June 27, 2020

Volcker Rule

Federal Agencies Finalize Amendments to Covered Funds Provisions

EXECUTIVE SUMMARY

On June 25, 2020, the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC" and, together with the OCC, Federal Reserve, FDIC and SEC, the "Agencies") approved a final rule (the "Final Rule") amending the regulations implementing Section 13 of the Bank Holding Company Act of 1956 (the "BHC Act"),[1] known as the "Volcker Rule".[2] The Final Rule follows a notice of proposed rulemaking issued by the Agencies in early 2020 that proposed a series of amendments (collectively, the "Proposal") to the "covered fund" provisions of the implementing regulations.

The Final Rule adopts the amendments in the Proposal substantially as proposed, with certain targeted adjustments in response to public comments. The amendments include, among other things, new exclusions for credit funds, venture capital funds, family wealth management vehicles and customer facilitation vehicles; revisions to existing exclusions for foreign public funds, loan securitizations and public welfare and small business funds; and modifications to the "Super 23A" provisions of the Volcker Rule. A number of commenters recommended that a new exclusion be created for long-term investment funds, which the Agencies declined to adopt.[3]

Many of the amendments contained in the Final Rule address aspects of the existing regulations that have, since their adoption in 2013, proven in practice to be complex and burdensome or to have unintended consequences. The Final Rule is intended, in broad terms, to accomplish three stated objectives: clarifying and simplifying compliance with the implementing regulations; refining the extraterritorial application of the Volcker Rule; and permitting additional fund activities that do not present the risks that the Volcker Rule was intended to address.[4]

The Final Rule will become effective on October 1, 2020 for all banking entities subject to the Volcker Rule. The Final Rule does not provide for any transition period, nor does it expressly provide that banking entities may elect to begin to comply with the Final Rule as of an earlier date.

This Memorandum discusses the amendments adopted in the Final Rule and related discussion in the "supplementary information" accompanying the Final Rule (the "Preamble"). **Appendix A** provides a comparison of the text of the Final Rule to the text of the currently effective regulations. **Appendix B** provides a comparison of the text of the Final Rule to the text of the Proposal.

OVERVIEW

As implemented by the Agencies' initial final rule adopted on December 10, 2013 (the "2013 Rule"), the Volcker Rule imposed broad restrictions on, and extensive compliance requirements with respect to, banking entities' ability to (i) engage in proprietary trading and (ii) invest in and sponsor private equity funds, hedge funds and certain other investment vehicles—collectively referred to as "covered funds."

In the past twelve months, the Agencies have adopted two final rules amending the 2013 Rule in an effort to streamline and simplify compliance obligations and to better tailor the requirements and applicability of the implementing regulations. Those amendments related primarily to the proprietary trading provisions, compliance program requirements and the applicability of the Volcker Rule to smaller banking entities and banking entities with limited trading assets and liabilities[5] (as discussed in our Memoranda regarding final rules implementing the EGRRCPA and amending the proprietary trading and compliance program provisions). The Final Rule represents a continuation of those past efforts, focusing now on the covered funds provisions. The Preamble also confirms that the Final Rule does not modify or revoke any of the Frequently Asked Questions ("FAQs") previously issued by staff of the Agencies, unless otherwise specified.[6]

Key aspects of the Final Rule and noteworthy departures from the Proposal are summarized below.

Table 1 – Comparison with 2013 Rule and Proposal

Amendment	Change from 2013 Rule	Change from Proposal
Credit funds *New exclusion*	New exclusion for vehicles the assets of which consist solely of loans, debt instruments permissible for the banking entity to hold directly, other assets that are related or incidental to acquiring, holding, servicing or selling loans (including certain equity securities and warrants), and certain interest rate or foreign exchange derivatives with terms that directly relate to, and reduce the risks of, the aforementioned permissible assets. May not engage in prohibited proprietary trading, issue asset-backed securities or engage in any transactions with a sponsoring or advising banking entity that would be prohibited under Super 23A, as though the credit fund were a covered fund.	Clarifies that the Super 23A provision applies only where a banking entity sponsors or advises the credit fund, not where a banking entity merely invests in the credit fund. Servicing assets may not include derivatives.

Amendment	Change from 2013 Rule	Change from Proposal
Qualifying venture capital funds *New exclusion*	New exclusion for funds that meet the definition of a "venture capital fund" under the SEC's regulations under the Investment Advisers Act of 1940 (the "Advisers Act"), subject to the conditions with respect to proprietary trading and Super 23A that also apply to credit funds, as described above.	Clarification that the Super 23A provision applies only where a banking entity sponsors or advises the venture capital fund, not where a banking entity merely invests in the venture capital fund.
Family wealth management vehicles *New exclusion*	New exclusion for trusts the grantors of which are all family customers and certain non-trust entities that are owned by family customers and up to five "closely related persons" of the family customers (*e.g.*, natural persons with a long-standing business or personal relationship with a family customer). De minimis (0.5%) allowance for third party ownership to establish corporate separateness or address bankruptcy, insolvency or similar concerns. Family customers must own a majority of the voting interests as well as a majority of all interests in the entity. Banking entity relying on exclusion is prohibited from purchasing low-quality assets from the vehicle, other than in connection with certain "riskless principal transactions."	Limit of five closely related persons in the Final Rule is increased from three. Family customers must own majority of interests (expanded from voting interests). De minimis allowance may be held by any entity (not only the banking entity). Exclusion for certain "riskless principal transactions" from prohibition on purchase of low-quality assets. Flexibility provided for disclosure obligations.
Customer facilitation vehicles *New exclusion*	New exclusion for vehicles formed by, or at the request of, a banking entity's customer in order to provide exposure to a transaction, investment strategy or other service provided by the banking entity, so long as the vehicle is wholly owned by the customer and its affiliates (other than a de minimis amount that may be held by a third party in order to establish corporate separateness or address bankruptcy, insolvency or similar concerns).	Changes parallel those made to the family wealth management vehicle exclusion (see above) with respect to de minimis ownership, riskless principal transactions and disclosure obligations.
Foreign public funds *Modification to exclusion*	Modification to the existing exclusion such that the "home jurisdiction" requirement and the requirement that ownership interests be sold "predominantly" through public offerings are replaced with a requirement that the fund be authorized to offer and sell ownership interests, and such interests are offered and sold through one or more public offerings. A "public offering" is a distribution subject to substantive disclosure and retail investor protection laws or regulations in the jurisdiction in which it is made, among other conditions. For a U.S. banking entity-sponsored fund, at least 75% of the fund must be sold to persons other than the banking entity, the issuer, affiliates thereof or senior executive officers and directors of the foregoing.	Reduces the minimum ownership by non-affiliated entities and persons to 75% in the Final Rule from 85% in the Proposal.
Loan securitizations	Modification to the existing exclusion such that funds may own debt securities, excluding asset-backed securities and convertible securities, of up to five percent of the aggregate value of the issuer's loans, cash and cash equivalents and permitted debt securities, calculated at par value at	Limits the five percent allowance to certain debt securities, rather than any loan-assets.

Amendment	Change from 2013 Rule	Change from Proposal
Modification to exclusion	the most recent time any such debt security is purchased (with an exception for calculation at fair market value in certain circumstances).	Clarifies the calculation methodology and timing.
Public welfare investment funds *Modification to exclusion*	Exclusion for small business investment companies (SBIC) expressly remains available during the SBIC's wind-down period, provided that the SBIC makes no new investments after voluntarily surrendering its license. Additional express exclusions for (i) funds that make investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (CRA); (ii) Rural Business Investment Companies (RBICs); and (iii) qualified opportunity funds (QOFs).	Additional express exclusions for CRA funds, RBICs and QOFs.
Investments alongside covered funds by banking entities and their director and employees	Subject to several conditions, banking entities are not required to treat a direct investment alongside a covered fund as an investment in a covered fund, or to limit the amount of any co-investment the banking entity makes alongside a covered fund, so long as the banking entity has independent legal authority to make such investments. Agencies expect that direct investments by directors and employees alongside covered funds would not be required to be counted as investments in covered funds or be subject to the condition that such persons provide services to the relevant fund—therefore, investments would not be attributed to the banking entity even if the banking entity arranged or provided financing for the transaction.	No change from Proposal.
Exclusions from "ownership interest" definition	Certain senior loans or senior debt instruments of a covered fund qualify for a safe harbor from treatment as an ownership interest in a covered fund. Creditor's interest in a covered fund is not deemed to be an ownership interest solely by reason of having the right to participate in the removal of an investment manager for "cause" or participate in the selection of a replacement manager upon an investment manager's resignation or removal.	Broader set of "for cause" terminations where removal rights may be exercised (not limited to events of default or acceleration).
Exemptions from Super 23A	The so-called "Super 23A" provisions of the Volcker Rule, which prohibit banking entities from providing extensions of credit to and entering into certain other transactions with advised or sponsored covered funds, now include exemptions to permit certain short-term extensions of credit and purchases of assets in connection with certain payment, clearing and settlement activities, as well as transactions that are exempted from the limitations of Section 23A of the Federal Reserve Act and Regulation W. Amended Super 23A applies to excluded credit funds and venture capital funds as though they were covered funds.	Certain "riskless principal transactions" are exempted (even if the covered fund is not a "securities affiliate" as required under Regulation W).
Permanent relief for qualifying foreign excluded funds	Substantially codifies policy statement that provided relief with respect to the potential attribution of the activities and investments of "qualifying foreign excluded funds" (which are excluded from the definition of covered fund but could still be considered banking entities) to a foreign banking entity that controls such a fund. Qualifying foreign excluded funds are exempted from proprietary trading and covered funds restrictions and compliance program requirements.	Clarifies the scope of the anti-evasion provision. Excludes qualifying foreign excluded funds from compliance program requirements.

Table of Contents

I. Definition of "Covered Fund" ... 6

I.A. New Exclusions from the Definition of "Covered Fund" ... 6

I.A.1. Credit Funds ... 7

I.A.2. Venture Capital Funds ... 8

I.A.3. Family Wealth Management Vehicles ... 10

I.A.4. Customer Facilitation Vehicles ... 11

I.B. Changes to Existing Exclusions from the Definition of "Covered Fund" ... 12

I.B.1. Foreign Public Funds ... 12

I.B.2. Loan Securitizations ... 14

I.B.3. Public Welfare Investment Funds and Small Business Investment Companies ... 15

II. Investments Alongside Covered Funds by Banking Entities and Their Directors and Employees ... 15

III. "Super 23A" – Limitations on Relationships with Certain Covered Funds ... 17

IV. Exclusions from the Definition of "Ownership Interest" ... 18

V. Qualifying Foreign Excluded Funds ... 20

I. DEFINITION OF "COVERED FUND"

The Final Rule's substantive changes to the definition of "covered fund" fall into two categories, which are described in this Part I. First, the Final Rule establishes new exclusions from covered fund status for four types of entities: credit funds, venture capital funds, family wealth management vehicles and customer facilitation vehicles. The Preamble indicates that these new exclusions are intended to "better tailor the [definition of "covered fund"] to the types of entities that [the Volcker Rule] was intended to cover" and calls attention to a number of requirements of these new exclusions that are intended to address the potential for evasion and ensure that the exclusions are not available to funds of the type that the Volcker Rule was intended to capture.[7] Second, the Final Rule revises the eligibility criteria for three existing exclusions from the definition of "covered fund" in order to "provide clarity and simplify compliance" with respect to the Volcker Rule and the implementing regulations.[8]

I.A. NEW EXCLUSIONS FROM THE DEFINITION OF "COVERED FUND"

Consistent with the Proposal, each of the four new exclusions established in the Final Rule is subject to the following conditions:

- The banking entity seeking to rely on the exclusion may not, directly or indirectly, guarantee, assume or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests (the "Anti-Bailout Requirements");
- The banking entity must provide certain disclosures to actual and prospective investors that parallel (with targeted adjustments tailored to the specific circumstances of the fund) those required under the organizing and offering exemptions, including disclosures with respect to the absence of a performance guarantee or insurance and the risk of loss (but with respect to credit funds and venture capital funds, solely if the banking entity serves as the sponsor or adviser to the fund) (the "Required Disclosures");[9] and
- The banking entity's ownership interest in and relationship with the issuer must comply with rules regarding material conflicts of interest, high-risk investments and safety and soundness and financial stability (the "Prudential Backstop").[10]

The Volcker Rule does not restrict banking entities from investing in non-covered funds, unless the investment constitutes prohibited proprietary trading, or from sponsoring or engaging in other relationships with non-covered funds. However, a non-covered fund that is "controlled" by a banking entity, as defined for purposes of the Bank Holding Company Act of 1956 (the "BHC Act"), would itself be treated as a banking entity and therefore would need to comply with the Volcker Rule's restrictions on proprietary trading and covered fund activities, except for certain types of entities that are neither covered funds nor subject to the restrictions that apply to banking entities (*e.g.*, qualifying foreign excluded funds, as discussed in Part V below; foreign public funds and registered investment companies solely on the basis of the banking entity's

ownership levels during a seeding period;[11] and certain foreign public funds that meet the conditions stated in FAQ #14).[12]

I.A.1. Credit Funds

The Final Rule excludes from the definition of "covered fund" certain credit funds that make loans, invest in permissible debt instruments or otherwise extend the type of credit that banking entities may provide directly under applicable banking law.[13] As described further below, qualifying for the exclusion requires that the fund meet certain conditions relating to the composition of its assets and its activities, and any banking entity seeking to rely on the exclusion would need to comply with certain activity limitations and requirements with respect to the fund.

- ***Asset requirements***. A qualifying credit fund's assets must be composed solely of the following:
  - ***loans*** (defined as any loan, lease, extension of credit or secured or unsecured receivable that is not a security or derivative);
  - ***debt instruments***, subject to certain restrictions discussed below. The Agencies declined to clarify the definition of "debt instrument," as some commenters had suggested, noting that they "believe that the term debt instrument already has a general meaning that is used in the marketplace and by regulators."[14]
  - ***rights and other assets that are related or incidental to acquiring, holding, servicing or selling such loans or debt instruments***, but excluding any commodity forward contract and any derivatives[15] and including securities only if they fall within one of the following categories:
    - ***cash equivalents***—*i.e.*, high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or debt instruments;
    - ***securities received in lieu of debts previously contracted*** with respect to such loans or debt instruments;
    - ***equity securities (or rights to acquire an equity security)*** received on customary terms in connection with such loans or debt instruments. The Preamble indicates that the Agencies "generally expect" that any such equity securities and rights "would not exceed five percent of the value of the fund's total investment in the borrower (or affiliated borrowers) at the time the investment is made," but they "understand that the value of those equity securities or other rights may change over time for a variety of reasons, including as a result of market conditions and business performance, as well as more fundamental changes in the business and the credit fund's corresponding management of the investment."[16] However, the Agencies expect that a fund's exposure to these instruments "individually and collectively and when viewed over time, would be managed on a basis consistent with the fund's overall purpose"[17]; and
  - ***interest rate or foreign exchange derivatives***, but only if the written terms of the derivative directly relate to the loans, debt instruments or other rights or assets described above; and the derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments or other rights or assets described above.[18]
- ***Activity requirements.*** A qualifying credit fund may not engage in any activity that would constitute "proprietary trading," as defined under the short-term intent prong as if the fund were a banking entity,[19] or issue asset-backed securities.[20] Issuers of asset-backed securities may be able to qualify for one or more other exclusions from the covered fund definition, including the loan securitization exclusion

(certain changes to which were adopted in the Final Rule, as described in Part I.B.2 of this Memorandum) and exemptions under the Investment Company Act of 1940 (the "Investment Company Act").[21]

- ***Conditions to rely on the exclusion.*** In addition to the criteria described above, each of the following conditions must be satisfied in order for a banking entity to rely on the credit fund exclusion:
  - the banking entity's investment in and other relationships with the fund comply with the Anti-Bailout Requirements and the Prudential Backstop as if such fund were a covered fund; [22]
  - the credit fund acquires only loans, debt instruments or equity securities that would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations;[23] and
  - the banking entity's investment in and other relationships with the fund comply with applicable banking laws and regulations, including applicable safety and soundness standards.[24]
- ***Additional conditions for fund sponsors and advisers.*** In addition to the generally applicable conditions immediately above, each of the following conditions must be satisfied where a banking entity serves as sponsor or adviser to an excluded credit fund:
  - the banking entity provides the Required Disclosures to actual and prospective investors in the fund; [25]
  - the banking entity ensures that the activities of the fund are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and
  - the banking entity complies with the limitations set forth in Super 23A and Section 23B[26] of the Federal Reserve Act with respect to the fund as if it were a covered fund.[27] In a change from the Proposal, the Final Rule does not impose such restrictions on banking entities that merely invest in qualifying credit funds.

In response to commenters who requested that the Agencies adopt a safe harbor for banking entities that rely, in good faith, on a representation by the credit fund that it invests only in permissible assets, the Agencies state that "[i]t is the responsibility of the banking entity to ensure that it complies" and that this responsibility "cannot be substituted solely with a representation from a credit fund."[28]

I.A.2. Venture Capital Funds

Consistent with the Proposal, the Final Rule excludes from the covered fund definition any "qualifying venture capital fund," which includes any "venture capital fund," as defined in the SEC's Rule 203(*l*)-1 under the Advisers Act,[29] that meets certain additional criteria set forth in the Final Rule. The criteria for this exclusion are:

- ***"Venture capital fund" under SEC Rule 203(l)-1.*** For purposes of the Advisers Act, a "venture capital fund" is an issuer that:
  - represents to investors and potential investors that it pursues a venture capital strategy;
  - holds no more than 20 percent of aggregate capital contributions and uncalled committed capital in assets other than "qualifying investments"[30]—which generally consist of equity securities of any "qualifying portfolio company" (*i.e.*, most private companies that are not themselves investment vehicles)[31]—or short-term holdings;

   - does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of aggregate capital contributions and uncalled committed capital, and any such indebtedness must generally be for a non-renewable term of no longer than 120 calendar days (except that any guarantee by the fund of a qualifying portfolio company's obligations up to the amount of the value of the fund's investment in the qualifying portfolio company is not subject to the 120 calendar day limit);
   - only issues securities that do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities, but may entitle holders to receive distributions made to all holders pro rata; and
   - is not registered as an investment company under the Investment Company Act and has not elected to be treated as a business development company.[32]

- ***Conditions to rely on the exclusion.*** Together with the above described conditions under the SEC's Rule 203(*l*)-1, each of the following conditions must be satisfied in order for a banking entity to rely on the "qualifying venture capital fund" exclusion with respect to any fund:
   - the fund does not engage in any activity that would constitute "proprietary trading," as defined under the short-term intent prong as if the fund were a banking entity;[33]
   - the banking entity's investment in and other relationships with the fund comply with the Anti-Bailout Requirements and the Prudential Backstop as if such fund were a covered fund;[34] and
   - the banking entity's investment in and other relationships with the fund comply with applicable banking laws and regulations, including applicable safety and soundness standards.[35]
- ***Additional conditions for fund sponsors and advisers.*** In addition to the foregoing, each of the following conditions must be satisfied in order for a banking entity that is acting as a fund sponsor or adviser to rely on the "qualifying venture capital fund" exclusion:
   - the banking entity provides the Required Disclosures to actual and prospective investors in the fund;
   - the banking entity ensures that the activities of the fund are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and
   - the banking entity complies with the limitations set forth in Super 23A and Section 23B of the Federal Reserve Act[36] with respect to the fund as if it were a covered fund. In a change from the Proposal, the Final Rule does not impose such restrictions on banking entities that merely invest in qualifying venture capital funds.

The preamble to the Proposal requested comment on whether the exclusion should be further limited to venture capital funds that do not invest in companies that, at the time of the investment, have more than a specified dollar amount of total annual revenue (*e.g.*, $50 million), calculated as of the last day of the calendar year.[37] The Agencies declined to impose such a limitation in the Final Rule, noting that it "could unnecessarily disadvantage certain companies because the revenues of startups can vary greatly based on industry and geography."[38] The Agencies also considered, but ultimately declined to impose, various other restrictions beyond those Rule 203(*l*)-1, such as separate limitations on permissible leverage, a minimum securities holding period and restrictions on the maximum amount of non-qualifying investments.[39]

I.A.3. Family Wealth Management Vehicles

The Final Rule excludes from the definition of "covered fund" any entity that acts as a "family wealth management vehicle."[40] As described further below, qualifying for the exclusion requires that the entity meet certain conditions relating to its purpose and its ownership base, and any banking entity seeking to rely on the exclusion would need to comply with certain activity limitations and requirements with respect to the entity.

- ***Purpose.*** A family wealth management vehicle must be an entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.[41]
- ***Trust grantors; ownership of non-trust vehicle.***
    - If the entity is a trust, all of the grantor(s) of the trust must be family customers.
    - If the entity is not a trust, (i) a majority of the voting and non-voting interests in the entity must be owned, directly or indirectly, by family customers; and (ii) the entity must be owned solely by family customers and up to five closely related persons of the family customers.[42] The Proposal would have allowed only three closely related persons to own interests in a family wealth management vehicle not structured as a trust, but the Agencies determined that increasing this limit to five would "more closely align the exclusion with the current composition of family wealth management vehicles, thereby increasing the utility of the exclusion without allowing such a large number of non-family customer owners to suggest the entity is in reality a hedge fund or private equity fund."[43]
    - Notwithstanding the foregoing, a third party may acquire or retain, as principal, up to a 0.5 percent ownership interest in the vehicle for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency or similar concerns. Expanding on the Proposal, the Final Rule allows any entity (not only a banking entity) to hold a de minimis ownership interest for these purposes.[44]
- ***Definitions.*** For purposes of this exclusion, the following definitions apply:
    - A "***family customer***" means (i) a family client (as defined below) or (ii) any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.[45]
    - A "***family client***" includes, among other things, any family member (including former family members), any key employee, certain family estates, certain non-profit organizations, charitable foundations and charitable trusts (subject to certain conditions in each case, including that all the funding of such entity come exclusively from other family clients) and various types of trusts (subject to certain conditions).[46]
    - A "***closely related person***" means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.[47]
- ***Additional criteria.*** The following additional criteria must be satisfied in order for a banking entity to rely on the Final Rule's exclusion with respect to a family wealth management vehicle:
    - the banking entity or an affiliate thereof provides bona fide trust, fiduciary, investment advisory or commodity trading advisory services to the vehicle;[48]

- the banking entity's investment in and other relationships with the vehicle comply with the Anti-Bailout Requirements and the Prudential Backstop as if such vehicle were a covered fund;[49]
- the banking entity provides the Required Disclosures to actual and prospective investors in the vehicle. The Final Rule modifies the Proposal by expressly permitting banking entities to "modify the manner of disclosure to accommodate the specific circumstances of the entity" and otherwise prevent such disclosures from being misleading.[50] The Agencies expect that a banking entity could satisfy these disclosure delivery obligations in a number of ways, such as by including them in the family wealth management vehicle's governing documents, in account opening materials or in supplementary materials (*e.g.*, a separate disclosure document provided by the banking entity solely for purposes of complying with this exclusion and providing the required disclosures);[51]
- the banking entity complies with the requirements of Section 23B of the Federal Reserve Act as if the vehicle were a covered fund and an affiliate of the banking entity;[52]and
- the banking entity complies with the prohibition on purchases of low-quality assets under the Federal Reserve's regulations implementing Section 23A of the Federal Reserve Act as if such banking entity and its affiliates were a member bank and the vehicle were an affiliate thereof. The Final Rule clarifies the Proposal by expressly allowing banking entities to engage in riskless principal transactions, as defined in Section _.10(d)(11) of the Final Rule, that involve the purchase of low-quality assets from a family wealth management vehicle, regardless of whether the vehicle is a "securities affiliate".[53]

I.A.4. Customer Facilitation Vehicles

The Final Rule excludes from the definition of "covered fund" certain customer facilitation vehicles that are formed by or at the request of a customer of the banking entity for the purpose of providing such customer (or one or more affiliates of such customer) with exposure to a transaction, investment strategy or other service provided by the banking entity.[54]

A banking entity may rely on this exclusion with respect to an issuer if each of the following conditions is satisfied:

- all of the ownership interests of the issuer are owned by the customer (or one or more of its affiliates) for whom the issuer was created, other than up to 0.5 percent of the issuer's outstanding ownership interests that may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency or similar concerns.[55] Similar to the de minimis allowance for family wealth management vehicles discussed above, the Final Rule expands the Proposal by allowing other entities (not only banking entities) to hold this de minimis interest;[56]
- the banking entity maintains documentation outlining how it intends to facilitate the customer's exposure to such transaction, investment strategy or other service;[57]
- the banking entity's investment in and other relationships with the vehicle comply with the Anti-Bailout Requirements and the Prudential Backstop as if such vehicle were a covered fund;[58]
- the banking entity provides the Required Disclosures to actual and prospective investors in the vehicle.[59] As with the family wealth management vehicle exclusion, such disclosures may be modified "to accommodate the specific circumstances of the issuers" and to otherwise make the disclosures not misleading;[60]

- the banking entity complies with the requirements of Section 23B of the Federal Reserve Act as if the vehicle were a covered fund and an affiliate of the banking entity;[61]
- the banking entity complies with the prohibition on purchases of low-quality assets under the Federal Reserve's regulations implementing Section 23A of the Federal Reserve Act as if such banking entity and its affiliates were a member bank and the vehicle were an affiliate thereof. As with the family wealth management vehicle exclusion, the Final Rule permits banking entities to engage in riskless principal transactions, including purchases of with low-quality assets, with the customer facilitation vehicle.[62]

Although the exclusion requires that "the vehicle be formed by or at the request of the customer" (in order to differentiate such vehicles from covered funds that are organized and offered by the banking entity), the Preamble clarifies that this "requirement will not preclude a banking entity from marketing its customer facilitation vehicle services or discussing with its customers prior to the formation of such vehicles the potential benefits of structuring such services through a vehicle."[63]

In response to commenters who recommended that this exclusion be limited to particular types of transactions, strategies or services, the Agencies state that the purpose of the exclusion is to "allow banking entities to provide customer-oriented financial services through vehicles" and that "[l]imiting the type of transaction, investment strategy, or service for which the customer facilitation vehicle may be formed would interfere with this purpose."[64]

I.B. CHANGES TO EXISTING EXCLUSIONS FROM THE DEFINITION OF "COVERED FUND"

I.B.1. Foreign Public Funds

The Final Rule expands the foreign public fund exclusion so that it is available to any issuer that meets the following conditions:

- the issuer is organized or established outside of the United States;
- the issuer is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more "public offerings." For this purpose, a "public offering" means a distribution (as defined in Section _.4(a)(3) of the Final Rule) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:
  - the distribution is subject to substantive disclosure and retail investor protection laws or regulations;
  - with respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;
  - the distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

- the issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.[65]

- solely with respect to a U.S. banking entity that serves as sponsor to the issuer, more than 75 percent—reduced from 85 percent in the 2013 Rule and the Proposal—of the ownership interests in the issuer must be sold to persons other than the sponsoring U.S. banking entity or the issuer (or affiliates of the sponsoring banking entity or issuer), and directors and senior executive officers—rather than all employees, as is the case under the 2013 Rule—of such entities.[66]
  - This modification should simplify the task of monitoring compliance with this condition. However, in light of the expansive definition of "affiliate" for purposes of the Volcker Rule,[67] identifying and monitoring compliance with respect to the relevant personnel of "affiliates" of the banking entity and the issuer may continue to be a material compliance burden.[68]

Other than the above-noted reduction in the amount of ownership interests that must be sold to persons other than the sponsoring U.S. banking entity and its associated parties (*i.e.*, from 85 percent to 75 percent), the Agencies adopted the amendments to the foreign public fund exclusion as proposed. These amendments reflect the Agencies' view that some of the conditions of the 2013 Rule's foreign public fund exclusion "may not be necessary to ensure consistent treatment of foreign public funds and U.S. registered investment companies" and may make it difficult for a non-U.S. fund to qualify for the exclusion or for a banking entity to validate compliance with the exclusion.[69]

In summary, the foreign public fund exclusion under Final Rule will differ from the 2013 Rule in the following respects:

- removal of the requirement that a foreign public fund be authorized to offer and sell ownership interests to retail investors in the issuer's "home jurisdiction;"
- removal of the requirement that a foreign public fund sell ownership interests "predominantly" through one or more public offerings outside the United States;
- revision of the "public offering" definition such that, unless a banking entity serves as sponsor or adviser to the fund, it is not a requirement that the distribution comply with all applicable requirements in the jurisdiction in which such distribution is being made. The Agencies state that they believe the other eligibility criteria to qualify under the foreign public fund exclusion are sufficient to appropriately identify these funds, and that it may be difficult or impossible for a banking entity that invests in a third-party fund to know whether the fund's distribution complied with all applicable requirements in the jurisdiction where it was distributed;[70]
- the above-noted reduction in the amount of ownership interests that must be sold to persons other than the sponsoring U.S. banking entity and its associated parties (*i.e.*, from 85 percent to 75 percent).[71] The Agencies explain that this change is intended to align the exclusion with the functionally equivalent threshold for banking entity investments in U.S. registered investment companies.[72]

In response to a comment on the Proposal, the Final Rule modifies Section _.12(b)(1)(ii), which provides that a foreign public fund will not be treated as a banking entity if the banking entity holds less than 25 percent of the voting shares in the foreign public fund and provides advisory, administrative or other

services to the fund, to clarify that the ownership limit applies to the banking entity and its affiliates, in the aggregate, and the requirement that the banking entity provide advisory or other services can be satisfied by the banking entity or its affiliates.[73]

In response to requests that the Agencies clarify the permitted seeding period for foreign public funds, the Agencies expressly declined to do so, stating that "depending on the facts and circumstances of a particular foreign public fund, the appropriate duration of its seeding period may vary and, under certain facts and circumstances, may exceed three years. The [A]gencies believe that this flexibility is appropriate and thus decline to further specify . . . a limit."[74]

I.B.2. Loan Securitizations

The 2013 Rule excluded from the definition of "covered fund" certain loan securitization vehicles—specifically, issuers of asset-backed securities that hold only loans, certain rights and assets that arise from the structure of the loan securitization or from the loans supporting a loan securitization and a limited range of other financial instruments. The 2013 Rule's loan securitization exclusion is not available to issuer that hold any securities or derivatives other than cash equivalents, securities relieved in lieu of debts previously contracted and foreign exchange and interest rate derivatives.[75]

The Final Rule amends the 2013 Rule by permitting a loan securitization vehicle to hold up to five percent of its assets in debt securities, excluding asset-backed securities and convertible securities.[76] This amendment does not provide as much flexibility as the Proposal, which would have allowed a loan securitization vehicle to hold up to five percent of its assets in any non-loan assets,[77] but will provide a greater degree of flexibility than the 2013 Rule, which required that a loan securitization's assets be composed exclusively of loans and not include any securities or derivatives (subject to limited exceptions for cash equivalents and foreign exchange and interest rate derivatives).

The Final Rule also clarifies the methodology for calculating the five percent limit on permitted debt securities, specifying that the limit must be calculated at the most recent time of acquisition of such debt securities.[78] Specifically, the aggregate value of permitted debt securities may not exceed five percent of the aggregate value of all loans, cash and cash equivalents and permitted debt securities held by the loan securitization, where the value of each such category of assets is calculated at par value at the most recent time any such debt security is purchased.[79] As an exception to this general rule of calculation, the value of any such loan, cash equivalent or debt security may instead be based on its fair market value if (i) the loan securitization is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements and (ii) the valuation methodology used by the loan securitization values similarly situated assets consistently.[80]

I.B.3. Public Welfare Investment Funds and Small Business Investment Companies

Under the 2013 Rule, a "covered fund" does not include small business investment companies ("SBICs") or companies that have received notice from the Small Business Administration to proceed to qualify for a license as an SBIC (which notice or license has not been revoked).[81] This exclusion also covers an issuer the business of which is to make investments that are: (i) designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as providing housing, services or jobs), of the type permitted for national banks under the National Bank Act;[82] or (ii) "qualified rehabilitation expenditures" with respect to a "qualified rehabilitated building" or "certified historic structure," as such terms are defined in Section 47 of the Internal Revenue Code of 1986 or a similar U.S. state historic tax credit program.[83] These types of investments often play a significant role in banking entities' Community Reinvestment Act objectives, particularly in the case of regional and community banking organizations.

Consistent with the Proposal, the Final Rule includes certain changes with respect to the exclusion for SBICs.[84] The Final Rule revises the exclusion for SBICs to clarify how the exclusion would apply to SBICs that voluntarily surrender their licenses during wind-down phases.[85] The Final Rule specifies that the exclusion for SBICs continues to apply to an issuer that was formerly an SBIC, but which has voluntarily surrendered its license to operate as a SBIC[86] and does not make new investments (other than investments in cash equivalents) after such voluntary surrender.[87] The requirement that an issuer does not make new investments after surrendering its license is intended to ensure that the exclusion would only apply to funds that are actually winding down and not funds that are making new investments (including follow-on investments to existing investments) or that are engaged in speculative activities.[88] In addition, the exclusion only applies to an issuer that surrenders its SBIC license and does not extend to an issuer if its SBIC license has been revoked.

In response to comments, the public welfare investment exclusion of the Final Rule explicitly incorporates funds, the business of which is to make investments that qualify for consideration under the Federal banking agencies' regulations implementing the Community Reinvestment Act.[89] The public welfare investment exclusion of the Final Rule also adds explicit exclusions from the definition of covered fund for Rural Business Investment Companies and "qualified opportunity funds" in respect of the "opportunity zone" program established by the Tax Cuts and Jobs Act.[90]

II. INVESTMENTS ALONGSIDE COVERED FUNDS BY BANKING ENTITIES AND THEIR DIRECTORS AND EMPLOYEES

Consistent with the Proposal, the Final Rule includes a rule of construction that a banking entity's investment alongside a covered fund is not treated as an investment in the covered fund for purposes of calculating the quantitative limitations on a banking entity's permitted investments in covered funds. These

quantitative limitations restrict a banking entity's ownership interest in a single covered fund that it organizes and offers to no more than 3 percent of the total outstanding "ownership interests" of the covered fund at any time more than one year after the date of establishment of the fund (the "per-fund limitation") and restrict the aggregate value of the banking entity's ownership interests held under the organizing and offering exemption to no more than 3 percent of the banking entity's Tier 1 capital (the "aggregate fund limitation").

The Final Rule adopts the following elements into the framework for calculating the investment limitations and the application of the Volcker Rule to direct investments that banking entities and their directors and employees make alongside a covered fund.

- A banking entity would not be required to include in the calculation of the per-fund and aggregate limitations referred to above "any investment the banking entity makes alongside a covered fund" and would not be restricted under Section _.12 in the "amount of any investment the banking entity makes alongside a covered fund," in each case, as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.[91]
- The Agencies expect that "any direct investments (whether a series of parallel investments or a co-investment) by a director or employee of a banking entity (or an affiliate thereof) made alongside a covered fund in compliance with applicable laws and regulations would not be treated as an investment by the director or employee in the covered fund."[92] As a result, "such a direct investment would not be attributed to the banking entity as an investment in the covered fund, regardless of whether the banking entity arranged the transaction on behalf of the director or employee or provided financing for the investment."[93]
- Section ._11(a)(7), which provides that directors and employees are eligible to invest in a covered fund organized and offered by a banking entity only if they are "directly engaged" in providing services to the fund, applies only to directors' and employees' investments in covered funds, but not to their direct investments made alongside covered funds.[94] The Agencies, however, declined to allow employees and directors of a banking entity that organizes and offers a covered fund to make investments directly in the covered fund, unless such employees or directors provide services to the applicable fund on behalf of the banking entity, and noted that this is a requirement under the Volcker Rule.[95]

The Preamble emphasizes that any such direct investments "must comply with laws and regulations, including any applicable safety and soundness standards."[96]

The Preamble further clarifies that the rule of construction would not prohibit a banking entity from having "investment policies, arrangements or agreements to invest alongside a covered fund in all or substantially all of the investments made by the covered fund or to fund all or any portion of the investment opportunities made available by the covered fund to other investors."[97] Accordingly, a banking entity could "market a covered fund it organizes and offers . . . on the basis of the banking entity's expectation that it would invest in parallel with the covered fund in some or all of the same investments, or the expectation that the banking entity would fund one or more co-investment opportunities made available by the covered fund."[98] The Preamble indicates that the Agencies expect, however, that any such investment policies, arrangements or agreements would "ensure that the banking entity has the ability to evaluate each investment on a case-

by-case basis to confirm that the banking entity does not make any investment unless the investment complies with applicable laws and regulations, including any applicable safety and soundness standards."[99]

Finally, consistent with the Proposal, the Final Rule provides that an investment by a banking entity's director or employee who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity—that is, the banking entity will be required to include any amounts paid by the director or employee in connection with his or her acquisition of the restricted profit interest—if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.[100] The Preamble clarifies that the Final Rule would not change the current treatment of the banking entity's or its affiliates' ownership of a restricted profit interest under the 2013 Rule.[101]

III. "SUPER 23A" – LIMITATIONS ON RELATIONSHIPS WITH CERTAIN COVERED FUNDS

The Final Rule exempts certain categories of transactions from the "Super 23A" provisions, which prohibit a banking entity from engaging in any "covered transactions," as defined under Section 23A of the Federal Reserve Act,[102] with a covered fund for which the banking entity serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor or sponsor, or that the banking entity organizes and offers (and other covered funds controlled by such a covered fund). The exemptions in the Proposal were adopted substantially as proposed. In addition, the Final Rule adopts a standalone exception that applies to riskless principal transactions.[103]

Although the Final Rule does not adopt any changes to the definition of "covered transaction" proposed by commenters, the exemptions described below—each of which is subject to the Prudential Backstop[104]—will provide greater flexibility for banking entities to engage in transactions with related covered funds, as well as with sponsored or advised credit funds and qualifying venture capital funds, which as described above are subject to Super 23A as if they were covered funds:

- First, Super 23A under the Final Rule incorporates the exemptions under Section 23A of the Federal Reserve Act and the Federal Reserve's Regulation W for certain transactions that are not subject to the quantitative limits, collateral requirements and low-quality asset prohibition, including the following:[105]
    - intraday extensions of credit to the fund, so long as the bank has safety and soundness policies designed to manage the risk exposure and only if the bank has no reason to believe the fund cannot repay the credit;
    - transactions with the fund that are secured by cash or U.S. government securities;
    - purchasing from the fund an extension of credit subject to a repurchase agreement; and

  - purchasing from the fund an extension of credit (provided that certain conditions are satisfied, including certain quantitative limits and only if the banking entity makes an independent evaluation of the borrower's creditworthiness).

- Second, Super 23A under the Final Rule also includes exemptions for a banking entity's short-term extensions of credit to, and purchase assets from, a covered fund, subject to the following conditions:[106]

  - the extension of credit or purchase of assets must be made in the ordinary course of business in connection with payment transactions, settlement services or futures, derivatives and securities clearing;[107]
  - any extension of credit must be repaid, sold or terminated no later than five business days after it was originated;[108] and
  - any extensions of credit must meet requirements applicable to intraday extensions of credit under Regulation W (as if the extension of credit were an intraday extension of credit, regardless of its actual duration).[109]

- Third, the Final Rule exempts from Super 23A certain riskless principal transactions with a related covered fund, including in circumstances in which the covered fund is not a "securities affiliate" (and therefore would not qualify for the first exemption described above).[110] As defined in the Final Rule, a "riskless principal transaction" is a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer. [111]

While the Proposal would have permitted a banking entity to enter into a riskless principal transaction with a covered fund only if it also met the criteria in Regulation W—*i.e.*, in accordance with the first exemption described above—the Final Rule adopts a standalone exemption that is available for riskless principal transactions.[112] For the other exemptions under Regulation W that are available only for a member bank's transactions with "securities affiliates," such as purchases of marketable securities or municipal securities, the first exemption described above is available only if the related covered fund is a securities affiliate. However, banking entities may separately rely on the second exemption described above (*i.e.*, the exemption for payment, clearing and settlement transactions discussed above) for certain transactions that cannot qualify for the first exemption. The Agencies state that they "expect that in many instances, subject to other applicable laws and regulations, a banking entity may be able to engage in acquisitions of assets [from related covered funds] in connection with payment, clearing, and settlement services" without relying on the exception for transactions exempted under Regulation W.[113]

IV. EXCLUSIONS FROM THE DEFINITION OF "OWNERSHIP INTEREST"

The Final Rule modifies the definition of "ownership interest" in two respects, both of which are intended to clarify that a creditor relationship with a covered fund would typically not constitute an "ownership interest" in the fund.

First, the Final Rule provides a safe harbor from the "ownership interest" definition for senior loans or senior debt instruments that satisfy the following conditions:[114]

- holders of the interest do not have the right to receive a share of the income, gains or profits of the covered fund, but are entitled to receive only: (i) interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and, reflecting a minor modification to the Proposal, (ii) repayment of a fixed principal amount on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, foregone income resulting from an early prepayment).[115] The Preamble indicates that this modification "will provide additional clarity that the safe harbor is available to senior loan and senior debt interests where contractual principal payments vary over the life of a senior loan or senior debt interest for reasons such as amortization and acceleration provided that the total amount of principal required to be repaid over the life of the instrument does not change."[116]
- the entitlement to payments under the terms of the interest are absolute and could not 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.[117]
- the holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed 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).[118]

The Agencies clarify in the Preamble that a debt interest in a covered fund would not be considered an ownership interest "solely because the interest is entitled to receive an allocation of collections from the covered fund's underlying financial assets in accordance with a contractual priority of payments."[119]

Second, the Final Rule's definition of "ownership interest" allows for certain additional rights of creditors (that need not be triggered exclusively by an event of default or acceleration) to attach to a debt interest without such interests being deemed ownership interests. Specifically, an ownership interest will not include rights of a creditor to participate in the removal or replacement of an investment manager for "cause" in connection with:

- the bankruptcy, insolvency, conservatorship or receivership of the investment manager;
- the breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;
- the breach by the investment manager of material representations or warranties;
- the occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;
- the indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;
- a change in control with respect to the investment manager;
- the loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or
- other similar events that constitute "cause" for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or to the

investment manager's exercise of investment discretion under the covered fund's transaction agreements.[120]

It will continue to be the case, as under the 2013 Rule, that the definition of "ownership interest" includes other types of interests that have 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, but excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event and, with respect to the investment manager, the aforementioned "causes."

V. QUALIFYING FOREIGN EXCLUDED FUNDS

The Final Rule makes permanent the temporary relief that the Agencies have provided in policy statements[121] with respect to the potential attribution of the activities and investments of qualifying foreign excluded funds to a foreign banking entity that controls such a fund due to interaction between the definitions of "covered fund" and "banking entity."[122] Consistent with these policy statements, the Final Rule exempts a foreign fund from the proprietary trading prohibition and restrictions on investments in and sponsorship of covered funds (and would not attribute the fund's activities to a foreign banking entity that invests in or sponsors the fund) if the following conditions are satisfied:

- The foreign banking entity's investment or sponsorship in the fund complies with the exemption for certain covered fund activities conducted "solely outside of the United States" (commonly referred to as the "SOTUS" exemption).[123]
- The fund:
    - is organized or established outside the United States and its ownership interests are offered and sold solely outside the United States;
    - would be a covered fund were the entity organized or established in the United States, or is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;
    - would not otherwise be a banking entity except by virtue of the foreign banking entity's acquisition or retention of an ownership interest in, or sponsorship of, or relationship with, the entity;
    - is established and operated as part of a bona fide asset management business; and
    - is not operated in a manner that enables the foreign banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of the Volcker Rule or the implementing regulations.[124]

The Final Rule also provides that, even if a qualifying foreign excluded fund is a banking entity, it would nevertheless be exempted from the proprietary trading restrictions of Section _.3(a) of the Final Rule[125] and, expanding on the Proposal, would not be required to have a Volcker Rule compliance program or comply with the reporting and additional requirements under Section _.20 of the Final Rule.[126] However,

any banking entity that owns or sponsors a qualifying foreign excluded fund will still be required to have appropriate compliance programs for itself and its other subsidiaries and provide reports and additional documentation as required by Section _.20.[127]

In response to comments regarding the anti-evasion provision, the Agencies note in the Preamble that the Final Specifies that the qualifying foreign excluded fund must not be operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any other affiliated banking entity (other than a qualifying foreign excluded fund), to evade the Volcker Rule or the Final Rule. The Agencies note that this change is meant to clarify the scope of the anti-evasion provision and provide certainty for banking entities that sponsor or control the qualifying foreign excluded fund.[128]

* * *

Copyright © Sullivan & Cromwell LLP 2020

ENDNOTES

[1] 12 U.S.C. § 1841 *et seq*.

[2] The Agencies approved the Final Rule as follows:

OCC: Acting Comptroller Brooks voted for the Final Rule in his capacity as a member of the FDIC Board, and the OCC approved the Final Rule.

Federal Reserve: 4 votes to 1 vote (Governor Brainard dissenting). The accompanying statements are available at: https://www.federalreserve.gov/newsevents/pressreleases/quarles-statement-20200625a.htm; https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200625a.htm.

FDIC: 3 votes to 1 vote (Director Gruenberg dissenting). The accompanying statements are available at: https://www.fdic.gov/news/speeches/spjun2520a.html; https://www.fdic.gov/news/speeches/spjun2520d.pdf.

SEC: 3 votes to 1 vote (Commissioner Lee dissenting). The accompanying statements are available at: https://www.sec.gov/news/public-statement/peirce-roisman-volcker-rule-2020-06-25; https://www.sec.gov/news/public-statement/lee-statement-final-rules-continuing-volcker-repeal.

CFTC: 3 votes to 2 votes (Commissioners Behnam and Berkovitz dissenting). The accompanying statements are available at: https://cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement062520; https://cftc.gov/PressRoom/SpeechesTestimony/behnamstatement062520; https://cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement062520b.

[3] In the preamble to the Proposal, the Agencies requested comment on whether to provide an exclusion for "long-term investment funds" that satisfy certain characteristics. The Agencies declined to adopt such an exclusion, noting that "it remains difficult to distinguish effectively such funds [*i.e.*, long-term investment funds] from the type of funds that [the Volcker Rule] was designed to restrict." Preamble at 105. The Agencies also observe that the new credit fund and venture capital fund exclusions should "improve banking entities' ability to provide long-term financing." Preamble at 106.

[4] Preamble at 11.

[5] Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 35008 (July 22, 2019), Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61974 (Aug. 22, 2019). *See also* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174 (May 24, 2018) ("EGRRCPA").

[6] Preamble at 13.

[7] Preamble at 57.

[8] Preamble at 11.

[9] The disclosures must be provided in writing to any prospective and actual investor and generally parallel the disclosures required under the organizing and offering exception. Final Rule § _.11(a)(8).

[10] Final Rule § _.15.

[11] FAQ 16 (posted July 16, 2015), *available at* https://www.federalreserve.gov/supervisionreg/faq.htm#16.

[12] FAQ 14 (posted June 12, 2015), *available at* https://www.federalreserve.gov/supervisionreg/faq.htm#14.

[13] Final Rule § _.10(c)(15).

[14] Preamble at 74–75.

[15] Preamble at 72.

ENDNOTES CONTINUED

[16] Preamble at 70.

[17] Preamble at 71.

[18] Final Rule § _.10(c)(15)(i)(D).

[19] Final Rule § _.10(c)(15)(ii)(A). Under this requirement, a qualifying credit fund could not engage in any activities that are principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from such purchases or sales. The Preamble states that "a credit fund would not be able to elect a different definition of proprietary trading or trading account." Preamble at 75.

The Preamble also notes that the exclusion does "not expressly incorporat[e] the permitted activities [for underwriting, market making related activities and risk-mitigating hedging] into the text of the final credit fund exclusion," as the exclusion is "intended to allow banking entities to share the risks of otherwise permissible lending activities." The Agencies "would not expect that a credit fund would be formed for the purpose of engaging, or in the ordinary course would be engaged, in" such permitted activities, but "to the extent that a credit fund seeks to engage in any of those activities as an exemption from the prohibition on engaging in proprietary trading . . . and does so in compliance with the requirements and conditions of the applicable exemption, then the [Final Rule] would not preclude such activities." Preamble at 76.

[20] Final Rule § _.10(c)(15)(ii)(B).

[21] 17 CFR § 270.3a-7; *see also* SEC, *Treatment of Asset-Backed Issuers Under the Investment Company Act*, 76 Fed. Reg. 55308, 55310-11 (Sept. 7, 2011).

[22] Final Rule § _.10(c)(15)(iv)–(v).

[23] Final Rule § _.10(c)(15)(iv)(B). The emphasis on "federal" banking law and regulations is a modification from the Proposal. The Preamble notes that the change is intended to emphasis that "[w]hether a credit fund's holdings are permissible for a banking entity to hold under state or foreign laws is not relevant to compliance with [the Volcker Rule]." Preamble at 80.

[24] Final Rule § _.10(c)(15)(iv)–(v). In addition, the banking entity's investment in and other relationships with the fund continues to be subject to capital charges. Preamble at 81. For example, a banking entity's investment in or relationship with a credit fund could be subject to the regulatory capital adjustments and deductions relating to investments in financial subsidiaries or in the capital of unconsolidated financial institutions, if applicable. *See* 12 CFR § 217.22. *See also* Preamble at 81, note 242.

[25] Final Rule § _.10(c)(15)(iii)(A).

[26] Final Rule § _.10(c)(15)(iii). The principal restrictions of Section 23B include (1) a requirement that most transactions between an insured depository institution ("IDI") and its affiliates be on terms and circumstances that are substantially the same as those prevailing at the time for comparable transactions with nonaffiliates; (2) a restriction on an IDI's purchase, as fiduciary, of assets from an affiliate unless certain criteria are met; (3) a restriction on an IDI's purchase, during the existence of an underwriting syndicate, of any security if a principal underwriter of the security is an affiliate; and (4) a prohibition on publishing an advertisement or entering into an agreement stating that an IDI will be responsible for the obligations of its affiliates. *See* 12 CFR Part 223.

[27] Final Rule § _.10(c)(15)(iii)(C).

[28] Preamble at 75.

[29] *See* 17 CFR § 275.203(*l*)-1.

[30] "Qualifying investment" is defined in the SEC's regulation to be: (1) an equity security issued by a qualifying portfolio company that has been acquired directly by the private fund from the qualifying portfolio company; (2) any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company described in (1); or (3) any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, as defined in Section 2(a)(24) of the Investment Company Act, or a predecessor, and is acquired by the private fund in exchange for an equity security described in (1) or (2). *See* 17 CFR § 275.203(*l*)-1(c)(3).

ENDNOTES CONTINUED

[31] In particular, "qualifying portfolio company" is defined in the SEC's regulation to be a company that: (1) at the time of any investment by the private fund, is not reporting or foreign traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is reporting or foreign traded; (2) does not borrow or issue debt obligations in connection with the private fund's investment in such company and distribute to the private fund the proceeds of such borrowing or issuance in exchange for the private fund's investment; and (3) is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by 17 CFR § 270.3a-7, or a commodity pool. *See* 17 CFR § 275.203(*l*)-1(c)(4).

[32] 17 CFR § 275.203(*l*)-1(a).

[33] Final Rule § _.10(c)(16)(i)(B). *See* Final Rule § _.3(b)(1)(i). Under this requirement, a qualifying venture capital fund could not engage in any activities that are principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from such purchases or sales. As with the credit fund exclusion, the Preamble notes that the venture capital fund exclusion does "not expressly incorporat[e] the permitted activities [for underwriting, market making related activities and risk-mitigating hedging] into the text of the qualifying venture capital fund exclusion," as the exclusion is "intended to allow banking entities to share the risks of otherwise permissible long-term venture capital activities." The Agencies "would not expect that a qualifying venture capital fund would be formed for the purpose of engaging, or in the ordinary course would be engaged [in such permitted activities] . . . . Moreover, such activities could reflect a purpose other than making long-term venture capital investments. Nevertheless, to the extent that a qualifying venture capital fund seeks to engage in any of those activities as an exemption from the prohibition on engaging in proprietary trading . . . and does so in compliance with the requirements and conditions of the applicable exemption, then the [Final Rule] would not preclude such activities." Preamble at 95-96.

[34] Final Rule § _.10(c)(16)(iii)–(iv).

[35] Final Rule § _.10(c)(16)(iv)(B).

[36] Final Rule § _.10(c)(16)(ii).

[37] 85 Fed. Reg. 12,120 (Feb. 28, 2020) at 12,136.

[38] Preamble at 102.

[39] Preamble at 101–03.

[40] Final Rule § _.10(c)(17).

[41] Final Rule § _.10(c)(17)(i).

[42] Final Rule § _.10(c)(17)(i).

[43] Preamble at 113.

[44] Final Rule § _.10(c)(17)(i)(C).

[45] Final Rule § _.10(c)(17)(iii)(B).

[46] Rule 202(a)(11)(G)-1(d)(4).

[47] Final Rule § _.10(c)(17)(iii)(A).

[48] Final Rule § _.10(c)(17)(ii)(A).

[49] Final Rule § _.10(c)(17)(ii).

[50] Preamble at 119.

[51] Preamble at 120–21.

[52] Final Rule § _.10(c)(17)(ii)(E).

[53] Final Rule § _.10(c)(17)(ii)(F); Preamble at 118.

[54] Final Rule § _.10(c)(18)(i).

[55] Final Rule § _.10(c)(18)(ii)(B).

[56] Final Rule § _.10(c)(18)(ii)(B); *see* Preamble at 126.

ENDNOTES CONTINUED

57 Final Rule § _.10(c)(18)(ii)(C)(1).

58 Final Rule § _.10(c)(18)(ii)(C).

59 Final Rule § _.10(c)(18)(ii)(C)(3).

60 Preamble at 128.

61 Final Rule § _.10(c)(18)(ii)(C)(5).

62 Final Rule § _.10(c)(18)(ii)(C)(6).

63 Preamble at 124.

64 Preamble at 125.

65 Final Rule § _.10(c)(1).

66 Final Rule § _.10(c)(1)(ii); Preamble at 33.

67 The Volcker Rule defines the term "affiliate" to have the same meanings as under Section 2 of the BHC Act. BHC Act § 2(a)(2).

68 As the Agencies acknowledge in the Preamble, some commenters recommended elimination of the restrictions on share ownership by associated parties of a U.S. banking entity sponsor of a foreign public fund and that "[t]he commenters generally viewed these requirements as unnecessary and burdensome to track and monitor." The Agencies noted in response that "U.S. banking entity sponsors of foreign public funds would need to track the ownership of such funds by their affiliates and management officials even if the requirements were eliminated in order to determine whether they control such funds for BHC Act purposes." Preamble at 32–33.

69 Preamble at 25–26.

70 Preamble at 31.

71 In the supplementary information accompanying the initial final rule adopted on December 10, 2013, the Agencies noted that the level of ownership of a foreign public fund that would satisfy the requirement that a fund be "predominantly" sold to persons other than its U.S. banking entity sponsor and associated parties was 85 percent or more (which would permit the U.S. banking entity sponsor and associated parties to own the remaining 15 percent). *See* 79 Fed. Reg. 5678.

72 Preamble at 33. Although the implementing regulations do not explicitly prohibit a banking entity from acquiring 25 percent or more of a U.S. registered investment company, a U.S. registered investment company would become a banking entity if it is affiliated with another banking entity (other than as described in Section _.12(b)(1)(ii) of the implementing regulations). *See* 79 Fed. Reg. 5732. ("[F]or purposes of [the Volcker Rule], a registered investment company . . . will not be considered to be an affiliate of the banking entity if the banking entity owns, controls, or holds with the power to vote less than 25 percent of the voting shares of the company or fund, and provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund only in a manner that complies with other limitations under applicable regulation, order, or other authority.").

73 Final Rule § _.12(b)(1)(ii); Preamble at 35.

74 Preamble at 35.

75 2013 Rule § _.10(c)(8).

76 Final Rule § _.10(c)(8)(i)(E).

77 Preamble at 43-44.

78 Final Rule § _.10(c)(8)(i)(E)(1)-(2).

79 Preamble at 45; Final Rule § _.10(c)(8)(i)(E)(1)–(2).

80 Final Rule § _.10(c)(8)(i)(E)(2).

81 2013 Rule § _.10(c)(11)(i).

82 2013 Rule § _.10(c)(11)(ii)(A). Under the National Bank Act, a national bank "shall not make any such investment if the investment would expose the [bank] to unlimited liability," for example, and such investments are subject to certain aggregate limits determined by the OCC. 12 U.S.C. §

ENDNOTES CONTINUED

24 (Eleventh). OCC regulations also provide specific examples of qualifying public welfare investments under the National Bank Act, including with respect to affordable housing projects, economic development and job creation investments, investments in "community and economic development entities" and other public welfare investments. *See* 12 CFR § 24.6.

83 2013 Rule § _.10(c)(11)(ii)(B). "Qualified rehabilitated buildings" are certain buildings first placed in service before 1936, and "certified historic structures" are listed in the National Register or certified as being of historical significance to a registered historic district. 26 U.S.C. §§ 47(c)(1), 47(c)(3).

84 Preamble at 57; Final Rule § _.10(c)(11)(i).

85 Final Rule § _.10(c)(11)(i).

86 *See* 13 CFR § 107.1900.

87 Final Rule §_.10(c)(11)(i). For purposes of this exclusion, "cash equivalents" would mean high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets.

88 *See* 85 Fed. Reg. 12,131.

89 Final Rule § _.10(c)(11)(ii)(A); Preamble at 52. The Agencies noted that explicitly excluding these types of investments from the definition of covered fund clarifies and gives full effect to the statutory exemption for public welfare investments and will reduce uncertainty and facilitate public welfare investments by banking entities. *See* 12 U.S.C. 1851(d)(1)(E). As the Preamble notes, a banking entity must have independent authority to make a public welfare investment—for example, a banking entity that is a state member bank may make a public welfare investment to the extent permissible under 12 U.S.C. 338a and 12 CFR 208.22.

90 Final Rule § _.10(c)(11)(iii)–(iv).

91 Final Rule § _.12(b)(5).

92 Preamble at 166.

93 Preamble at 166.

94 Preamble at 166.

95 Preamble at 167; 12 U.S.C. § 1851(d)(1)(G)(vii).

96 Preamble at 164.

97 Preamble at 164.

98 Preamble at 164.

99 Preamble at 164-65.

100 Final Rule § _.12(c)(1)(ii).

101 Preamble at 157.

102 Section 23A of the Federal Reserve Act defines "covered transaction" to mean the following with respect to an "affiliate" of a "member bank": (i) a loan or extension of credit to the affiliate, including a purchase of assets subject to an agreement to repurchase; (ii) a purchase of or an investment in securities issued by the affiliate; (iii) a purchase of assets *from* the affiliate, except such purchase of real and personal property as may be specifically exempted by the Federal Reserve; (iv) the acceptance of securities or other debt obligations issued by the affiliate as collateral for a loan or extension of credit to any person or company; (v) the issuance of a guarantee, acceptance or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate; (vi) a transaction with an affiliate that involves the borrowing or lending of securities, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate; or (vii) a "derivative transaction," as defined in paragraph (3) of Section 5200(b) of the Revised Statutes of the United States, with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate. 12 USC § 371c(b)(7).

103 Preamble at 139.

104 Final Rule § _.14(a)(3).

ENDNOTES CONTINUED

105 Preamble at 137.

106 Final Rule § _.14(a)(2)(v).

107 Final Rule § _.14(a)(2)(v)(A).

108 Final Rule § _.14(a)(2)(v)(B).

109 Final Rule § _.14(a)(2)(v)(C).

110 Final Rule § _.14(a)(2)(iv); Preamble at 139. In a riskless principal transaction, the riskless principal (the banking entity) buys and sells the same security contemporaneously, and the asset risk passes promptly from the affiliate (the related covered fund) through the riskless principal to a third party. In permitting such transactions under Regulation W, the Board previously found that there was no regulatory benefit to subjecting riskless principal transactions to section 23A of the Federal Reserve Act, because such transactions closely resemble securities brokerage transactions, and these transactions do not allow the affiliate to transfer risk to the affiliate acting as a riskless principal.

111 Preamble at 108 note 321. The Final Rule defines riskless principal transactions similarly to the definition adopted in Regulation W, which the Agencies note is "appropriately narrow and generally familiar to banking entities." Preamble at 118. *See* 12 CFR 223.3(ee).

112 *See* Preamble at 108 note 321; 12 CFR 223.42.

113 Preamble at 136–39.

114 Final Rule § _.10(d)(6)(ii)(B).

115 Final Rule § _.10(d)(6)(ii)(B)(1). The Final Rule slightly modified the Proposal in this regard. The Preamble notes that the "modification requires that the senior loan or senior debt interest involves, among other things, repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner." Preamble at 153. The purpose of the modification was to clarify that the "safe harbor is available to senior loan and senior debt interests where contractual principal payments vary over the life of a senior loan or senior debt interest for reasons such as amortization and acceleration provided that the total amount of principal required to be repaid over the life of the instrument does not change." Preamble at 153–54.

116 Preamble at 153–54.

117 Final Rule § _.10(d)(6)(ii)(B)(2).

118 Final Rule § _.10(d)(6)(ii)(B)(3).

119 Preamble at 155.

120 Final Rule § _.10(d)(6)(i)(A)(2).

121 Preamble at 19–20; Final Rule § _.13(b). For the first instance of relief, *see* Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20170721a1.pdf. For the currently effective relief, *see* Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20190717a1.pdf.

122 Final Rule § _.13(b).

123 Final Rule § _.6(f)(3)(ii); Preamble at 17.

124 Final Rule § _.6(f); Preamble at 16–17.

125 Final Rule § _.6(f).

126 Final Rule § _.20.

127 Preamble at 22.

128 Final Rule § _.6(f)(5); Preamble at 21.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Name	Phone	Email
Thomas C. Baxter Jr.	+1-212-558-4324	baxtert@sullcrom.com
Whitney A. Chatterjee	+1-212-558-4883	chatterjeew@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Elizabeth T. Davy	+1-212-558-7257	davye@sullcrom.com
Eric M. Diamond	+1-212-558-4044	diamonde@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Michael T. Escue	+1-212-558-3721	escuem@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Wendy M. Goldberg	+1-212-558-7915	goldbergw@sullcrom.com
Joseph A. Hearn	+1-212-558-4457	hearnj@sullcrom.com
Shari D. Leventhal	+1-212-558-4354	leventhals@sullcrom.com
Marion Leydier	+1-212-558-7925	leydierm@sullcrom.com
Erik D. Lindauer	+1-212-558-3548	lindauere@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Camille L. Orme	+1-212-558-3373	ormec@sullcrom.com
Stephen M. Salley	+1-212-558-4998	salleys@sullcrom.com
Rebecca J. Simmons	+1-212-558-3175	simmonsr@sullcrom.com
William D. Torchiana	+1-212-558-4056	torchianaw@sullcrom.com
Donald J. Toumey	+1-212-558-4077	toumeyd@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com

Benjamin H. Weiner	+1-212-558-7861	weinerb@sullcrom.com
Mark J. Welshimer	+1-212-558-3669	welshimerm@sullcrom.com
Michael M. Wiseman	+1-212-558-3846	wisemanm@sullcrom.com
Washington, D.C.		
Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
William F. Kroener III	+1-202-956-7095	kroenerw@sullcrom.com
Stephen H. Meyer	+1-202-956-7605	meyerst@sullcrom.com
Jennifer L. Sutton	+1-202-956-7060	suttonj@sullcrom.com
Andrea R. Tokheim	+1-202-956-7015	tokheima@sullcrom.com
Samuel R. Woodall III	+1-202-956-7584	woodalls@sullcrom.com
Los Angeles		
Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
William F. Kroener III	+1-310-712-6696	kroenerw@sullcrom.com
Paris		
William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com
Tokyo		
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com

APPENDIX A

(Textual Comparison of the Final Rule (June 25, 2020 Release) Against Amended Provisions of Currently Effective Regulations)

§ 248.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part (Regulation VV) is issued by the Board under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818); the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978, as amended (12 U.S.C. 310~~1~~3 *et seq.*).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds by certain banking entities, including state member banks, bank holding companies, savings and loan holding companies, other companies that control an insured depository institution, foreign banking organizations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the Board is authorized to issue regulations under section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)) and take actions under section 13(e) of that Act (12 U.S.C. 1851(e)). These include any state bank that is a member of the Federal Reserve System, any company that controls an insured depository institution (including a bank holding company and savings and loan holding company), any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act (12 U.S.C. 3106), and any subsidiary of the foregoing other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency (as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)), but do not include such entities to the extent they are not within the definition of banking entity in § 248.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the BHC Act or this part, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of BHC Act and this part shall apply to the activities of a banking entity, even if such activities are authorized for the banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the Board to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

§ 248.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *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, 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 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)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1) (i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) the average gross sum of which

over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The Board has not determined pursuant to § 248.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3) (i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for

future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1) (i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The Board has determined pursuant to § 248.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3) (i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart (B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

* * * * *

§ 248.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds*. The prohibition contained in § 248.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)

(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 248.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

* * * * *

Subpart C—Covered Funds Activities and Investments

§ 248.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, 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);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the Board; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B) (*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(2) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(3) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds 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; and

(C) *(1)* Has as its sponsor that banking entity (or an affiliate thereof); or

(2) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of “investment company” under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds*.

(i) Subject to paragraphs (c)(1)(ii) and (iii) ~~below~~of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings. ~~to retail investors in the issuer’s home jurisdiction; and~~

~~(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.~~

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold ~~predominantly~~ to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and ~~employees~~senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(~~C~~B) of this section, the term "public offering" means a distribution (as defined in § 248.4(a)(3)~~ of subpart B~~) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(~~A~~B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(~~B~~C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(~~C~~D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is ~~comprised~~ composed of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles*. An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope*. An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are ~~comprised~~composed solely of:

(A) Loans as defined in § 248.2(t) ~~of subpart A~~;

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; ~~and~~

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section~~.~~; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) the aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A), and debt securities held under this paragraph (c)(8)(i)(E); and

(2) the aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) the issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(ii) the issuing entity's valuation methodology values similarly situated assets consistently.

(ii) Impermissible *assets*. For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities*. Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E), if those securities are:

(A) Cash equivalents – which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities – for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives*. The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, ~~or~~ the contractual rights ~~of~~or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, ~~or~~ the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section~~.~~, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates*. The assets or holdings of the *issuing* entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset- backed securities issued by the asset- backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) Scope. An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are ~~comprised~~ composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds*. An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 et seq.); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program~~.~~;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b-3(b)(8)(A) or (B), or that has terminated

its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z-2(d).

(12) Registered investment companies and excluded entities. An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of "investment company" under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.*

(i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 248.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(2) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(2) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 248.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 248.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 248.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any

entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(1)(iii) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.*

(i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)-1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 248.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 248.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 248.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.*

(i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from

investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 248.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 248.14(b) and 248.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

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

(B) "Family customer" means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)-1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)-1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.*

(i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 248.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 248.14(b) and 248.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

(d) Definition of other terms related to covered funds. For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the Board determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset- backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(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:

(*1*) the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event); and

(*2*) the right to participate in the removal of an investment manager for "cause" or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(2), "cause" for removal of an investment manager means one or more of the following events:

(*i*) the bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(*ii*) the breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(*iii*) the breach by the investment manager of material representations or warranties;

(*iv*) the occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(*v*) the indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(*vi*) a change in control with respect to the investment manager;

(*vii*) the loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(*viii*) other similar events that constitute "cause" for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(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 (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest~~.~~, which is ~~A~~an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(~~A~~*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(~~B~~*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(~~C~~*3*) Any amounts invested in the covered fund, including any amounts paid by the entity ~~(or employee or former employee thereof)~~ in connection with obtaining the restricted profit interest, are within the limits of § 248.12 of this subpart; and

(~~D~~*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(2) The entitlement to payments under the terms of the interest are absolute and could not 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; and

(3) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed 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).

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or

lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a "U.S. person" as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *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, except as permitted under § 248.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 248.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

§ 248.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 248.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 248.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof) except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word “bank” in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund’s offering documents):

(A) That “any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity’s] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate”;

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the "ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity" (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 248.10(a) does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 248.4(a) or (b), respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 248.12(a)(2)(ii) and (iii) and (d).

§ 248.12 Permitted investment in a covered fund.

(a) Authority and limitations on permitted investments in covered funds.

(1) Notwithstanding the prohibition contained in § 248.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 248.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—

(1) *Attribution of ownership interests to a covered banking entity.*

(i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 248.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 248.10(c)(1) ~~of this subpart~~ will not be considered to be an affiliate of the banking entity so long as~~ the banking entity:~~:

(A) The banking entity, together with its affiliates, ~~D~~does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, ~~P~~provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of

its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset- backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—

(i) *Master-feeder fund investments*. If the principal investment strategy of a covered fund (the "feeder fund") is to invest substantially all of its assets in another single covered fund (the "master fund"), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest ~~of~~in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments*. If a banking entity organizes and offers a covered fund pursuant to § 248.11 ~~of this subpart~~ for the purpose of investing in other covered funds (a "fund of funds") and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest ~~of~~in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments*—(i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) *Aggregate permitted investments in all covered funds.*

(1)

(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity ~~(or employee thereof)~~ in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) ~~of this subpart~~), on a historical cost basis~~.~~;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)

(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity ~~(or employee thereof)~~ in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(~~2~~ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity ~~(or employee thereof)~~ in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.*

(1) *Extension Period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application Requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(~~2~~3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(~~2~~3) *Factors governing the Board determinations*. In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(~~3~~4) *Authority to impose restrictions on activities or investment during any extension period*. The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(~~4~~5) *Consultation*. In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 248.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 248.10(a) does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking

entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i), the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)

(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An 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 not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(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;

(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; and

(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.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 248.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 248.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

§ 248.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.*

(1) 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 § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(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.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 248.11, § 248.12, or § 248.13 of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 248.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the Board (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12

CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 248.15.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on ~~prime brokerage~~ other permitted transactions*. ~~A prime brokerage~~Any transaction permitted under paragraphs (a)(2)(ii), (a)(2)(iii), or (a)(2)(iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c-1) as if the counterparty were an affiliate of the banking entity under section 23B.

§ 248.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 248.11 through 248.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and (B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) Definition of high-risk asset and high-risk trading strategy. For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 248.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 248.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 248.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 248.4 and 248.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

* * * * *

§ 248.20 Program for compliance; reporting

(a) Program requirement. Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) Reporting requirements under appendix A to this part.

(1) A banking entity (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The Board notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the Board notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

* * * * *

(e) Additional documentation for covered funds. A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 248.10(c)(1), 248.10(c)(5), 248.10(c)(8), 248.10(c)(9), or 248.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 248.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC–regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC–regulated business development company; the period of time during which the vehicle will operate as a

seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC–regulated business development company within the time period specified in § 248.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 248.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

APPENDIX B

(Textual Comparison of the Final Rule (June 25, 2020 Release) Against the Proposal)

§ 248.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part (Regulation VV) is issued by the Board under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818); the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978, as amended (12 U.S.C. ~~3101~~3103 *et seq.*).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds by certain banking entities, including state member banks, bank holding companies, savings and loan holding companies, other companies that control an insured depository institution, foreign banking organizations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the Board is authorized to issue regulations under section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)) and take actions under section 13(e) of that Act (12 U.S.C. 1851(e)). These include any state bank that is a member of the Federal Reserve System, any company that controls an insured depository institution (including a bank holding company and savings and loan holding company), any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act (12 U.S.C. 3106), and any subsidiary of the foregoing other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency (as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)), but do not include such entities to the extent they are not within the definition of banking entity in § 248.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the BHC Act or this part, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of BHC Act and this part shall apply to the activities of a banking entity, even if such activities are authorized for the banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the Board to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

§ 248.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *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, 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 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)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1) (i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) the average gross sum of which

over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The Board has not determined pursuant to § 248.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3) (i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for

future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1) (i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The Board has determined pursuant to § 248.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3) (i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart (B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

* * * * *

§ 248.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds*. The prohibition contained in § 248.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)

(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in ~~section~~ § 248.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables ~~any other~~the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

* * * * *

Subpart C—Covered Funds Activities and Investments

§ 248.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, 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);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the Board; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B) (*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(2) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(3) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds 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; and

(C) *(1)* Has as its sponsor that banking entity (or an affiliate thereof); or

(2) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of “investment company” under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds*.

(i) Subject to paragraphs (c)(1)(ii) and (iii) ~~below~~of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold ~~predominantly~~ to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in ~~section~~ § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term "public offering" means a distribution (as defined in § 248.4(a)(3~~) of subpart B)~~)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading ~~adviser~~advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is composed of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope*. An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 248.2(t~~) of subpart A;~~);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; ~~and~~

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section~~.~~; and

(E) ~~Any~~Debt securities, other ~~assets~~than asset-backed securities and convertible securities, provided that~~ ~~:

(1) the aggregate value of ~~any such other assets that do not meet the criteria specified in paragraphs (c)(8)(i)(A) through (c)(8)(i)(D) above do~~such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A), and debt securities held under this paragraph (c)(8)(i)(E); and

(2) the aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated

at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) the issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) the issuing entity's assets. valuation methodology values similarly situated assets consistently.

(ii) Impermissible *assets*. For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) aboveof this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities*. Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E), if those securities are:

(A) Cash equivalents – which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization'ssecuritization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities – for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives*. The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates*. The assets or holdings of the *issuing* entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset- backed securities issued by the asset- backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) Scope. An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds*. An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender; ~~or~~

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs~~); or~~) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 et seq.); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program~~.~~;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b-3(b)(8)(A) or (B), or that has terminated

its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z-2(d).

(12) Registered investment companies and excluded entities. An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of "investment company" under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.*

(i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(15) *Credit funds*. Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements*. The issuer's assets must be composed solely of:

(A) Loans as defined in ~~section~~§ 248.2(t~~) of subpart A;~~);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) ~~each~~Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) ~~a~~A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) ~~a~~A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) ~~an~~An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements*. To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 248.3(b)(l)(i~~) of subpart A,~~), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor*. A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 248.11(a)(8) of this subpart, as if the issuer were a covered fund; ~~and~~

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly~~.~~; and

(C) Complies with the limitations imposed in § 248.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(1)(iii) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking ~~entity's~~entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in ~~§§ 248.14 (except the banking entity may acquire and retain any ownership interest in the issuer) and 248.15 of this subpart~~§ 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.*

(i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR ~~§~~ 275.203(l)-1; and

(B) Does not engage in any activity that would constitute proprietary trading under ~~section~~§ 248.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under ~~section _.~~§ 248.11~~-~~(a)(8~~) of this subpart,~~), as if the issuer were a covered fund;~~ and~~

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly~~.(~~; and

(C) Complies with the restrictions in § 248.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in ~~§§ 248.14 (except the banking entity may acquire and retain any ownership interest in the issuer) and 248.15 of this subpart~~§ 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.*

(i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers; ~~and~~

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to ~~3~~5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 248.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than ~~up to 0.5 percent~~as described in paragraph (c)(17)(i)(C) of ~~the entity's outstanding ownership interests that may be held by the banking entity and its affiliates for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns~~this section;

(E) Complies with the requirements of §§ 248.14(b) and 248.15, as if such entity were a covered fund; and

(F) ~~Complies~~Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the ~~issuer~~entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

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

(B) "Family customer" means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)-1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)-1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles*.

(i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created~~, subject to paragraph (c)(18)(ii)(B)(*4*) of this section; and~~;

~~(B) The banking entity and its affiliates:~~

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 248.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than ~~up to 0.5 percent~~as described in paragraph (c)(18)(ii)(B) of ~~the issuer's outstanding ownership interests that may be held by the banking entity and its affiliates for the~~

~~purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns;~~this section;

(*5*) Comply with the requirements of ~~§~~§§ 248.14(b) and 248.15, as if such issuer were a covered fund; and

(*6*) ~~Comply~~Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

(d) Definition of other terms related to covered funds. For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the Board determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset- backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(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 ~~-~~:

(*1*) the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event~~, which includes the right to participate in the removal of an investment manager for cause or to nominate or vote on a nominated replacement manager upon an investment manager's resignation or removal);~~; and

(*2*) the right to participate in the removal of an investment manager for "cause" or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(2), "cause" for removal of an investment manager means one or more of the following events:

(*i*) the bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(*ii*) the breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(*iii*) the breach by the investment manager of material representations or warranties;

(*iv*) the occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(*v*) the indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(*vi*) a change in control with respect to the investment manager;

(*vii*) the loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(*viii*) other similar events that constitute "cause" for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(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 (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest~~. An~~, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 248.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the ~~rights~~right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) ~~Fixed~~Repayment of a fixed principal ~~payments~~amount, on or before a maturity date, in a contractually-

determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, ~~foregone~~forgone income resulting from an early prepayment);

(2) The entitlement to payments under the terms of the interest are absolute and could not 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; and

(3) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed 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).

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a “U.S. person” as defined in rule 902(k) of the SEC’s Regulation S (17 CFR 230.902(k)).

(9) *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, except as permitted under § 248.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 248.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee’s Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

§ 248.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 248.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 248.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof) except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word “bank” in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the

banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That "any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate";

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the "ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity" (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 248.10(a) does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 248.4(a) or (b), respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph

(a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 248.12(a)(2)(ii) and (iii) and (d).

§ 248.12 Permitted investment in a covered fund.

(a) Authority and limitations on permitted investments in covered funds.

(1) Notwithstanding the prohibition contained in § 248.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 248.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—

(1) *Attribution of ownership interests to a covered banking entity.*

(i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 248.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in §~~-~~ 248.10(c)(1) ~~of this subpart~~ will not be considered to be an affiliate of the banking entity so long as~~ the banking entity:~~:

(A) ~~Does~~The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) ~~Provides~~The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single

covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset- backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—

(i) *Master-feeder fund investments*. If the principal investment strategy of a covered fund (the "feeder fund") is to invest substantially all of its assets in another single covered fund (the "master fund"), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments*. If a banking entity organizes and offers a covered fund pursuant to § 248.11~~ of this subpart~~ for the purpose of investing in other covered funds (a "fund of funds") and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments*—(i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) *Aggregate permitted investments in all covered funds.*

(1)

(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii~~) of this subpart),~~)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in ~~their~~his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last

day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund*. For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)

(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit

interest under § 248.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.*

(1) *Extension Period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application Requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations*. In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(~~3~~4) *Authority to impose restrictions on activities or investment during any extension period*. The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(~~4~~5) *Consultation*. In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 248.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 248.10(a) does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i), the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)

(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An 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 not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(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;

(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; and

(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.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 248.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in ~~section~~§ 248.13(b~~)~~);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables ~~any other~~the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

§ 248.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.*

(1) 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 § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(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.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of ~~§~~§§ 248.11, ~~§ ~~248.12, or ~~§ ~~248.13~~ of this subpart; ~~;

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 248.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the Board (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. ~~§~~371c(d) or ~~section~~§ 223.42 of the Board's Regulation W (12 CFR 223.42~~); and~~) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(~~iv~~v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of ~~section~~§ 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (~~iv~~v) must comply with the limitations in § 248.15~~ of this section. ~~.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (a)(2)(iii), or (a)(2)(iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c-1) as if the counterparty were an affiliate of the banking entity under section 23B.

§ 248.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 248.11 through 248.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and (B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) Definition of high-risk asset and high-risk trading strategy. For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 248.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 248.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 248.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 248.4 and 248.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

* * * * *

§ 248.20 Program for compliance; reporting

(a) Program requirement. Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) Reporting requirements under appendix A to this part.

(1) A banking entity (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The Board notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the Board notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

* * * * *

(e) Additional documentation for covered funds. A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 248.10(c)(1), 248.10(c)(5), 248.10(c)(8), 248.10(c)(9), or 248.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 248.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC–regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC–regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC–regulated business development company within the time period specified in § 248.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 248.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.