SULLIVAN & CROMWELL LLP

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Bank Capital Requirements

Federal Banking Agencies Propose Capital Rule Simplifications to the Standardized Approach Calculations Applicable Primarily to Non-Advanced Approaches Banking Organizations

On September 27, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation issued a proposed rule[1] that they describe as simplifying compliance with certain aspects of the agencies' capital rules. The proposed changes would apply only to standardized approach calculations. Additionally, except for revisions to the treatment of acquisition, development, and construction ("*ADC*") exposures that are designed to address concerns regarding the current definition of high volatility commercial real estate ("*HVCRE*") exposure under the standardized approach, the proposed changes would apply only to banking organizations that are not subject to the advanced approaches capital rules ("*non-advanced approaches banking organizations*").[2] Accordingly, except for their treatment of HVCRE exposures, the proposed changes would not apply to advanced approaches banking organizations' calculations of standardized approach risk-based capital ratios for purposes of implementing the standardized approach floor on risk-based capital ratios required by Section 171 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (known as the "*Collins Amendment*").

In addition to the proposed changes in the treatment of ADC exposures, the key proposed changes relate to the regulatory capital treatment for mortgage servicing assets, certain deferred tax assets, investments in the capital instruments of unconsolidated financial institutions, and minority interests. These changes would both simplify the calculations and have the impact of increasing regulatory capital ratios for some non-advanced approaches banking organizations. The agencies also propose what are described as "additional clarifications and technical amendments" applicable to both advanced approaches and standardized approach calculations by all banking organizations.

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The agencies included, for certain items, some discussion of the continued use in this proposal of the dichotomy between non-advanced and advanced approaches banking organizations. The agencies noted with respect to minority interest calculations that "the largest and most internationally active banking organizations should be required to comply with stricter or more complex regulations, where appropriate, commensurate with their size, complexity, and risk profile" and that "[g]iven the potential complexity in the capital structure of [these] institutions, the agencies believe that maintaining the more risk-sensitive approach for these firms better ensures they do not overstate capital ratios at the consolidated level as a result of overcapitalized subsidiaries, thereby protecting the safety and soundness of the banking sector."[3] Similarly, with respect to the proposed simplified treatment for mortgage servicing assets, certain deferred tax assets, and investments in the capital instruments of unconsolidated financial institutions, the agencies "believe that the more complex capital deduction treatments in the capital rule are appropriate for advanced approaches banking organizations, because their size, complexity, and international exposure warrant a risk-sensitive treatment that more aggressively reduces potential interconnectedness among such firms."[4]

Comments on the proposed rule are due 60 days after the date of its publication in the *Federal Register*.

Key Elements of the Proposal

- ***Items subject to simplification.*** For non-advanced approaches banking organizations only, the proposed rule would:
  - ***Simplify common equity tier 1 threshold deductions.*** The proposed rule would revise the common equity tier 1 ("*CET1*") threshold deductions under the agencies' capital rules for (i) mortgage servicing assets ("*MSAs*"), (ii) deferred tax assets ("*DTAs*") arising from temporary differences that could not be realized through net operating loss carry backs, and (iii) significant investments in the capital of unconsolidated financial institutions in the form of common stock.[5]
    - The agencies' capital rules currently limit the inclusion of each of these items to 10 percent of a banking organization's CET1 capital, with a combined 15 percent limit and any excess above these limits being deducted from CET1 capital.
    - The proposed rule would raise the limit for each of these items individually to 25 percent of CET1 capital (after deductions and adjustments) and would eliminate the combined 15 percent limit. Any amount of MSAs or DTAs individually exceeding this limit would be deducted from CET1 capital. MSAs and DTAs not deducted from regulatory capital would be assigned a 250 percent risk weight. As discussed below, for investments in the capital of unconsolidated financial institutions, the 25 percent limit would apply to all types of those investments—whether significant or non-significant and whether or not in the form of common stock—with deductions for investments that exceed this threshold but are not in the form of common stock being made in accordance with the corresponding deduction approach.
  - ***Remove the distinction between significant and non-significant investments in the capital of unconsolidated financial institutions.*** The agencies' capital rules currently include distinctions among different categories of investments in the capital of unconsolidated financial institutions.
    - In addition to the deduction noted above for significant investments[6] in the capital of unconsolidated financial institutions in the form of common stock, the agencies' capital rules also require capital deductions for (i) non-significant investments in the capital of

unconsolidated financial institutions,[7] and (ii) significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock.

- A banking organization currently is required to deduct from its regulatory capital any amount of non-significant investments in the capital of unconsolidated financial institutions that exceeds 10 percent of the banking organization's CET1 capital, and any amount of significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock must be deducted from regulatory capital in its entirety, each in accordance with the corresponding deduction approach.[8]

- The proposed rule would remove these distinctions among investments in the capital of unconsolidated financial institutions and apply a deduction limit on all such investments equal to 25 percent of the banking organization's CET1 capital.
  - Any amount of these investments not deducted from regulatory capital would be risk weighted according to the relevant treatment for the exposure category of the investment.[9]
- By removing the distinctions among the different categories of investments in the capital of unconsolidated financial institutions, the proposal would eliminate—for non-advanced approaches banking organizations—the exclusion of significant investments in the form of common stock from the provision in the capital rules that allows banking organizations to apply a preferential risk weight of 100 percent to the aggregated adjusted carrying value of equity exposures that do not exceed 10 percent of a banking organization's total capital.[10]

- ***Simplify the limitations on minority interest includable in regulatory capital.*** The agencies' capital rules currently include limits on the amount of capital that would count toward regulatory requirements in cases where the capital is issued by a consolidated subsidiary of the banking organization and not owned by the banking organization—that is, minority interest.
  - The agencies' capital rules currently require a complex calculation to determine the amount of minority interest based on the required capital for the issuer subsidiary.[11] The limitations are intended to avoid overstating capital ratios at the parent banking organization because minority interest is not available to absorb losses for the consolidated banking organization.[12]
  - The proposal would allow non-advanced approaches banking organizations to include CET1 minority interest, tier 1 minority interest, and total capital minority interest up to 10 percent of the parent banking organization's CET1, tier 1, and total capital elements, respectively (before the inclusion of any minority interest and after certain deductions and adjustments).[13]
  - Advanced approaches banking organizations would be required to continue to apply the treatment of minority interest as provided in the existing capital rules.
  - The proposed rule would retain the requirement in the agencies' existing capital rules that, for additional tier 1 and tier 2 regulatory capital instruments, if the instrument is not issued directly by the subject banking organization or a subsidiary of the banking organization that is an operating entity, the only asset of the issuing entity must be its investment in the capital of the subject banking organization, and proceeds must be immediately available without limitation to the subject banking organization or its top-tier holding company and meet or exceed all other criteria to qualify as an additional tier 1 or tier 2 instrument, as applicable.[14]

- ***The proposed rules would replace the complex HVCRE exposure definition with a simpler definition for HVADC exposures.*** The agencies' capital rules currently use a complex definition for HVCRE exposures. The capital rules currently define an HVCRE exposure as any credit facility that, prior to conversion to permanent financing, finances or has financed the acquisition, development, or construction of real property, unless the facility finances one- to four-family residential properties, certain agricultural or community development exposures, or commercial real estate projects where the borrower meets certain contributed capital requirements and other prudential criteria.

- For the calculation of risk-weighted assets for both advanced approaches and non-advanced approaches banking organizations under the agencies' standardized approach capital framework, the proposed rule would replace this complex HVCRE definition with a more straightforward definition for high volatility acquisition, development, or construction ("*HVADC*") exposures.
  - The HVADC exposure definition would apply to credit facilities that *primarily* finance or refinance ADC activities, and is generally expected to encompass a broader range of exposures than the current HVCRE definition.
  - The proposed rule would not revise the treatment of HVCRE exposures for purposes of calculating risk-weighted assets under the advanced approaches capital framework, but banking organizations subject to the advanced approaches would use the proposed HVADC exposure category to calculate their capital ratios under the standardized approach.
- The agencies note in the proposal that some of the simplifications may increase the scope of exposures captured by the HVADC exposure definition while others may decrease it but that in "in the aggregate it is likely that more acquisition, development, or construction loans would be captured under the proposed HVADC exposure definition than under the current HVCRE definition."[15]
  - For example, as compared to the HVCRE definition, the proposed HVADC definition would not include an exemption for loans that finance projects with substantial borrower contributed capital (and consequently removes the restriction on the release of internally generated capital).
  - Accordingly, the agencies propose to apply a lower risk weight of 130 percent in place of the currently applicable 150 percent risk weight under the standardized approach.
- The proposed rule would also clarify the scope of exposures covered by the HVADC definition and simplify and clarify certain exemptions.
  - The proposed rule would include exemptions for:
    - one- to four-family residential properties, such that lot development loans and loans to finance ADC of townhomes or row houses would not be considered HVADC (while loans to finance or refinance the ADC of apartments and condominiums generally would be considered HVADC);
    - community development loans, such that (i) real property projects that have the primary purpose of "community development" would not be considered HVADC, and (ii) loans to finance activities that promote economic development by financing small businesses or farms that meet certain size eligibility or revenue standards would not be considered HVADC; and
    - permanent loans, which are defined to include any prudently underwritten loan that has a clearly identified source of repayment sufficient to service amortizing principal and interest payments aside from the sale of the property (although loan payments need not be amortizing in order for a loan to be considered "permanent").[16]
- The proposal would also clarify that a credit facility "primarily finances or refinances" ADC activities where more than 50 percent of loan proceeds will be used for those activities.[17]
- The proposed HVADC exposure definition would apply automatically as of the effective date of the final rule (only for ADC exposures originated on or after such date), but would grandfather the treatment of ADC loans originated prior to that date.

- ***The agencies pose certain notable questions in the proposal.*** In the proposal, the agencies pose a variety of specific questions, including two important general questions:
  - Question 14 notes that, although the proposed rule is intended to address comments received during the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) review,[18] the agencies are also seeking comment more generally on any additional alternatives to

simplify and streamline the regulatory capital rules—particularly with respect to the burden related to their calculation and reporting and the potential disparate impact on smaller and medium-sized banking organizations relative to their G-SIB counterparts.

- Although both this proposal and the recent transitional provisions extension proposal (the "extensions proposal")[19] use the advanced approaches threshold as the dividing line to determine which banking organizations will benefit from continued application of the transition provisions and the proposed simplifications to the capital rules, the agencies may be considering alternatives to this threshold, such as a distinction between G-SIBs and non-G-SIBs.
- For example, the revised definition of "large and noncomplex" banking organizations in the recent amendments to the Federal Reserve's capital plan rule[20] replaced the $10 billion foreign exposure element of the advanced approaches threshold definition with a G-SIB status element, such that the final rule defines "large and noncomplex" as a firm that (i) has average total consolidated assets of less than $250 billion, (ii) has average total nonbank assets of less than $75 billion, and (iii) is not a bank holding company that is identified as a global systemically important bank holding company pursuant to 12 C.F.R. § 217.402.[21]
- As another example, "for purposes of clarity and enforceability" the proposal would add a new section to the Federal Reserve's capital rules that would create a stand-alone requirement that banking organizations subject to the Federal Reserve's capital rules (such as bank holding companies and state member banks) may not repurchase or redeem any capital instrument without the prior approval of the Federal Reserve.[22] Although the proposal does not specify how the new section would promote "enforceability," it may be intended to confirm that bank holding companies that are not subject to the Federal Reserve's capital plan rule[23] must receive prior regulatory approval before engaging in any common stock repurchases.

- Question 15 notes that the agencies are also seeking comment on whether and why they should consider any further "comprehensive simplifications to the capital rule[s] for small and medium-sized banking organizations by, for example, further simplifying risk-weighted assets and the definition of capital, or reducing the number of regulatory capital ratios, consistent with legal requirements."[24]

- ***The proposal includes certain "technical" amendments to the regulatory capital rules.*** The proposal also describes certain "technical corrections and clarifications" included in the proposed rule that would apply to both advanced approaches and non-advanced approaches banking organizations, intended to fix "typographical and technical errors in several provisions of the capital rule[s] that warrant clarification or updating," as well as "incorrect or imprecise cross-references."[25]
  - For example, the proposal notes that the proposed rule would correct an error in the definition of "investment in the capital of an unconsolidated financial institution" by changing the word "and" to "or," which would clarify that an instrument qualifying for the definition can be either recognized as capital for regulatory purposes by a primary supervisor of an unconsolidated financial institution or can be part of the equity under U.S. generally accepted accounting principles (GAAP) of an unconsolidated unregulated financial institution.
  - Banking organizations should review these revisions, as some may be impactful depending on a firm's particular circumstances and how it has interpreted and applied the existing capital rules.
- ***Banking organizations subject to the extension.*** Advanced approaches banking organizations would continue to apply the capital rules' current treatment for MSAs, temporary difference DTAs, and investments in the capital of unconsolidated financial institutions in calculating risk weighted assets under both the advanced and standardized approaches. Advanced approaches banking organizations would also continue to calculate includable minority interest according to the agencies' current capital rules.
  - Although not expressly addressed in the proposal, the proposed simplifications would appear not to be available to intermediate holding companies (IHCs) of foreign banking organizations that have more than $250 billion in total consolidated assets or $10 billion in foreign exposure (the

thresholds for application of the advanced approaches under the agencies' capital rules). Although these IHCs are not subject to the requirement to determine their risk-based capital requirements under the agencies' advanced approaches rules,[26] they are "nonetheless subject to the other requirements that apply to advanced approaches banking organizations."[27] The proposed simplifications for the items noted above would constitute "aspects of the revised capital framework that apply to institutions that meet the thresholds for application of the advanced approaches rules, but are not part of the advanced approaches rules" themselves.[28]

- ***Related regulatory reports.*** The agencies also plan to propose corresponding changes to various regulatory reporting forms and instructions.

In August, the agencies proposed to extend the capital rules' transitional provisions for MSAs, temporary difference DTAs, and investments in the capital of unconsolidated financial institutions in anticipation of this simplification proposal.[29] If the extensions proposal is finalized substantially as proposed, the capital treatment proposed therein would remain effective until the changes in this simplification proposal are finalized and become effective (or until the finalized extensions proposal is otherwise superseded). However, if the extensions proposal is not finalized, all the transition provisions currently in the capital rules would remain in effect, including a final, stricter recalibration to the treatment of items discussed in the extensions proposal beginning January 1, 2018, for all banking organizations covered by the agencies' capital rule.

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ENDNOTES

[1] Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation, *Regulatory Capital Rules: Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act* (Sept. 27, 2017) (hereafter, the "proposal").

[2] Advanced approaches banking organizations are generally those with $250 billion or more in total consolidated assets or $10 billion or more in foreign exposures (including subsidiary depository institutions of bank holding companies that meet one of these thresholds).

[3] The proposal, at 23.

[4] The proposal, at 21.

[5] The agencies' capital rules require that amounts of the following items that individually exceed 10 percent of the banking organization's CET1 capital be deducted from a banking organization's CET1 capital: (i) MSAs, (ii) DTAs arising from temporary differences that could not be realized through net operating loss carry backs, and (iii) significant investments in the capital of unconsolidated financial institutions in the form of common stock. In addition, for each of these items, any amount not deducted after the application of the 10 percent CET1 deduction threshold must be deducted from CET1 capital if that amount exceeds 15 percent of the banking organization's CET1 capital.

Beginning January 1, 2018, any amount of these three items that a banking organization does not deduct from CET1 capital will be risk weighted at 250 percent (until that time, these items are risk weighted at 100 percent). See the agencies' notice of proposed rulemaking that was issued on August 25, 2017 (82 Fed. Reg. 40495) (proposing to extend the transitional treatment of these items for non-advanced approaches banking organizations).

[6] A significant investment in the capital of an unconsolidated financial institution is defined as an investment in the capital of an unconsolidated financial institution where the banking organization owns more than 10 percent of the issued and outstanding common stock of the unconsolidated financial institution. 12 CFR § 217.2 (Federal Reserve); 12 CFR § 3.2 (OCC); 12 CFR § 324.2 (FDIC).

[7] A non-significant investment in the capital of an unconsolidated financial institution is defined as an investment in the capital of an unconsolidated financial institution where the institution owns 10 percent or less of the issued and outstanding common stock of the unconsolidated financial institution. 12 CFR § 217.2 (Federal Reserve); 12 CFR § 3.2 (OCC); 12 CFR § 324.2 (FDIC).

[8] 12 CFR § 217.22(c)(2), (4)-(5) (Federal Reserve); 12 CFR § 3.22(c)(2), (4)-(5) (OCC); 12 CFR § 324.22(c)(2), (4)-(5) (FDIC).

[9] To further reduce complexity, the agencies do not propose a specific methodology dictating which specific investments a non-advanced approaches banking organization must deduct and which it must risk weight in cases where the firm is exceeding the 25 percent CET1 capital deduction threshold for investments in the capital of unconsolidated financial institutions. Non-advanced approaches banking organizations would be required to risk weight any investments in the capital of unconsolidated financial institutions that are not deducted according to the relevant treatment for the exposure category of the investment.

[10] Equity exposures that exceed, in the aggregate, 10 percent of a non-advanced approaches banking organization's total capital would then be assigned a risk weight based upon the approaches available in sections 52 and 53 of the capital rules. 12 CFR § 217.52 and 53 (Federal Reserve); 12 CFR § 3.52 and 53 (OCC); 12 CFR § 324.52 and 53 (FDIC).

[11] 12 CFR § 217.22(a)-(b) (Federal Reserve); 12 CFR § 3.22(a)-(b) (OCC); 12 CFR § 324.22 (a)-(b) (FDIC).

[12] The proposal, at 22-23.

ENDNOTES (CONTINUED)

13 In each case, the parent banking organization's regulatory capital for purposes of these limitations would be measured before the inclusion of any minority interest and after the deductions from and adjustments to the regulatory capital of the parent banking organization described in sections 22(a) and (b) of the capital rules.

14 12 CFR § 217.20(c)(1)(xiii) and (d)(1)(ix) (Federal Reserve); 12 CFR § 3.20(c)(1)(xiii) and (d)(1)(ix) (OCC); 12 CFR § 324.20(c)(1)(xiii) and (d)(1)(ix) (FDIC).

15 The proposal, at 7.

16 The proposal, at 13.

17 The proposal, at 10.

18 In March 2017, the Federal Financial Institutions Examination Council (FFIEC) released its report on the second Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) review to Congress. Under EGRPRA, the FFIEC and its member agencies are directed to conduct a joint review of their regulations every 10 years and consider whether any of those regulations are outdated, unnecessary, or unduly burdensome. The March 2017 EGRPRA report identified community banking organization concerns with the compliance burden associated with the revised capital rules. In response to these concerns, the agencies stated that they are "developing a proposal to simplify the regulatory capital rules in a manner than maintains safety and soundness and the quality and quantity of regulatory capital in the banking system," indicating that amendments likely would include, among other things, simplifying (i) the current regulatory capital treatment for MSAs, timing difference DTAs, and holdings of regulatory capital instruments issued by financial institutions, and (ii) the current limitations on minority interests in regulatory capital. *See* Federal Financial Institutions Examination Council, Joint Report to Congress, Economic Growth and Regulatory Paperwork Reduction Act (March 2017).

19 Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation, *Regulatory Capital Rules: Retention of Certain Existing Transition Provisions for Banking Organizations that are not Subject to the Advanced Approaches Capital Rules*, 82 Fed. Reg. 40495 (Aug. 25, 2017). For additional information please see our client memoranda Banking Organization Capital Requirements: Federal Banking Agencies Propose Extension of Certain Transitional Provisions for Non-Advanced Approaches Banking Organizations (Aug. 25, 2017), *available at* https://www.sullcrom.com/banking-organization-capital-requirements-August-25-2017.

20 Board of Governors of the Federal Reserve System, *Amendments to the Capital Plan and Stress Test Rules; Regulations Y and YY*, 82 Fed. Reg. 9308 (Feb. 3, 2017).

21 12 C.F.R. § 225.8(d)(9).

22 The proposal, at 24.

23 12 C.F.R. § 225.8.

24 The proposal, at 27.

25 The proposal, at 23.

26 Under 12 C.F.R. § 252.153, a foreign banking organization with U.S. non-branch assets of $50 billion or more is required to establish a U.S. intermediate holding company. These U.S. intermediate holding companies are not required to comply with the provisions set forth in 12 C.F.R. Part 217, subpart E (the Internal Ratings-Based and Advanced Measurement Approaches).

27 Board of Governors of the Federal Reserve System, *Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations*, Final Rule, 79 Fed. Reg. 17240, 17281 (Mar. 27, 2014).

28 *Id.*

ENDNOTES (CONTINUED)

[29] For additional information please see our client memoranda Banking Organization Capital Requirements: Federal Banking Agencies Propose Extension of Certain Transitional Provisions for Non-Advanced Approaches Banking Organizations (Aug. 25, 2017), *available at* https://www.sullcrom.com/banking-organization-capital-requirements-August-25-2017.

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