



September 21, 2017

**SUBMITTED VIA EMAIL**  
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Legislative and Regulatory Activities Division  
Office of the Comptroller of the Currency  
400 7<sup>th</sup> 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”)<sup>1</sup> 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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<sup>1</sup> SFIG is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. 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](http://www.sfindustry.org).



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.<sup>2</sup>

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](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

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<sup>2</sup> 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)<sup>3</sup> 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<sup>4</sup> 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

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<sup>3</sup> 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."

<sup>4</sup> 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.<sup>5</sup>

**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

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<sup>5</sup> 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,<sup>6</sup> 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

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<sup>6</sup> 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<sup>7</sup> 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.

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<sup>7</sup> See e.g. Section 3(c)(5) of and Rule 3a-7 to the 1940 Act.



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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 [Richard.Johns@sfindustry.org](mailto:Richard.Johns@sfindustry.org) or (202) 524-6301.

Respectfully Submitted,

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Executive Director  
Structured Finance Industry Group