CREDIT SUISSE

October 17, 2018

Via Electronic Mail

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20582

Legislative and Regulatory Activities Division
Office of the Comptroller Currency
250 E Street, SW
Suite 3E-218
Washington, DC 20219

Re: "Covered Funds" Portions of the Joint Notice of Proposed Rulemaking Implementing Revisions to the Volcker Rule: Federal Reserve Docket No. R-1608 and RIN 7100-AF 06, OCC Docket No. OCC-2018-0010 and RIN 1557-AE27, FDIC N 3064-AE67, SEC File no. S7-14-18 and RIN 3235-AM10, and CFTC RIN 3038-AE72

Ladies and Gentlemen:

Credit Suisse appreciates the opportunity to provide comments to the Board of Governors of the Federal Reserve System ("the Federal Reserve"), the Federal Deposit Insurance Corporation ("the FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC" and, together, "the Agencies") on the "covered funds" portions of their Joint Notice of Proposed Rulemaking Implementing Revisions to the Volcker Rule ("the Proposed Rule").[1] Credit Suisse's comments on the "proprietary trading" provisions of the Volcker Rule are set forth in a separate comment letter, which should be read in conjunction with this submission.

The main legislative purpose of the Volcker Rule's covered funds provisions was to prevent banks from effectively subverting the Rule's prohibitions on banks engaging in proprietary trading by instead engaging in proprietary trading through affiliated funds. As such, banks are, among other things, prohibited from sponsoring or investing in covered funds, subject to certain exemptions and exclusions. Although there is no evidence to suggest that bank sponsorship or investment in private funds played a role in the financial crisis, we understand that this prohibition was motivated by a

[1] 83 Fed. Reg. 33,432 (July 17, 2018).

laudable desire to eliminate certain activities which could increase the possibility of future bank failures and create systemic risk for the U.S. banking system and the economy at large.

We strongly believe that banks should be able to actively participate in the asset management business. Asset management activities provide banks with earnings that are generally less volatile than traditional banking businesses such as corporate and retail lending, and less risky than investment banking activities. The asset management business is also less capital-intensive, as it relies predominantly on third party capital from investors, and not bank proprietary capital. In these ways, asset management activities play an important role in the diversification of banking businesses, contributing to overall institutional safety and soundness.

Bank participation in the asset management business also adds to competition in the sector and provides more investment opportunities to investors. In particular, asset managers that are affiliated with banks are more highly regulated than "independent" asset managers, and have larger risk, compliance, and control-related functions, which provide additional comfort to certain classes of investors. Indeed, Congress recognized the value of asset management activities for both banks and their investors by specifically creating an "Asset Management Exemption" in the Volcker Rule, which enabled banks to continue to participate in the market.

While the goals of the Volcker covered fund provisions are sensible, the current Implementing Regulations[2] go well beyond the statutory intent to prevent bank proprietary trading, and have imposed far higher burdens on bank-affiliated funds, creating a number of unintended consequences. These unintended consequences effectively constrain the ability of banks to fully and actively participate in the asset management business, depriving banks of a lower risk and less volatile business and depriving investors of investment opportunities.

The Implementing Regulations also have had other adverse effects. For example, the prohibition on transactions between a covered fund and an affiliated entity means that advisers effectively may be precluded from engaging in certain transactions that represent the best execution for the fund and its clients, thereby conflicting with the adviser's fiduciary duties. The extraterritorial application of the rule to "foreign excluded funds" also has had adverse consequences, and we believe that the Agencies should focus the Implementing Regulations on satisfying the key policy goal of protecting the U.S. financial system and U.S. financial institutions from the risks of speculative short-term trading. The Agencies should follow the historical bank regulatory approach in the U.S. of taking a "water's edge" approach to financial regulation.

We respectfully request that the Agencies to consider making the following changes to the Implementing Regulations (and other related relief). We believe that, if adopted, these changes would redress the adverse effects and unintended consequences of the Implementing Regulations, and better align the Volcker rule with its original legislative intent. We explain our recommendations at greater length in the subsequent sections of this comment letter.

1. **Foreign Excluded Funds:** Clarify the treatment of Foreign Excluded Funds by either exempting Qualifying Foreign Excluded Funds ("QFEFs") from the definition of banking entity or expressly recognizing that the trading activities of QFEFs are not proprietary trading.
2. **Super 23A:** "Super 23A" restrictions should be confined to domestic activities. The Agencies should incorporate the exemptions under Section 23A of the Federal Reserve Act.
3. **Covered Funds Exemptions**: The Agencies should retain the current covered fund definition tied to the sections 3(c)(1) and 3(c)(7) exemptions from the Investment Company Act registration

[2] See "Proprietary Trading and Certain Interests in and Relationships with Covered Funds", 79 Fed. Reg. 5,536 (January 31, 2014) (setting forth the "2013 Rule Preamble" and the text of the "2013 Rule").

rather than adopting a “characteristics-based” test. However, additional exclusions should be added for certain types of funds, including credit funds.

4. **Aggregate Investment Limit:** The aggregate 3% Tier 1 capital investment limit should apply only at the parent consolidated level for *all* firms.
5. **Employee Investments:** The scope of permissible employee investments should be clarified. First, a service provider test should not apply to employees indirectly invested in covered funds through non-covered Employee Securities Companies (“ESCs”). Second, a banking entity should be deemed to act in an agent capacity for its sponsored ESCs, notwithstanding the fact that it may control or hold a *de minimis* interest in such ESCs.
6. **Seeding Period:** The seeding period should be extended to three years. Alternatively, the Federal Reserve should create a streamlined process for presumptively granting two-year extensions to the current one-year seeding period.
7. **Per-Fund Limit:** Update the per-fund bank investment limit should be broadened to allow bank-affiliated securitization investment managers to rely on applicable foreign risk retention regulations as a basis for exceeding the 3% per-fund limitation, provided that those foreign rules are generally comparable to U.S. requirements.
8. **Inter-Agency Process:** The Agencies should enter an interagency agreement delegating responsibility for interpretation and guidance relating to the Implementing Regulations to a single agency. In addition, the Agencies should agree that an institution’s primary regulator should be charged with conducting any Volcker examination of the banking entity.

****

We thank the Agencies for their considerations of our comments. If you have any questions, please do not hesitate to contact the undersigned, Roger Machlis [redacted]), Yosef Ibrahimi [redacted]), or Peter Ryan ([redacted]).

Sincerely,

Eric M. Varvel

,

Eric M. Varvel
Global Head, Asset Management

1. Clarify the Treatment of Foreign Excluded Funds

- **Exempt Qualifying Foreign Excluded Funds ("QFEF") from the definition of banking entity. Alternatively, expressly recognize that the trading activities of QFEFs are not proprietary trading.**

A significant concern with the Implementing Regulations is overbroad and extraterritorial application to foreign fund vehicles, commonly referred to as "foreign excluded funds." The Federal Reserve, FDIC and OCC, with the support of the SEC and CFTC, recognized the unintended consequences and extraterritorial impact of the Volcker Rule in their July 21, 2017 Statement Regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (the "Interpretive Relief").[3] That guidance, while temporary in scope, is helpful. Credit Suisse believes that the Interpretive Relief provides the basis for changes to the Implementing Regulations that would limit the extraterritorial impact of the Volcker Rule while avoiding the core concern identified by the banking agencies – use of controlled foreign excluded funds to engage in proprietary trading.

We propose that the concept of "qualifying foreign excluded funds" ("QFEF") articulated in the Interpretive Relief be the basis for changes to the Implementing Regulations, though, as discussed below, some additional clarification would be required. Based on this approach, the Implementing Regulations should be revised to carve out QFEFs explicitly from the definition of "banking entity."

The Volcker Rule applies to "banking entities"[4] and their "affiliates"[5], and these terms are defined by reference to statutory law. When promulgating the Implementing Regulations, the Agencies recognized that it was not necessary or appropriate for covered funds to fall within the definition of "banking entity" and accordingly excluded covered funds from the definition of banking entity.[616] A similar carve-out was not provided for foreign excluded funds. This leads to the anomalous and unintended result that non-U.S. funds with no U.S. investors, which are affiliates of non-U.S. banking entities, are subject to the Volcker Rule's proprietary trading restrictions while a "covered fund" is not subject to the proprietary trading restrictions. The application of activities-based restrictions to non-U.S. funds represents broad extraterritorial overreach, which was clearly not intended when the legislation was enacted, as the Interpretative Relief acknowledges. The banking agencies also recognized the unintended consequences of foreign excluded funds being considered banking entities in the Interpretive Relief.

We also support importing the definition of QFEF provided in the Interpretive Relief into the Volcker Rule's definition section, and expressly excluding such QFEFs from the definition of banking entity.[7] Like covered funds, QFEFs would not be subject to the proprietary trading restrictions. This would address the over breadth and extraterritorial impact of the Implementing Regulations while requiring the least extensive modifications to the Implementing Regulations. This solution would mostly involve importing the relevant provisions of the Interpretive Relief into the revision of the Implementing Regulations (i.e. making permanent the temporary solution which was the subject of

---

[3] FRB, FDIC, OCC, Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017).

[4] The definition of banking entity includes (i) insured depository institution, (ii) companies that control an insured depository institution, (iii) foreign banking organizations treated as bank holding companies under the International Banking Act of 1978, and (iv) all affiliates of such entities. 12 U.S.C. § 1851(h)(1).

[5] Implementing Regulations § _.2(a)(adopting the definition of affiliate set forth in section 2(k) of the Bank Holding Company Act of 1956).

[6] Implementing Regulations § _.2(c)(2)(i).

[7] Specifically, Credit Suisse proposes adding Qualified Foreign Excluded Funds to Section __2(c)(2)(i). The revised language would read "Banking entity does not include (i) a covered fund or qualified foreign excluded fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;" Paragraphs (c)(1)(i)-(iii) track the definition of banking entity in 12 U.S.C. Section 1851(h)(1) as noted in fn. 2 above. The Qualified Foreign Excluded Fund criteria from the Interpretive Relief should be expressly included in a new Section__10(c)(15), and such funds should be expressly recognized as excluded from the definition of a covered fund.

careful consideration by the Agencies over an extended period of time). In addition, given that QFEFs are non-US funds, with no U.S. investors, we believe this solution would clarify and confirm that QFEFs are not subject to the provisions of so-called Super 23A (though such clarification should also be appropriately noted in the preamble to the revised Implementing Regulations).

Furthermore, we propose that the current third prong of the QFEF definition be clarified. The current language provides that a QFEF "would not otherwise be a banking entity except by virtue of the foreign banking entity's acquisition or retention of an ownership interest in, or sponsorship of, the entity." This language should be revised to explicitly incorporate the control standard from the Bank Holding Company Act of 1956 ("the BHC Act")[8] in order to expressly include all entities that may be deemed to be controlled under the BHC Act.[9] This express adoption of the statutory control standard would include, for example, cases where control can be determined based on election of the directors or trustees of the fund.

To the extent the Agencies decide not to expressly carve-out QFEFs from the definition of banking entity, as an alternative we would urge that QFEFs be expressly excluded from the proprietary trading restrictions of the Volcker Rule. Accordingly, we would propose that Section __.3(d) be modified to add a new subsection (10) to the list of exclusions from the definition of proprietary trading. The proposed additional language would be:

> Any purchase of one or more financial instruments by a banking entity that is a Qualifying Foreign Excluded Fund.

We believe that these proposed changes to the Implementing Regulations (and clarifications in the preamble to the revisions) would limit the Volcker Rule's extraterritorial reach in accordance with Congressional intent. Applying activities-based restrictions to non-U.S. funds without U.S. investors simply because those funds are controlled by a non-U.S. affiliate of a foreign banking organization is far outside the scope of what Congress intended. Comity, appropriate deference to home country regulators and the presumption against extraterritoriality weigh in favor of excluding QFEFs from the definition of banking entity.

To the extent the Agencies do not adopt one of the foregoing proposals, Credit Suisse urges that the QFEF criteria be incorporated into the Solely Outside the United States (SOTUS) permitted activities exemption in a way that would permit the banking entity sponsoring a QFEF that also is a "banking entity" to elect to treat that QFEF as a SOTUS fund. Such a change could be implemented by modifying Section __.13(b)(1) to provide for such election.

Recommendations: Credit Suisse urges that the revisions to the Volcker Rule expressly adopt the "Qualifying Foreign Excluded Funds" (QFEF) construct embodied in the Banking Agencies' July 21, 2017 guidance. Credit Suisse prefers that such funds be expressly excluded from the definition of "banking entity" and thereby not subject to the proprietary trading restrictions. Alternatively, Credit Suisse recommends that the activity of QFEFs be added to the list of activities expressly defined to not constitute "proprietary trading" under the Volcker Rule.

To the extent the Agencies do not adopt one of the foregoing proposals, Credit Suisse urges that the QFEF criteria be incorporated into the Solely Outside the United States (SOTUS) permitted activities exemption in a way that would permit the banking entity sponsoring a QFEF (that also is a "banking entity") to elect to treat the QFEF as a SOTUS fund.

---

[8] 12 U.S.C. 1851.

[9] Credit Suisse would urge adoption of the definition of control under 12 U.S.C. Section 1841(a)(2), as well as any interpretations of control under applicable Federal Reserve guidance or interpretation.

2. Revise the Super 23A Restrictions on Covered Transactions

- **"Super 23A" restrictions should be confined to domestic activities and the exemptions under Section 23A of the Federal Reserve Act should apply.**

Credit Suisse believes that the Agencies through the Implementing Regulations made the "Super 23A" prohibitions broader and more stringent than intended or required by statute.[10] As implemented, Super 23A does nothing to advance the primary goal of the Volcker Rule – prohibiting proprietary trading – and instead imposes significant costs and transactional complexity on banking entities. Furthermore, the Super 23A prohibitions, as implemented, effectively deprive bank-affiliated asset managers of the ability to enter into trades and financing transactions with their affiliated broker-dealers that could be beneficial to investors in the fund by providing them with best execution.

For example, Super 23A prohibits an affiliated broker-dealer from financing a covered fund through repurchase agreements ("repos"), executing certain total return swaps or credit-linked notes, and purchasing assets from a covered fund. As a result, covered funds are disadvantaged in a number of important ways:

- In some asset classes, a covered fund's bank-affiliated broker-dealer may be one of the largest sell-side participants, making that broker-dealer a key source of attractive investment opportunities that may be coupled with repo financing. Without the repo financing, these investments may not be able to meet some covered funds' investment hurdle rates. As a matter of practice, broker-dealers generally do not provide financing for deals sourced by a competitor, meaning the covered fund may need to forgo certain opportunities, which can have a material adverse impact on the fund's overall returns.
- In some asset classes, the bank-affiliated broker-dealer may be one of the best-placed market participants to evaluate repo risks. A covered fund may own many securities where the only possible repo counterparty is its bank-affiliated broker-dealer because no other broker-dealers offer repos on those securities.
- Repos are an important liquidity tool. Eliminating a major repo counterparty such as a bank-affiliated broker-dealer means a fund may be at higher risk of needing to engage in forced transactions or fire sales.

In addition, under many circumstances "best execution" may require what would otherwise constitute a covered transaction between a fund and an affiliated broker-dealer. The fund and the investors of the fund – clients of the banking entity – are disadvantaged by the fund being unable to transact with an affiliated broker-dealer in circumstances where the affiliate transaction represents the best possible price for the fund and its investors.

- For example, Credit Suisse had no choice but to unwind certain repo financing with the bank for one of our covered funds prior to the legacy conformance date because the positions would have violated the Super 23A and Implementing Regulations prohibitions. This resulted in the fund having to find other counterparties that, in many cases, could not offer as attractive terms as Credit Suisse given Credit Suisse's position in the market relative to other broker-dealers.
- For a number of asset classes, there may be a limited number of potential counterparties, and prohibiting an affiliated broker-dealer from bidding for a position artificially depresses the price of the assets to the detriment of the investors in the covered fund.

We propose that in order to address the adverse implications of Super 23A as currently implemented, the Agencies align Super 23A with the regulatory framework currently provided by Section 23A and the Federal Reserve's Regulation W. Specifically, and as discussed in greater detail below, Credit Suisse requests that the Agencies: (i) import the exemptions provided in Section 23A of

---

[10] The statutory language is codified at 12 U.S.C. § 1851, and all subsequent references to the Statute are to that section. §1851(f) contains the statutory language on covered transactions.

the Federal Reserve Act and the Federal Reserve's Regulation W to Super 23A; (ii) clarify that, consistent with Section 23A and Regulation W, Super 23A does not apply extraterritorially[11]; and (iii) permit covered transactions between a covered fund and an affiliated broker-dealer even absent a specific exclusion under Section 23A or Regulation W, where such a transaction would be required by best execution. These changes to the Implementing Regulations would harmonize the application of the Volcker Rule with other regulations and would not impede achieving the core policy goals of the Volcker Rule.

The Agencies should, in revising the Implementing Regulations, import the exemptions set forth in the Federal Reserve Act and Regulation W. The current Implementing Regulations interpret "covered transaction" to mean the covered transactions set forth in Section 23A without incorporating the exemptions provided in Section 23A or in Regulation W. The statutory language does not prohibit or otherwise restrict importing these exemptions.[12] Reading the statutory language in light of the history and practice around Section 23A and Regulation W, the expressed legislative intent was to import the overall framework applicable to member bank/affiliate transactions provided for in Section 23A and Regulation W. Revising the Implementing Regulations to incorporate these exemptions would allow banking entities to continue providing services to related covered funds consistent with standard market practice. Moreover, banking entities are familiar with the exemptions provided under Section 23A and Regulation W, and would be well-equipped to build-out appropriate processes and procedures without the cost and complexity required under the current iteration of Super 23A.

The Agencies should also recognize that Super 23A does not have extraterritorial effect and does not apply to transactions between a non-U.S. banking entity acting outside the United States and covered funds (1) that a non-U.S. banking entity sponsors or invests in under the SOTUS exemption and (2) other covered funds that are organized under non-U.S. law. In each of these cases, the covered fund does not present risks to U.S. financial stability. As a threshold matter, there is a presumption against applying U.S. law on an extraterritorial basis absent an explicit indication that Congress intended to act extraterritorially. Nothing in the statutory text indicates such a legislative intent. In fact, the historical approach towards financial regulation by Congress and the Agencies has been a "water's edge" approach, with appropriate deference to a banking entity's home country regulator. Section 23A and Regulation W do not apply to the non-U.S. branches of a non-U.S. bank or to transactions between a U.S. branches and affiliates that are not engaged in U.S. activities; a similar limit should apply to Super 23A. Finally, there is no policy justification for prohibiting a non-U.S. banking entity from engaging in transactions with a SOTUS or non-U.S. fund when there is no restriction on that bank's ability to invest in the fund. In revising the Implementing Regulations, the Agencies should recognize explicitly that Congress did not intend Super 23A to govern the relations between a non-U.S. bank and STOTUS and non-U.S. funds and therefore clarify that Super 23A does not have such an extraterritorial impact.

In circumstances where the advisor of a covered fund has a fiduciary duty to the fund and its investors, and best execution would require transacting with an affiliate of the covered fund, such a transaction should be permissible, provided it is permitted under other applicable law. Transactions between a regulated bank and affiliates are permissible under Regulation W. Providing broader authority for covered transactions between a covered fund and an affiliate where necessary for best execution does not pose a risk of speculative and risky trading or raise the likelihood of a regulated institution "bailing-out" a covered fund.

[11] Sections 23A and 23B of the Federal Reserve Act and Regulation W thereunder only apply to the activities of U.S. insured depository institutions and the U.S. branches and agencies of foreign banks. *See* 12 U.S.C. § 371c, 371c-1 (member banks), 1828(j) (state nonmember banks), 1468(a) (federally insured savings associations); 12 C.F.R. § 223.61(a) (U.S. branches and agencies of foreign banks).
[12] *See* 12 U.S.C. Sec. 1851(f).

Recommendations: Credit Suisse recommends that the definition and application of "covered transaction" under the Implementing Regulations be revised to incorporate the exemptions provided in Section 23A of the Federal Reserve Act and the Federal Reserve's Regulation W. Credit Suisse further urges that the revisions to the Implementing Regulations clarify that funds relying on the SOTUS exemption or covered fund organized outside of the United States are not subject to Super 23A.

The exemptions provided in Section 23A and Regulation W represent reasoned determinations by the Federal Reserve that such transactions do not pose risk to a member bank, and that application of Section 23A should be limited to transactions that create risk in the United States (for foreign banks, this application would be limited to transactions with their U.S. operations). Congress was aware of these long-standing exemptions and the Federal Reserve's determinations that certain activities were not risky and therefore permissible for member banks. The enacting statute provides that Super 23A applies "as if such banking entity were a member bank and such [covered] fund were an affiliate thereof," which embodies an express congressional intent to incorporate those long-standing exemptions in Section 23A and Regulation W and, thereby, incorporate into the Volcker Rule context the policy determination that certain specific transactions are low-risk.

3. Retain and Expand the Exemptions Based Approach to the Covered Funds Definition

- **The Agencies should retain the current sections 3(c)(1) and 3(c)(7) exemptions rather than adopting a "characteristics-based" test. However, additional exclusions should be added for certain types of funds, including credit funds.**

Section 619 of the Dodd-Frank Act added section 13 to the BHC Act, which generally prohibits a banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having relationships with a hedge fund or a private equity fund (referred to as a "covered fund"), subject to certain exemptions and exclusions. These restrictions are designed to ensure that banking entities do not rescue investors in those funds from loss and that banking entities are not themselves exposed to significant losses from investments or other relationships with those funds.

In their 2013 Implementing Regulations, the Agencies adopted a definition of "covered fund" that refers to fund issuers that would be an investment company but for section 3(c))(1) or 3(c)(7) of the Investment Company Act of 1940, as amended (the "1940 Act"). As stated in the Proposed Rule, the Agencies adopted this unified definition of "covered fund" rather than having separate definitions of "hedge fund" and "private equity fund" because section 13 of the BHC Act set forth those terms without differentiation (page 153 of Final Rule Release). The Agencies have requested comment on "whether the Final Rule's covered fund definition effectively implements the Statute and is appropriately tailored to identify the funds that engage in the investment activities contemplated by section 13 of the BHC Act. The Agencies also request comment on whether the definition has been imprecise, and whether this has led to any unintended results.

As noted earlier in this comment letter, the main legislative purpose of the covered funds provisions of the Volcker Rule was to prevent banks from effectively subverting the Final Rule's prohibitions on engaging in proprietary trading by instead conducting such activity through affiliated funds. We understand that these provisions were motivated by the appropriate desire to eliminate certain activities that could increase the possibility of future bank failures and create systemic risk for the U.S. banking system. However, we believe that the current provisions are overbroad and that this has led to a number of unintended results and adverse consequences.

Sections 3(c)(1) and 3(c)(7) under the 1940 Act are two of a number of exemptions under the 1940 Act upon which private funds may rely in order to exempt themselves from registration under the 1940 Act. The majority of private fund vehicles today rely upon these two exemptions in order to place their shares with investors without registration. The universe of such funds and their strategies varies considerably and includes not only highly leveraged funds with active trading strategies, but also funds with long-term investment strategies that involve little or no short-term trading and minimal leverage. Many of these funds in the latter category cannot be described accurately either as hedge funds or private equity funds.[13]

Included in this universe are certain real estate funds, securitization funds, fixed-income funds, credit funds, and funds that acquire and hold stakes in other companies.[14] The reason that many of these funds rely on the sections 3(c)(1) or 3(c)(7) exemptions under the 1940 Act is that other exemptions from registration provided under the 1940 Act (which do not result in the application

[13] We note that even hedge funds and private equity funds encompass a wide spectrum of funds with various trading and holding strategies.
[14] Many of these funds have similar strategies to those employed by registered investment companies and business development companies ("BDCs'). In fact, BDCs invest in secured and unsecured debt, make loans to and hold equity in portfolio companies and provide managerial assistance to their portfolio companies for fees. As a result, BDCs are considered to be a form of publicly offered private equity. BDCs differ from similar private funds relying on section 3(c)(7) in that they are regulated under the 1940 Act and are subject to certain requirements and restrictions set forth under 1940 Act provisions applicable to BDCs.

of the definition of "covered fund") may be too narrow to fit certain types of investment strategies.[15] However, many of these funds have no connection to investment activities that could be described as proprietary trading or trading that would be viewed as creating systemic risk to the banking system, but, nonetheless, are swept into the scope of the covered fund rules solely based on the process of how these funds are offered to investors (i.e. pursuant to the sections 3(c)(1) or 3(c)(7) exemption). Additionally, as noted above, many of these funds employ similar strategies to registered investment companies and BDCs[16] but may not be able to entirely operate under the 1940 Act regulatory framework applicable to registered investment companies and BDCs and therefore, limit their offerings only to investors that are able to meet certain investor qualification standards required by sections 3(c)(1) and 3(c)(7) of the 1940 Act.

Therefore, we believe that separately defining "hedge fund" and "private equity fund" may prove problematic both from a definitional and interpretative standpoint. Instead, we support retaining the current sections 3(c)(1) and 3(c)(7) exemptions under the 1940 Act as a starting point for the definition of "covered fund." However, we recommend narrowing the universe of funds that would be deemed covered funds by providing certain exemptions or exclusions for funds that employ investment strategies that do not involve the types of trading or strategies that would involve risk to a banking entity or create systemic risk.

In particular, we would recommend excluding funds, which may include collateralized loan obligation funds ("CLOs") and collateralized debt obligation funds ("CDOs") that engage in credit strategies by primarily investing, directly or indirectly, in secured debt (including senior and second lien loans), and/or unsecured debt (including mezzanine loans) ("Credit Funds"), from the definition of "covered fund." Credit Funds are comprised primarily of debt instruments and by the nature of their holdings do not engage in short-term proprietary trading; instead they seek to generate returns from the income generated by their underlying debt investments. Debt instruments, by their nature, are held for income and generally trade in very narrow ranges with limited upside potential and therefore are not primarily traded to achieve short-terms gains as may be the case with equity and other types of instruments. Debt investments, either by themselves or held in funds, while arguably tradeable, are held in order to achieve income returns to the funds, which returns are generated primarily by the interest paid from such investments and not from short-term trading gains. As noted above, many registered investment companies and BDCs which are offered publicly hold similar investments and follow similar investment and trading strategies, investing in and holding debt in order to achieve returns with the flexibility to dispose of their portfolio holdings as market and other factors may dictate.

We also note that the types of funds cited above have provided, and continue to provide, important sources of capital formation and funding to businesses of varying sizes. The importance of private funds in this context has historically been recognized. This was first discussed by the Securities and Exchange Commission's Division of Investment Management twenty-six years ago in its seminal 1992 *Protecting Investors Study* which noted that the section 3(c)(1) exemption is "used by a wide variety of issuers that provide important sources of capital to small businesses and others."[17] The same *Protecting Investors Study* suggested the creation of an alternative exemption to

[15] Many real estate funds, because of the way certain of their underlying real estate investments are structured or financed, may not be able to rely on section 3(c)(5)(C) under the 1940 Act entirely because such investments may not be fully secured by the underlying real estate and therefore would not be considered primarily real estate assets under the 55% test employed under section 3(c)(5)(C)). With respect to certain credit funds (including CLOs) and securitized asset funds, such funds may not be able to utilize the Rule 3a-7 asset-backed securitization exemption under the 1940 Act because of the narrow limits on disposing of the underlying holdings coupled with varying interpretations of the extent and meaning of such limits. Most funds with credit strategies require the flexibility to sell or trade their portfolio holdings in response to market events, rises or perceived rises in interest rates, or credit impairment or other factors that may affect an individual debt issuer or a market sector; not to be able to do so could leave fund exposed to ongoing market and credit risk.
[16] This regulatory framework, in addition to board governance requirements, may also include as applicable, diversification requirements, investment and concentration restrictions, and limitations with respect to affiliated transactions.
[17] See, Division of Investment Management, Securities and Exchange Commission, "Protecting Investors: A Half Century of Investment Company Regulation" (1992), p. 103.

the more narrow 100 person limit of section 3(c)(1), which also could be relied upon by funds and other vehicles to increase funding available to small businesses. Section 3(c)(7) was added as an additional exemption under the 1940 Act by Section 209 of the National Securities Markets Improvement Act of 1996 ("NSMIA"). The Senate report accompanying the legislation that resulted in NSMIA cited the important role that private investment funds can play in facilitating capital formation for U.S. companies, particularly new ventures or companies in emerging industries.[18]

We continue to support retaining the sections 3(c)(1) and 3(c)(7) exemptions as the basis of the "covered funds" definition. We urge, however, the Agencies to add certain exclusions under the current definition for funds (particularly Credit Funds) that do not pursue short-term trading strategies but which may still need to rely upon the sections 3(c)(1) and 3(c)(7) exemptions from registration under the 1940 Act in order to offer their interests and strategies to qualified investors. We believe that these funds continue to serve important capital formation and funding needs for many businesses, and that, based on their operating strategies, do not pose the types of risks to the U.S. banking system that section 13 of the BHC Act was enacted to address. Additionally, as U.S. banking entities have increasingly moved into more stable businesses, including asset management businesses, the ability of U.S. banking entity affiliates to offer these types of funds not results in additional product competition to the marketplace and sources of market funding, but also may help to build more stable businesses within the banking entity itself.

Recommendations: Regarding the questions posed by the Agencies, we believe that using a characteristics-based approach by separately defining "hedge fund" and "private equity fund" will prove problematic both from a definitional and interpretative standpoint. Instead, we support retaining the current definition of a covered fund based on the sections 3(c)(1) and 3(c)(7) exemptions from registration under the Investment Company Act but recommend narrowing the universe of funds that would be deemed covered funds by providing certain exclusions from the definition of covered funds for funds that employ investment strategies that do not involve the types of trading or strategies that would involve risk to a banking entity or create systemic risk.

As an example, we recommend that Credit Funds that engage in credit strategies by primarily investing and holding various types of debt including bank loans, mezzanine debt and high yield debt be excluded from the definition of covered fund, regardless of the fact that such funds may rely on the sections 3(c)(1) or 3(c)(7) exemptions from registration.

[18] S. Report No. 293, 104th Congress 10 (1996) accompanying S. 1815.

4. Revise the Aggregate Investment Limit

- **The 3% Tier 1 capital investment limit should apply at a consolidated global level for *all* firms.**

The current 3% aggregate limit is appropriate, but we believe it should be based on consolidated Tier 1 capital at the global parent level. This would provide for a level playing field for all bank-owned asset managers and promote competition.

The Implementing Regulations provide that "[t]he aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3% of the Tier 1 capital of the banking entity…"[19] The Agencies should amend the Implementing Regulations to clarify that the 3% aggregate covered fund investment limit is measured at the ultimate parent of the banking entity and not at a lower level. The statutory purpose of the aggregate covered fund ownership limitation is to ensure that the investments are "immaterial to the banking entity."[20] Measuring aggregate covered fund ownership at the parent level is a better test of immateriality than measuring covered fund investments at a lower level, such as at the level of an Intermediate Holding Company ("IHC").

Requiring foreign banking entities to measure aggregate fund ownership against Tier 1 capital at both their global parent and IHC adds unnecessary complexity and artificially restricts the Foreign Banking Organization's ("FBO") ownership. This can be especially problematic because Regulation YY may require that the FBO keep its ownership interest in a controlled U.S. fund within its IHC. Requiring international banks to abide by aggregate ownership restrictions at both the IHC and parent level puts FBOs at a disadvantage relative to their U.S. peer banks, who only need to comply with a parent-level aggregate ownership restriction. Revising the Implementing Regulations to specify that aggregate ownership limitations apply only at the level of the ultimate parent would provide parity in treatment between U.S. and international banks, and would simplify the compliance process for such institutions without weakening the expressed statutory intent, which aims to ensure covered fund investments are immaterial to the banking entity.

Recommendation: We believe that the current 3% limit is appropriate, but should be based on the Tier 1 capital of the global firm rather than just the U.S. Tier 1 capital base. This would provide for a level playing field for all bank-owned asset managers and a reduction of unnecessary complexity.

[19] __.12(a)(2)(iii)

[20] 12 U.S.C. Sec. 1851(d)(4)(B)(ii)(II)

5. Expand Permissible Employee Investments

- **A service provider requirement should not apply to employees indirectly investing in covered funds through Employee Securities Companies ("ESCs").**
- **A banking entity should be deemed to act in an agent capacity for its sponsored ESCs, notwithstanding control or holding a *de minimis* interest in such ESCs.**

The Implementing Regulations limit ownership of covered funds by employees of a banking entity to those employees who are directly engaged in providing investment advisory or other services to the relevant covered fund. Banking entities historically have established ESCs to invest in sponsored funds (which may be covered funds) for the benefit of their employees. ESC's are pooled investment vehicles whose security holders are limited to current and former employees of the banking entity (or related entities), the employer itself and certain other affiliated or related persons.[21] Because ESCs do not rely on the section 3(c)(1) or 3(c)(7) exemptions, they are not covered funds, and should not be subject to any restriction on employee investments.

We recommend that the Agencies revise: (i) §__.11(a)(7) to clarify that employees investing in non-covered ESCs are not required to provide services to the underlying covered funds in which the ESC may invest[22], and (ii) .§__.3(d)(7) to clarify that ESCs act in the capacity of an agent, broker or custodian for the benefit of the invested employees [23]

A sponsoring banking entity is required to control the ESCs it established for the benefit of its employees from a corporate governance perspective. This control is a *required* condition for exemptive relief under Section 6(b) of the Investment Company Act. Traditionally, the structuring involved in sponsoring an ESC may also result in the banking entity holding residual or reversionary interests in the ESC, which may result in the banking entity holding *de minimis* interests in the ESC,

The "employee service provider" restriction of § __.11(a)(7) applies by its plain language only to covered funds. Many institutions have discontinued or limited the offering of ESCs due to the broad anti-evasion language of § __.21(a), and uncertainty over the interaction of that provision with the employee service provider restriction. This is due to concern that although ESCs are not covered funds, the employee service provider restriction could be given broader effect and applied to employees participating in the ESCs which in turn invest in covered funds. Clarifying that participation in ESCs does not require application of a service provider test to the participating employees would be useful in effectuating the underlying purpose of ESCs.

Section 6(b) of the Investment Company Act contemplated broad offering of ESCs to the employees of the sponsoring institution. Participation in an ESC is not limited only to the senior management of a banking organization. Prior to the adoption of the Implementing Regulations, many banking organizations broadly offered ESCs to their employees. ESCs were a valuable method for ensuring long-term retention of employees at multiple levels of seniority. Clarifying that participation in ESCs is not subject to an employee service provider test would reconcile the Implementing Regulations with Section 6(b) of the Investment Company Act, and the process followed by the SEC with respect to ESCs. Nothing in the statutory or regulatory record suggest an express Congressional intent to curtail the broad offering of ESCs to employees of banking entities, and the recognition of such vehicles as exempted from registration due to their social benefit. Accordingly, the revisions to

[21] ESCs rely on an exemption from registration under the 1940 Act provided by section 6(b) and the employer must file an application with the Securities and Exchange Commission to obtain an exemption (via an Exemptive Order) for current and future ESCs.
[22] This change could also be made through the adoption of appropriate explanatory text in the relevant portion of a preamble to a revision of the Implementing Regulations.
[23] Such a change could be made through an appropriate clarification in a preamble to the revision of the Implementing Regulations.

the Implementing Regulations should clarify that employee service provider tests do not apply to ESCs.

Although ESCs may be banking entities because of corporate governance control, the relation of the banking entity to the ESC is a relationship which implicates proprietary trading concerns. §__. 12 CFR 248(3)(d)(7) excludes from the definition of proprietary trading the activity of a banking entity as agent, broker or custodian. Notwithstanding the fact that a banking entity may control its sponsored ESC, or hold a *de minimis* ownership stake as a result of its reversionary interest, the character and relation of a banking entity to its sponsored ESC, is similar to that of an agent or custodian. – as the banking entity is managing the ESC for the benefit of its employees and former employees. Although the banking entity controls the ESC, it is required to manage the ESC for the benefit of its employees (and former employees), and this standard is inherent in the consideration and grant of exemptive relief by the SEC.[24] Given the requirement that the banking entity manage the ESC for the benefit of the invested employees, this activity should not be characterized as principal activity subject to the proprietary trading restrictions.

The Agencies should amend the Implementing Regulations to clarify that, when acting on behalf of an affiliated ESC, the banking entity would be considered acting as agent, broker or custodian, notwithstanding that it holds a *de minimis* reversionary interest in the ESC or controls the ESC. We strongly believe that the framework of this proposal is embodied in the inherent characteristics and fundamental purpose of ESCs, which is to permit a banking entity's sponsored and controlled vehicles to invest in the banking entity's own funds for the benefit of its employees. The limitations are recognized in the underlying statute, legislative history and embodied in the process through which the SEC considers and grants exemptive relief under Section 6(b) of the Investment Company Act.

Recommendations: The Agencies should permit ESCs to invest in sponsored covered funds without requiring that investors in the ESC be engaged in the provision of services to the underlying covered funds.

Where acting on behalf of an affiliated ESC, the banking entity should be considered acting as agent, broker or custodian, rather than in a principal capacity, notwithstanding the fact that it may hold a *de minimis* reversionary interest in the ESC and would control the ESC. Accordingly, ESCs should not be subject to the Implementing Regulations.

[24] Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 196-97 (1940) (Noting that the character of an ESC eligible for an exemption from registration, is akin to a charitable vehicle set up for the benefit of the employee investors).

6. Extend the Seeding Period

- **Extend the seeding period to three years.**
- **Alternatively, create a streamlined process for granting two-year extensions to the current one-year seeding period.**

The so-called "asset management exemption" to the Volcker Rule restrictions on bank ownership or sponsorship of covered funds was included by Congress in recognition of the value that the asset management business brings to the U.S. banking industry and the U.S. economy as a whole. Asset management is a risk-reducing business for banks because the asset management business generally provides a steady earnings flow and involves less volatility and less principal risk than core commercial and investment banking activities.

Congress included the asset management exemption in the Statute in order to allow banks to remain in this business, but limited the amount of capital that banks invest in their affiliated funds to avoid banks having too much exposure to the risks of their managed funds. Congress realized that the per-fund limit on bank capital investments in affiliated covered funds (3%) was much too restrictive to enable banks to provide seed capital for new funds, and provided by statute for extensions of the seeding period for covered funds.[25] Accordingly, the Implementing Regulations permit banks to provide seed capital to new covered funds, but requires the banks to reduce such seed capital to conform to the per-fund investment limits within one year, subject to the discretion of the Federal Reserve Board to extend the seeding period for up to two years.

Several years of industry experience with the Implementing Regulations shows that one year is frequently too short a period of time for a new fund to develop a sufficient track record that would be required to attract investment capital from many third-party investors. In fact, because any extension request would need to be submitted to the Federal Reserve Board 90 days before the end of the initial one year seeding period,[26] and given the need to prepare a request, banking entities frequently have to make decisions on seeking extension of the seeding period after only a few months of sales efforts. This creates a significant administrative burden on the operation of covered funds, creates planning uncertainty in the offering of covered funds, and places a material burden on the applications departments of the Federal Reserve Banks that consider these extension requests under delegated authority from the Federal Reserve.[27]

The statutory language provides that the Federal Reserve may extend the period of time to reduce the seeding period of a covered fund for 2 additional years if such an extension would be consistent with safety and soundness principles and in the public interest. The current Implementing Regulations also recognize that the Federal Reserve alone may extend the seeding period of a covered fund.[28] Because the Statute vests discretion in the Federal Reserve alone, Credit Suisse believes that the Federal Reserve may act alone to issue guidance articulating a streamlined process for the extension of seeding period for covered funds. Although the Implementing Regulations provide a list of factors for the Federal Reserve to consider, the Federal Reserve is entitled to consider all the facts and circumstances, subject to the statutory requirement that any extension be consistent with safety and soundness principles and in the public interest.

Given the real limitations of an initial one-year seeding period, and the requirement that applications be filed 90 days before the end of the initial seeding period, Credit Suisse proposes that the Federal Reserve issue guidance adopting streamlined procedures for the consideration and grant

[25] 12 U.S.C. Sec. 1851(d)(4)(C)
[26] SR 17-5 Procedures for a Banking Entity to Request an Extension of the One-Year Seeding Period for a Covered Fund (July 24, 2017).
[27] Id. The Federal Reserve has delegated authority to grant (but not to deny) such requests to the Federal Reserve Banks, if criteria specified by the Federal Reserve are met.
[28] Section __.12(e)

of seeding period extension requests for covered funds on a routine basis. Credit Suisse proposes that any bank without material deficiencies in its covered fund compliance procedures, and which represents through a self-certification that a fund is in conformance with all the requirements of the asset management exemption (other than reducing the bank's seed capital to 3% or less), should be presumptively entitled to an automatic two-year extensions without any further showing by the bank.

The Agencies would have the ability to test and monitor the adequacy of each bank's process (and the underlying basis of any self-certification) through ordinary course examination and review of the policies and procedures of their regulated institutions. Furthermore, bank's would still be subject to an aggregate tier 1 capital limitation on covered fund interests – so the extension of covered fund seeding periods would not permit unlimited fund activities. The aggregate fund limitation, requirement for adequate compliance processes, and ordinary course examination and review by the Agencies would ensure there is adequate consideration of safety and soundness principles with respect to extensions of covered fund seeding periods.

Credit Suisse's proposed process is informed by the approach the Federal Reserve took in considering extensions for "illiquid funds."[29] There the Federal Reserve announced it generally expected illiquid funds to qualify for extensions – though noted a few limited cases where extensions might not be granted, such as a lack of meaningful progress on conformance efforts, deficient compliance programs, or concerns about evasion. In that circumstance, the Federal Reserve's guidance specified that there should be a certification of the General Counsel or Chief Compliance Officer of the sponsoring entity. Credit Suisse believes, a similar certification from a senior officer of the sponsoring entity would be appropriate for a streamlined process for the consideration of extensions for covered funds.

Recommendations: Credit Suisse believes it would be ideal to expressly provide for a three-year seeding period, but acknowledges that the language of the enacting statute of the Volcker Rule may prohibit a blanket three-year seeding period. The Statute does confer broad discretion on the Federal Reserve to structure any extension process and to grant two-year extensions. Credit Suisse recommends that the Federal Reserve issue guidance creating a streamlined extension process. Where a bank subject to the Volcker Rule does not have any material deficiencies in their covered fund compliance procedures, and represents that a fund is in conformance with all of the requirements of the asset management exemption (other than reducing the bank's seed capital to 3% or less), Credit Suisse believes it would be appropriate for such self-certified extension requests to be presumptively entitled to an automatic two-year extension without further showing. Currently, extension requests are due 90 days before the end of the initial one-year seeding period. It is difficult and inefficient to prepare a fund-specific application with specific facts on the basis of approximately 270 days of sales efforts. Allowing routine extensions through a process which emphasizes proper process and procedures around the offering of covered funds is consistent with safety and soundness principles and within the authority of the Federal Reserve. The Agencies would have the ability to test or monitor process (and the underlying basis of any bank's self-certification) through ordinary course examination and review of the policies and procedures of their regulated institutions.

[29] SR-18 Procedures for a Banking Entity to Request an Extended Transition Period for Illiquid Funds

7. Broaden the Per-Fund Limit to Facilitate Securitization

- **The per-fund limit should be broadened to allow bank-affiliated investment managers to rely on the foreign risk retention regulations to which they are subject as a basis for exceeding the 3% limitation, provided that those foreign rules generally are comparable to U.S. requirements.**

If collateralized loan obligation ("CLO")[30] and similar securitization transactions are not exempted from the Implementing Regulation's definition of a covered fund in accordance with [__________], the per-fund limit under Section __.12(a)(ii) of the Rule (the "Per-Fund Limit") should be broadened to allow investment managers that are affiliated with banking entities ("Bank Investment Managers") to rely on the foreign risk retention regulations to which they are subject as a basis for exceeding the 3% limitation under the Per-Fund Limit.

The Per-Fund Limit allows a banking entity and its affiliates to invest in up to 3% of the ownership interests issued by an issuing entity of asset-backed securities "unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78o-11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder."

In the context of CLOs, the implementing regulations issued pursuant to Section 15G of the Exchange Act (the "U.S. Risk Retention Regulations") require, as a general matter, sponsors of securitization transactions or their affiliates to retain at least 5% of the asset-backed securities issued (any such retained securities, a "Retention Holding"). Thus Per-Fund Limit has been interpreted to mean that Bank Investment Managers like Credit Suisse are permitted to retain up to, but no more than, 5% of covered fund interests without being in violation of the Per-Fund Limit (the "5% Allowance").

Investment managers of European CLOs[31], as a general matter, have been subject not only to the US Risk Retention Regulations, but also to European regulations requiring that the CLO investment manager or an originator entity retain at least 5% of the issued securities (as currently in effect and to be in effect starting January 1, 2019 pursuant to the "Securitisation Regulation" (Regulation (EU) 2017/2402), the "EU Risk Retention Regulations")). Therefore, until recently, to the extent a Bank Investment Manager managing a European CLO like Credit Suisse was required by both the US Risk Retention Regulations and the EU Risk Retention Regulations to hold the Retention Holding, it could rely on the 5% Allowance to comply with the Per-Fund Limit.

However, the United States Court of Appeals for the District of Columbia Circuit in *Loan Syndications and Trading Association v. Securities and Exchange Commission and Board of Governors of the Federal Reserve System*, No. 1:16-cv-0065 (the "LSTA Decision"), which became effective on April 5, 2018, held that investment managers of "open market CLOs" (described in the LSTA Decision as CLOs where assets are acquired from "arms-length negotiations and trading on an open market") are not subject to the US Risk Retention Regulations. The LSTA Decision leaves Bank Investment Managers like Credit Suisse trapped between two legal regimes when managing European CLOs and has had a perverse result. Through no action of their own or any change to the relevant underlying regulations themselves, such managers no longer can rely on the 5% Allowance

---

[30] "A CLO is an asset-backed security that is typically collateralized by portions or tranches of senior, secured commercial loans or similar obligations of borrowers who are of lower credit quality or that do not have a third-party evaluation of the likelihood of timely payment of interest and repayment of principal." Cite to risk retention rule preamble.

[31] Generally, CLOs denominated in Euros, the vast majority of the portfolios of which are comprised of Euro-denominated debt collateral issued by European corporate borrowers.

due to the US Risk Retention Regulations no longer being applicable to them, despite such managers still being required, as a regulatory and contractual matter, to buy and retain a Retention Holding under the comparable EU Risk Retention Regulations.

After the LSTA Decision, the only way a Bank Investment Manager can buy and retain a Retention Holding to satisfy the EU Risk Retention Regulations in connection with managing a European CLO and still be in compliance with the Rule is to rely on the SOTUS exemption. Compliance with SOTUS essentially means that a European CLO cannot sell into the United States equity tranches or debt tranches that carry voting rights in respect of removal and replacement of the CLO investment manager, unlike the typical European CLO managed by CLO investment managers that are not subject to the Rule's limitations ("Non-Bank Investment Managers"). Such structuring to comply with SOTUS, in the absence of an ability to rely on the 5% Allowance, has adverse implications for US investors and Bank Investment Managers as it:

- Does not reduce investment exposure of the banking entity to the CLO because the Bank CLO Manager still must maintain a Retention Holding to comply with EU Risk Retention Requirements;
- Reduces the availability and quality of European CLO investments to US investors;
- Puts Bank Investment Managers at a competitive disadvantage relative to Non-Bank Investment Managers by reducing the marketability and liquidity of European CLOs managed by Bank Investment Managers; and
- Reduces competition among securitization investment managers by discouraging banking entities from entering the market, thereby reducing options for US investors and increasing CLO management fees in the market.

If CLOs and similar securitizations are not exempted from the definition of covered fund, expanding the 5% Allowance to account for comparable foreign risk retention regulatory obligations, such as the EU Risk Retention Obligations, at least would ameliorate these negative effects.

Recommendations: The per-fund limit should be broadened to allow bank-affiliated CLO investment managers to rely on comparable foreign risk retention regulations (including but not limited to those of the European Union) to which they are subject as a basis for exceeding the 3% limitation. This would increase the availability and quality of foreign securitization investments to US investors, level the playing field as between bank-affiliated securitization investment managers and those who are not, and increase competition among securitization investment managers to the benefit of investors, all without increasing the exposure of bank-affiliated securitization investment managers, who are required to retain such investments by foreign risk retention regulations regardless of whether it is SOTUS or the per-fund limit being relied upon for Volcker Rule compliance.

8. Designate a Lead Volcker Rule Regulator

- **The Agencies should delegate the responsibility for interpretation and guidance to a single agency. In addition, the banking entity's primary regulator should be charged with conducting the Volcker examination of the banking entity.**

The Statute's delegation of rulemaking and enforcement jointly to five separate U.S. financial regulators has resulted in a lack of transparency, inefficiencies and uncertainties in the marketplace. Although the Statute requires the Agencies to consult and coordinate to ensure consistent implementation, the Statute does not articulate how the Agencies should coordinate interpretation, examination and enforcement of the Volcker Rule. This has left the marketplace and regulated entities in a state of uncertainty due to the significant level of interpretative guidance required.

The existing inefficient and ambiguous approach has left market participants in a position of uncertainty with respect to numerous interpretative issues. While the Agencies previously have issued 21 FAQs ("Frequently Asked Questions"), they have failed to act on numerous guidance requests from market participants. This lack of guidance leads to significant uncertainty when market participants are unsure how to comply with a certain provision of the regulation.

One example of this uncertainty and inefficiency occurred in March 2017. As market participants commenced filing their annual CEO attestations, rumors circulated in the marketplace that one or all the Agencies would no longer accept any knowledge qualifications in the language of the attestation. Despite requests from industry organizations, the Agencies did not issue an FAQ clarifying the matter. Numerous market participants, uncertain as to the validity of the rumor, filed their CEO attestations only to have them subsequently rejected because the language used in the attestation was not acceptable to one of the Agencies.

This is not an insignificant issue. Credit Suisse, like most banking entities, supports its CEO attestation through a comprehensive global sub-certification process whereby control owners and several layers of supervisors certify to the design and operating effectiveness of their Volcker controls. It is important to know how the attestation should be phased to ensure the sub-certifications are consistent and ensure that this process properly supports the CEO's review and attestation. If the Agencies, or a single agency, wanted to eliminate qualifying language in the CEO attestation then that information should have been provided to the marketplace well in advance of the CEO attestation filing date (Credit Suisse's annual Volcker sub-certification process, for example, commences in September, 6 months before the CEO attestation is signed and filed with the Agencies). In this particular instance, Credit Suisse formally was advised after submitting its CEO Attestation that the language had to be revised. Fortunately, we assessed that such revision remained supported by the extensive and vast sub-certification of controls that had been carried out over the previous 6 months.

We note that the U.S. House of Representatives recently passed a bill by a large bipartisan majority that would designate a single Volcker regulator.[32] Regardless of whether such a statutory change occurs or not, we recommend that the Agencies agree to designate a lead regulator responsible for interpretation and guidance issues. We also recommend that a banking entity's primary regulator be responsible for conducting the Volcker examination of the banking entity.

Recommendations: We recommend that the Agencies enter into a formal written interagency statement on Volcker Rule interpretation that: (i) delegates to a single agency the responsibility for interpretation and guidance and (ii) provides that the institution's primary regulator will be charged with conducting the Volcker examination of the banking entity.

[32] H.R. 4790, "The Volcker Rule Regulatory Harmonization Act," passed the U.S. House of Representatives on April 13, 2018 by a margin of 300-104. The bill would grant the Federal Reserve Board sole rulemaking authority and provide that examination and enforcement be conducted solely by the institution's primary federal regulator.