The Effect of the Final Volcker Rule on Funds and Securitizations

On December 10, 2013, the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System (Board), the Office of the Comptroller of the Currency (OCC), the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) adopted the final version[1] of the so-called Volcker Rule (final rule), the regulation proposed in 2011 (proposed rule)[2] that implements Section 619[3] of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Volcker Rule (both as originally proposed and as adopted) and Section 619 limit the ability of banks subject to US regulation and their affiliates (banking entities) to engage in proprietary trading and to own and engage in transactions with privately held funds, including many securitization vehicles.[4] The limitations on transactions with funds are often described by legislators as intended to affect hedge funds and private equity funds.

This alert will discuss only the provisions of the final rule that relate to funds. The final rule modifies the restrictions on funds proposed in 2011 in several important ways: it broadens and makes more specific the exemptions to the general prohibition on owning interests in or sponsoring funds (covered funds) that rely for their exemption from registration as an investment company on Section 3(c)(1) or 3(c)(7) under the Investment Company Act of 1940 (1940 Act).[5] Among the securitization vehicles completely excluded by the final rule from the definition of "covered fund" are those that benefit from the final version's elaboration of the loan securitization exemption found in Section 619, including many collateralized loan obligations. It also narrows the scope of the provision that treats commodity pools as covered funds, makes more specific the intended exemption for agency or fiduciary relationships with covered funds, and clarifies the manner in which the prohibition (so-called Super 23A) on transactions between covered funds and banking entities is intended to apply. One important effect of these changes is to limit the broad application of Super 23A so that it now applies only to vehicles that have not been completely excluded from the definition of "covered fund" and that instead operate under one of a number of partial exceptions to the prohibition on ownership or sponsorship by banks or their affiliates.

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[1] Available at the website of each agency, including the Board's: http://www.federalreserve.gov/newsevents/press/bcreg/20131210a.htm, which contains links to the various documents.

[2] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68846 (Nov. 7, 2011).

[3] Sometimes also referred to as the Volcker Rule. This alert will use that term occasionally to refer to the basic notion of limiting the activities of banks and their affiliates in this particular fashion.

[4] The term "funds" will be used throughout with the intention of including securitization vehicles where appropriate under the final rule.

[5] For the remainder of this alert, all references to Section 3(c)(1) or 3(c)(7) should be understood as references to those sections of the 1940 Act.

Entities Covered

The institutions that are subject to the Volcker Rule remain unchanged from the proposed rule. Banks insured by the FDIC, bank holding companies, non-US banks with branches or agencies in the US and entities under common control with them must all comply. The Volcker Rule refers to any such entity as a "banking entity," even though it might not itself be a bank.

Dates by Which Conformance Is Required

The final rule becomes effective on April 1, 2014, but the Board has by separate order postponed the date by which conformance with the final version is required until July 21, 2015. It did this by utilizing its authority to grant three separate one-year extensions to banking entities that apply. Although the order says nothing on this point, banking entities should now have the opportunity to request up to two one-year extensions from July 21, 2015 based on their individual circumstances.

During the conformance period, the Board expects good-faith efforts to achieve compliance, which it describes in the order as requiring analysis, development of a plan, termination of prohibited activities, divestiture of impermissible investments, adaptation of structures to comply with risk-retention requirements and development of record-keeping systems. "Moreover, banking entities should not expand activities and make investments during the conformance period with an expectation that additional time to conform those activities or investments will be granted."[6]

Limitations on Relationships With Funds and Securitization Vehicles

Covered Funds. Like the proposed rule, the final rule generally treats as a covered fund any entity that would be an investment company under 1940 Act but for the application of Section 3(c)(1) or 3(c)(7). As a consequence, the term "covered fund" potentially includes vehicles used either for ordinary corporate structuring purposes or for numerous kinds of pooled investments (such as asset-backed securities), and not just private equity funds or hedge funds.

The term "covered fund" also is defined to include a commodity pool that either (i) relies on the exemption contained in Rule 4.7 of the regulations of the CFTC or (ii) has a registered commodity pool operator, has qualified eligible persons[7] as holders of substantially all of its interests and has not publicly offered any of its interests to anyone who is not a qualified eligible person.[8] Rule 4.7 is a close analogue to Sections 3(c)(1) and 3(c)(7), as is the portion of the definition referred to in clause (ii) above making its use in the definition of "covered fund" somewhat understandable. However, the reference in the definition to reliance on the exemption in Rule 4.7 creates some uncertainty. The definition of "non-United States person" that is found in Rule 4.7 is what many pools that are offered only outside the United States rely

[6] Federal Reserve Board, Order Approving Extension of Conformance Period (Dec. 10, 2013).

[7] As defined in Rule 4.7(a)(2) or 4.7(a)(3) of the CFTC's regulations.

[8] §__.10(b)(i) and (ii) of the Common Rules. "Common Rules" is the term used to designate the regulations that apply to all entities subject to the Volcker Rule, regardless of their federal regulator. On the remainder of this alert, all citations in the form "§__.10" or "Section __.10" are references to those provisions in the Common Rules. A banking entity must assess whether a vehicle is treated as a covered fund because of its commodity pool status whenever it is deciding whether it can (i) acquire an interest, (ii) retain an interest, or (iii) act as a sponsor. Preamble, p. 492. In addition to the point about timing that the Preamble is making, one could also add that such an evaluation should be made whenever a transaction is contemplated that might be subject to Super 23A.

upon for exemption from regulation as commodity pools. This raises the possibility that reliance on that definition could render a non-US pooled investment a covered fund. This uncertainty is removed by the Preamble to the final rule, which appears to treat as covered under the first prong of the definition only a commodity pool that is exempt under Rule 4.7(a)(1)(iii). The Preamble then also points out that only registered commodity pool operators may rely on the Rule 4.7 exemption, which makes it clear that general reliance on the definition of "non-United States person" is not the sort of reliance on Rule 4.7 that is intended to be covered by the final rule.

Section __.10(c)(1) provides some help to some non-US commodity pools (as well as to certain other kinds of vehicles), since it excludes from the definition of "covered fund" foreign public funds, which are defined as non-US funds that are authorized to sell interests to retail customers in the issuer's home jurisdiction and that sell such interests "predominantly through one or more public offerings outside of the United States." The definition of "foreign public fund" is further limited if the issuer is sponsored by a banking entity located or organized in the United States. To rely on the foreign public fund exemption, a US sponsor must ensure that the fund issuer sells predominantly to persons other than the issuer, the sponsor, and affiliates, employees and directors of the issuer or the sponsor. The exemption also contains a special definition of "public offering" for these purposes.

One additional type of entity is defined as a covered fund, regardless of whether it is a commodity pool or actually relies on Section 3(c)(1) or 3(c)(7), namely one (i) that is both "organized or established" outside the US and controlled by a banking entity that is "located in or organized under the laws of the United States"; (ii) whose ownership interests are sold solely outside the US except for an ownership interest sold to the controlling banking entity or one of its affiliates; (iii) that holds itself out as an "entity or arrangement" that raises money to acquire securities for trading or for resale or other disposition[9]; (iv) whose sponsor is the banking entity that controls it or one of the banking entity's affiliates; and (v) that would have to rely on Section 3(c)(1) or 3(c)(7) if it were subject to that Act.[10]

The Consequences of Being a Covered Fund. Once an entity is determined to fall under the definition of "covered fund," the ability of a banking entity to hold ownership interests in it or sponsor it, underwrite or make a market in ownership interests issued by the fund or engage in financial transactions with the fund is potentially restricted. The provision that creates the ownership and sponsorship restrictions is found in §__.10(a)(1); §__.14 sets forth special affiliate transaction rules based upon Sections 23A and 23B of the Federal Reserve Act.

The ultimate application of these provisions depends upon whether a complete exemption from the definition of "covered fund" is available. If not, then it must be determined whether a partial exemption is available from the prohibition on the ownership or sponsorship of a covered fund and whether the conditions on the application of the special affiliate transaction rules are satisfied. Making these determinations will generally also require the careful review of numerous and complex definitions and cross-references. What follows generally discusses each of these determinations.

[9] The phrase "resale or other disposition" refers to merchant-banking activities.

[10] §__.10(b)(1)(iii). The Preamble states that such a foreign fund is a covered fund with respect to its US sponsor but not with respect to a non-US bank that acquires an ownership interest in it "solely outside the United States." Preamble, p. 485-6.

Numerous Exemptions From the Definition of "Covered Fund." In a significant change from the proposed rule, the final rule contains numerous specific exemptions from the definition of "covered fund" rather than mere exceptions from the prohibition on ownership and sponsorship. This permits more affiliate transactions between banking entities and various types of funds to be carried out free of the prohibitions found in Super 23A, which are now set forth in §__.14(a). In their proposed form, these prohibitions would have rendered difficult or impossible many common financial transactions between banking entities and funds they were otherwise permitted to own or sponsor. The numerous exemptions from these prohibitions appear to reflect agreement with the view of many commenters that using reliance on Section 3(c)(1) and 3(c)(7) to identify the pooled investment vehicles subject to the Volcker Rule resulted in the regulation of many vehicles whose activities are unlike those the statute sought to regulate.

In addition to the exclusion for foreign public funds mentioned above, the final rule excludes from the definition of "covered fund" wholly-owned subsidiaries, joint ventures and acquisition vehicles. The exclusion for wholly owned subsidiaries permits structures to qualify even if up to five percent of the subsidiary's ownership interest is held by employees and directors of a relevant banking entity, including former employees and directors who acquired their interest in the course of their service; in addition, up to 0.5 percentof the subsidiary's ownership interests may be held by a third party "for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns."[11] The principal reason given in the Preamble for excluding wholly owned subsidiaries is their "corporate and administrative convenience" and their lack of engagement in "the investment activities prohibited by [Section 619]."[12]

Holding an ownership interest in joint ventures is permitted if there are no more than 10 unaffiliated co-venturers and the activities of the venture are permissible for the relevant banking entity or its affiliate but do not involve either "investing in securities for resale or other disposition,"[13] or holding itself out as being involved in such activities. The reference to investing in securities for resale is explained in the Preamble as being intended to prevent banking entities from using the joint venture exemption to hold merchant banking investments.

There is little substantial discussion on the exemption for the ownership of an acquisition vehicle. The principal constraint on such a holding is that it may last only as long as is necessary to effectuate a *bona fide* merger or acquisition.

The remaining exemptions from the definition of "covered fund" cover a wide variety of structures and relate essentially to the specific types of activities for which these structures are employed. They include foreign pension or retirement funds,[14] insurance company separate accounts, bank-owned life insurance, loan securitizations, certain asset-backed commercial paper (ABCP) conduits, certain covered bonds,

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[11] Section __.10(c)(2)(ii).

[12] Preamble, p. 514. Section 619 of the Dodd-Frank Act, codified as Section 13 of the Bank Holding Company Act, is the statutory expression of the Volcker Rule.

[13] Section __.10(c)(3)(ii).

[14] The Preamble points out that many US pension funds will not be covered funds because they can rely on Section 3(c)(11) of the 1940 Act, rather than on Section 3(c)(1) or 3(c)(7).

small business investment companies, public welfare funds, registered investment companies, business development companies, issuers formed by the FDIC in its capacity as receiver or conservator, and any other structure determined by the proper agencies to be excluded from the definition. The discussion below will focus on the exemptions for loan securitizations and ABCP conduits.

Loan Securitizations. To qualify for this exemption, a securitization vehicle must hold only "loans" as defined in the final rule, rights and assets that are incidental or relate to servicing or the distribution of proceeds, interest rate and foreign exchange derivatives, and special units of beneficial interest and collateral certificates (Eligible Loan Assets). The definition of "loans" in §__.2(s) includes loans, leases, extensions of credit[15] and secured or unsecured receivables, so long as none of these assets are in the form of a security or a derivative.[16] The definition of "security" used in the final rule is the one found in Section 3(a)(10) of the Securities Exchange Act of 1934. The definition of "derivative,"[17] on the other

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[15] The following comments from the Preamble shed some light on the intended scope of the term "extensions of credit": "Congress recognized that repurchase agreements and securities lending agreements are loans or extensions of credit by including them in the legal lending limit." (Preamble, fn. 217) "The definition of 'loan' does not specify the type, nature or structure of loans included within the definition, other than by excluding securities and derivatives. In addition, the definition of loan does not limit the scope of parties that may be lenders or borrowers for purposes of the definition. The Agencies note that the parties' characterization of an instrument as a loan is not dispositive of its treatment under the federal securities laws or federal laws applicable to derivatives. The determination of whether a loan is a security or a derivative for purposes of the loan definition is based on the federal securities laws and the Commodity Exchange Act. Whether a loan is a 'note' or 'evidence of indebtedness' and therefore a security under the federal securities laws will depend on the particular facts and circumstances, including the economic terms of the loan. For example, loans that are structured to provide payments or returns based on, or tied to, the performance of an asset, index or commodity or provide synthetic exposure to the credit of an underlying borrower or an underlying security or index may be securities or derivatives depending on their terms and the circumstances of their creation, use, and distribution. Regardless of whether a party characterizes the instrument as a loan, these kinds of instruments, which may be called 'structured loans,' must be evaluated based on the standards associated with evaluating derivatives and securities in order to prevent evasion of the restrictions on proprietary trading and ownership interests in covered funds." (Preamble, pp. 530-1)

[16] The Preamble contains some additional helpful elaboration of what should count as a loan: "The Agencies believe that the final rule excludes from the definition of covered fund typical structures used in the most common loan securitizations representing a significant majority of the current securitization market, such as residential mortgages, commercial mortgages, student loans, credit card receivables, auto loans, auto leases and equipment leases. Additionally, the Agencies believe that esoteric asset classes supported by loans may also be able to rely on the loan securitization exclusion, such as time share loans, container leases and servicer advances." Preamble, pp. 570-1.

[17] "Derivative. (1) Except as provided in paragraph (h)(2) of this section, derivative means: (i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); (ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled; (iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)); (iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i)); (v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and (vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b)); (2) A derivative does not include: (i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or (ii) Any identified banking product, as defined in section 402(b) of the

hand, is quite broad and seems to include instruments, such as foreign exchange forwards, that are excluded from the definition of "swap" for most purposes by the Treasury Department determination of December 2012.[18]

The only securities (including asset-backed securities) or interests in securities that such a loan securitization vehicle may hold are cash equivalents held for ease of servicing or distributions and securities received "in lieu" of debts previously contracted in the form of permissible loans. Presumably, "in lieu" means "in total or partial satisfaction." A loan securitization vehicle may not hold any commodity forward contracts (other than, presumably, foreign exchange forwards). The restrictions on the types of securities that may be held in a loan securitization will limit the types of investments that collateralized loan obligations (CLOs) may hold while relying on the loan securitization exemption. This may result in the structuring of some CLO transactions so that reliance on Section 3(c)(1) or Section 3(c)(7) of the 1940 is not required, or possibly lead to a bifurcation of the market between CLOs that can be purchased by banking entities and those that cannot. Collateralized debt obligations will not be able to rely on the loan securitization exemption at all and will perhaps become a specialized investment vehicle for companies unaffiliated with banks.[19]

Certificates of beneficial interest and collateral certificates may be held by loan securitization vehicles, but only if a number of conditions are satisfied. The certificates themselves must be issued by a special purpose vehicle that satisfies the loan securitization requirements and was established "under the direction of" the same entity that established the loan securitization vehicle that will hold the certificates, must transfer only economic risks and benefits that the holder of the certificates could hold directly under the loan securitization exemption, and must have been created "solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization."[20]

ABCP Conduits. The exemptive relief afforded to ABCP conduits is in effect an extension of the relief afforded to loan securitizations. An ABCP conduit may escape treatment as a covered fund if it holds only Eligible Loan Assets and asset-backed securities that are backed only by Eligible Loan Assets, acquires any such asset-backed securities from the respective issuer or underwriter in the course of an original issuance, issues only residual interests and commercial paper with a maximum legal maturity of 397 days[21], and has entered into arrangements with a regulated liquidity provider for 100 percent liquidity

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Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a))." Section __.2(h).

[18] For purposes of the loan securitization exemption, the term "foreign exchange derivatives" as used in the exemption presumably includes all kinds of "derivatives," as long as the term "foreign exchange" or "foreign currency" appears in the name of the applicable derivative and so long as the derivative satisfies the requirements of §__.10(c)(8)(iv). In a potentially important limitation, the exception requires that the derivatives "directly" relate to the assets held by the loan securitization vehicle and reduce the interest rate or foreign currency risks associated with those assets.

[19] CLOs and other complex securitization structures may at times need to evaluate not only the availability of the loan securitization exemption but also the applicability of the definitions of "ownership interest" and "sponsor."

[20] Section __.10(c)(8)(v).

[21] This date was chosen to match the maximum permissible maturity of paper held by money market funds. Preamble, p. 567.

coverage for its commercial paper.[22] In essence, an exempt conduit is a loan securitization vehicle that, in exchange for having complete liquidity coverage, is permitted to hold limited types of asset-backed securities, as well as loans.

The meaning of "liquidity coverage" is clarified only in the Preamble:

> The liquidity coverage may be provided in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or similar arrangement and 100 percent liquidity coverage means that, in the event the qualifying asset-backed commercial paper conduit is unable for any reason[23] to repay maturing asset-backed securities issued by the issuing entity, the total amount for which the regulated liquidity provider may be obligated is equal to 100 percent of the amount of asset-backed securities outstanding plus accrued and unpaid interest. In addition, amounts due pursuant to the required liquidity coverage may not be subject to the credit performance of the asset-backed securities held by the qualifying asset-backed commercial paper conduit or reduced by the amount of credit support provided to the qualifying asset-backed commercial paper conduit. Under the final rule, liquidity coverage that only funds an amount determined by reference to the amount of performing loans, receivables, or asset-backed securities will not be permitted to satisfy the liquidity requirement for a qualifying asset-backed commercial paper conduit.[24]

Neither the Preamble nor the Common Rules discuss whether an ABCP conduit may also benefit from credit (as opposed to liquidity) support provided by a regulated liquidity provider or anyone else. Most of the requirements that make up the definition of "qualifying asset-backed commercial paper conduits" are phrased in a manner that appears to establish what is permissible and exclude all else. There would not appear to be any reason for excluding credit support, however, unless the credit support was in the form of a credit default swap, which would not be permissible given the prohibition on all derivatives other than interest and foreign exchange swaps. An additional argument in favor of permitting credit support derives from the fact that the ownership limitations in the *de minimis* exception available to banking entities may be exceeded to the extent required to comply with risk-retention requirements. The proposed risk-retention requirements for ABCP conduits contemplate the existence of credit support.[25]

In the event that an ABCP conduit does not qualify for this particular exemption from the definition of "covered fund," the Preamble acknowledges that the exemption is not exclusive, and that, accordingly,

[22] A liquidity provider is regulated if it is a depository institution; a bank holding company or a subsidiary thereof; a savings and loan holding company substantially all of whose activities are permissible for financial holding companies or a subsidiary thereof; a foreign bank subject to Basel capital requirements in its home country; the United States; or a foreign sovereign. Section __.10(c)(9)(ii) of the Common Rules.

[23] This appears to include bankruptcy, but nothing elsewhere in the Preamble or the final rule clarifies this point.

[24] Preamble, p. 567.

[25] The proposed risk-retention rule can be found on several websites, including at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130828a1.pdf.

the conduit may rely upon any otherwise applicable exemption under the 1940 Act other than Section 3(c)(1) or 3(c)(7).[26]

Exemptions Other Than Exclusions from the Definition of "Covered Fund." Several types of relief provided by the final rule are expressed, not as exclusions from the definition of "covered fund," but as exceptions to the prohibition on ownership or sponsorship. This is the type of relief that was provided in the proposed rule and proved to be insufficiently broad. Among the exceptions is one that relates to agency and fiduciary activities, and another that relates to activities that take place outside the US. Others will be discussed below under the heading *Other Partial Exceptions for Ownership and Sponsorship of Covered Funds.*

Section__.10(a)(2) excludes from the ownership prohibition in §__.10(a)(1) the holding of interests in a covered fund in an agency, brokerage or custodial capacity, as long as the agent does not retain for itself a beneficial interest. Section __10(a)(2) provides no exclusion, however, from the prohibition on the sponsorship of a covered fund. Also excluded in §__.10.(a)(2) is a banking entity's ownership of interests in a covered fund acquired in the course of collecting a debt previously contracted in good faith, which must be divested "as soon as practicable," as well as such an entity's acting as a fiduciary for a customer that is not a covered fund, as long as the entity does not itself retain a beneficial interest for itself. There is a further exclusion for the holding of interests in covered funds "through" a pension plan or similar plan organized under US or foreign law and operated for a banking entity, if the ownership interest is "held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof)." The exception in §__.10(a)(2)(ii) for interests held through domestic and foreign pension plans contrasts with the exemption of certain US plans from Section 3(c)(11) of the 1940 Act and the exclusion of foreign pension plans from the definition of "covered fund" by §__.10(c)(5). The contrast seems to suggest that the word "through" in §__.10(a)(2)(ii) may be the most important, indicating that the banking entity served by the pension plan is treated as holding ownership interests, albeit indirectly. If that is correct, then perhaps the concern being addressed is the possible application of the Volcker Rule to the banking entity for whose employees the plan is operated. In other words, the exception may be intended to avoid problems of attribution.[27] It could, however, also be applied to domestic plans that do not otherwise satisfy the requirements of Section 3(c)(11).[28]

Another exception to the prohibition in §__.10(a)(1) on the ownership and sponsorship of a covered fund singles out non-US activities of banking entities affiliated with non-US banks that have activities in the

[26] Preamble, p. 570.

[27] An indirect confirmation of this view is found in the following cautionary remark in the Preamble: "The Agencies note that this provision does not permit joint investments between the banking entity and its employees. Rather, this provision is intended to enable banking entities to maintain deferred compensation and other similar plans formed for the benefit of employees. The Agencies recognize that, since it is possible an employee may forfeit its interest in such a plan, the banking entity may have a residual or reversionary interest in the assets referenced under the plan. However, other than such residual or reversionary interests, a banking entity may not rely on this provision to invest in a covered fund." Preamble, footnote 1652.

[28] In addition, the way § __.10(a)(2) is written suggests that a domestic pension plan that is not exempt under Section 3(c)(11) of the 1940 Act could itself be a covered fund; it also leaves open the question of whether such a non-qualifying plan should be treated as a banking entity in the first place.

US but whose activities and assets are largely outside the US.[29] Understanding the scope of this exception can be important not only for non-US banks but also for fund organizers in the US whose activities encompass the structuring and marketing of offshore investment vehicles. That scope is discussed more fully in the Appendix.

Other Partial Exceptions for Ownership and Sponsorship of Covered Funds. Despite the general prohibition on owning or sponsoring a covered fund found in §__.10(a)(1), banking entities may hold ownership interests in and sponsor covered funds, subject to limitations. The definition of "ownership interest" has been expanded in the final rule to include many types of remuneration obtained, directly or indirectly, with respect to the ownership or operation of a covered fund.[30] This expansion may make some of the partial exceptions less useful. Something resembling a carried interest is still excluded from the definition of "ownership interest" in the final rule, but it is now called a "restricted profit interest" and has been modified to permit limited contributions to the covered fund by the holder of a restricted interest. The definition of "sponsor" remains unchanged from the proposed rule.[31]

The basic requirements for sponsorship coupled with *de minimis* ownership remain unchanged. Any banking entity that wishes to hold an ownership interest in or sponsor a covered fund must (i) provide *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services, (ii) organize and offer the fund only in connection with providing such services to customers pursuant to a "credible plan," (iii) limit its ownership interest to the *de minimis* amounts specified in Section __.12, comply with Super 23A, (iv) not guarantee or insure the performance of the fund, (v) not allow the fund to use a version of the owner/sponsor's name or the word "bank," limit the ownership interests held by its directors or

[29] Section__.13(b).

[30] "(i) *Ownership interest* means any equity, partnership, or other similar interest. An "other similar interest" means an interest that: (A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event); (B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund; (C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event); (D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests); (E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; (F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or (G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (d)(6)(i)(F) of this section." Section __.10(d)(6).

[31] "*Sponsor* means, with respect to a covered fund: (i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section; (ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or (iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name." Section __.10(d)(9).

employees and the directors or employees of its affiliates, and provide certain disclosures.[32] Although the *de minimis* provision is also an exception to §__.10(a)(1), it was not discussed above with the agency/fiduciary exception because it is subject to the special requirements mentioned above, one of which is compliance with Super 23A.

New provisions of the final rule cover more fully the holding of interests during the time a covered fund is being organized and during periods of underwriting and market-making.[33] Ownership interests held in connection with underwriting and market-making activities are included in the calculation of both a banking entity's holdings in each individual fund and in all covered funds if the banking entity acts as sponsor, investment adviser or commodity trading advisor with respect to the fund; if it holds ownership interests it acquired under the general provisions of the Volcker Rule, as a securitizer or under the risk-retention rules; or if it guarantees the performance of the covered fund or of any covered fund in which the covered fund itself holds an interest. Otherwise, interests held in connection with underwriting and market-making are counted only with respect to the aggregate ownership limitation and in connection with required deductions from Tier 1 capital.

The final rule sets out the calculation of ownership amounts and adjustments to capital in more detail than did the proposed rule. The additional detail includes increased differentiation between different time periods in the existence of a covered fund, as well as special rules for registered investment companies, foreign public funds, risk-retention requirements, foreign banking entities and multi-tier structures (master feeder and fund-of-funds investments). The basic limits remain, however, at three percent of the value of an individual fund and three percent of Tier 1 capital as an aggregate limit.

An additional exception to the prohibitions found in §__.10(a)(1) is found in §__.11(b). It provides relief for the sponsorship of vehicles that issue asset-backed securities and the ownership of an interest in such vehicles. Like the *de minimis* provision, §__.11(b) requires compliance with a number of restrictions, including the *de minimis* ownership limitations themselves. It does not require, however, that the offering of securities and the holding of an ownership interest be in connection with the provision of *bona fide* trust, fiduciary, investment advisory or commodity trading advisory services. This additional exception is of use only for affiliates of issuers that are not completely excluded from the definition of "covered fund."

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[32] Note that the *de minimis* ownership rules apply only if a banking entity organizes and offers the covered fund for certain purposes and in a certain manner: "The final rule requires that a covered fund be organized and offered pursuant to a written plan or similar documentation outlining how the banking entity (or an affiliate thereof) intends to provide advisory or similar services to its customers through organizing and offering the fund. As part of this requirement, the plan must be credible and indicate that the banking entity has conducted reasonable analysis to show that the fund is organized and offered for the purpose of providing bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to customers of the banking entity (or an affiliate thereof) and not to evade the restrictions of section 13 of the BHC Act [Section 619]. The language of the final rule also adopts the statutory requirements (and modifications related to commodity pools as discussed above) that the banking entity provide bona fide trust, fiduciary, investment advisory, or commodity trading advisory services, and that the covered fund be organized and offered only in connection with the provision of those services. Banking entities provide a wide range of customer-oriented services which may qualify as bona fide trust, fiduciary, investment advisory, or commodity trading advisory services." Preamble, p. 644.

[33] This exception is also expressed as an exception to §__.10(a) but was not discussed together with the agency/fiduciary exception because it is closely related to the exceptions for underwriting and market-making in the portion of the Common Rules that restrict proprietary trading and because most of the exception deals with its effects on calculating the amount of the ownership interests held by an entity that relies on it. In substance this exception resembles the agency/fiduciary exception.

Section __.11(b)(2) identifies some of the potential beneficiaries of this provision as securitizers, as that term is defined in Section 15G of the Securities Exchange Act of 1934. Since securitizers often do not organize asset-backed securitization vehicles in connection their fiduciary or investment advisory activities, the relief otherwise granted for *de minimis* holdings of ownership interests in covered funds would not be available to them in such cases.[34]

Affiliate Transactions -- Super 23A and Section 23B. The increased number of clear exemptions in the final rule from the definition of "covered fund" substantially reduces previous concerns about the application of Super 23A. Because Super 23A absolutely prohibits types of transactions between banking entities and certain covered funds that are otherwise only limited, but still permitted under Section 23A of the Federal Reserve Act and the Board's Regulation W, its wide application as contemplated under the proposed rule would have been quite disruptive.

The basic prohibition imposed by Super 23A is found in §__.14(a)(1) and differs in its formulation (as opposed to the effective scope of its application) only in minor ways from the prohibition set forth in the proposed version:

> Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to §__.11 of this subpart, or that continues to hold an ownership interest in accordance with §__.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

As noted above, several types of relief from the operation of the ownership and sponsorship prohibition in §__.10(a)(1) are not phrased as exclusions from the definition of "covered fund." One of those exceptions is the agency/fiduciary exception. Another is the exception for transactions that are solely outside the US. The latter is discussed below in the Appendix. Since Super 23A is intended to limit transactions between a banking entity and a covered fund, analyzing the agency/fiduciary exception is a useful tool for understanding in general how Super 23A can affect entities that must make use of the exceptions to the ownership and sponsorship prohibition in §__.10(a)(1).

Super 23A lists a number of relationships between a banking entity and a covered fund that will trigger its application. The terms "investment manager, investment adviser, commodity trading advisor, or sponsor" are fairly clear, as is the phrase "organizes and offers a covered fund pursuant to §__.11," although the phrase "directly or indirectly" could raise occasional issues. The next reference in Super 23A is to holding an ownership interest in accordance with §__.11(b). The meaning of that phrase is also fairly clear. Section __.11(b) deals with sponsoring or holding an ownership interest in a vehicle that issues asset-backed securities as long as there is compliance with the various restrictions that apply to *de minimis* interests in covered funds. Among those restrictions is an explicit requirement of compliance with Super 23A. It is less clear, however, how the relationship between the reference to §__.11(b) and the phrase

[34] The use of the term "securitizer" in this context may in some instances raise implications about the scope of the term "sponsor."

"organizes and offers a covered fund pursuant to §__.11" is to be understood. Since §__.11(b) is already mentioned separately, but only in connection with the retention of ownership interests, this reference to organizing and offering should probably be understood as triggering the application of Super 23A independently of the holding of an ownership interest of the type referred to in §__.11(b), even if the triggering could be redundant in some cases.

The portion of Super 23A found in Section __.14(a)(2)(i) in turn excludes from the operation of the prohibition in §__.14(a)(1) the acquisition of any ownership of interests in a covered fund permitted by §__.11, §__.12 or §__.13.[35] Consequently, ownership interests held pursuant to §__.11(a), the *de minimis* provision, and §__11.(c), the partial exemption for underwriting and market-making, would appear to be excluded from the operation of Super 23A, as would the holding of interests pursuant to §__.11(b). However, the acquisition and retention of ownership interests is only one of the kinds of transactions that would be prohibited pursuant to Super 23A. From the permissibility of holding such ownership interests it would follow, then, that the reference in §__.14(a)(1) to the ownership of interests pursuant to §__.11(b) is there to trigger the operation of Super 23A with respect to prohibitions that do not relate simply to the retention of ownership interests. In other words, even though the holding of an ownership interest pursuant to §__.11(b) is excluded from the prohibitions of Super 23A, it triggers that prohibition with regard to relationships other than ownership. In addition, despite the general exclusion from the operation of Super 23A of any ownership interests held pursuant to §§__.11, __.12 or __.13, it similarly follows that, if any of the other relationships are present that can trigger the application of Super 23A, then Super 23A can still apply to prohibit transactions other than the permissible ownership transactions.

The relationships permitted by the agency/fiduciary exception can trigger such an application to the extent they also involve something other than the retention of an ownership interest, such as serving directly or indirectly as investment adviser, investment manager, commodity trading advisor or sponsor to the applicable covered fund, or organizing and offering the fund. If these relationships exist in a particular case[36] and in fact trigger the prohibitions of Super 23A, the relationships could be significantly affected, since the prohibitions apply, among other things, to the extension of credit to the applicable covered fund and to the purchase of assets from it.

Despite the above analysis, it might appear odd for entities that rely on the agency/fiduciary exception to be affected by Super 23A. The Preamble contains language that generally suggests that Section __.10(a)(2) is intended to take the relationships it describes, such as the agency/fiduciary exception, largely out of the scope of the Volcker Rule:

[35] Properly conducted prime brokerage transactions are also excluded from Super 23A by §__.14(a)(2)(ii). Prime brokerage transaction is defined in §__.10(d)(7) as "any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act ..., that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support."

[36] The Preamble has the following to say about delegating advisory functions: "The Agencies believe that a banking entity that delegates its responsibility to act as sponsor, investment manager, or investment adviser to an unaffiliated party would still be subject to the limitations of section 13(f) [Section 619] if the banking entity retains the ability to select, remove, direct, or otherwise exert control over the sponsor, investment manager, or investment adviser designee." Preamble, p. 753.

> Because these activities do not involve the banking entity engaging in an activity intended or designed to take ownership interests in a covered fund as principal, they do not appear to be the types of activities that section 13 [Section 619]of the BHC Act was designed to address. However, the Agencies note that in order to prevent a banking entity from evading the requirements of section 13 and the final rule, the exclusions for these activities do not permit a banking entity to engage in establishing, organizing and offering, or acting as sponsor to a covered fund in a manner other than as permitted elsewhere in the final rule. The Agencies intend to monitor these activities and investments for efforts to evade the restrictions in section 13 of the BHC Act and the final rule on banking entities' investments in and relationships with covered funds.[37]

A close reading of this language suggests, however, that Section __.10(a)(2) puts only certain ownership relationships outside the Volcker Rule. If that is correct, then the Volcker Rule still applies to any non-ownership relationship (e.g., sponsorship) by such entities with a covered fund, and Super 23A would apply (if its preconditions are satisfied) to the non-ownership aspects of the agency/fiduciary relationship. The possibility of such an application may be enhanced by the fact that the holdings excluded by §__.10(a)(2) are not clearly either included or excluded by the definition of "ownership interest."[38]

In addition to raising issues about the application of Super 23A, the Preamble clarifies the scope of the prohibition expressed by Super 23A. Footnote 1220 in the Preamble reminds readers that in one respect Super 23A is broader than might appear:

> In addition, section 608 of the Dodd-Frank Act added credit exposure arising from securities borrowing and lending or a derivative transaction with an affiliate to the list of covered transactions subject to the restrictions of section 23A of the F[ederal] R[eserve] Act, in each case to the extent that such transaction causes a bank to have credit exposure to the affiliate. See 12 U.S.C. 371c(b)(7) and (8). As a consequence, interaffiliate hedging activity within a banking entity may be subject to limitation or restriction under section 23A of the F[ederal] R[eserve] Act.

The Preamble also makes clear that the existing statutory and regulatory limitations and exemptions to the definition of "covered transaction," the kind of transaction to be prohibited by Super 23A, are not incorporated by Super 23A. In other words, what counts as a covered or prohibited transaction is anything referred to by the definition of "covered transaction" without regard to any limitations or exemptions contained elsewhere, such as the exemption for intraday extensions of credit.

On a more positive note, the Preamble points out that Super 23A does not prohibit certain indirect affiliate transactions despite the fact that such transactions are limited by Section 23A itself and Regulation W:

> Similarly, the final rule incorporates the statutory restriction as written, which provides that a banking entity that serves in certain specified roles may not enter into a transaction with a covered fund that would be a covered transaction as defined in section 23A of the F[ederal]

[37] Preamble, p. 470.

[38] There are numerous other ambiguities regarding the interrelationships between §__.10(a)(2), the definition of "ownership interest," the various exemptions for pension plans and the interaction of the definition of "covered fund" with the definition of "banking entity." These ambiguities will need to be carefully parsed when reliance on §__.10(a)(2) proves necessary.

> R[eserve] Act as if the banking entity were a member bank and the covered fund were an affiliate thereof. There are certain occasions when the restrictions of section 23A apply to transactions that involve a third party other than an affiliate of a member bank. For example, section 23A would apply to an extension of credit by a member bank to a customer where the extension of credit is secured by shares of an affiliate. The Agencies believe that these transactions between a banking entity and a third party that is not a covered fund are not covered by the terms of section 13(f) [of the Bank Holding Company Act], which (as discussed above) make specific reference to transactions by the banking entity with the covered fund. A contrary reading would prohibit securities margin lending, which Congress has specifically addressed (and permitted) in other statutes. There is no indication in the legislative history that Congress intended section 13(f) to prohibit margin lending that occurs in accordance with other specific statutes. Thus, section 13(f) does not prohibit a banking entity from extending credit to a customer secured by shares of a covered fund (as well as, perhaps, other securities) held in a margin account. However, the Agencies expect banking entities not to structure transactions with third parties in an attempt to evade the restrictions on transactions with covered funds, and the Agencies will use their supervisory authority to monitor and restrict transactions that appear to be evasions of section 13(f).[39]

There is an additional affiliate transaction limitation that supplements Super 23A, namely the provision in §__.14(b) that is based on Section 23B of the Federal Reserve Act. This provision applies under the same conditions that govern the application of Super 23A but is less problematic because it in effect requires only that transactions between a banking entity and a covered fund be at arm's length. Nevertheless, there may be circumstances in which this limitation conflicts with affiliate transaction requirements imposed by other statutes or regulatory schemes.

Conclusion

The provisions in the final rule governing the relationships between banking entities and covered funds have been made more accommodating by the use of numerous exclusions from the definition of "covered fund," including those relating to loan securitizations and ABCP conduits. If a vehicle does not benefit from such exclusions, successfully operating within the exceptions phrased as exception to §__.10(a)(1) requires more attention to detail, including with respect to the application of Super 23A. It remains to be seen whether the final rule captures and properly curtails the perceived risks intended to be covered by the Dodd-Frank Act or whether it just transfers risk to other parts of the financial system.

APPENDIX

Non-US Banks: "Solely Outside the US" and Super 23A

The practical effect of the "solely outside the US" exception is somewhat unclear, given the fact that a non-US fund is exempt from the 1940 Act on jurisdictional grounds and therefore does not, in the first instance at least, rely on Section 3(c)(1) or 3(c)(7) for that relief. This jurisdictional exemption should be available, since the originally proposed and somewhat vague inclusion as a covered fund of non-US funds relying on exemptions like 3(c)(1) and 3(c)(7) is no longer in the final rule. Nothing in the final rule or the Preamble suggests that the relevant exemption from the 1940 Act must be set out in a numbered section

[39] Preamble, pp. 756-7.

of the 1940 Act, unless the Preamble or the final rule is using the term “investment company” to describe a particular kind of activity, unlike the 1940 Act itself, which generally uses the term to refer to a company that must register as an investment company. As phrased, the special exception in the final rule for non-US banks also does not cover the case of funds that were originally held only by non-residents of the US but later needed to rely on Section 3(c)(1) or 3(c)(7) because of secondary transfers to US residents. Furthermore, neither the general 1940 Act exemption for purely foreign funds nor the special exception for non-US banks is of any help to covered funds as defined in §__.10(b)(1)(iii). The Preamble does, however, state that a non-US fund “offered or sold in the United States in reliance on the exclusions in section 3(c)(1) or 3(c)(7) of the Investment Company Act would be included in the definition of covered fund under § __.10(b)(1)(i) of the final rule unless it meets the requirements of an exclusion from that definition ...”[40]

The Preamble also contains the following language:

> To further ensure that this approach to foreign funds is consistent with the scope of coverage applied within the United States, the final rule excludes from the definition of covered fund any foreign issuer that, were it subject to U.S. securities laws, would be able to rely on an exclusion or exemption from the definition of investment company other than the exclusions contained in section 3(c)(1) or 3(c)(7) of the Investment Company Act.

It is unclear whether this language is intended to mean that a purely jurisdictional exclusion from the 1940 Act does not suffice. However, because the provision referred to by the cited language from the Preamble only relates to non-US funds sponsored by US banking entities, it should perhaps not be taken to have any application for to non-US funds established by non-US banking entities outside the US.

To qualify for the special exception for activities “solely outside the US”[41], the applicable non-US banking entity must not be organized in the US or be controlled by a US entity, the activities and investments of the applicable non-US banking entity must (roughly speaking) conform to the requirements of the Board’s Regulation K, the relevant activities relating to the non-US fund must take place solely outside the US, and no interest in a covered fund intended to benefit from this exception may be offered or sold to a US resident.

This exception to §__.10(a)(1) has been broadened in the final rule to reflect more precisely than did the proposed rule what the agencies adopting the rule consider to be the proper geographic allocation of risk. This is intended to be accomplished by defining “occurring solely outside of the United States” in the Common Rules as follows:

> (i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

[40] Preamble, p. 486.

[41] Section __.13(b) of the Common Rules.

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.[42]

The Preamble expands the above risk-allocation factors somewhat by stating that a non-US bank may conduct back office functions in the US for its non-US funds that rely on this exception and may also provide investment advice to the manager or general partner of the non-US fund "so long as that investment advisory activity in the United States does not result in the U.S. personnel [of the non-US bank] participating in the control of the covered fund or offering or selling an ownership interest to a resident of the United States."[43] Interestingly, the non-US bank could apparently acquire ownership interests for US customers under the agency/fiduciary exception described above, although this seems to be contrary to the restriction on selling to US persons.[44] Perhaps the distinction is between offering and selling an interest to a US resident and acquiring an interest for and at the request of a US resident. This view appears to be confirmed by §__.13(b)(3), which provides that "[a]n ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States."[45]

Because the "solely outside the US" exception is not expressed as an exclusion from the definition of "covered fund," it only provides an exception to the prohibition on ownership and sponsorship.

[42] Section __.13(b)(4).

[43] Preamble, p. 738.

[44] *See* Preamble, p. 738.

[45] The Preamble says the following about compliance with the prohibition on targeting US residents: "Absent circumstances otherwise indicating a nexus with residents of the United States, the sponsor of a foreign fund would not be viewed as targeting U.S. residents for purposes of the foreign fund exemption if it conducts an offering directed to residents of one or more countries other than the United States; includes in the offering materials a prominent disclaimer that the securities are not being offered in the United States or to residents of the United States; and includes other reasonable procedures to restrict access to offering and subscription materials to persons that are not residents of the United States. If ownership interests that are issued in a foreign offering are listed on a foreign exchange, secondary market transactions could be undertaken by the banking entity outside the United States in accordance with Regulation S under the foreign fund exemption. Foreign banking entities should use precautions not to send offering materials into the United States or conduct discussions with persons located in the United States (other than to or with a person known to be a dealer or other professional fiduciary acting on behalf of a discretionary account or similar account for a person who is not a resident of the United States). In order to comply with the rule as adopted, sponsors of covered funds established outside of the United States must examine the facts and circumstances of their particular offerings and confirm that the offering does not target residents of the United States." Preamble, p. 744.

Consequently, the question arises whether the restrictions of Super 23A apply to any of the other relationships that might exist between a non-US banking entity and a non-US fund. None of the material discussed above in connection with the agency/fiduciary exception adequately explains why Super 23A should apply to the operation of funds outside of the US by non-US banks. Given that the "solely outside the US" exception by itself provides relief only from the prohibition on ownership and sponsorship, such an application is at least theoretically possible unless the Common Rules and the Preamble otherwise work together to prevent it.

The Preamble asserts that "the final rule has been modified to more narrowly focus the scope of the definition of covered fund as it applies to foreign funds. These changes substantially address the issues raised by commenters regarding the applicability of section 13(f) [Section 619(f)] of the BHC Act to foreign funds." The changes referred to are those in §__.10(b)(1)(ii) [which narrows the provision treating commodity pools as covered funds] and (c)(1)(ii) [which deals with foreign public funds]. Neither of the changes prevents the application of Super 23A to a non-US private fund, unless it is clear that no reliance on either Section 3(c)(1) or Section 3(c)(7) of the 1940 Act will be necessary. As noted above, however, certain types of flowback appear to be permitted. Perhaps that permission has led to the assumption that flowback will occur and will provide a US nexus that is sufficient to trigger Super 23A, even if it does not prohibit ownership and sponsorship of the relevant fund. The geographical limitations added in the final rule do not otherwise clarify these issues. The provision of credit to such a fund or the acquisition of assets from it, which would be prohibited if Super 23A applied, would appear, however, to be of more interest to the home country regulator of the non-US bank than to US bank regulators.

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