October 17, 2018

SUBMITTED VIA EMAIL
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comments@FDIC.gov

rule-comments@sec.gov

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds
OCC Docket ID OCC-2018-0010
Board Docket ID R-16-08; RIN 7100-AF06
FDIC RIN 3064-AE67
SEC File Number S7-14-18
CFTC RIN 3038-AE72

Dear Sir or Madam:

The Structured Finance Industry Group ("SFIG")[1] appreciates the opportunity to respond to the Agencies' Notice of Proposed Rulemaking ("NPR") seeking public input on proposed revisions to

[1] SFIG is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG's core charge is to support a robust and liquid securitization market, recognizing that securitization is an essential source of funding for the real economy. SFIG provides an inclusive network for securitization professionals to collaborate and, as industry leaders, to drive necessary changes, be advocates for the securitization community, share best practices and innovative ideas, and educate industry members through conferences and other programs. Members of SFIG represent all sectors of the securitization market, including issuers, investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. Further information can be found at www.sfindustry.org.

the final rule (the "2013 Final Rule") implementing Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Volcker Rule"), which added a new Section 13 to the Bank Holding Company Act of 1956, as amended (the "Statute").

For convenience, we attach as Annex A the comment letter submitted by SFIG to the OCC on September 21, 2017 (the "Prior SFIG Comment") in response to its notice seeking public input on the 2013 Final Rule (the "OCC Notice") and will refer to the Prior SFIG Comment from time to time in this letter.

As indicated in a June 2017 Treasury Report and the OCC Notice, the Statute was not intended to impede securitization.[2] The Statute explicitly exempts securitization from restriction under the Volcker Rule by stating that "[n]othing in this section shall be construed to limit or restrict the ability of a banking entity or nonbank financial company … to sell or securitize loans in a manner otherwise permitted by law."[3] Notwithstanding this clear statutory language, however, bank participation in the securitization industry, whether as sponsor, issuer or investor, continues to be plagued by the stumbling blocks of the 2013 Final Rule.

Accordingly, we appreciate the Agencies' recognition in the NPR that the 2013 Final Rule may have resulted in ambiguity, overbroad application and unduly complex compliance requirements.[4] However, none of the proposed revisions and only 5 of the 342 questions included in the NPR address securitization.[5] As we discussed in our Prior SFIG Comment, the securitization industry continues to face unnecessary challenges to executing what should be routine loan securitizations as a result of the burdensome compliance requirements in the 2013 Final Rule.

The three primary issues are: (1) the definition of private equity and hedge funds, which flows into the definition of covered fund, scopes in all issuers that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "1940 Act"), which are exclusions frequently relied

[2] "In its design and implementation, however, the Volcker Rule has far overshot the mark. The rule has spawned an extraordinarily complex and burdensome compliance regime due to a combination of factors: the scope of firms subject to the rule's prohibitions, the number of regulators charged with enforcement, the ambiguous definitions of key activities under the rule, and the extensive compliance programs that the rule requires firms to adopt." U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES, BANKS AND CREDIT UNIONS 71-72 (June 2017) (*hereinafter* "Treasury Report"). "The Volcker Rule was intended to promote the safety and soundness of banking entities and prevent taxpayer bailouts by minimizing bank exposure to certain proprietary trading and fund activities that could involve undue risk. At the same time, the Volcker Rule was designed to permit banking entities to continue providing client-oriented financial services that are critical to capital generation and that facilitate liquid markets." U.S. DEP'T OF THE TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, NOTICE SEEKING PUBLIC INPUT ON THE VOLCKER RULE 6-7 (2017).

[3] "Loans" include not only corporate loans, but also mortgage loans, student loans and other types of securitized financial assets.

[4] "The data collected in connection with the 2013 final rule, compliance efforts by banking entities, and the Agencies' experience in reviewing trading and investment activity under the 2013 final rule, have provided valuable insights into the effectiveness of the 2013 final rule. These insights highlighted areas in which the 2013 final rule may have resulted in ambiguity, overbroad application, or unduly complex compliance routines."

[5] For convenience, Questions 176-180 included in the NPR and referenced herein are attached as Annex B.

upon by securitization issuers; (2) the loan securitization exclusion ("LSE") at its starting point in the definition of loans is drafted narrowly so that it fails to facilitate many common asset securitization structures; and (3) the definition of "ownership interest" is so broad and ambiguous that the legal community has difficulty opining that even the most senior classes of debt instruments commonly issued by securitization issuers are not "ownership interests".

These concerns were already recognized in the Treasury Report and the OCC Notice, both of which acknowledged that the broad definition of covered fund far exceeds the scope necessary to address the high risk speculative activities that were the focus of the Volcker Rule.[6] These issues (and other more specific issues that we will discuss below) have impeded transactions that were not the intended targets of the Volcker Rule and have resulted in significant time and expense in ensuring that securitizations comply with the 2013 Final Rule.

We appreciate the Agencies' renewed focus on the broad definition of covered fund in Questions 160-171 of the NPR and will applaud any changes made to the definition that narrow its scope to the purposes intended by the Statute. Given our focus on issues specific to the securitization industry, this comment letter will focus on changes to (i) the LSE and qualifying asset-backed commercial paper conduit exclusion that would allow them to work in practice for most customary securitizations and (ii) the definition of "ownership interest" that would make it more workable for securitizations.

In addition, our members are of the view that the proposed accounting prong in the definition of "trading account" is overbroad and will capture transactions that were not previously included under the 2013 Final Rule's definition of "trading account" and that do not implicate the type of activity prohibited by the Statute. Although this comment letter will not focus on this issue, we are concerned about the impact on the securitization industry if the liquidity for asset-backed securities is impeded as a result of this proposed change.

Our recommendations are summarized as follows:

1. In response to Questions 177 and 178 of the NPR, the Agencies should modify the LSE so that it (a) does not require the issuance of an "asset-backed security" (as defined in the 2013 Final Rule), (b) clearly permits issuers relying on the LSE to hold leases and other assets that are not securities, and (c) tests whether a securitization is primarily backed by qualifying assets that are not impermissible securities or derivatives.

2. In response to Questions 179 and 180 of the NPR, the Agencies should redefine ownership interests to remove "other similar interest". Alternatively, they should modify the scope of "other

[6] SFIG previously commented that the 2013 Final Rule's definition of covered fund does not adequately exclude securitizations, as required by the Statute, in its submission to the Senate Banking Committee's call for proposals on regulatory reform. http://www.sfindustry.org/images/uploads/pdfs/SFIG_White_Paper_-_Regulatory_Reform_%28Digital%29.pdf. *See* U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES, BANKS AND CREDIT UNIONS 77-78 (June 2017).

similar interest" to make it more workable in practice. In either case, there should be a safe harbor exclusion for ordinary debt instruments.

3. The Agencies should modify the "qualifying asset-backed commercial paper conduit" exclusion (as defined in the 2013 Final Rule) so that it (a) does not require the sponsor banking entity to assume all risks associated with the securities issued and (b) otherwise may be useful to more customer-facing bank-sponsored asset-backed commercial paper ("ABCP") issuers.

We address each of these recommendations and their underlying rationale in more detail below.

1. **Modify the Loan Securitization Exclusion (LSE) so that it (a) does not require the issuance of asset-backed securities, (b) clearly permits issuers relying on such exclusion to hold leases and other assets that are not securities and (c) tests whether a securitization is primarily backed by qualifying assets that are not impermissible securities or derivatives.**

The LSE should be the exclusion for securitizations, but securitizations cannot fully avail themselves of the LSE absent the following changes. Proposed revisions to the text of the LSE, as summarized below, are attached as Annex C.

a. Remove Requirement to Issue Asset-Backed Securities.

As discussed in further detail in the Prior SFIG Comment, the condition under the LSE requiring an issuer to issue asset-backed securities should be removed. We refer to the Prior SFIG Comment for a description of the practical dilemma this requirement has posed for banks' standard securitization warehouse transactions. This requirement continues to create problems for banks that invest in plain vanilla securitization products, and there does not appear to be any policy reason for this requirement. To the extent an issuer relying on the LSE ultimately does issue asset-backed securities, it would be required to comply with all relevant regulations, including risk retention, that may otherwise apply to such an issuer. These asset-backed securities regulations are sufficient to achieve any regulatory concerns with asset-backed securitizations without the requirement in the LSE.

b. Permit LSE Issuers to Hold Leases and Other Assets That Are Not Securities.

We appreciate that, in Question 177, the Agencies acknowledge that the narrow scope of assets permitted to be held by an LSE issuer has created problems for the securitization industry. In the Prior SFIG Comment, we explain in detail that private securitization issuers other than just collateralized loan obligation ("CLO") issuers are not always able to qualify for an exemption under the 1940 Act other than Section 3(c)(1) or 3(c)(7), even though they clearly are not engaged in the high risk activities that were the focus of the Statute. Such other issuers include some backed by mortgage assets, servicing rights or some leases, as well as some issuers collateralized by other asset classes such as some licensing or franchise agreements.

Additionally, in order to comply with the 2013 Final Rule, some issuers have added an independent collateral trustee that is a U.S. bank (or foreign branch or agency) of a U.S. bank in order to qualify for the exemption provided in Rule 3a-7 of the 1940 Act, even though the inclusion of such trustee was not otherwise required for any legal or market-driven reason. These issuers hold primarily eligible financial assets that satisfy Rule 3a-7, but which are not of the type that fit within the Section 3(c)(5) exemption of the 1940 Act. Credit cards that include some cash advance balances are a good example of this type of asset.

Given that the purpose of the Statute is to ensure that banking entities are not engaged in or exposed to prohibited proprietary trading of securities, we think that if the related assets are not securities, an issuer should be able to comply with the 2013 Final Rule under the LSE and should not have to adopt unnecessary and costly features in order to fit a 1940 Act exemption other than Section 3(c)(1) or 3(c)(7).

For example, if a securitization issuer holds some operating lease assets, which equates to the issuer actually owning the underlying leased asset, that issuer should not be a covered fund and may not even be an investment company. Similarly, if an issuer holds servicing rights, franchise fees, intellectual property royalties or other assets (other than securities) that support the securities issued by such issuer, that issuer should not be treated as a covered fund on the basis of these non-security holdings.

To this point, Question 178 essentially asks whether the Agencies should codify the clarification of an error in the text of the 2013 Final Rule that was initially corrected through an FAQ issued in June 2014. Without the clarification provided in the FAQ, no CLO issuer could have relied on the LSE, as any rights that it held under a management or servicing agreement, derivative contract, or even its securities issuance documents would not have been permitted to be held by an LSE entity unless such other assets themselves were securities of the type permitted under Section 10(c)(8)(iii) of the 2013 Final Rule. Fortunately, the Agencies recognized this and published the relevant FAQ prior to the effectiveness of the 2013 Final Rule. We applaud the codification of such FAQ in any formal amendment of the 2013 Final Rule.

We also believe that the language that is the subject of Question 178 could be instrumental in addressing the larger issues raised in this comment (and implicit in Question 176 of the NPR) regarding the need for more or expanded exclusions to fit the needs of the securitization industry. If the LSE were to permit an issuer relying on such exclusion to hold any assets other than securities (unless those securities meet the requirements of Section 10(c)(8)(iii) of the 2013 Final Rule), then we believe the LSE would become available to most customary securitizations in which banking entities currently participate.

At a minimum, we reiterate our request in the Prior SFIG Comment that the definition of "loan and servicing or incidental assets" be expanded to clearly include leases and related assets, whether those leases are accounted for or legally characterized as operating leases or capital leases and regardless of the amount of residual (i.e. leased asset value) being financed.[7]

c. *<u>Test Whether a Securitization is "Primarily" Backed by Qualifying Assets</u>.*

Finally, we greatly appreciate the solicitation for input from the industry about whether an issuer relying on the LSE should be permitted to own a small percentage of other (potentially non-compliant) assets. As discussed in the Prior SFIG Comment, we recommend that an issuer be permitted to hold at least ten percent of its assets in non-compliant assets.

Such an allotment for non-compliant assets would ease the compliance burden of the 2013 Final Rule by allowing issuers to evaluate the assets backing a securitization without scrutinizing minor mechanics of the deal for non-compliance. For example, small amounts of reinvested funds could be invested in money market funds or other permitted investments without triggering non-compliance of an issuance otherwise primarily backed by loans. We would expect that non-compliant assets would also routinely include letters of credit and debt securities issued by the same types of (and often the same exact) entities that are the borrowers under the loans otherwise constituting such issuer's assets.

Testing whether an issuance is "primarily" backed by qualifying assets is consistent with the approach taken in other industry regulations. For example, Section 3(c)(5) of the 1940 Act tests whether an entity is "primarily" engaged in certain businesses.[8] Rule 3a-7 of the 1940 Act tests whether payments to noteholders depend "primarily" on cash flow from eligible assets.[9] The use of "primarily" in both instances struck a balance that allowed for investor protection without unnecessary constraints on the growth and development of structured finance markets.

For the same reason, testing whether an issuance is "primarily" backed by qualifying assets is appropriate in the context of the LSE. The use of "primarily" in the LSE does not detract from the 2013 Final Rule's restriction on proprietary trading and certain interests in, and relationships with, covered funds, and it helps create a clear exclusion on which asset-backed securitizations can comfortably rely.

Permitting a small amount of non-complying assets would help ease the constraints on the growth and development of securitization markets, but it would not be a substitute for the broader recommendations above. For example, for issuers that hold operating leases, the non-compliant operating leases could be closer to a majority of the assets held by such issuer.

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[7] In this regard it should be noted that this characterization for U.S. GAAP purposes is currently in flux, which reinforces the nuanced nature of making the assessments necessary to determine on which 1940 Act exemption a leasing entity may rely.

[8] 15 U.S.C. §80a-3(c)(5).

[9] 17 C.F.R. §270.3a-7(a)(1).

2. Redefine ownership interests to remove "other similar interest". Alternatively, modify the scope of "other similar interest" to make it more workable in practice. In either case, add a safe harbor for ordinary debt instruments that are not ownership interests

"Ownership interests" in covered funds are defined broadly to include not only partnership interests and equity securities, but also "other similar interests" in such funds that commonly may be considered debt of the entity. The concept of "other similar interest" in the 2013 Final Rule is very complex, involving seven criteria that are in many respects unclear or overly broad. Applying these criteria to the activities of issuers in the securitization industry has been very difficult, and has resulted in not only added time and costs to the execution of transactions, but has also impeded transactions that were not the intended targets of the Volcker Rule. Below, we respond to Questions 179 and 180 of the NPR and explain the rationale for our proposals.

a. *<u>Question 179: Issues with Clause (A) of "Other Similar Interests"</u>*

An interest that has "[t]he 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 [a] covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event)" is an "other similar interest" under Clause (A) of the definition. This criterion effectively precludes banking entities from investing in debt instruments that are integral to securitization markets without any explanation as to why such a feature, standing alone, poses the type of risk that the Volcker Rule was enacted to prevent.

For example, consider the negative impact of Clause (A) on the CLO markets. Banks are often the principal investors in the senior-most class of CLOs, which is generally AAA-rated debt with a fixed principal amount and a stated rate of interest. A CLO holds a revolving portfolio of commercial loans, which makes the Rule 3a-7 exemption from the 1940 Act unavailable. However, as a credit matter, a revolving portfolio of commercial loans also requires even senior lenders to pay close attention to the performance of the investment manager of the CLO and retain the right to give some input on any replacement of that manager.

Prior to the Volcker Rule, this right was included in most CLOs, regardless of the tenor or form of investment. This right also is often present in other kinds of commercial loans to protect the interest of the banking entity as a creditor, whether or not an event of default exists.[10] CLO warehouse facilities (whether in the form of loans, total return swap transactions, committed purchase agreements or otherwise) provided by banks to issuers that acquire loan assets in contemplation of a subsequent securitization include such a right when possible.

Clause (A) of the "other similar interest" criterion, however, has precluded some banking entities from investing in CLO senior debt instruments, including making loans to such CLOs (without

[10] For example, many commercial loans to operating entities have change-in-control or key-man provisions that effectively give the lenders some control over the identity of the manager of their borrower.

making less favorable structural changes). Additionally, banks with pre-existing CLO exposures that included such rights have been forced to irrevocably waive such rights because of Clause (A). It is odd that a regulation designed to promote safer banking practices results in banks waiving credit enhancing remedies under senior debt instruments.[11]

We appreciate that Question 179 of the NPR expressly addresses this particular issue. The suggestion in Question 179 to modify the definition to expressly permit rights of a creditor 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, is very helpful and would eliminate one significant problem arising from Clause (A) of the definition of "other similar interest".

However, problems with Clause (A) could persist even after implementing this change because, as with non-securitization bank financings, banks sometimes have contractual rights to participate in the selection or removal of a general partner, managing member or member of the board of directors or trustees of their borrower that are not limited to the exercise of a remedy upon an event of default or other default event. Bank credit agreements may contain such rights in various forms, such as in change in control provisions. Such provisions are intended to protect the bank's interest as a creditor by ensuring that the borrower continues to function in the manner underwritten by the bank for credit purposes. Consequently, we maintain that the removal of Clause (A) entirely is more appropriate than the change proposed in Question 179.

b. *<u>Question 180: Other Issues with "Other Similar Interest"</u>*

Other criteria in the "other similar interest" definition also raise issues for securitizations and suffer from a lack of clarity or policy purpose. The industry has for several years now been able to function by relying on interpretive guidelines regarding these criteria that were developed by prominent law firms specializing in CLOs and other securitizations, but this is no substitute for clear regulation.

The shortcomings of the other criteria in the "other similar interest" definition make it difficult to determine whether various loans by banking entities to special purpose entities ("<u>SPEs</u>") are ownership interests because, where the letter of the criteria is unclear, there is no discernible policy purpose to inform the language.[12]

For example, Clause (B) of "other similar interest" includes any right to receive a share of the income, gains or profits of a covered fund. Securitization debt products almost always include a contractual allocation of collections from an issuer's underlying financial assets to the various classes of noteholders. However, for non-equity classes, such allocation is normally limited to paying current interest and principal payable on those debt instruments. As a stopgap, industry

[11] In recent transactions, the U.S. CLO industry has sought to remedy this issue by complying with the LSE. However, these efforts have not been effective in all cases because of the LSE's shortcomings, which are detailed above.
[12] Please refer to the Prior SFIG Comment for further discussion of some of the ambiguities that raise these issues.

consensus has concluded that this sort of "waterfall" could not be subject to Clause (B) as long as the amounts payable to noteholders are limited to fixed principal and interest determined on a fixed or typical index floating rate basis because there is no reason to believe this feature should run afoul of any policy reasons for the 2013 Final Rule.

Question 180 of the NPR is problematic in light of this conclusion because it suggests such interpretation may not be correct and could even be read to suggest that Clause (B) of the definition of "other similar interest" renders any debt interest in a non-excluded covered fund a prohibited ownership interest. If that reading were accurate, we submit that the 2013 Final Rule would be overbroad in this respect, because there is no policy reason for prohibiting a banking entity from entering into a loan agreement with or investing in a senior debt security issued by a private equity fund or a hedge fund that is not managed or advised by such banking entity. The same is true for loan interests in securitization issuers.

c. *Proposed Solution*

Eliminating "other similar interest" from the definition of ownership interest altogether, especially as it applies to securitizations, is the best way to fix the problems discussed above without reducing the effectiveness of the Volcker Rule. Hedge funds and private equity funds, the kinds of funds clearly targeted by the Statute, issue equity interests, rather than debt. Therefore, a simplified ownership interest definition would be sufficient to capture these kinds of funds. To address any evasion concerns, the Agencies could retain as "ownership interests" synthetic instruments that convey the economic performance of an equity interest.

d. *Alternative Proposal – Redefine "Ownership Interest" as "Voting Security"*

An alternative approach to addressing the issues raised in the sections (a) and (b) above and the Prior SFIG Comment would be to eliminate the current definition of "ownership interest" entirely and replace it with the definition of "voting securities" from Regulation Y for purposes of the Statute. Under Regulation Y, "voting securities" means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder (i) to vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or (ii) to vote on or to direct the conduct of the operations or other significant policies of the issuing company.[13] We do not believe that this definition encompasses noteholders that may have a right to consent to a contractually circumscribed advisor or manager of any kind, although a clear statement to this effect would be helpful.

e. *Add a Safe Harbor for Ordinary Debt Instruments That Are Not Ownership Interests*

Additionally, to ensure that ordinary debt instruments are not ownership interests under the Volcker Rule, we recommend a safe harbor exclusion from the definition of "ownership interest"

[13] 12 C.F.R. §225.2(q)(1).

for any loan, repurchase facility, derivative exposure, debt security or other form of financing that has the following characteristics:

- Pursuant to the terms of the applicable debt documents, the holders of the debt have payment entitlements consisting solely of (i) the right to receive interest at a stated interest rate (either fixed or based on a customary index or interbank rate), as well as commitment fees, as appropriate, and (ii) the right to receive the full principal amount on or before a stated final maturity date (which may include prepayment premiums intended solely to reflect, and compensate debt holders for foregone income resulting from an early prepayment).

- The applicable debt documents provide that the holders' entitlements to principal and interest are absolute and unconditional, regardless of any features that may reflect write-downs or charge-offs of the underlying assets, priority of payments, or limited recourse or non-recourse provisions.

- Except for the right to foreclose on the collateral upon an event of default, the holders of the debt have no rights to receive the underlying assets.

3. Modify the Qualifying Asset-Backed Commercial Paper Conduit Exclusion so that it (a) does not require the advising banking entity to assume all risks associated with the securities issued and (b) otherwise may be useful to more customer facing bank sponsored ABCP issuers.

Although not addressed in the NPR, we reiterate the view set forth in the Prior SFIG Comment that the qualifying asset-backed commercial paper conduit exclusion has been of very little practical use. We believe that the Agencies intended this exclusion to be available to most bank-sponsored ABCP programs that were in existence at the time of adoption of the 2013 Final Rule. Implementing the minor changes we suggested in the Prior SFIG Comment would enable this intention to be realized. Those proposed changes may be read in detail in the attached and are briefly summarized as follows:

1. A conduit relying on this exclusion should be permitted to own, hold or originate the same assets that an issuer relying on the LSE can hold, regardless of the manner in which such assets are acquired or originated by the conduit. Many conduits acquire loans and ABS backed by loans from the bank that sponsors the conduit or another bank or conduit. Conduits also may enter into repurchase agreements with counterparties with loans or loan backed ABS as reference assets. Some conduits also originate loans directly with corporate and other borrowers.

2. The requirement that the sponsor bank provide full support liquidity should be removed. We do not understand how this furthers the objectives of the Statute in that it permits a

bank to rely on an exclusion only if the bank takes on all, rather than just some, credit risk related to the issuer.

3. The ABCP tenor restriction should be removed. This also is not relevant to the policy objectives of the Statute and, as the net stable funding ratio is phased in by banking entities around the globe, will become an increasingly burdensome compliance requirement.

Proposed changes to the text of the qualifying asset-backed commercial paper conduit exclusion, as summarized above, are attached as Annex D.

* * *

SFIG welcomes opportunities to work with the Agencies to modify the 2013 Final Rule in order to better accomplish the purpose of the Statute without unnecessary disruption of the securitization markets.

If you have any questions about this response, please contact Sairah Burki, Head of ABS Policy at (202) 524-6302 or sairah.burki@sfindustry.org.

Respectfully Submitted,

Sairah Burki
Head of ABS Policy
Structured Finance Industry Group

<u>Annex A</u>

Prior SFIG Comment

SFIG
Structured Finance Industry Group

September 21, 2017

SUBMITTED VIA EMAIL
regs.comments@occ.treas.gov

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, D.C. 20219

Re: Volcker Rule, Notice: request for comment
OCC Docket ID OCC-2017-0014

Dear Acting Comptroller Noreika:

The Structured Finance Industry Group ("SFIG")[1] appreciates the opportunity to respond to the Office of the Comptroller of the Currency ("OCC") notice ("Notice") seeking public input on the final rule. For ease of reference, "final rule" and other terms defined in the Notice are used herein as therein defined.

SFIG is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG's core charge is to support a robust and liquid securitization market, recognizing that securitization is an essential source of funding for the real economy.

As you indicate in the Notice, section 13 of the BHC Act (the "Statute"), added pursuant to Section 619 of the Dodd-Frank Act, was intended to promote the safety and soundness of banking entities and prevent taxpayer bailouts by minimizing bank exposure to certain proprietary trading and certain hedge and private equity fund activities that could involve undue risk. At the same time, the Volcker Rule was intended to permit banking entities to "continue providing client-oriented financial services that are critical to capital generation and that facilitate liquid markets."

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Securitization was not a primary focus of the Statute – on the contrary, the Statute itself explicitly exempts securitization from restriction under the Volcker Rule instructing "[n]othing in this section shall be construed to limit or restrict the ability of a banking entity or nonbank financial company … to sell or securitize loans in a manner otherwise permitted by law."

Because of the complexity and ambiguity of the final rule, more than three years after the effective date, determinations as to whether even routine loan securitization transactions are swept up within the prohibitions or restrictions of the Volcker Rule continue to be unclear. Ellen Marks, former chair of the Securitization and Structured Finance Committee of the Business Law Section of the American Bar Association, authored an article in 2015 addressing some of the legal issues affecting securitization. The article focused on the difficulty of obtaining legal opinions to determine whether (a) securitization issuers that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "1940 Act") are not covered funds or (b) debt instruments issued by such issuers are not "ownership interests." The time and expense associated with determining the impact of the final rule on securitizations, including obtaining necessary legal opinions, continue to hamper securitization transactions, resulting in inefficient functioning of the securitization markets and reduced market liquidity. Moreover, although the entire process required to categorize funds and measure ownership positions in covered funds has resulted in significant investment by banks in compliance support, including annual licensing of external tools (Bloomberg), development of global internal tools, personnel training to categorize funds and other vehicles, controls, annual testing and audit, the actual amount of affected covered fund relationships that were ultimately discovered by most banks during the process has been very small.[2]

SFIG previously commented that the final rule's definition of covered fund does not adequately exclude securitizations, as required by the Statute, in its submission to the Senate Banking Committee's call for proposals on regulatory reform. http://www.sfindustry.org/images/uploads/pdfs/SFIG_White_Paper_-_Regulatory_Reform_%28Digital%29.pdf

These concerns were recognized in the Treasury Report, and now in the Notice, acknowledging that the broad definition of covered fund far exceeds the scope necessary to reach private equity and hedge funds. We appreciate the OCC taking the initiative to start the process of regulatory review of the final rule. This comment focuses on the covered fund considerations identified in the Notice in an effort to elaborate on specific changes to the final rule that would facilitate

[2] The compliance burden of analyzing funds that are neither hedge funds nor private equity funds nor funds engaged in short-term trading cannot be underestimated. Members of the Securities Industry and Financial Markets Association ("SIFMA") have analyzed, in aggregate, more than a million vehicles for covered fund status. For most SIFMA members, more than 70% of the vehicles analyzed were not covered funds. Additionally, SIFMA members have analyzed more than half a million CUSIPS of securities issued by common types of securitizations. Of these, 95% were determined to be out-of-scope. SFIG members have also reported that they have automatically classified blocks of securities as ownership interests in covered funds rather than going through the time and expense of analyzing them separately.

ordinary securitization and other structured finance activities that, we believe, are outside the intended scope of the Volcker Rule.

Our recommendations are summarized as follows:

1. Redefine covered funds more narrowly as funds that rely solely on Section 3(c)(1) or Section 3(c)(7) and that principally engage in short-term speculative trading activity defined as trading conducted for the primary purpose of generating profits from short-term price movements or short-term trading strategies, which we believe were the intended target of the Volcker Rule.

2. Redefine ownership interests to remove "other similar interest".

3. Modify the Loan Securitization Exclusion ("LSE") so that it (a) does not require the issuance of an "asset-backed security" (as defined in the final rule), (b) more clearly permits issuers relying on the LSE to hold leases and related assets and (c) tests whether a securitization is primarily backed by loans.

4. Modify the "qualifying asset backed commercial paper conduit" exclusion (as defined in the final rule) so that it (a) does not require the advising banking entity to assume all risks associated with the securities issued and (b) otherwise may be useful to more customer-facing bank sponsored ABCP issuers.

We address each of these recommendations and their underlying rationale in more detail below.

Redefine covered funds more narrowly as funds that rely solely on Section 3(c)(1) or Section 3(c)(7) and that principally engage in short-term speculative trading activity defined as trading conducted for the primary purpose of generating profits from short-term price movements or short-term trading strategies, which we believe were the intended target of the Volcker Rule.

By defining covered funds by reference to Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, the final rule includes as covered funds all issuers that engage solely in limited offerings of their securities, without regard to the assets or business activities of such issuers. This net is too broad because, although it is largely successful in catching the private equity and hedge funds intended for regulation, it also catches many securitization issuers that do not engage in the speculative short-term trading activity that was the intended target of the Statute. Fundamentally, the final rule defines a covered fund by reference to the technical regulatory status of its offering of securities to investors rather than by reference to the potentially risky activities of the fund itself.

Starting with this premise, the final rule incorporates a complex scheme of 1940 Act exemptions and exclusions that may enable issuers to avoid having to rely on Sections 3(c)(1) or 3(c)(7) and being captured by the covered fund definition. However, these various exemptions and exclusions, while helpful in many cases, were not drafted with the Volcker Rule in mind and thus have proven to be less helpful than expected. For example, Section 3(c)(5)[3] of the 1940 Act is available to many issuers of mortgage loan or equipment loan backed securities. However, because Section 3(c)(5) is limited to issuers who hold sales finance assets, issuers who hold lease assets may not qualify. We submit that the distinction between sales finance assets and lease assets is irrelevant to the purpose of the Volcker Rule. Similarly, some issuers who hold credit card portfolios may not qualify under Section 3(c)(5) because they include cash advance facilities that do not relate to sales activities of their consumer cardholders. Even real estate financings may run afoul of Section 3(c)(5)(C) if holders of the issuer's securities do not have a remedy that provides them with the ability to access the underlying real estate. Again, we do not see the relevance of these distinctions to the objectives of the Volcker Rule.

Another such exemption is SEC Rule 3a-7[4] under the 1940 Act, which was adopted for the express purpose of excluding most securitization issuers from the scope of the 1940 Act. Here again, the regulation contains limitations that make Rule 3a-7 unavailable for many securitization issuers although those limitations have no relevance to the underlying objectives of the Volcker Rule. For example, Rule 3a-7 excludes any issuer that issues redeemable securities. This feature does not seem relevant to the objectives of the Volcker Rule. Also, the "eligible financial assets" requirement in Rule 3a-7 gives rise to ambiguity when a significant portion of an issuer's assets are leases or other operating arrangements that, as a result, include residual values, such that the issuer owns the underlying leased equipment rather than just the lease cash flows from the sale or rent of such equipment. Rule 3a-7 also includes a limitation on trading of eligible financial assets and restricts eligible investors in a way that may impair secondary liquidity. A typical collateralized loan obligation transaction ("CLO") will include limited trading of financial assets, such as trading of traditional commercial loans, which renders Rule 3a-7 unavailable to the issuer. Though the Statute makes clear that the securitization of loans is precisely the type of activity the final rule was not permitted to restrict, there is no obvious way to ensure the CLO issuers, are not covered funds. The Agencies adopted the LSE to provide an exclusion for such issuers but, as discussed below, the LSE needs further refinements to achieve this goal.

Rather than requiring banks to continue to rely on a series of exemptions that were not drafted with the Volcker Rule in mind and that in practice fail to encompass many securitization issuers, we recommend that the Agencies eliminate the ambiguities and complexities around the definition of covered fund by redefining it to address more directly the underlying concern with private equity and hedge fund activities, i.e., engaging in risky proprietary trading activities. Among other

[3] Section 3(c)(5) of the 1940 Act excludes from the definition of investment company "[a]ny person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate."

[4] Rule 3a-7 excludes issuers of asset-backed securities from the definition of investment company upon the satisfaction of certain conditions.

benefits, simplifying the requirements would eliminate the need for thousands of hours spent on compliance and conformance for fund activities that do not raise the concerns addressed by the Volcker Rule. Accordingly, in order to more closely align the definition of covered fund with the objectives of the Statute and to minimize the complexities and burden that the final rule imposes on banks and their affiliates that engage in managing, investing in, acting as trustee for, and entering into credit extensions with, securitization issuers, we suggest that the definition of covered fund include only entities that (i) rely solely on Section 3(c)(1) or 3(c)(7) of the 1940 Act and (ii) are in the business of engaging in short-term speculative trading activity defined as trading conducted for the primary purpose of generating profits from short-term price movements or short-term trading strategies.[5]

Redefine ownership interests to remove "other similar interest".

"Ownership interests" in covered funds are defined broadly to include not only partnership interests and equity securities, but also interests in such funds that are generally considered to be debt of the entity.

The definition of ownership interest in the final rule is very complex, involving seven criteria, in many respects unclear, that spell out the concept "other similar interest." Applying these criteria to the activities of issuers in the securitization industry has been very difficult and has resulted in not only added time and costs to the execution of transactions, but also the abandonment of transactions that were not the intended targets of the Volcker Rule.

Some of the criteria are clear, but have the effect of precluding banking entities from playing their traditional role with respect to investing in debt instruments that have become an integral part of securitization markets. For example, a senior note that includes any 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 a covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event) is an "other similar interest", and this has had significant impacts on CLO markets. Banks are often the investors in the senior-most class of CLOs, which is generally AAA-rated debt with a fixed principal amount and a stated rate of interest. Because a CLO includes a revolving portfolio of commercial loans (which makes the Rule 3a-7 exemption from the 1940 Act unavailable to it as described above), even senior lenders have to pay close attention to the performance of the investment manager of the CLO and therefore insist on having some say in any replacement of that manager. Prior to the Volcker Rule, this right was included in most CLOs, regardless of the tenor or form of investment. Even warehouse facilities (whether in the form of loans, total return swap transactions, committed purchase agreements or otherwise) provided by banks to issuers that were acquiring loan assets in contemplation of a subsequent securitization

[5] We believe this definition would not include short-term trading in financial instruments that has a proper purpose in a structure (e.g., temporary reinvesting to ensure available cash flow or hedging) and would appreciate a statement to that effect in the adopting release of any future rulemaking regarding the Volcker Rule.

would include such a provision. Such rights are often associated with other kinds of commercial loans in order to protect the interest of the banking entity as a creditor. For example, many commercial loans to operating entities have change-in-control or key-man provisions that effectively give the lenders some control over the identity of the manager of their borrower. This ownership interest criterion has precluded some banking entities from investing in CLO senior debt instruments, including loans, or otherwise including less favorable terms in such debt instruments in order to ensure they are not inadvertently swept up as ownership interests. The U.S. CLO industry has sought to address this impediment by complying with the LSE. However, this solution also has been unsatisfactory because the LSE itself has many shortcomings, which are detailed below.

Other criteria defining "other similar interest" raise issues because of a lack of clarity or policy purpose. Although we suspect these ambiguities were unintended, they nevertheless make it difficult to reach determinations on whether various loans by banking entities to a special purpose entity ("SPE") are "ownership interests," making it difficult to obtain the necessary legal opinions. We set forth below some examples of the kinds of ambiguities that raise these issues.

- Criterion (B) provides for a right to receive a share of the income, gains or profits of a covered fund. Because the drafters did not use the word "net" before "income, gains or profits" some practitioners are not comfortable opining that any debt repaid from collections on underlying assets of an SPE is not an ownership interest, notwithstanding that the debt is entitled to receive only principal and interest as determined in accordance with its debt documents. While we do not believe this result is intended, clarity on that point would be helpful.

- Criterion (D), in turn, provides for the right to receive all or a portion of excess spread. Most securitization debt agreements do not provide for increases in interest rate or amount based on excess spread in the underlying assets. However, it is quite common for excess spread to be used to pay principal or interest that is otherwise owed on such debt instruments. This feature should not, and we do not believe this criterion was intended to, convert a debt instrument into an ownership interest, but the ambiguity in language results in significant time and expense to make that determination.

- Criterion (E) includes an interest that could be reduced based on losses arising from the underlying assets of the covered fund. The most conservative reading of this criterion could mean that any limited recourse debt instrument is an ownership interest. Although most industry participants do not believe this is intended, the ambiguity adds to the compliance burden and uncertainty of banks that must be prepared to demonstrate why every relationship with a covered fund is permitted under the Volcker Rule.

We believe the best way to eliminate these problems is to remove the category of "or other similar interest" altogether. This would be particularly appropriate once the over-broad reach of the current covered fund definition has also been addressed. For example, hedge funds issue equity interests, rather than debt, and a simplified ownership interest definition would be sufficient to capture these activities. To address evasion concerns, the revisions could retain as "ownership interests" synthetic instruments that convey the economic performance of an equity interest.

In addition to the removal of "or other similar interest", which alone will be quite helpful, we also recommend a more direct solution to alleviate all residual concerns that ordinary debt instruments could be construed as ownership interests under the Volcker Rule. Accordingly, we request that the definition include a safe harbor exclusion for any loan, repurchase facility, derivative exposure, debt security or other form of bank financing that has the following characteristics:

- Pursuant to the terms of the applicable debt documents, the holders of the debt have payment entitlements consisting solely of (i) the right to receive interest at a stated interest rate (either fixed or based on a customary index or interbank rate) and (ii) the right to receive a fixed principal payment on a stated final maturity.

- The entitlements to principal and interest under the applicable debt documents are absolute and are not reduced to reflect write-downs or charge-offs of the underlying assets of the fund in accordance with the terms of the applicable debt documents.

- Except for the right to foreclose on the collateral upon an event of default, the holders of the debt would have no rights to receive the underlying assets.

If the Agencies implement our recommendations for changes to the definition of covered fund and simplification of the definition of ownership interest as set forth above, many of our principal concerns with the Volcker Rule would be addressed. We offer additional comments below that would modify other parts of the final rule in accordance with the purpose of the Statute that it not limit or restrict the ability of banks to securitize loans in any manner otherwise permitted by law.

Modify the Loan Securitization Exclusion (LSE) so that it (a) does not require the issuance of asset-backed securities, (b) more clearly permits issuers relying on such exclusion to hold leases and related assets and (c) tests whether a securitization is primarily backed by loans.

We recommend that the Agencies remove the condition under the LSE requiring an issuer to issue asset-backed securities. This condition is a significant problem for issuers that need to rely on the LSE for their warehouse facilities, whether for a temporary period prior to when they begin to issue asset-backed securities or indefinitely. As discussed above, many CLO issuers rely on bank facilities to fill up their "warehouse" with loans prior to securitizing them in the capital markets. Once an issuer has securitized any portfolio it will have asset-backed securities issued and outstanding that will enable another warehouse facility to be made to the same issuer without causing the issuer to fall out of compliance with the requirements of the LSE. However, prior to its first ABS issuance, most issuers will not have any securities outstanding other than those issued to their organizational owners. Such equity securities generally will not be structured as asset-backed securities because they are equity interests that typically are not collateralized by financial assets. Although bank warehouse facilities clearly will be collateralized by and rely on financial assets for their repayment, they often will not be considered "securities" as defined in the Securities Exchange Act of 1934 (the "Exchange Act"), but rather will constitute loans. As a result, CLO issuers in their warehouse phase and banks providing these facilities find themselves caught in a dilemma. Because the 1940 Act defines securities to include loans, the CLO issuer must find an exemption from the 1940 Act even before it has issued any securities into the capital markets, yet the facility made available by the warehouse bank may not be a security under the Exchange Act and thus not an asset-backed security. Consequently, the issuer cannot satisfy the LSE. There is no policy under the Volcker Rule requiring that this situation, which is typically temporary, should make the LSE unavailable to a securitization issuer. Accordingly, we recommend that the condition be eliminated.

Separately, we recommend that the definition of "loan and servicing or incidental assets" be modified so that it is clear that leases and related lease assets may be included as assets owned by and supporting the debt securities issued by an entity relying on the LSE. Although the final rule expressly includes leases as loans, when an issuer owns operating leases it actually owns the underlying equipment. This is true even if the debt holders are relying primarily on the cash flows of the leases for repayment. Although the preamble to the final rule contains helpful language to support the view that leased vehicles and residual realizations are permitted as incidental assets,[6] we think clarification would reduce the cost and burden of obtaining necessary legal opinions on this point.

Finally, in order to ease the compliance burden and costs of a hard-line rule, we also recommend that the LSE permit limited holdings (i.e., up to 20%) of non-complying assets. We believe that the agencies intended to exclude most loan securitizations from the Volcker Rule through the LSE. In practice, however, other than for U.S. CLOs, the LSE is rarely used because it is a rigid rule that requires thorough vetting of deal documents in order to ensure that no non-complying asset is included in a securitization. The time and expense of examining even plain vanilla securitizations has rendered the LSE unattractive. We think this is an unintended consequence of the hard-line rule. To restore the intended purpose of the LSE, we suggest that the agencies implement a test for

[6] If leased vehicles, including residuals, were not permitted to be incidental assets, the inclusion of SUBIs as permitted assets would be rendered moot by the requirement in paragraph (c)(8)(v)(A) that requires the related SUBI issuer to itself satisfy the LSE. In the preamble to the final rule, the Agencies discuss the importance of SUBIs in facilitating the securitization of vehicle leases without the need to retitle each and every vehicle. This illustrates that the Agencies appreciated at the time of adoption of the final rule that SUBI issuers themselves hold title to the leased vehicles underlying a vehicle lease securitization. (See e.g. the text preceding footnote 1916 as well as the text of footnote 1919.) It follows that if leased vehicles and residual realizations are permitted as incidental assets for a SUBI issuer, then issuers relying on the LSE that invest in SUBIs and other issuers that rely on the LSE should be able to hold interests in leased assets as incidental assets permitted under paragraph (c)(8)(i)(B). This is consistent with the approach taken by the FDIC relating to 12 C.F.R. §360.6, Treatment of Financial Assets Transferred in connection with a Securitization or Participation, as amended on September 27, 2010 (the "FDIC Rule"). The Federal Deposit Insurance Corporation's expressed view in relation to the FDIC Rule is that auto and other equipment leases can be financial assets notwithstanding the potential need to dispose of the underlying leased equipment in order to convert portions of the residual to cash.

the LSE that determines whether a securitization is "primarily" backed by loans and that, therefore, evaluates a securitization based on the true nature of the deal, rather than placing undue focus on de minimis aspects of the transaction. This approach to regulation is consistent with the approach taken in other tests[7] and would significantly ease compliance burdens and costs.

Modify the Qualifying Asset-Backed Commercial Paper Conduit Exclusion so that it (a) does not require the advising banking entity to assume all risks associated with the securities issued and (b) otherwise may be useful to more customer facing bank sponsored ABCP issuers.

Bank sponsored ABCP programs have been an efficient way for banks to fund customer securitization facilities in the capital markets for over 30 years. The transactions funded by bank sponsored ABCP programs are typically customer driven lending activities that promote the real economy. However, the qualifying asset backed commercial paper conduit exclusion has been largely ineffective as an exclusion from the Volcker Rule's Super 23A prohibitions, and therefore has not been available to bank sponsored ABCP programs. Given that these programs are a vehicle for the bank to lend to customers, we believe it is reasonable to take the view that the criteria in the qualifying asset backed commercial paper conduit exclusion (other than a requirement that the ABCP conduit not engage in any proprietary trading activity that could not be engaged in by a banking entity) are unnecessary. At the very least, the qualifying asset backed commercial paper conduit exclusion should be modified to permit an ABCP issuer to hold, directly or indirectly, any assets that may be held by an issuer relying on the LSE. This should be permitted regardless of whether the ABCP issuer itself acquires the LSE assets or loans commercial paper proceeds to another bank sponsored entity that in turn acquires such assets. It also should be true regardless of the form in which the ABCP issuer acquires such loans, which could be undivided ownership interests in a portfolio of receivables, a secured loan to an SPE borrower, a trust certificate or any other form of financing.

We also propose the removal in their entirety of the conditions to the qualifying asset backed commercial paper conduit exclusion that do not appear to have any grounding in the purpose of the Statute. First and foremost, the requirement that any qualifying asset backed commercial paper issuer enjoy full support liquidity from its program sponsor is counterintuitive to the purpose of the Statute. This condition requires that bank sponsors have 100% risk in all underlying assets of an ABCP issuer. It is not clear how this achieves the purpose of the Statute. Second, we submit that the 397 day tenor restriction on CP issued by a safe harbored ABCP issuer is not justified by any objective of the Statute. While ABCP programs typically do not issue CP with longer tenors today, because they are merely funding vehicles for bank activities, the need to increase the tenor of CP in response to bank regulatory changes such as the implementation of the net stable funding ratio could change this dynamic.

[7] *See e.g.* Section 3(c)(5) of and Rule 3a-7 to the 1940 Act.

*   *   *

SFIG welcomes opportunities to work with the OCC to modify the final rule in order to better accomplish the purpose of the Statute without unnecessary disruption of the securitization markets.

If you have any questions about this response, please contact Richard Johns, Executive Director of the Structured Finance Industry Group, at [redacted] or [redacted].

Respectfully Submitted,

Richard Johns
Executive Director
Structured Finance Industry Group

Annex B

NPR Questions 176-180

Question 176. Are there any concerns about how the 2013 final rule's exclusions from the covered fund definition for loan securitizations, qualifying asset-backed commercial paper conduits, and qualifying covered bonds work in practice? If commenters believe the Agencies can make these provisions more effective, what modifications should the Agencies make and why?

Question 177. The 2013 final rule's loan securitization exclusion excludes an issuing entity for asset-backed securities that, among other things, has assets or holdings consisting solely of certain types of permissible assets enumerated in the 2013 final rule. These permissible assets generally are loans, certain servicing assets, and special units of beneficial interest and collateral certificates. Are there particular issues with complying with the terms of this exclusion for vehicles that are holding loans? Are there any modifications the Agencies should make and if so, why and what are they? How would such modifications be consistent with the statutory provisions? For example, debt securities generally are not permissible assets for an excluded loan securitization. What effect does this limitation have on loan securitization vehicles? Should the Agencies consider permitting a loan securitization vehicle to hold 5 percent or 10 percent of assets that are considered debt securities rather than ''loans,'' as defined in the 2013 final rule? Are there other types of similar assets that are not ''loans,'' as defined in the 2013 final rule, but that have similar financial characteristics that an excluded loan securitization vehicle should be permitted to own as 5 percent or 10 percent of the vehicle's assets? Conversely, would this additional flexibility be necessary or appropriate now that banking entities have restructured loan securitizations as necessary to comply with the 2013 final rule and structured loan securitizations formed after the 2013 final rule was adopted in order to comply with the 2013 final rule? After banking entities have undertaken these efforts, would allowing an excluded loan securitization to hold additional types of assets allow a banking entity indirectly to engage in investment activities that may implicate section 13 rather than as an alternative way for a banking entity either to securitize or own loans through a securitization, as contemplated by the rule of construction in section 13(g)(2) of the BHC Act?

Question 178. Should the Agencies modify the loan securitization exclusion to reflect the views expressed by the Agencies' staffs in response to a FAQ[182] that the servicing assets described in paragraph 10(c)(8)(i)(B) of the 2013 final rule may be any type of asset, provided that any servicing asset that is a security must be a permitted security under paragraph 10(c)(8)(iii) of the 2013 final rule? Should the Agencies, for example, modify paragraph 10(c)(8)(i)(B) of the 2013 final rule to add the underlined text: "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 meets the requirements of paragraph (c)(8)(iii) of this section." Should the 2013 final rule be amended to include this language? Are there other clarifying modifications that would better address the expressed concern?

Question 179. Are there modifications the Agencies should make to the 2013 final rule's definition of the term "ownership interest" in the context of securitizations? If so, what modifications should the Agencies make and how would they be consistent with the ownership interest restrictions? Banking entities have raised questions regarding the scope of the provision of the 2013 final rule that provides that an ownership interest includes an interest that has, among other characteristics, "the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event)" in the context of creditor rights. Should the Agencies modify this parenthetical to provide greater clarity to banking entities regarding this parenthetical? For example, should the Agencies modify the parenthetical to provide that the "rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event" include 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? Would the ability to participate in the removal or replacement of an investment manager under these limited circumstances more closely resemble a creditor's rights upon default to protect its interest, as opposed to the right to vote on matters affecting the management of an issuer that may be more typically associated with equity or partnership interests? Why or why not? What actions do holders of interests in loan securitizations today take with respect to investment managers and under what circumstances? Are such rights limited to certain classes of holders?

Question 180. The Agencies understand that in many securitization transactions, there are multiple tranches of interests that are sold. The Agencies also understand that some of these interests may have characteristics that are the same as debt securities with fixed maturities and fixed rates of interest, and with no other residual interest or payment. In the context of the definition of ownership interest for securitization vehicles, should the Agencies consider whether securitization interests that have only these types of characteristics be considered "other similar interests" for purposes of the ownership interest definition? If so, why or why not? If so, why should a distribution of profits from a passive investment such as a securitization be treated differently than a distribution of profits from any other type of passive investment? Please explain why securitization vehicles should be treated differently than other covered funds, some of which also could have tranched investment interests.

<u>Annex C</u>

<u>Proposed Revisions to the LSE</u>

(8) *Loan securitizations.*

(i) *Scope. An entity that is primarily backed by loans.* An entity will be primarily backed by loans if it satisfies all the conditions of this paragraph (c)(8) and its assets or holdings are comprised solely of:

(A) Loans as defined in §ll.2(s) of subpart A;

(B) Rights or other assets, provided that any such right or other asset that is a security or derivative meets the requirements of paragraph (c)(8)(iii), (c)(8)(iv) or (c)(8)(v) of this section, as applicable, or falls within subclause (C) below; and

(C) Special units of beneficial interest and collateral certificates and exchange notes that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets*. For purposes of this paragraph (c)(8), 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 paragraph (c)(8)(iii) of this section or paragraph (c)(8)(i)(C) 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 if those securities are:

(A) Cash equivalents;

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

(C) Not more than 10% of the par value of the aggregate par value of all assets of the issuing entity at the time of any acquisition of assets or issuance of securities or other funding by such issuing entity.

(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 derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) 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.

(v) *Special units of beneficial interest, collateral certificates and exchange notes*. The assets or holdings of the issuing entity may include collateral certificates, exchange notes 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, exchange note or collateral certificate meets the requirements in this paragraph (c)(8);
(B) The special unit of beneficial interest, exchange note 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, exchange note 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, exchange note or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

Annex D

Proposed Revisions to the Qualifying Asset-Backed Commercial Paper Conduit Exclusion

(9) Qualifying asset-backed commercial paper conduits.

(i) An 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

(B) one or more regulated liquidity providers have entered into a legally binding commitment to provide full 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.