue to hold subordinated debt or preferred stock and warrants or common stock of non-bank entities not listed on a national securities exchange and to fund capital calls and exercise warrants), https://www.fdic.gov/regulations/laws/bankdecisions/investactivity/equnlistedstock.html; *see also* 12 U.S.C. § 1843(c)(2) (permitting bank holding companies to acquire and retain shares and other assets, which would include stock warrants, in satisfaction of a debt previously contracted).

[58] *See* SIFMA 2018 Comment Letter at B-32 n.95 (describing this existing authority of national banks under OCC rules and interpretations).

[59] *See* 76 Fed. Reg. at 39652 (wherein the SEC recognized that allowing a venture capital fund to hold up to 20% of its assets in non-qualifying investments would provide important flexibility and still result in the fund being a venture capital fund). Such a percentage would also be consistent with the percentage of revenues used to determine whether a securities affiliate was principally engaged in underwriting or dealing for purposes of Section 20 of the Glass-Steagall Act, before that provision was repealed by the Gramm-Leach-Bliley Act. *See* Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities, 61 Fed. Reg. 68750 (Dec. 30, 1996) (increasing the limit to 25% of revenues).

[60] 85 Fed. Reg. at 12133 (Question 29).

principle, because banking entities are not subject to a specific quantitative limit on the amount of equity securities or rights to acquire an equity security in which they are permitted to invest directly, provided these securities or rights are received on customary terms in connection with loans or debt instruments.

The proposed requirement that equity securities or rights to acquire an equity security be received on customary terms in connection with loans or debt instruments is sufficient to address any material risk that a qualifying credit fund will use the authority to acquire equity securities or rights to acquire an equity security to engage principally in the business of investing in equity securities or rights to acquire an equity security. If the Agencies nevertheless decide to impose a quantitative limit on the amount of these assets that may be held by a qualifying credit fund, that limit should be set at no less than 25% of the fund's assets, separate and apart from any 25% basket for other types of non-loan, non-debt investments as described above. Such a percentage is consistent with the percentage of revenues used to determine whether a securities affiliate was principally engaged in underwriting or dealing for purposes of Section 20 of the Glass-Steagall Act, before that provision was repealed by the Gramm-Leach-Bliley Act.[61]

Other Proposed Conditions

We agree that all of the conditions proposed in paragraphs (ii) through (v) of proposed Section __.10(c)(15) are reasonable, subject to two exceptions. First, for the reasons described in the qualifying venture capital fund section above, for qualifying credit funds that are sponsored by a banking entity, the definition of proprietary trading for purposes of proposed Section __.10(c)(15)(ii)(A) should be the same definition that applies to the banking entity for purposes of the proprietary trading provisions of the Volcker Rule, instead of the short-term intent test even if it would not apply for purposes of the proprietary trading provisions. Second, also for the reasons described in the qualifying venture capital fund section above, a banking entity's investment in and relationships with a qualifying credit fund should not be subject to Section __.14 (*i.e.*, Super 23A).

No Other Conditions Are Necessary or Appropriate

The Agencies should not impose any special "quantitative limitations, additional capital charges, control restrictions or other requirements on use of the credit fund exclusion," as suggested in the Preamble to the Proposal.[62] Based on the equivalence principle, qualifying credit funds should be subject to the same quantitative limitations, capital charges, control restrictions and other requirements on credit-related assets as banking entities would be subject to directly, plus the additional conditions required to make the exclusion fully consistent with the purposes of the covered funds provisions of the Volcker Rule. There is no reason to subject

[61] *See* Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities, 61 Fed. Reg. 68750 (Dec. 30, 1996) (increasing limit to 25% of revenues).

[62] 85 Fed. Reg. at 12133 (Question 37).

qualifying credit funds to any special conditions other than those required to make the exclusion fully consistent with those purposes.

Likewise, additional limitations or conditions on the exclusion are not necessary to address the concerns about evasion that the Agencies raised in the preamble to the 2013 Final Rule when they declined to adopt an exclusion for credit funds in that rule.[63] Those concerns are already effectively addressed by the proposed conditions to the exclusion, which would distinguish qualifying credit funds from private equity funds and hedge funds. Subject to our recommended modifications, the proposed limitations on the assets and activities of qualifying credit funds[64] would ensure that those funds engage in providing credit and credit intermediation, rather than indirect proprietary trading through fund structures that the covered funds provisions are intended to prevent. Similarly, other proposed conditions on the qualifying credit fund exclusion address the Agencies' concerns regarding evasion risk. For example, the requirement that a banking entity not directly or indirectly guarantee, assume or otherwise insure the obligations or performance of the credit fund or of any entity to which the credit fund extends credit or in which the credit fund invests[65] is consistent with the anti-bailout purpose. Moreover, the proposed requirement that a banking entity's investment in and relationship with the credit fund comply with the covered funds backstop provisions as if the credit fund were a covered fund[66] is consistent with the intent of the covered funds provisions to restrict the ability of banking entities to engage in high-risk activities indirectly through fund structures. No additional conditions on the exclusion are necessary to prevent evasion of Section 13.

Interaction with Loan Securitization Exclusion

We do not believe that the proposed qualifying credit fund exclusion should be combined with the loan securitization exclusion, as the Agencies requested comment on in the Preamble to the Proposal.[67] As described in our 2018 Comment Letter,[68] very few credit funds have been able to qualify for the existing exclusion for loan securitization vehicles. In particular, credit funds are generally unable to satisfy the conditions of the loan securitization exclusion because credit funds do not typically issue asset-backed securities, and, in order to meet the needs of clients, credit funds typically invest in debt securities and warrants. Any benefits of combining the qualifying credit fund and loan securitization exclusions into a single exclusion are outweighed by the compliance costs of doing so, given the investments banking entities have already made in complying with the loan securitization exclusion.

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[63] *See* 79 Fed. Reg. at 5705 ("The Agencies, however, are unable effectively to distinguish credit funds from other types of private equity funds or hedge funds in a manner that would give effect to the language and purpose of section 13 and not raise concerns about banking entities being able to evade the requirements of section 13.").

[64] Proposal § __.10(c)(15)(i)-(ii).

[65] Proposal § __.10(c)(15)(iv)(A).

[66] Proposal § __.10(c)(15)(v)(A).

[67] 85 Fed. Reg. at 12133 (Question 38).

[68] *See* SIFMA 2018 Comment Letter at B-35.

F. Tender Option Bond Vehicles

Recommendation 6: The Agencies should exclude tender option bond vehicles from the definition of covered fund.

For the reasons described in SIFMA's separate comment letter on the 2018 proposed amendments to the 2013 Final Rule that focused on tender option bond vehicles,[69] the Agencies should also exclude those vehicles from the definition of covered fund.

II. Modifications to Existing Fund Exclusions

We strongly support the Agencies' proposed modifications to certain existing exclusions from the covered fund definition, including those for foreign public funds ("**FPFs**"), loan securitizations and small business investment companies, which would help to address the overbreadth and undue complexity of the definition of covered fund by further tailoring that definition. In addition, the Agencies should clarify and expand the scope of the exclusion from the definition of covered fund for public welfare investment funds and also exclude these funds from the definition of banking entity. For the reasons described in detail in our 2018 Comment Letter, we believe that the Agencies clearly have the statutory authority to amend these exclusions pursuant to the tailoring clause in subsection (h)(2) of Section 13.[70]

A. Foreign Public Funds

Recommendation 7: The Agencies should adopt the proposed amendments to the exclusion for FPFs, with two modifications. First, the Agencies should not require a non-U.S. retail fund to engage in a public offering, but instead, like RICs, only to be authorized to engage in a public offering. Second, the Agencies should eliminate entirely the ownership limitation on parties affiliated with a U.S. banking entity sponsor of an FPF. The Agencies should also confirm that a fund automatically meets the standards necessary to qualify for the FPF exclusion if the fund is listed on an internationally recognized exchange that permits trading for retail investors.

The Agencies should adopt the proposed amendments to the exclusion for FPFs, with two modifications: (1) the Agencies should not require a non-U.S. retail fund to engage in a public offering and (2) the Agencies should eliminate entirely the ownership limitation on affiliated parties applicable to U.S. banking entities. The amendments proposed by the Agencies and the two modifications we propose are consistent with the purposes of the covered fund provisions of Section 13. They would appropriately exclude foreign funds that are sufficiently similar to U.S.

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[69] SIFMA, Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds: Tender Option Bond Vehicles (Oct. 17, 2018) https://www.federalreserve.gov/SECRS/2018/November/20181115/R-1608/R-1608_101718_132738_410977663674_1.pdf.

[70] *See* SIFMA 2018 Comment Letter at B-10 to B-15 (describing the tailoring authority of Section 13(h)(2)).

registered investment companies ("**RICs**"). As the Agencies explain in the Preamble to the Proposal, "it was appropriate to exclude [FPFs] from the 'covered fund' definition because they are sufficiently similar to [RICs]" and RICs do not fall within the statutory definition of "hedge fund and private equity fund."[71] The Agencies further noted that "it appears that some of the conditions of the [FPF] exclusion may not be necessary to ensure consistent treatment of [FPFs] and [RICs]."[72]

Accordingly, with a view to ensuring more consistent treatment of FPFs and RICs, the proposed amendments to the exclusion for FPFs would eliminate the requirements that a FPF (1) be authorized to offer and sell ownership interests to retail investors in its home jurisdiction (the "**home jurisdiction requirement**") and (2) sell ownership interests predominantly through public offerings outside of the United States (the "**predominate public offering requirement**"). The proposed amendments would replace these two requirements with a requirement that the FPF be authorized to offer and sell ownership interests, and that such interests be offered and sold, through one or more public offerings.[73]

The proposed elimination of the home jurisdiction requirement appropriately recognizes that the mere fact that some foreign funds are organized in one non-U.S. jurisdiction and offered to investors in another non-U.S. jurisdiction does not make them any less similar to RICs. Second, the proposed replacement of the predominate public offering requirement with a requirement that FPF ownership interests must be authorized to be sold through one or more public offerings (and that some interests be sold in such an offering) brings the treatment of FPFs closer to that of RICs, which must be authorized under U.S. securities laws to offer their shares in public offerings (although they are not required to do so).

Finally, the proposed amendments to the exclusion for FPFs do not increase opportunities for evasion of the requirements of Section 13 of the BHC Act. Therefore, no additional reservation of authority regarding evasion, as suggested in the Preamble to the Proposal,[74] is necessary. This is because the proposed amendments would ensure more consistent treatment of FPFs with RICs and accordingly, do not raise potential evasion concerns. In this regard, we note that the Agencies continue to have broad anti-evasion powers under the 2013 Final Rule.

Authorized to Engage in a Public Offering

We do not believe, however, that the Proposal's requirement that some of an FPF's ownership interests be sold through one or more public offerings—in addition to being authorized to be so offered—is necessary or appropriate. As we discussed in our 2018 Comment

[71] 85 Fed. Reg. at 12126.

[72] 85 Fed. Reg. at 12126.

[73] Proposal § __.10(c)(1)(i)(B).

[74] 85 Fed. Reg. at 12128 (Question 12).

Letter,[75] a RIC is authorized under U.S. securities laws to offer its shares in public offerings, but it is not required to do so and in fact may not do so in every instance. The extent and availability of information about both RICs and non-U.S. retail funds is primarily governed by the authorization to offer interests publicly as opposed to the actual sale of those interests through a public offering. The requirements arising from that authorization, including disclosure requirements, are applicable regardless of whether the retail fund also sells its interests to investors through a private placement. Moreover, a banking entity may have no practical means to verify whether and to what extent a fund has offered its securities through private placements, particularly where the fund is sponsored by a third party. These challenges also exist in the context of sponsored funds due to the fact that a banking entity sponsor may rely on a dispersed network of brokers and other intermediaries to distribute a fund's interests. Therefore, any requirement that a non-U.S. retail fund engage in a public offering—rather than that it be authorized to do so—is inconsistent with providing an exclusion for FPFs based on their similarity to RICs.

Ownership by Affiliated Parties

The Proposal retains the requirement that ownership interests in an FPF that is sponsored by a U.S. banking entity must be sold predominantly (*i.e.*, 85%) to parties other than the sponsoring U.S. banking entity, its affiliates or the FPF.[76] The Proposal would, however, permit sales to employees of the banking entity (or its affiliates) or the FPF—other than senior executive officers and directors—without those sales being attributed to the banking entity or FPF.[77] As we discussed in our 2018 Comment Letter,[78] this ownership limit for affiliated parties should be eliminated entirely because it has no meaningful policy benefit, no equivalent requirement exists for RICs and it imposes an unnecessary compliance burden. Moreover, it would be both impractical and inefficient for a banking entity to indirectly engage in impermissible proprietary trading by inducing its affiliates, senior executive officers or directors to invest in a sponsored FPF. Regardless, the Agencies would still be able to address any such issues using their broad anti-evasion powers.

If the Agencies retain the ownership limit for affiliated parties, the Agencies should not attribute sales of ownership interests to senior executive officers or directors of the sponsoring U.S. banking entity, its affiliates or the FPF to the banking entity or the FPF. There is no comparable ownership limit applied to affiliated parties for RICs. Attributing to the banking entity or the FPF the sales of ownership interests to senior executive officers or directors of the sponsoring U.S. banking entity, its affiliates or the FPF results in disparate treatment of FPFs as compared to RICs. The Agencies also recognize the compliance difficulties that may be imposed by a Volcker Rule-specific ownership requirement, and such an additional compliance

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[75] SIFMA 2018 Comment Letter at B-18.

[76] Proposal § __.10(c)(1)(ii).

[77] Proposal § __.10(c)(1)(ii)(D).

[78] SIFMA 2018 Comment Letter at B-18 to B-19.

requirement would be quite costly and burdensome, especially for foreign funds that, like RICs, are exchange-traded or offered through dispersed networks of brokers, intermediaries and advisors. Therefore, the senior executive officer and director attribution requirement should be removed in order to ensure more consistent treatment of FPFs and RICs.

Funds Listed on an Internationally Recognized Exchange

We also recommend that the Agencies confirm in the preamble to the final rule that a fund automatically meets the standards necessary to qualify for the FPF exclusion if ownership interests in the fund are listed on an internationally recognized exchange that permits trading for retail investors. For such funds, any purported benefits of applying the FPF exclusion's specific criteria would be unnecessary and impose unnecessary compliance costs, particularly for trading desks that may take ownership interests in such funds. Confirming in the preamble that such funds automatically meet the standards to qualify for the FPF exclusion would help simplify compliance efforts without creating undue risk because funds listed on such an exchange should necessarily satisfy the FPF exclusion criteria and serve the purpose of excluding vehicles that are similar to RICs.

B. Loan Securitizations

Recommendation 8: The Agencies should adopt the proposed amendments to the exclusion for loan securitization vehicles, with one modification: they should increase the basket for investments in debt securities or other non-loan assets from 5% to 10% of total assets, as calculated by reference to the par value of the securities or assets on the day they are acquired.

The Agencies should adopt the proposed amendments to the exclusion for loan securitizations, including codifying FAQ 4 regarding cash equivalents and permitting a loan securitization to hold a limited amount of debt securities or other non-loan assets, except that the basket for debt securities and other non-loan assets should be increased from 5% to 10% of total assets. The amendments proposed by the Agencies, as well as our recommended exception, are consistent with both the purposes of Section 13 and the rule of construction regarding the sale and securitization of loans in Section 13(g)(2).[79]

Codification of FAQ 4

The proposed amendment codifying FAQ 4 would provide much-needed certainty regarding permitted holdings of loan securitizations. As we noted in our 2018 Comment Letter,[80] the servicing assets provisions of the 2013 Final Rule's loan securitization exclusion could be read to mean that servicing assets are limited to permitted securities because of the

[79] 12 U.S.C. § 1851(g)(2).

[80] SIFMA 2018 Comment Letter at B-65.

proviso that seems to require "each asset" to be a permitted security, even though such a reading would render the reference to "rights and other assets" superfluous.[81] While FAQ 4 subsequently clarified the 2013 Final Rule's treatment of servicing assets, along with its clarification of the meaning of "cash equivalents," its codification by the Agencies would promote transparency and a consistent interpretation of the provision.

Treatment of Non-Loan Assets

The Agencies stated in the Preamble to the 2013 Final Rule that the purpose of the loan securitization exclusion was to "implement the rule of construction contained in section 13(g)(2) of the BHC Act which provides that nothing in section 13 of the BHC Act shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the [Federal Reserve] to sell or securitize loans in a manner that is otherwise permitted by law."[82] However, the loan securitization exclusion codified in the 2013 Final Rule creates real impediments to customary loan securitization activities. In the preamble to the 2018 proposed amendments to the 2013 Final Rule, the Agencies invited comment on "concerns about how the 2013 [F]inal [R]ule's exclusions from the covered fund definition for loan securitizations . . . work in practice," and whether there are "particular issues with complying with the terms of this exclusion for vehicles that are holding loans," both of which indicated that the Agencies were cognizant of and concerned with these difficulties.[83]

As we described in our 2018 Comment Letter, loan securitization activities are a significant source of financing for the real economy, including not only corporate loans, but also mortgage loans, student loans, auto loans and other types of financial assets.[84] However, issuers who hold any amount of non-loan assets, including debt securities, cannot avail themselves of the loan securitization exclusion under the 2013 Final Rule, except in very limited circumstances.[85] Thus, vehicles that were common prior to the enactment of Section 13, including those that allowed a limited basket of debt securities in addition to loans, are included within the broad definition of covered fund, with all of the attendant consequences.

The proposed amendments to the loan securitization exclusion would better and more effectively enable the securitization of loans—which has been described as a key purpose of the exclusion—although further modifications should be made to provide more flexibility and liquidity to the loan securitization marketplace and its participants and thereby give full effect to the statutory rule of construction. The proposal to permit up to 5% of the assets of a loan securitization vehicle to consist of non-loan assets would provide much-needed flexibility.

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[81] Final Rule § __.10(c)(8)(i)(B).

[82] 79 Fed. Reg. at 5685 (citing 12 U.S.C. § 1851(g)(2)).

[83] 83 Fed. Reg. at 33480 (Questions 176, 177).

[84] *See* SIFMA 2018 Comment Letter at B-21.

[85] *See* Final Rule § __.10(c)(8)(iii) (identifying the securities that a loan securitization vehicle is permitted to hold).

However, as we noted in our 2018 Comment Letter,[86] the law otherwise permits loan securitizations to include baskets of debt securities equal to at least 10% of the total assets of such vehicles, which in turn makes it easier for them to securitize loans. We therefore recommend that the Agencies modify the amendment to allow up to 10% of a loan securitization vehicle's assets to be held in non-loan assets. Implementing this change would avoid creating the same compliance impediments and other difficulties that the Agencies referenced in the preamble to the 2018 proposed amendments to the 2013 Final Rule and be more faithful to the language of subsection (g)(2) of Section 13 and therefore the purposes of the covered fund provisions of Section 13.

In response to the Agencies' request for comment,[87] we believe that calculating compliance with the limit on non-loan assets should be determined by reference to the par value of the securities or assets on the day they are acquired. This method would present the lowest compliance cost for market participants, given its widespread use across other relevant tests, and would therefore maximize the flexibility offered by the non-loan asset allowance. The Agencies should also clarify in the rule text that compliance with the limit on non-loan assets would only be assessed at the time a loan securitization vehicle invests in such assets.

C. Small Business Investment Companies

Recommendation 9: The Agencies should adopt the proposed amendment to the exclusion for Small Business Investment Companies.

The Agencies should adopt the proposed amendments to the exclusion for Small Business Investment Companies ("**SBICs**"). These amendments would more appropriately exclude SBICs from the definition of covered fund throughout their entire existence. This would enable banking entities to invest more broadly in SBICs and thereby make investments in small businesses.

The preamble to the 2013 Final Rule describes the SBIC exclusion as promoting "investments in a way that appropriately facilitates national community and economic development objectives," while "permitting a banking entity to . . . provide valuable expertise and services to [SBICs] and to provide funding and assistance to small businesses and low- and moderate-income communities."[88] However, as the Agencies note in the Preamble to the Proposal, the exclusion for an SBIC is not available to an SBIC that has surrendered its license during the winding-down process.[89] Thus, a banking entity which has invested in an SBIC that had previously relied on the exclusion could find itself invested in a covered fund without any

[86] SIFMA 2018 Comment Letter at B-22.

[87] 85 Fed. Reg. at 12129 (Question 14).

[88] 79 Fed. Reg. at 5698.

[89] 85 Fed. Reg. at 12131.

advance notice. This possibility could discourage investment in SBICs in the first place, thereby undermining the Agencies' stated belief "that providing the exclusion will also allow banking entities to continue to provide capital to community-improving projects and in some instances promote capital formation."[90]

The Agencies should adopt the proposed amendment to the SBIC exclusion, which would appropriately exclude these SBICs from the definition of covered fund throughout their entire existence. By providing renewed certainty for banking entities seeking to invest in SBICs, the proposed amendment would enable expanded investment in SBICs. This, in turn, would increase investment in small businesses, furthering the stated purpose of the exclusion. By limiting the amendment to only cover SBICs that do not make additional investments (other than investments in cash equivalents) after the voluntary surrender of their license, an act that requires the written approval of the Small Business Administration, the Agencies have appropriately limited the scope of the proposed exclusion and addressed evasion concerns. We therefore believe that additional restrictions on the exclusion are not necessary.

D. Public Welfare Investment Funds

Recommendation 10: The Agencies should expressly confirm that the exclusion for PWI Funds includes all vehicles that would be eligible to receive consideration as qualified investments under the CRA. The Agencies should also expressly exclude PWI Funds held pursuant to the authority in 12 U.S.C. § 24(Eleventh) from the definition of "banking entity" so as not to inhibit investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities.

Consistent with the Preamble to the Proposal,[91] we believe that the Agencies should expressly confirm that investments that would be eligible to receive consideration as qualified investments under the Community Reinvestment Act ("**CRA**") satisfy the public welfare investment fund ("**PWI Fund**") exclusion. The 2013 Final Rule excludes from the definition of covered fund vehicles that "make investments that are designed primarily to promote the public welfare, of the type permitted under paragraph (11) of [12 U.S.C. § 24], including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs)."[92] While OCC regulations implementing the CRA provide that investments that qualify for CRA credit would meet the requirements for PWI Funds,[93] the 2013 Final Rule "did not expressly incorporate these implementing regulations into the exclusion for public welfare investments."[94]

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[90] 79 Fed. Reg. at 5698.

[91] 85 Fed. Reg. at 12130.

[92] Final Rule § __.10(c)(11)(ii)(A).

[93] *See* 12 C.F.R. §§ 24.3, 25.23.

[94] 85 Fed. Reg. at 12130.

To provide additional clarity on the types of vehicles excluded from the definition of covered fund under this exclusion, the Agencies should expressly confirm that all vehicles that would be eligible to receive consideration as qualified investments under OCC, Federal Reserve or FDIC regulations implementing the CRA satisfy the PWI Fund exclusion. By providing additional certainty for banking entities seeking to invest in PWI Funds, this clarification would enable expanded public welfare investments by banking entities and further the stated purpose of the exclusion to enable banking entities to "provide valuable expertise and services to [PWI Funds] and to provide funding and assistance to small businesses and low- and moderate-income communities."[95]

Exclusion from the Banking Entity Definition

The Agencies also request comment on whether the scope of the PWI Fund exclusion is "properly calibrated."[96] For the reasons described in our 2018 Comment Letter, the Agencies should exclude PWI Funds and other vehicles held pursuant to the authority in 12 U.S.C. § 24(Eleventh) permitting national banks to make investments designed primarily to promote the public welfare, including public welfare investment funds, from the definition of "banking entity."[97] Certain vehicles in which a banking entity is permitted to invest under this authority, including some PWI Funds, may be treated as banking entities under the 2013 Final Rule, which is problematic because it may be impractical or, in some cases, impossible for the banking entity to ensure that the vehicle adheres to the compliance framework of the 2013 Final Rule. We therefore recommend that the Agencies exclude from the definition of banking entity any vehicle held pursuant to the authority in 12 U.S.C. § 24(Eleventh) and the related implementing regulation 12 C.F.R. Part 24, including PWI Funds that are excluded from the definition of covered fund. This would reduce unnecessary compliance burdens, better enable national banks and other banking entities to invest in the public welfare and meet their requirements under the CRA and "appropriately facilitate[] national community and economic development objectives" in a manner consistent with Section 13.[98]

E. Rural Business Investment Companies and Qualified Opportunity Funds

Recommendation 11: The Agencies should provide an express exclusion from the definition of covered fund for RBICs and QOFs, either by expanding the PWI Fund exclusion to include investments in such vehicles or by providing separate exclusions for such vehicles, similar to the exclusion for SBICs.

[95] 85 Fed. Reg. at 12129–30.

[96] 85 Fed. Reg. at 12130 (Question 17).

[97] SIFMA 2018 Comment Letter at B-58 to B-60.

[98] 79 Fed. Reg. at 5698.

The Agencies should expressly exclude Rural Business Investment Companies ("**RBICs**") and qualified opportunity funds ("**QOFs**") from the definition of covered fund. In the Preamble to the Proposal, the Agencies request comment on whether they should provide an express exclusion from the covered fund definition for RBICs and QOFs.[99] RBICs, as defined under Sections 203(*l*) and 203(m) of the Advisers Act,[100] are companies licensed under the Rural Business Investment Program of the U.S. Department of Agriculture and the Small Business Administration, which were "designed to promote economic development and job creation in rural communities by investing in companies involved in the production, processing and supply of food and agriculture-related products."[101] QOFs are funds that qualify for certain tax incentives under the Tax Cuts and Jobs Act for long-term investments in designated economically distressed communities and "are required to have at least 90 percent of their assets in designated low-income zones."[102] In order to avoid status as an investment company, some RBICs and QOFs must rely on the exclusions available under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940. Further, while certain of these RBICs and QOFs may qualify for an exclusion from the definition of covered fund, such as the PWI Fund exclusion, there is uncertainty about whether particular RBICs and QOFs are excluded from the covered fund definition.

Section 13 expressly permits banking entities to make and retain investments that are "designed primarily to promote the public welfare, of the type permitted under paragraph (11) of [12 U.S.C. § 24],"[103] which include direct and indirect investments "designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)."[104] As discussed above and in the Preamble to the Proposal,[105] RBICs and QOFs are funds that must make investments that are clearly designed primarily to promote the public welfare because they are required to invest primarily in ways that promote job creation in rural communities (which often may have significant low- and moderate-income populations or be economically disadvantaged and in need of revitalization or stabilization) and in economically distressed communities, respectively. Thus, RBICs and QOFs engage in investments that are substantively similar or identical to those of PWI Funds that are already excluded from the definition of covered fund and of the type Congress recognized the Volcker Rule was not designed to prohibit.[106] An express exclusion for

[99] 85 Fed. Reg. at 12130 (Questions 21 and 22).

[100] 15 U.S.C. §§ 203(*l*) and (m).

[101] 85 Fed. Reg. at 12130.

[102] 85 Fed. Reg. at 12130.

[103] 12 U.S.C. § 1851(d)(1)(E).

[104] 12 U.S.C. § 24 (Eleventh).

[105] *See* 85 Fed. Reg. at 12130 (Questions 21 and 22).

[106] *See* 156 Cong. Rec. S5896 (daily ed. July 15, 2010) (Statement of Sen. Merkley) (noting that Section 13(d)(1)(E) permits investments "of the type" permitted under 12 U.S.C. § 24 (Eleventh), including "a range of low-income community development and other projects," but "is flexible enough to permit the [Agencies] to include other similar low-risk investments with a public welfare purpose").

RBICs and QOFs would give additional effect to this statutory provision and, by providing additional certainty regarding the permissibility of investments in RBICs and QOFs, grant banking entities more opportunities to "provide valuable expertise and services to these entities and to provide funding and assistance to small businesses and low- and moderate-income communities."[107]

To implement an express exclusion for RBICs and QOFs, the Agencies should either (1) expand the definition of PWI Fund in the 2013 Final Rule to expressly reference investments in or by RBICs and QOFs or (2) provide separate exclusions from the definition of covered fund for RBICs and QOFs, similar to the exclusion for SBICs.

III. Qualifying Foreign Excluded Funds

> ***Recommendation 12:*** The Agencies should adopt the proposed exemptions for activities and investments of QFEFs.

The Agencies should adopt the proposed exemptions for the activities and investments of qualifying foreign excluded funds ("**QFEFs**"), which are consistent with the purposes of Section 13 of the BHC Act and would address concerns about unintended consequences and extraterritorial application of the 2013 Final Rule. In 2017 and 2019, the federal banking agencies issued helpful policy statements that provided much-needed, although not permanent, relief to foreign banking entities faced with uncertainty stemming from the application of the 2013 Final Rule to their activities.[108] The proposed exemptions would not only provide non-U.S. banking entities with certainty regarding the permissibility of their asset management businesses, but would also provide customers of QFEFs with certainty regarding how the Volcker Rule may impact their investments and relationships.

IV. Limitations on Relationships with a Covered Fund

> ***Recommendation 13:*** The Agencies should adopt the proposed amendments to Super 23A. The Agencies should also clarify that a banking entity may engage in any covered transaction that is exempt under Section 223.42 of Regulation W with a related covered fund, including those applicable to transactions with securities affiliates, such as the exemptions for purchasing marketable securities, purchasing municipal securities and riskless-principal transactions.

[107] 85 Fed. Reg. at 12129–30.

[108] FDIC, Federal Reserve and OCC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20170721a1.pdf; FDIC, Federal Reserve and OCC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20190717a1.pdf.

Super 23A prohibits any banking entity from entering into a covered transaction, as defined by Section 23A of the Federal Reserve Act,[109] with a covered fund for which the banking entity has a relationship specified in the Super 23A provisions (a "**related covered fund**"). The Proposal would exempt from such prohibition (1) transactions that would be exempt under Section 23A of the Federal Reserve Act[110] or Section 223.42 of Regulation W[111] and (2) transactions in which a banking entity extends credit to, or purchases assets from, a related covered fund in the ordinary course of business in connection with payment transactions, settlement services, or futures, derivatives and securities clearing.[112]

We strongly support these proposed amendments to Super 23A, which are consistent with the purposes of the covered fund provisions of Section 13 and do not raise safety and soundness concerns. As described in detail in our 2018 Comment Letter, incorporating the exemptions for certain covered transactions under Section 23A of the Federal Reserve Act and Regulation W into Super 23A is the most natural reading of the statutory language of Super 23A.[113] These amendments would also promote the safety and soundness of banking entities and the financial stability of the United States because the exemptions in Section 23A of the Federal Reserve Act and Regulation W have previously been determined to be consistent with appropriately insulating the Deposit Insurance Fund from the risks of an IDI's non-IDI affiliates.[114] Moreover, as the Agencies note in the Preamble to the Proposal, allowing banking entities to both sponsor and advise a covered fund, while providing brokerage and other services to the covered fund, would reduce complexity within the financial system, thereby promoting the financial stability of the United States.[115] The proposed exemptions from Super 23A would also support the safety and soundness of banking entities by facilitating better risk management of a covered fund and its activities and investments by reducing reliance on third parties to provide necessary services for a fund's operation, which exposes both the banking entity and the fund to the risk of operational problems of the third-party service provider.[116]

The Agencies should not expand the scope of Super 23A to prohibit the purchase of low-quality assets based on Section 223.15 of Regulation W,[117] as is asked about in the Preamble to the Proposal.[118] Imposing this limitation would unduly restrict the very transactions and services,

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[109] 12 U.S.C. § 371c.

[110] 12 U.S.C. § 371c(d).

[111] 12 C.F.R. § 223.42.

[112] Proposal § __.14(a)(2)(iv).

[113] SIFMA 2018 Comment Letter at B-43 to B-44; 12 U.S.C. § 1851(f)(1).

[114] *See* Federal Reserve SR 03-2, "Adoption of Regulation W Implementing Sections 23A and 23B of the Federal Reserve Act," https://www.federalreserve.gov/boarddocs/srletters/2003/sr0302.htm.

[115] *See* 85 Fed. Reg. at 12145.

[116] *See* 85 Fed. Reg. at 12145.

[117] 12 C.F.R. § 223.15(a).

[118] 85 Fed. Reg. at 12146 (Question 77).

including in connection with payment, clearing and settlement activities, that the Agencies are proposing to permit. Similarly, because the Section 23B requirements of Section __.14(b) of the 2013 Final Rule would continue to apply, a banking entity would only be able to purchase an asset (including a low-quality asset) from a related covered fund if such purchase provides the banking entity with at least as favorable terms as that which an unaffiliated third party would receive. Accordingly, a banking entity is already protected from being forced to purchase an asset in a transaction that would inappropriately benefit the related covered fund.

Concerns that a banking entity may bail out or provide inappropriate support to a covered fund for which it acts as sponsor or investment adviser, such as by purchasing low-quality assets from a related covered fund, are separately addressed through the backstop provisions[119] of the Final Rule and, for a covered fund that is organized and offered by a banking entity, the anti-bailout provisions of the asset management exemption.[120] The Agencies would also retain the ability to address instances of evasion of Super 23A under the anti-evasion provision of Section 13(e) of the BHC Act and the Final Rule. Furthermore, Section 23A of the Federal Reserve Act and Regulation W would continue to apply to transactions between an IDI and its affiliates, including an investment fund for which the IDI or one of its affiliates serves as investment adviser. Therefore, existing law and regulations already prevent or limit the ability of IDIs and other banking entities to purchase low-quality assets of a related covered fund.

Consistent with their stated intention to "permit a banking entity to engage in covered transactions with a related covered fund . . . including transactions that would be exempt pursuant to [S]ection 223.42 of the [Federal Reserve's] Regulation W,"[121] the Agencies should clarify that a banking entity may engage in any covered transaction that is exempt under Section 223.42 of Regulation W with a related covered fund, including those applicable under Regulation W only to transactions with securities affiliates, such as the exemptions for purchasing marketable securities, purchasing municipal securities and riskless-principal transactions. Super 23A applies to a banking entity "as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof."[122] Certain of the exemptions in Section 223.42 of Regulation W, however, apply only to a transaction with a "securities affiliate" of an IDI.[123]

Because a related covered fund would not seem to meet the definition of securities affiliate, the practical result of one possible interpretation of the proposed amendments to Super 23A is that any covered transaction exemptions that apply only to transactions with securities

[119] Final Rule § __.15.

[120] Final Rule § __.11(a)(5).

[121] 85 Fed. Reg. at 12144.

[122] Final Rule § __.14(a)(1).

[123] A "securities affiliate" is defined for purposes of Regulation W as an affiliate of a member bank that is registered with the SEC as a broker-dealer or any other securities broker or dealer affiliate of the member bank approved by the Federal Reserve. 12 C.F.R. § 223.3(gg).

affiliates would not actually be incorporated into Super 23A, which we do not believe was the intent of the Agencies. In the Preamble to the Proposal, the Agencies do not address the distinction in Regulation W between affiliates and securities affiliates. This is presumably because Super 23A itself does not distinguish between affiliates and securities affiliates, instead treating any related covered fund as an affiliate of a banking entity. To give full effect to the Agencies' stated intent to incorporate the exemptions under Section 23A and Section 223.42 of Regulation W into Super 23A,[124] the Agencies should clarify that a banking entity may engage in any covered transaction that is exempt under Section 223.42 of Regulation W with a related covered fund, including those exemptions referencing a securities affiliate, such as the exemptions for purchasing marketable securities, purchasing municipal securities and riskless-principal transactions.

Permitting banking entities to engage in all covered transactions that are exempt under Section 223.42 of Regulation W with a related covered fund (including those referencing a securities affiliate) would serve important policy objectives while at the same time avoiding new incentives for the banking entity to support the related covered fund or permit the banking entity to engage in prohibited proprietary trading through the related covered fund. This approach would also be consistent with some of the same rationales relied upon by the Federal Reserve for exempting these transactions under Regulation W. For instance, the Federal Reserve stated it "does not believe that there is any regulatory benefit to subjecting [riskless-principal securities] transactions" to Section 23A of the Federal Reserve Act because "riskless principal securities transactions closely resemble securities brokerage transactions" that are not subject to Section 23A.[125] Because the Agencies stated "that the same rationales that support the exemptions in [S]ection 23A of the Federal Reserve Act and the [Federal Reserve's] Regulation W also support exempting such transactions from the prohibition on covered transactions between a banking entity and related covered funds under [S]ection 13(f)(1) of the BHC Act,"[126] no regulatory purpose would be served by subjecting riskless-principal transactions between a banking entity and a related covered fund to Super 23A. To the contrary, subjecting these transactions to Super 23A would prevent banking entities from providing some of the very transactions and services that the Agencies are proposing to permit and, moreover, would require related covered funds to continue to rely on third-party service providers for certain transactions in a manner that is inconsistent with the goal of reducing exposure of both the banking entity and the fund to the risk of operational problems of third-party service providers.[127]

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[124] *See* 85 Fed. Reg. at 12144.

[125] *See* Federal Reserve, Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76560, 76597 (Dec. 12, 2002).

[126] 85 Fed. Reg. at 12144.

[127] *See* 85 Fed. Reg. at 12145.

V. Ownership Interest

A. Treatment of For-Cause Removal Rights

Recommendation 14: The Agencies should adopt the proposed clarification that an interest that allows its holder to remove an investment manager for cause upon the occurrence of an event of default or acceleration event, or to nominate or vote on a replacement manager upon an investment manager's resignation or removal, would not be considered an ownership interest for that reason alone. This clarification should be expanded, however, to cover additional "for cause" termination events (*e.g.*, insolvency of the investment manager, breach of the investment management or collateral management agreement, etc.).

We strongly support the proposed amendment to the definition of ownership interest to clarify that an interest that allows its holder "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 for that reason alone.[128] This proposed clarification would provide important clarity for, among others, securitization structures and appropriately recognize that the ability of a holder to vote on removal or appointment of managers for cause is not a right limited to equity holders. This clarification would also serve as an important companion piece to the proposed safe harbor for senior loans or debt interests described below, which would together provide more certainty for the holders of debt interests in entities that may be covered funds. We recommend, however, that the Agencies expand this clarification to cover the right to participate in the removal of an investment manager for additional "for cause" reasons, such as insolvency of the investment manager or breach of the investment management or collateral management agreement. Providing this clarification would more fully recognize that debt holders may be able to remove or appoint an investment manager for reasons other than solely related to an event of default of acceleration event.

B. Senior Loan and Debt Interest Safe Harbor

Recommendation 15: The Agencies should adopt the proposed safe harbor from the definition of ownership interest for certain senior loans or senior debt securities that do not have equity-like characteristics, with one modification. The Agencies should clarify that the safe harbor is available to senior loans and senior debt securities that include acceleration or amortization provisions with respect to repayment of principal.

We strongly support the proposed amendment to the definition of ownership interest to provide an explicit safe harbor for certain senior loans and senior debt securities.[129] As discussed

[128] Proposal § __.10(d)(6)(i)(A).

[129] Proposal § __.10(d)(6)(ii)(B).

in detail in our 2018 Comment Letter, the overly complex definition of ownership interest in the Final Rule requires a specific, detailed analysis to determine whether any interest that is not an equity or partnership interest and does not otherwise convey actual control has any one of the enumerated, technical characteristics of an "other similar interest."[130] The proposed safe harbor would help resolve the issue of banking entities unnecessarily treating ordinary debt securities as ownership interests as a means of avoiding the extensive legal analysis that would otherwise be required for them to determine that the debt securities are not considered "other similar interests" under the Final Rule.

We also generally support the proposed set of characteristics that would define a senior loan or senior debt interest, which provide helpful clarity and flexibility, with one exception: the Agencies should clarify that the safe harbor is available to senior loans and senior debt securities that include acceleration or amortization provisions with respect to repayment of principal. The safe harbor includes a condition that, under the terms of the debt interest, the holder is entitled to receive only "[f]ixed principal payments on or before a maturity date (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, foregone income resulting from an early prepayment)."[131] Debt instruments, however, commonly include provisions that require or allow for the acceleration or amortization of principal repayment. While we believe that it was not the Agencies' intent, the proposed language could cause doubt as to whether instruments with such provisions clearly satisfy the proposed condition that principal payments must be "fixed." Because these provisions merely alter the timing of repayment of principal amounts and do not give the holder any equity-like rights (*i.e.*, the holder remains entitled to only repayment of principal plus interest at a stated rate), the Agencies should clarify that the safe harbor for senior loan and senior debt interests is available for debt instruments that include acceleration or amortization provisions with respect to repayment of principal amounts.

Finally, we agree with the Agencies that the proposed characteristics are rigorous enough to address concerns about potential evasion because they would exclude interests with equity-like characteristics.[132]

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[130] SIFMA 2018 Comment Letter at B-52.

[131] Proposal § __.10(d)(6)(ii)(B)(1)(ii).

[132] *See* 85 Fed. Reg. at 12147.

C. Exclusion for Erroneous Acquisition or Retention of Ownership Interest in a Covered Fund

> ***Recommendation 16:*** The Agencies should provide an explicit exclusion from the prohibition on acquiring or retaining as principal an ownership interest in a covered fund for the erroneous acquisition or retention of an ownership interest in a covered fund and associated correcting transactions to confirm that such transactions are not prohibited by the covered fund provisions.

For the reasons described in our 2018 Comment Letter,[133] the Agencies should provide an exclusion from the prohibition on acquiring or retaining as principal an ownership interest in a covered fund for the erroneous acquisition or retention of an ownership interest in a covered fund and associated correcting transactions. Such an exclusion would be consistent with the exclusion for error trades adopted in the proprietary trading provisions in the 2019 Amendments.[134]

VI. Parallel Investments

> ***Recommendation 17:*** The Agencies should adopt the proposed rule of construction on parallel investments and co-investments by a banking entity in the same portfolio companies as a covered fund.

We agree with the proposed rule of construction that parallel investments and co-investments by a banking entity in the same portfolio companies as a covered fund should not be included in the calculation of limits on the banking entity's investments in the covered fund or otherwise restricted by the Volcker Rule, as long as the parallel investments or co-investments are made in compliance with applicable laws and regulations, including applicable safety and soundness standards.[135] Among other things, this condition means that parallel investments and co-investments by a banking entity must be otherwise permissible under applicable law and that the rule of construction would not permit a banking entity to engage in prohibited proprietary trading alongside covered funds.[136] The proposed rule of construction would clarify that parallel investments and co-investments would not be re-characterized as investments, or attributed to or otherwise treated as an evasion of the investment limits, in a covered fund, despite language suggesting otherwise in the preamble to the 2013 Final Rule.[137]

We do not believe that the proposed rule of construction would create opportunities for evading Section 13 of the BHC Act. As described above, the rule of construction would not

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[133] SIFMA 2018 Comment Letter at B-53.

[134] Final Rule § __.3(d)(10).

[135] Proposal § __.12(b)(5).

[136] *See* 85 Fed. Reg. at 12149.

[137] 79 Fed. Reg. at 5734; 85 Fed. Reg. at 12149.

permit a banking entity to engage in prohibited proprietary trading alongside covered funds. Likewise, the rule of construction would not permit a banking entity's investments in covered funds to exceed the 3% per-fund limit or the 3% aggregate limit, which is consistent with Section 13(d)(4)(B)(ii) of the BHC Act.[138] The Agencies should not "impose any additional limitations on a banking entity's investment policies, arrangements or agreements to invest alongside a covered fund," including limitations based on the "approach used to define 'contractual obligation' in the Conformance Rule," as suggested in the Preamble to the Proposal.[139] Any such limitations would perpetuate what the proposed rule of construction is intended to correct—continued interference with the ability of banking entities to make otherwise permissible parallel investments or co-investments directly without any textual basis in Section 13 for recharacterizing such direct investments as investments in a covered fund.

VII. Sponsored and Advised Covered Funds

Recommendation 18: The Agencies should eliminate the requirement that a banking entity include the value of ownership interests in covered funds sponsored or advised by the banking entity and acquired or retained in accordance with the underwriting or market-making exemption towards its aggregate fund limit, per-fund limit and the specific capital deduction required under Section __.12(d) of the Final Rule.

The 2019 Amendments eliminated the requirement that a banking entity include the value of ownership interests in third-party covered funds acquired or retained in accordance with the underwriting or market-making exemption towards its aggregate fund limit and the capital deduction requirement, consistent with the treatment of these interests under the 2013 Final Rule for the per-fund limit.[140] The Agencies explained in the preamble to the 2019 Amendments that "[b]anking entities have had to undertake an often time-consuming process to determine whether an issuer is a covered fund and the security issued is an ownership interest, all for the purpose of ensuring compliance with the aggregate fund limit and capital deduction requirement for the period of time that the banking entity holds the ownership interest as part of its otherwise permissible underwriting and market making activities."[141] The Agencies expressed the view that while "[t]hese compliance challenges are heightened in the case of third-party funds. . . . [A] banking entity can more readily determine whether a fund is a covered fund if the banking entity advises . . . the fund."[142] The Agencies did not eliminate the aggregate fund limit, per-fund limit and capital deduction requirement for sponsored or advised covered funds acquired or retained in accordance with the underwriting or market-making exemption in the 2019 Amendments, but

[138] 12 U.S.C. § 1851(d)(4)(B)(ii).

[139] 85 Fed. Reg. at 12150-51 (Question 87).

[140] Final Rule § __.11(c); 84 Fed. Reg. at 62017.

[141] 84 Fed. Reg. at 62017.

[142] 84 Fed. Reg. at 62017.

stated that they "continue to consider whether the approach being adopted in the [2019 Amendments] may be extended to other issuers, such as funds advised by the banking entity."[143]

We believe that the Agencies should extend the relief granted in the 2019 Amendments and eliminate the requirement that a banking entity include the value of ownership interests in covered funds sponsored or advised by the banking entity and acquired or retained in accordance with the underwriting or market-making exemption towards its aggregate fund limit, per-fund limit and the capital deduction requirement. The same burdens as identified in the 2019 Amendments apply to funds sponsored or advised by a banking entity or its affiliates. Eliminating this requirement with respect to sponsored or advised covered funds would be consistent with Section 13. Just as "Section 13 does not require any per-fund or aggregate limits, or capital deduction, with respect to covered fund ownership interests acquired pursuant to the underwriting and market making exemption in section 13(d)(1)(B),"[144] Section 13 likewise does not require the application of those limits to sponsored or advised covered funds. Indeed, "[a]n exemption from the prohibition on acquiring or retaining an ownership interest in a covered fund for underwriting and market making involving covered fund ownership interests is consistent with and supported by [Section 13]," because "Section 13(d)(1)(B) provides a statutory exemption for underwriting and market making activities and, by its terms, applies to both prohibitions in section 13(a), whether on proprietary trading or covered fund activities."[145] Second, other restrictions contained in the underwriting and market-making exemptions would continue to apply to a banking entity's relationships with and ownership interests in sponsored or advised covered funds where the ownership interests are acquired or retained in accordance with the underwriting or market-making exemption.

VIII. Confirmation of Certain Agency Guidance

Recommendation 19: The Agencies should specifically confirm in the preamble to the final rule that FAQs 5, 14 and 16 are not modified or revoked and that banking entities may continue to rely on them.

The Preamble to the Proposal states that "[t]he proposed rule would not modify or revoke any previously issued staff FAQs, unless otherwise specified."[146] In FAQ 5, the staffs of the Agencies clarified that entities formed to become FPFs should be treated the same as entities formed to become RICs or business development companies during their seeding period.[147] In FAQ 14, the staffs of the Agencies stated that FPFs would not be considered banking entities so long as no banking entity owns 25% or more of the voting securities of the fund after the

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143 84 Fed. Reg. at 62017.

144 84 Fed. Reg. at 62017 & n.575; 12 U.S.C. § 1851(d)(4)(B).

145 84 Fed. Reg. at 62017.

146 85 Fed. Reg. at 12123.

147 *See* Frequently Asked Questions, https://www.federalreserve.gov/supervisionreg/faq.htm#5.

permitted seeding period.[148] In FAQ 16, the staffs of the Agencies provided guidance regarding the seeding period during which RICs and FPFs would not be treated as banking entities subject to the restrictions of the Volcker Rule.[149] These FAQs are consistent with the language of the 2013 Final Rule, which provides that RICs, FPFs and certain other entities will not be an affiliate of a banking entity if certain limitations are complied with.[150] Similar to the Agencies' prior affirmation that FAQs 14 and 16 continued to be valid in the preamble to the 2018 proposed amendments to the 2013 Final Rule,[151] and in line with the Preamble to the Proposal, we urge the Agencies to specifically confirm FAQs 5, 14 and 16 are not modified or revoked and that banking entities may continue to rely on them.

Recommendation 20: The Agencies should specifically confirm in the preamble to the final rule that FAQs 5 and 16 are not modified or revoked with respect to ETFs and that banking entities may continue to rely on them with respect to ETFs.

Authorized Participants ("**APs**") of exchange traded funds ("**ETFs**") serve several critical functions to ensure that the ETF market remains robust and liquid, particularly for ETFs that are not sponsored by a banking entity. These activities may include, among others: (i) assisting the ETF sponsor/organizer in establishing the ETF and seeding newly created ETFs or share classes of existing ETFs; (ii) trading with the ETF issuer to create and redeem ETF shares on behalf of customers or the ETF issuer; and (iii) trading the ETF shares to reduce price dislocations between the ETF components and shares. For newly established ETFs, APs often provide the necessary seed capital to establish the ETF or relevant share class to provide the necessary track record and market liquidity on behalf of the ETF issuer to attract customers. This type of seeding was recognized by the Agencies in the Volcker Rule registered fund seeding provisions and the frequently asked questions (FAQs 5 and 16). Once established, APs continue to serve a critical role in ensuring market liquidity of the ETF. Because APs are the only parties authorized to have direct access to the ETF issuer, customers often seek liquidity directly through the AP rather than the exchange. As such APs are required to stand ready to accept customer redemption or creation requests of any size as part of their service to the ETF issuer and its customers.

The preamble to the 2013 Final Rule recognizes that APs serve a number of these key functions and notes the importance of APs continuing to provide market liquidity of these core asset management products.[152] Specifically, the Agencies recognized that APs "are generally the conduit for market participants seeking to create or redeem shares of the [ETF]" and that APs

[148] *See* Frequently Asked Questions, https://www.federalreserve.gov/supervisionreg/faq.htm#14.

[149] *See* Frequently Asked Questions, https://www.federalreserve.gov/supervisionreg/faq.htm#16.

[150] Final Rule § __.12(b)(1)(ii).

[151] 83 Fed. Reg. at 33444 ("Accordingly, nothing in the proposal would modify the application of the staff FAQs [14 and 16] . . . .").

[152] *See*, *e.g.*, 79 Fed. Reg. at 5607-08.

engage in activities "such as building inventory to 'seed' a new ETF or engaging in ETF-loan related transactions."[153] The Agencies also explained "that banking entities currently conduct a substantial amount of AP creation and redemption activity in the ETF market and, thus, if the rule were to prevent or restrict a banking entity from acting as an AP for an ETF, then the rule would impact the functioning of the ETF market."[154] Banking entity-affiliated APs must be able to continue to serve in these important market functions without causing ETFs to be treated as banking entities thereby prohibiting them from engaging in the activities they were established to conduct. Specifically, we request the Agencies confirm that: (i) the seeding provisions and relevant FAQs (namely FAQs 5 and 16) continue to be available for APs seeding newly launched ETFs, including third party ETFs that rely on APs solely for seed capital, so that APs serving *bona fide* AP activity would not be required to treat the ETF as a banking entity; and (ii) APs that provide market liquidity through creation, redemption or block trading activity engaged in by a market making or underwriting desk that complies with the relevant permitted activity criteria (*e.g.*, reasonably expected near term demand, market risk limits, etc.) would not on their own cause the ETF to become a banking entity for purposes of the Volcker Rule due to the provision of the necessary services provided by the AP.

IX. Voluntary Compliance

Recommendation 21: The Agencies should permit banking entities to voluntarily comply, in whole or in part, with amendments adopted by a final rule implementing the Proposal, rather than the 2013 Final Rule, before the compliance date of the final rule implementing the Proposal, starting on its effective date.

Banking entities are required to comply with the 2019 Amendments by January 1, 2021 but may voluntarily comply, in whole or in part, with the 2019 Amendments prior to the compliance date, beginning on the 2019 Amendments' effective date, January 1, 2020.[155] The Agencies should similarly allow banking entities to voluntarily comply, in whole or in part, with amendments adopted by a final rule implementing the Proposal, rather than with the 2013 Final Rule, before the compliance date of the final rule implementing the Proposal, starting on its effective date. This clarification would provide banking entities and markets generally with flexibility and would minimize potential negative impacts on customers and capital formation if, for example, banking entities needed to delay the launch of new funds until the relevant exclusion or amendments become available.

[153] 79 Fed. Reg. at 5607-08.

[154] 79 Fed. Reg. at 5608.

[155] 84 Fed. Reg. at 61794.