March 8, 2016

Single Counterparty Credit Limits

Federal Reserve Board Proposes Revised Rules to Establish Single Counterparty Credit Limits

SUMMARY

On March 4, the Federal Reserve issued a proposed rulemaking ("*SCCL Reproposal*") that would impose single counterparty credit limits ("*SCCL*"), pursuant to Section 165(e) of the Dodd-Frank Act, on:

- U.S. bank holding companies ("*BHCs*") with $50 billion or more in total consolidated assets;
- Foreign banking organizations ("*FBOs*") with $50 billion or more in total consolidated assets, but with single counterparty credit limits applying only to the exposures of their combined U.S. operations; and
- U.S. intermediate holding company subsidiaries ("*IHCs*") of FBOs with $50 billion or more in total consolidated assets (together with the U.S. BHCs and FBOs described above, "*Covered Companies*").

Section 165(e) requires the Federal Reserve to promulgate regulations prohibiting a BHC or FBO with $50 billion or more in total consolidated assets from having credit exposure to any unaffiliated company in excess of 25 percent of the company's capital stock and surplus, with discretion to impose a lower limit if "necessary to mitigate risks to the financial stability of the United States."

In December 2011 (for U.S. BHCs)[1] and December 2012 (for FBOs and IHCs),[2] the Federal Reserve initially proposed single counterparty credit limit rules (the "*Original SCCL Proposal*"), along with other enhanced prudential standards for Covered Companies, but the Original SCCL Proposal was not included in the final package of enhanced prudential standards issued by the Federal Reserve in 2014.[3] The Original SCCL Proposal met with significant criticism due in large part to measurement methodologies that would have produced significant overstatements of realistic economic exposure, which would likely have required Covered Companies to unwind existing transactions on a large scale.

The SCCL Reproposal makes important changes to the Original SCCL Proposal that should reduce both the number of counterparties with exposures that would be at or above the applicable limit and the aggregate amount of exposures that exceed the limit, although the full impact will not be known until the Federal Reserve makes a final determination of how credit exposure from derivative transactions will be measured. The Federal Reserve estimates that, under the SCCL Reproposal, the total amount of excess credit exposure of U.S. BHCs would be less than $100 billion. By contrast, an industry data study of the Original SCCL Proposal estimated that there would have been, in the aggregate, 100 incidents of counterparty exposures in excess of the proposed limits totaling nearly $1.3 trillion.[4] Nonetheless, the SCCL Reproposal remains conservative and introduces new concepts that would increase the complexity of, and burden associated with, compliance. We have summarized below key elements of the SCCL Reproposal.

The Federal Reserve has asked that comments on the SCCL Reproposal be submitted by June 3, 2016.

KEY ELEMENTS OF THE SCCL REPROPOSAL

A. SCOPE OF COVERED COMPANIES, CALCULATION OF LIMITS, AND COMPLIANCE TIME FRAME

Although the universe of companies covered by the SCCL Reproposal remains substantially the same as under the Original SCCL Proposal, the SCCL Reproposal tailors requirements and compliance time frames largely by the size of the Covered Company and, in some cases, counterparty. In this memorandum we use the following terms to describe these tiers:

- "*Covered Company*": as defined in the first paragraph of this memorandum;
- "*Large Covered Company*": a Covered Company (whether a U.S. BHC, an FBO or an IHC) having $250 billion or more in total consolidated assets or $10 billion or more in on-balance sheet foreign exposures (the threshold at which banks generally become subject to advanced approaches capital requirements);
- "*Major Covered Company*": (i) a U.S. BHC (other than an IHC) that is a Global Systemically Important BHC ("*GSIB*") as determined under the Method 1 calculation of the Federal Reserve's GSIB surcharge framework,[5] (ii) an FBO with total consolidated assets of $500 billion or more, or (iii) a U.S. IHC with total consolidated assets of $500 billion or more; and
- "*Major Counterparty*": Major Covered Companies, FBOs and IHCs that have the characteristics of, or would be identified as, GSIBs under the global methodology or the Federal Reserve's Regulation Q, and nonbank financial companies designated by the FSOC ("*Nonbank SIFIs*").

Most notably, for Large Covered Companies, a smaller denominator is used (tier 1 capital as opposed to total capital plus the portion of the allowance for loan and lease loses ("*ALLL*") not included in tier 2 capital),[6] and Major Covered Companies are subject to an additional limit of 15 percent on exposures to Major Counterparties. Although the measure of capital for Covered Companies has been reduced by using tier 1 capital, the applicable credit limit for exposures of Major Covered Companies to Major Counterparties has been increased (from 10 percent in the Original SCCL Proposal to 15 percent), and we expect that the net result of these two modifications is a more lenient limit for such exposures. In addition, Large Covered Companies also must comply within a shorter time frame.

The chart below identifies the types of Covered Companies and how the SCCL Reproposal applies to them.

Entity Type	Applicable Limit	Compliance Date[7]
Covered Companies that are not Large Covered Companies or Major Covered Companies	*U.S. BHCs and IHCs***:** 25 percent of total regulatory capital plus the balance of ALLL not included in tier 2 capital. *FBOs (with respect to combined U.S. operations)*: 25 percent of total regulatory capital on a consolidated basis.	Two years from the effective date of the rule.
Large Covered Companies that are not Major Covered Companies	*U.S. BHCs and IHCs*: 25 percent of tier 1 capital. *FBOs (with respect to combined U.S. operations)*: 25 percent of worldwide tier 1 capital.	One year from the effective date of the rule.
Major Covered Companies	*U.S. BHCs and IHCs*: • Exposure to a Major Counterparty: 15 percent of tier 1 capital. • Exposure to other counterparties: 25 percent of tier 1 capital. *FBOs (with respect to combined U.S. operations)*: • Exposure to a Major Counterparty: 15 percent of worldwide tier 1 capital. • Exposure to other counterparties: 25 percent of worldwide tier 1 capital.	One year from the effective date of the rule.

Nonbank SIFIs are not included as Covered Companies under the SCCL Reproposal, although Nonbank SIFIs are "Major Counterparties" for purposes of the 15 percent limit for Major Covered Companies described above. The preamble notes that the Federal Reserve intends to apply similar credit limits to these companies separately by rule or by order at a later date.

B. KEY CHANGES TO MEASUREMENT METHODOLOGY

A key focus of the criticism of the Original SCCL Proposal was its proposed methodologies for measuring credit exposure, which were almost entirely insensitive to risk. "Credit exposure" to a company is defined in section 165(e) of the Dodd-Frank Act to mean all extensions of credit to the company, including (i) loans, deposits, and lines of credit, (ii) all repurchase agreements, reverse repurchase agreements, and securities borrowing and lending transactions with the company (to the extent that such transactions create credit exposure for the Covered Company), (iii) all guarantees, acceptances, and letters of credit (including endorsement or standby letters of credit) issued on behalf of the company, (iv) all purchases of, or investments in, securities issued by the company, (v) counterparty credit exposure to the company in connection with derivative transactions between the Covered Company and the company and (vi) any other similar transaction that the Federal Reserve, by regulation, determines to be a credit exposure for purposes of section 165.

The SCCL Reproposal tempers the blunt approach embodied in the Original SCCL Proposal by introducing risk-based elements to certain of the exposure measurements and excluding or exempting exposures to certain entities from the limit. Chief among these modifications are:

- ***Derivatives.*** For derivatives (other than credit and equity derivatives) a Covered Company can use any methodology for measuring counterparty credit exposure, including an internal model methodology ("*IMM*"), that the Covered Company is entitled to use under the risk-based capital rules. The Federal Reserve notes, however, that it will consider whether to require the use of the Basel Committee's Standardized Approach for Counterparty Credit Risk ("*SACCR*")[8] when the federal banking agencies consider incorporation of the SACCR into the risk-based capital rules. For the time being, the ability to use IMM is a significant improvement over the Original SCCL Proposal, which would have required that Covered Companies measure such exposures under the Current Exposure Method ("*CEM*"). That method allows only limited recognition of netting and no recognition of collateral that will be posted against future exposures. Although SACCR is more risk-sensitive than CEM and addresses some of its shortcomings, it remains a relatively conservative approach to measuring exposure and would result in a less risk-sensitive exposure measure compared to IMM if it is ultimately incorporated into the SCCL. The approach for FBOs differs, as discussed below.
- ***Credit and equity derivatives.*** The SCCL Reproposal retains the requirement in the Original SCCL Proposal that a Covered Company shift the exposure from the original counterparty to the protection provider. However, for eligible credit and equity derivatives that are used to hedge covered positions subject to the Federal Reserve's market risk rule where the counterparty on the hedged transaction is not a financial entity, instead of treating the full notional amount as the exposure amount (as required for financial entities), the Covered Company would measure exposure to the protection provider in the same manner as for other derivative transactions (that is, using any counterparty credit risk methodology authorized under the risk-based capital rules). For this purpose, "*financial entities*" is broadly defined and includes: (i) a depository institution; (ii) a BHC; (iii) a savings and loan holding company; (iv) a securities broker or dealer registered with the U.S. Securities and Exchange Commission; (v) an insurance company that is subject to supervision by a State insurance regulator; (vi) an FBO; (vii) a non-U.S.-based securities firm or a non-U.S.-based insurance company that is subject to consolidated supervision and regulation comparable to that applicable to U.S. depository institutions, securities broker-dealers, or insurance companies; (viii) a central counterparty ("*CCP*"); and (ix) a legal entity whose main business includes the management of financial assets, lending, factoring, leasing, provision of credit enhancements, securitization, investments, financial custody, proprietary trading, and other financial services.
- ***Securities financing transactions.*** Although the SCCL Reproposal relies on the same general "add-on" approach embodied in the Original SCCL Proposal, the add-on, which represents the collateral haircut applicable to the transferred securities, would be lower because it would be adjusted to reflect a five-day liquidation period, to align with the risk-based capital rules for repo-style transactions, rather than the 10-day liquidation period assumed for other transactions (which was used in the Original SCCL Proposal). The preamble notes that the Federal Reserve considered several alternatives to address commenters' concerns regarding the conservative netting methodology in the Original SCCL Proposal. Commenters argued that the Original SCCL Proposal's methodology implied unrealistic assumptions about correlations among securities that a Covered Company transfers to, and receives from, a counterparty. The Federal Reserve ultimately rejected the alternatives because assumptions about correlations may break down

during times of stress and the alternatives would have introduced complexity that would increase the possibility of arbitrage.

- ***Non-U.S. sovereigns.*** The SCCL Reproposal excludes from the definition of "counterparty" foreign sovereign entities, including a central bank, and all of its agencies and instrumentalities (but not its political subdivisions, such as a state, province, or municipality), that are assigned a zero percent risk weight under the Federal Reserve's risk-based capital rules. This represents a significant change from the Original SCCL Proposal, in which the Federal Reserve proposed to make credit exposures to all foreign sovereign entities regardless of risk weight subject to the limits in the same manner as credit exposures to companies.[9]
- ***Qualifying central counterparties.*** Trade exposures to central counterparties that meet the definition of a "*qualifying central counterparty*" under Regulation Q ("*QCCPs*"), including potential future exposure arising from transactions cleared by a QCCP and pre-funded default fund contributions, are also excluded under the SCCL Reproposal. In light of the increasing use of central counterparties, including as a result of clearing mandates, this exemption is an important addition under the SCCL Reproposal. The Original SCCL Proposal treated transactions with CCPs the same as any other derivative transaction and subjected guaranty fund contributions to the prescribed limits.

The Federal Reserve has made other modifications to measurement methodologies, such as a market value measure of exposure for equity or debt securities (rather than the greater of purchase price or market value under the Original SCCL Proposal), which may ease the burden associated with compliance even if they are unlikely to have an impact on whether the SCCL is binding with respect to a particular counterparty.

In a few instances, the measurement approach or methodology is more conservative. For example, whereas the Original SCCL Proposal permitted a Covered Company to choose whether to use eligible collateral to reduce exposure to a counterparty and therefore shift the exposure to the eligible collateral issuer, the SCCL Reproposal, similar to the Basel Large Exposure Framework, requires a Covered Company to do so.[10]

C. NEW CONCEPTS IN THE REPROPOSED SCCL

The SCCL Reproposal introduces new concepts that would introduce a compliance burden and, in some cases, may make it difficult for Covered Companies to adhere to the prescribed limits. Most notably:

- ***Scope of counterparty.*** The scope of the counterparty has been modified in two ways from the Original SCCL Proposal. Both modifications are responsive to provisions in the Basel Large Exposure Framework, albeit with substantially more detail than that framework's provisions.
  - ***Economic interdependence.*** The SCCL Reproposal adds an "economically interdependent" test to the framework in certain circumstances. If total exposures to a single counterparty exceed five percent of the consolidated capital stock and surplus of a Covered Company (or five percent of its tier 1 capital in the case of a Large Covered Company), the Covered Company would be required to add to its aggregate exposure to that counterparty all exposures to other counterparties that are "economically interdependent" with that counterparty. Counterparties are considered "economically interdependent" if the failure, default, insolvency or material financial distress of one of the counterparties would cause the failure or distress of the other counterparty. The indicia of economic interdependence under the SCCL Reproposal are similar, but not identical, to those included in the Basel Large Exposure Framework.

    - ***Control relationships.*** A Covered Company is required to add to exposures to a counterparty all exposures to other counterparties that are connected by certain control relationships, including (i) the presence of voting agreements; (ii) the ability of one counterparty to influence significantly the appointment or dismissal of another counterparty's administrative, management or supervisory body, or the fact that a majority of members have been appointed solely as a result of the exercise of the first entity's voting rights; and (iii) the ability of one counterparty to significantly influence senior management or to exercise a controlling influence over the management or policies of another counterparty. Unlike the economic interdependence test, for these potential control relationships there is no five percent threshold, meaning that the operational burden of investigating such indicia of control is not alleviated with respect to any given counterparty.

- ***Scope of covered company.*** The SCCL Reproposal broadens the concept of control by using the BHC Act definition of control, which includes a "controlling influence over the management or policies" test, for determining which entities are subsidiaries of the Covered Company. This differs from the Original SCCL Proposal, which defined control for all purposes as entities which the Covered Company (i) owns, controls or holds with power to vote 25 percent or more of a class of a company's voting stock; (ii) owns or controls 25 percent or more of a company's total equity; or (iii) consolidates for accounting purposes. In addition, the Federal Reserve specifically asks whether the proposal's definition of "*subsidiary*" should be expanded to include any investment fund or vehicle advised or sponsored by a Covered Company.

- ***Funds and securitizations.*** In the Original SCCL Proposal the Federal Reserve reserved authority to impose a look-through approach for securitization funds, investment funds or other special purpose vehicles (collectively, "*SPVs*"). The SCCL Reproposal instead includes the following requirements for Large Covered Companies, which are responsive to the provisions in the Basel Large Exposure Framework:

    - ***Look-through.*** For credit exposures to SPVs, Large Covered Companies are required to analyze their credit exposure to the issuers of the underlying assets in an SPV in which the Large Covered Company invests or to which the Large Covered Company otherwise has credit exposure. Unless the Large Covered Company can demonstrate that its exposure to the issuer of each underlying asset held by an SPV is less than 0.25 percent of the Large Covered Company's tier 1 capital (considering only exposures that arise from the SPV), the Large Covered Company is required to apply a "look-through approach" and recognize an exposure to each issuer of the assets held by the SPV.

    - ***Exposures to third parties.*** Large Covered Companies also are required to identify third parties (for example, credit enhancement providers) whose failure or distress would likely result in a loss in the value of the Large Covered Company's investment in the SPV and recognize an exposure to the relevant third party that is equal to the value of the Large Covered Company's investment in the SPV.

D. UNRESOLVED CONCERNS FROM THE ORIGINAL SCCL PROPOSAL

Notwithstanding the modifications described above, much of the framework of the Original SCCL Proposal remains unchanged in the SCCL Reproposal. Concerns identified by commenters on the Original SCCL Proposal that have not been addressed include:

- The requirement to shift the risk of an exposure to a hedged counterparty to an eligible protection provider, ignoring the reduced likelihood that the Covered Company will experience a loss in light of the fact that both the counterparty and the protection provider would have to default (that is, a "double default" would have to occur);

- Application of the SCCL to credit exposures to individuals and their immediate families despite the fact that exposures to individuals are very unlikely to approach the limit;

- Application of the SCCL to U.S. states and their agencies, instrumentalities, and political subdivisions (including municipalities);
- The absence of any transition period for Covered Companies that cross the threshold and become Major Covered Companies or for entities that become Major Counterparties; and
- No allowance for temporary breaches outside of those resulting from capital reductions or mergers (of the Covered Company or two unaffiliated counterparties).

E. APPLICATION TO FOREIGN BANKING ORGANIZATIONS

As noted, the SCCL Reproposal applies to FBOs with $50 billion or more in total consolidated assets, but only to the exposures of their combined U.S. operations. As under the Original SCCL Proposal, combined U.S. operations include the FBO's branches and agencies, as well as U.S. subsidiaries, including any IHC. The limits also apply separately to a FBO's U.S. IHC subsidiary.

The approach for FBOs would differ in several ways from the approach for domestic Covered Companies:

- The threshold for an FBO or the U.S. IHC of an FBO to be considered a Major Covered Company is based solely on asset size ($500 billion in total consolidated assets), and not on its score under the Method 1 GSIB capital surcharge calculation applicable for domestic BHCs;
- The combined U.S. operations of an FBO would not be permitted to use the IMM method for measuring credit exposure to a counterparty from derivatives and instead would be required to use, for derivatives subject to a qualified master netting agreement, the exposure at default calculation set forth in 12 C.F.R. 217.132(c), which for FBOs would include only the CEM, or the gross valuation methodology for derivatives not subject to a qualified master netting agreement. The preamble does pose the question whether the final rule should provide a separate process to allow FBOs to receive Federal Reserve approval to use internal models to value derivative transactions solely for the purpose of complying with the rule;[11] and
- The definition of "eligible collateral" excludes debt or equity securities (including convertible bonds) issued by an affiliate of the FBOs and IHCs or the combined U.S. operations of an FBO, and the definition of "eligible protection provider" excludes the FBO or any affiliate thereof.

Consistent with the Original SCCL Proposal, the SCCL Reproposal does not apply to exposures of an IHC or an FBO's combined U.S. operations to the FBO's home country sovereign, regardless of the risk weight assigned to that sovereign under Regulation Q.

F. COMPARISON TO THE BASEL LARGE EXPOSURE FRAMEWORK

The Federal Reserve notes that the SCCL Reproposal was prompted in part by the Basel Large Exposure Framework and the national bank lending limit regime, which similarly address credit exposures to single counterparties. In 2014, the Basel Committee published the Basel Large Exposure Framework,[12] which, like lending limits applicable to state and federally chartered depository institutions, is used to identify, measure, and limit, as a percentage of an institution's capital, exposures to a counterparty, but is also is designed in part to address interconnectedness among systemically important financial institutions.[13]

The SCCL Reproposal does in fact draw on the Basel Large Exposure Framework, including, most notably:

- Using tier 1 capital as the denominator for Large Covered Companies' single counterparty credit limits and a 15 percent limit for Major Covered Companies' exposures to Major Counterparties;
- Introducing a more subjective approach to determining counterparties, as reflected in the "economic interdependence" and "control relationship" tests, which are substantially similar to the Basel Large Exposure Framework;
- Incorporating a specific "look through" approach to SPVs and third parties associated with SPVs, which are similar to those of the Basel Large Exposure Framework;
- Modifying the measurement methodology for determining the exposure to an eligible protection provider when applying the "risk shifting" requirement to protection providers under credit and equity derivatives when the hedged counterparty is not a financial entity; and
- Including an exemption for QCCPs, although the exemption in the Basel Large Exposure Framework is explicitly temporary, subject to findings during an observation period that will be concluded in 2016.

G. ANALYTICAL SUPPORT

Public comments on the Original SCCL Proposal maintained that because the Original SCCL Proposal did not provide the underlying basis and rationale for the originally proposed SCCL rules, the public was effectively denied the opportunity to comment meaningfully on the Original SCCL Proposal. Likely in response to those comments, the release of the SCCL Reproposal was accompanied by a White Paper in which the staff of the Federal Reserve analyzed data on the default correlation between systemically important financial institutions ("*SIFIs*") and between SIFIs and non-SIFI companies.[14] This data on correlations informed the Federal Reserve's credit risk model used to set the more stringent single counterparty credit limit of 15 percent between SIFIs (that is, exposures of a Major Covered Company to a Major Counterparty).[15]

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ENDNOTES

[1] Federal Reserve System, *Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies*, 77 Fed. Reg. 594 (Jan. 5, 2012).

[2] Federal Reserve System, *Enhanced Prudential Standards and Early Remediation Requirements for Foreign Banking Organizations and Foreign Nonbank Financial Companies*, 77 Fed. Reg. 76628 (Dec. 28, 2012).

[3] Federal Reserve System, *Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations*, 79 Fed. Reg. 17240, 17243 (Mar. 27, 2014); *see* our Client Memorandum, "Federal Reserve Approves Final Rule Implementing Certain Provisions of Section 165 of the Dodd-Frank Act Increasing Supervision and Regulation of Large U.S. Bank Holding Companies and Foreign Banking Organizations," (Feb. 24, 2014), *available at* http://sullcrom.com/enhanced-prudential-standards-for-large-us-bank-holding-companies-and-foreign-banking-organizations.

[4] The Clearing House Association, *Single Counterparty Credit Limits: The Clearing House Industry Study* (Jul. 2012), *available at* https://www.theclearinghouse.org/issues/banking-regulations/dodd-frank/counterparty-risk/20120719-tch-releases-sccl-study.

[5] 12 C.F.R. § 217.402.

[6] The SCCL Reproposal uses capital measures as calculated under the Federal Reserve's capital rules, Regulation Q, 12 C.F.R. Part 217.

[7] The preamble to the SCCL Reproposal indicates that the compliance timeline will be one or two years from the effective date of the proposed rule, but it is likely intended to take effect one or two years from the effective date of the final rule, as applicable. Federal Reserve System, Draft Notice of Proposed Rulemaking, *Single Counterparty Credit Limits for Large Banking Organizations* (Mar. 4, 2016), at 84.

[8] Basel Committee on Banking Supervision, *The standardized approach for measuring counterparty credit risk* (Mar. 2014).

[9] Federal Reserve System, *Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies*, 77 Fed. Reg. 594, 615 (Jan. 5, 2012).

[10] The Original SCCL Proposal specifically provided Covered Companies with a choice as to whether to use eligible collateral as a credit risk mitigation tool in recognition of the "potentially operationally burdensome" tracking of collateral. Federal Reserve System, *Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies*, 77 Fed. Reg. 594, 619 (Jan. 5, 2012).

[11] Federal Reserve System, Draft Notice of Proposed Rulemaking, *Single Counterparty Credit Limits for Large Banking Organizations*, Question 52 (Mar. 4, 2016), at 74.

[12] Basel Committee on Banking Supervision, *Standards: Supervisory framework for measuring and controlling large exposures* (April 2014).

[13] *See* Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision*, (Sept. 2012) (Principle 19).

[14] Federal Reserve, *Calibrating the Single-Counterparty Credit Limit between Systemically Important Financial Institutions* (Mar. 4, 2016).

[15] In a similar fashion, the Federal Reserve, simultaneously with the release of its final rule imposing a common equity surcharge for GSIBs, released a White Paper setting forth the analytical bases of that rule, although in that case the release accompanied the final rule in response to public comments received on the proposal. *See* Board of Governors of the Federal Reserve System, *Calibrating the G-SIB Surcharge* (Jul. 20, 2015), *available at* http://www.federalreserve.gov/aboutthefed/boardmeetings/gsib-methodology-paper-20150720.pdf.

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