Volcker 2.0

August 23, 2019

On August 20, 2019, the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") adopted final regulations (the "Amended Final Regulations") revamping the regulations implementing the Volcker Rule, a centerpiece of the Dodd-Frank Act. The other agencies responsible for implementing the Volcker Rule – the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, and the Commodity Futures Trading Commission (along with the OCC and FDIC, collectively, the "Agencies") – are expected to approve the Amended Final Regulations shortly. The adoption of the Amended Final Regulations comes more than a year after the amendments were initially proposed in 2018 (the "2018 Proposal"), and more than five and a half years after the original Volcker Rule regulations were adopted.[1]

The Amended Final Regulations are largely consistent with the specific changes set forth in the 2018 Proposal, but with certain notable changes with respect to the thresholds for the compliance requirements, the definition of a "trading account," and the addition of several new exclusions from the definition of "proprietary trading." The Amended Final Regulations also made certain minor modifications to the 2018 Proposal, including with respect to the proprietary trading prohibition's exemption for liquidity management, the CEO attestation, and certain of the trading metrics.[2]

The emphasis of the Amended Final Regulations is on the compliance program requirements and proprietary trading provisions of the Volcker Rule, with only limited changes relevant to the covered fund provisions of the Volcker Rule. However, the Agencies indicated that they are intending to issue separate rulemaking proposals regarding certain other aspects of the Volcker Rule, in particular, relating to the Volcker Rule's fund-related provisions, the treatment of funds organized outside the U.S. (notably, whether such funds should be treated as "banking entities" subject to the

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[1] These existing regulations are codified at 12 C.F.R. Part 248 (Federal Reserve), 12 C.F.R. Part 44 (OCC), 12 C.F.R. Part 351 (FDIC), 17 C.F.R. Part 255 (SEC), and 17 C.F.R. Part 75 (CFTC).

[2] The Agencies' 2018 Proposal contained certain proposed changes to the Volcker Rule regulations, but was also accompanied by 342 discrete questions pertaining to virtually all aspects of the Volcker Rule regulations (including the covered fund provisions). The Amended Final Regulations are largely confined to implementing the changes that were specifically proposed.

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Volcker Rule), and the Volcker Rule's "Super 23A" restrictions on transactions with advised- or sponsored-covered funds.[3]

The Amended Final Regulations are effective January 1, 2020, but compliance is not mandatory until January 1, 2021. As a result, banking entities have the option of opting into the new provisions as early as next year.

The most significant aspects of the Amended Final Regulations are discussed below.

I. TAILORED APPLICATION OF COMPLIANCE REQUIREMENTS BASED ON A BANKING ENTITY'S TRADING ASSETS AND LIABILITIES

The Amended Final Regulations adopt a tailored approach to the Volcker Rule by imposing only the most comprehensive restrictions on banking entities that have the largest trading activities. In this regard, the Amended Final Regulations create three broad categories of banking entities: (i) those with "significant trading assets and liabilities," (ii) those with "limited trading assets and liabilities," and (iii) those with "moderate trading assets and liabilities."

- ***Significant Trading Assets and Liabilities*** – Banking entities with "significant trading assets and liabilities" include those banking entities that have, along with their affiliates, trading assets and liabilities the gross sum of which over the four previous quarters (measured as of the last day of the quarter) equals or exceeds $20 billion (excluding trading assets and liabilities involving obligations of or guaranteed by the U.S. or a U.S. agency or a government-sponsored enterprise ("GSE")). This is a relaxation from the 2018 Proposal, which would have set the threshold at $10 billion, and which would not have excluded GSE obligations from the calculations.

  For top-tier U.S. banking organizations, this calculation is based on worldwide trading assets and liabilities. For top-tier foreign banking organizations ("FBOs") and their respective subsidiaries, this calculation is based on trading assets and liabilities of the combined U.S. operations of the FBO (including its U.S. branches, agency offices, and subsidiaries).

[3] In the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. Law No. 115-174) ("EGRRCPA"), Congress amended the statutory provisions of the Volcker Rule in certain respects, in particular, by exempting community banks from the scope of the Volcker Rule and by relaxing the "name-sharing" restrictions applicable to sponsored covered funds. These amendments were implemented by the Agencies in a separate rulemaking. *See* Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, and Securities and Exchange Commission, *Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds*, 84 FED. REG. 34008 (July 22, 2019). These EGRRCPA-related Volcker Rule changes are not addressed in this memo.

- ***Limited Trading Assets and Liabilities*** – Banking entities with "limited trading assets and liabilities" include those banking entities that have, along with their affiliates, trading assets and liabilities the gross sum of which over the four previous quarters (measured as of the last day of the quarter) is less than $1 billion (excluding trading assets and liabilities involving obligations of or guaranteed by the U.S. or a U.S. agency or a GSE). As in the case of the "significant trading assets and liabilities" threshold, for top-tier U.S. banking organizations, the calculation is based on worldwide trading assets and liabilities, while for FBOs this calculation is based on the trading assets and liabilities of their combined U.S. operations. This is a relaxation from the 2018 Proposal, which would have required FBOs, like U.S. banking entities, to calculate this threshold based on worldwide trading assets and liabilities. The effect of this is, many large FBOs with a limited U.S. footprint will now be categorized as having "limited trading assets and liabilities" and thus will be subject to more lenient Volcker Rule compliance requirements.
- ***Moderate Trading Assets and Liabilities*** – Banking entities with "moderate trading assets and liabilities" include those banking entities that are subject to the Volcker Rule but have neither "significant trading assets and liabilities" nor "limited trading assets and liabilities." This category includes some regional and super-regional banking organizations as well as some FBOs with larger U.S. footprints.

Banking entities with "***significant trading assets and liabilities***" remain subject to the full panoply of compliance, metrics reporting, programmatic, and documentation requirements, as well as the CEO attestation requirement. The Amended Final Regulations reduce the Volcker Rule's compliance requirements with respect to those banking entities with either "***moderate trading assets and liabilities***" or "***limited trading assets and liabilities***."

Banking entities with "***moderate trading assets and liabilities***" are no longer subject to:

- *The "six-pillar" compliance program requirements* (instead, banking entities in this category will be permitted to adopt a "simplified" compliance program, which means that they may incorporate Volcker Rule compliance into existing policies and procedures, rather than on a standalone basis, as appropriate given their activities, size, scope, and complexity).
- *The requirement to maintain specific compliance programs in connection with any underwriting or market-making activities.*
- *The covered fund documentation requirements* (regarding the exclusions or exemptions relied upon by the banking entity when sponsoring a covered fund).
- *Any of the requirements found in the "risk-mitigating hedging" exemption*, other than the requirement that the hedging activity be designed to reduce or otherwise mitigate one or more specific, identifiable risks arising in connection with and related to one or more identified

positions, contracts, or other holdings, and that the hedging activity be recalibrated to maintain compliance with the Volcker Rule.

- *The CEO attestation*. This is a signification change from the 2018 Proposal. Previously, this attestation requirement extended only to those banking entities with consolidated assets in excess of $50 billion, but the 2018 Proposal would have applied the CEO annual attestation requirement to all banking entities in the "moderating trading assets and liabilities" category.
- *Trading metrics reporting*. The obligation to file trading metrics reports is now limited to banking entities with "significant trading assets and liabilities." Previously, reporting was required by banking entities having $10 billion in trading assets and liabilities.

Consistent with the 2018 Proposal, banking entities with "***limited trading assets and liabilities***" are afforded a presumption of compliance with the Volcker Rule regulations "and shall have no obligation to demonstrate compliance with [the Volcker Rule] on an ongoing basis." This effectively removes from these banking entities all Volcker Rule compliance requirements. However, this presumption can be rebutted if an agency determines in an examination or audit that the banking entity has engaged in activities prohibited by the Volcker Rule, subject to notice to and response by the banking entity. In this case, the banking entity would be treated as a banking entity with "*moderate trading assets and liabilities*" and would be required to adopt the appropriate compliance procedures. Thus, banking entities within this category should consider retaining some level of Volcker Rule compliance to prevent a rebuttal of the presumption and a resulting reclassification into the "*moderate trading assets and liabilities*" category.

II. Elimination of "Enhanced" Compliance Program Requirements

The Amended Final Regulations eliminate entirely the highly prescriptive "enhanced compliance program" that has been applied to banking entities with more than $50 billion in total consolidated assets or more than $10 billion in trading assets and revenues, as was proposed in 2018. These program requirements, set forth in Appendix B to the current regulations, contained hundreds of specific requirements and have been widely criticized as being unnecessarily complex and costly to implement.

III. Proprietary Trading Restrictions

The Amended Final Regulations make a number of changes to the proprietary trading provisions, most – but not all – of which are consistent with the 2018 Proposal.

A. Retention of the Short-Term Intent Prong within the "Trading Account" Definition

The 2018 Proposal would have eliminated the so-called "short-term intent" prong of the "trading account" definition, which defined a "trading account" as including an account of the banking entity used for the purpose of purchasing or selling financial instruments by the banking entity if made with certain short-term profit-related intent. The "short-term intent" prong had been widely criticized as highly subjective and impracticable to apply. In lieu thereof, the 2018 Proposal would have added a new "accounting" prong to the "trading account" definition. Under this proposed prong, a transaction in a financial instrument would have been deemed to be in a "trading account" if that "financial instrument ... is recorded at fair value on a recurring basis under the applicable accounting standards." This new prong would have enabled a banking entity not subject to the dealer prong or the market risk capital prong to rely on applicable accounting standards (such as GAAP or IFRS) to determine whether a transaction should be deemed in a trading account.

The new "accounting" prong was met with considerable criticism during the comment period as being largely unworkable, given that it would have captured a large number of routine transactions not previously considered to be "proprietary trading." As a result, in the Amended Final Regulations, the Agencies decided to abandon the proposed accounting prong and retain the existing short-term intent prong.

B. Modifications to the Market Risk Capital Rule Prong

Although the "short-term intent" prong is being retained, the Agencies are modifying the definition of "trading account" to provide that banking entities subject to the "market risk capital rule" prong – *i.e.*, larger U.S. banking entities that required to hold capital based on the Market Risk Capital regulations supplementing the risk-based capital regulations – are not required to comply with the "short-term intent" prong. Thus, for these larger U.S. banking entities, a transaction will be deemed to be in a "trading account" solely based on whether the transaction triggers the "market risk capital rule" prong (*i.e.*, whether the financial instruments are "both market risk capital rule covered positions and trading positions" as defined in the U.S. Market Risk Capital regulations) or triggers the dealer prong.

In addition, the Amended Final Regulations permit a banking entity *not* subject to the "market risk capital rule" prong – such as a smaller U.S. banking entity or a FBO – to elect to evaluate transactions as if the banking entity were subject to the "market risk capital rule" prong, and thereby disregard the short-term intent prong altogether. A banking entity making such an election must do this on behalf of all of its subsidiaries and affiliates and thus apply the market risk capital rule prong standards across the enterprise.

The 2018 Proposal would have modified the market risk capital prong slightly with respect to FBOs. Previously, this prong deemed a transaction in a financial instrument to be in a trading account if considered to be a covered position or trading position under the *U.S.* market risk capital rules. The 2018 Proposal would have modified this prong to include, with respect to FBOs, the comparable non-U.S. market risk capital regulations adopted by the FBO's home country supervisor. The Amended Final Regulations do not adopt this modification, presumably because of the new "election" feature available to FBOs. The Amended Final Regulations also make clear that the market risk capital regulations refer solely to those regulations adopted by U.S. regulators, and do not include comparable non-U.S. regulations.

C. No Changes to the Dealer Prong

Consistent with the 2018 Proposal, the Amended Final Regulations retain the remaining prong of the "trading account" definition – the "dealer" prong – without any changes. The "dealer prong" deems a transaction in a financial instrument to be in a trading account to the extent a transaction is the type that would require licensing or registration as a dealer.

D. Reversal of the Rebuttable Presumption

The 2018 Proposal would also have eliminated the "trading account" definition's rebuttable presumption, namely, that positions held for less than 60 days are deemed to be in a trading account (and thus potentially impermissible proprietary trading). This rebuttable presumption has been widely criticized because the only means for a banking entity to rebut the presumption was to establish that short-term profit-related intent was not the basis for the transaction, which, as mentioned above, was both subjective and highly impracticable.

Consistent with the 2018 Proposal, the Agencies eliminated the rebuttable presumption that positions held for less than 60 days are deemed to be in a trading account (and thus potentially impermissible proprietary trading), as originally proposed. Although not set forth in the 2018 Proposal, the Amended Final Regulations now include a *reverse* rebuttable presumption; positions held for 60 days or more are deemed *not* to be in a trading account (and thus not proprietary trading).

E. No Broad-Based Limited Presumption of Compliance

The 2018 Proposal would have provided a limited presumption of compliance with the proprietary trading restrictions. The presumption would have applied at the trading desk level, and only to those trading desks not covered by the dealer prong (*i.e.*, trading desks of a regulated dealer) or the market risk capital prong (*i.e.*, trading desks of a banking entity large enough to be subjected to market risk capital rules). Thus, the presumption would have applied only to those trading desks

that engage in transactions that otherwise would be captured solely by the new accounting prong. The presumption of compliance would apply only if the sum of the absolute values of the daily net realized and unrealized gain and loss figures of that trading desk for the prior 90-day calendar period is less than $25 million.

Given that the accounting prong was not adopted in the Amended Final Regulation, the Agencies also did not adopt this limited presumption of compliance for transactions otherwise subject to the accounting prong.

F. Expansion of the Liquidity Management Exclusion from Proprietary Trading

The existing exclusion from proprietary trading for certain liquidity management activities is limited to transactions in securities. Consistent with the 2018 Proposal, the Amended Final Regulations expand this exclusion to include transactions in certain other types of financial instruments, namely, F/X forwards, F/X swaps, and physically settled cross-currency swaps, but also added non-deliverable cross-currency swaps to the exclusion in the final rulemaking.

G. Bona Fide Error Exclusion

The Amended Final Regulations add an exclusion from proprietary trading for trades made in error, or for correcting trades, provided that the erroneously purchased (or sold) financial instrument is promptly transferred by the banking entity, largely as proposed. However, the Agencies did not adopt the provision in the 2018 Proposal that would have required the transactions be booked in a separately managed trade error account for disposition.

H. New Exclusion for Matched-Book Swaps Transactions

The Amended Final Regulations add a new exclusion for certain matched-books swaps and security-based swaps transactions, provided that such transactions are customer-driven and "(i) [t]he banking entity retains no more than minimal price risk; and (ii) the banking entity is not a registered dealer, swap dealer, or security-based swap dealer."

I. New Exclusion for MSR Hedges

The Amended Final Regulations add a new exclusion for "[a]ny purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy."

J. New Exclusion for Non-Trading Assets and Liabilities

The Amended Final Regulations add a new exclusion for "[a]ny purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form" of that banking entity. This allows a banking entity to disregard transactions that are not deemed to be a "trading asset" or "trading liability" under its Call Report, FR Y-9C, or similar report filed by the banking entity. The Agencies explained that this new exclusion is intended to provide greater clarity to smaller banking entities that are not subject to the Market Risk Capital regulations and thus remain subject to the short-term intent prong.

K. Changes to the RENTD Requirements

The existing regulations permit reliance on the underwriting and market-making exemption only if the amount and type of securities in the banking entity's position are designed not to exceed the "reasonably expected near term demands of customers, clients, or counterparties," a standard known as "RENTD." In connection with the market-making exemption, banking entities are required to support the RENTD analysis with a "demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors." The 2018 Proposal would have eliminated this "demonstrable analysis" condition to the market-making exemption.

In addition, the 2018 Proposal would have created a limited rebuttable presumption of compliance with the underwriting and market-making RENTD requirements, provided that the banking entity establishes at the trading desk level certain "risk limits." These risk limits must be designed not to exceed the reasonably expected near term demand of clients, customers, and counterparties based on the amount, type, and risk of the position, and other factors. Inasmuch as the risk limits themselves must be developed using a RENTD analysis, it is not entirely clear that the new risk limit concept entails a material change from the existing RENTD requirements, although the Agencies explained in the 2018 Proposal that the benefit is that "a banking entity would not be required to adhere to any specific, pre-defined requirements for the limit-setting process beyond the banking entity's own ongoing and internal assessment of the amount of activity that is required to conduct underwriting, including to reflect the banking entity's ongoing and internal RENTD assessment. Risk limits established under this rebuttable presumption would be subject to review by the Agencies, and a banking entity would have been required to promptly report any violation by the trading desk of the risk limits to the appropriate Agency, rendering reliance on this rebuttable presumption somewhat unattractive.

The Amended Final Regulations adopted the RENTD changes largely as proposed, but eliminated the self-reporting requirement for violations, and further stipulated that the risk limits must take into consideration the liquidity, maturity, and depth of the market for that type of financial instrument.

L. Changes to the Risk-Mitigating Hedging Exemption

Consistent with the 2018 Proposal, the Amended Final Regulations make several changes to the requirements of the risk-mitigating hedging exemption. Banking entities within the "moderate trading assets and liabilities" category will no longer be subject to any requirements of this exemption other than the requirement that, at the inception of the hedge, the risk-mitigating hedging activity is designed to reduce or significantly mitigate one or more specific risks, and the hedge is subject to periodic ongoing recalibration.

While banking entities with significant trading assets and liabilities will remain subject to the existing conditions of the exemption, the Amended Final Regulations modify those conditions by removing the requirements (i) that the hedge be shown to have in fact demonstrably reduced or otherwise significantly mitigated an existing risk, and (ii) that the banking entity engage in correlation analysis and ongoing independent testing to ensure that such demonstrable reduction or significant mitigation has occurred.

The Amended Final Regulations also create a limited exception from the special documentation requirements applicable to cross-desk hedging transactions. This will exclude from the documentation requirements a banking entity's hedging activity conducted through the purchase or sale of financial instruments appearing on a written list of pre-approved financial instruments that are commonly used by the trading desk for specific types of hedging, and the banking entity has established pre-approved hedging limits for trading in these types of instruments by the trading desk. As adopted, this limited exception is consistent with the 2018 Proposal.

M. Quantitative Metrics for Trading Activities

With respect to metrics reporting, the Agencies are making several changes, including limiting the applicability of certain metrics only to market-making and underwriting desks, replacing the Customer-Facing Trade Ratio with a new Transaction Volumes metric, replacing Inventory Turnover with a new Positions metric, and eliminating inventory aging data for derivatives, consistent with the 2018 Proposal. The Amended Final Regulations also eliminates the Risk Factor Sensitivity, Stress VaR, and Inventory Aging metrics, and relaxes certain documentation requirements (including required schedules and narratives) that were included in the 2018 Proposal.

IV. COVERED FUND RESTRICTIONS

The Amended Final Regulations make relatively few changes to the covered fund provisions and no changes to the "covered fund" definition itself, as discussed below.

A. Expanded Risk-Mitigating Hedging Exemption

The Amended Final Regulations restore an exemption found in the original 2011 proposed regulation allowing a banking entity to acquire a covered fund ownership interest as a risk-mitigating hedge against customer exposures. Like the 2011 proposal, the Amended Final Regulations require that the ownership interest in the covered fund be "taken by the banking entity [only] when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund." The restoration of this exemption permits banking entities to resume offering certain fund-linked programs. In the accompanying Preamble, the Agencies concede that such programs do not entail "high-risk trading strategies," as was originally stated in the preamble accompanying the original final regulations, provided that the programs are "properly monitored and managed."

B. Revised Underwriting and Market-Making Exemption

The Amended Final Regulations largely retain the existing exemption for underwriting and market-making related activities for ownership interests in covered funds. However, with respect to covered funds that the banking entity does *not* organize and sponsor, a banking entity no longer must include in its aggregate fund limit and capital deduction the value of any ownership interests of the covered fund acquired or retained under the exemption. This is consistent with the 2018 Proposal.

C. No Immediate Relief on Super 23A

The so-called "Super 23A" provision under Volcker flatly prohibits a banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a covered fund from entering into any "covered transaction," as defined under Section 23A of the Federal Reserve Act, with the fund or any other covered fund that is controlled by such fund. However, existing regulations under Volcker do not incorporate any of the exemptions contained in Section 23A of the Federal Reserve Act or the Federal Reserve's Regulation W. The 2018 Proposal solicited comment on whether the Agencies should incorporate these exemptions into Super 23A. In the Amended Final Regulations, the Agencies adopted a minor change to the special CEO attestation required under the "prime brokerage" exemption from Super 23A, but otherwise chose not to revise the Super 23A provisions. The Agencies stated in the accompanying Preamble that they are planning to address Super 23A in a separate proposal in the future.

V. RELIEF FOR FOREIGN BANKS

Foreign banks will welcome several key changes to the so-called TOTUS and SOTUS exemptions. These exemptions permit a FBO to engage in proprietary trading and covered fund activities outside the United States, provided certain conditions are met.

A. TOTUS Exemption for Proprietary Trading Activities

The Volcker Rule's "trading outside the United States," or "TOTUS," exemption is modified in a number of important respects, as proposed in 2018.

First, the Amended Final Regulations remove the prohibition on financing for a banking entity's purchase or sale being provided by any branch, agency office, or affiliate that is located in the United States or organized under the laws of the United States or of any state. This restriction was removed due to concerns regarding fungibility of money and the inability of banking entities to prove the source of financing came from outside the United States, as well as the recognition that financing results in credit risk, which is not the type of risk intended to be addressed by the Volcker Rule.

Second, the Amended Final Regulations modify the current requirement that no personnel of the banking entity or its affiliate that arrange, negotiate, or execute the trade be located in the United States. Instead, the Amended Final Regulations require that "the banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State." According to the Agencies, this change recognizes that some limited involvement by U.S. personnel in the arranging or negotiating of the transaction would be consistent with this exemption so long as the principal bearing the risk of a purchase or sale is outside the United States.

And third, the Amended Final Regulations remove entirely the condition to the TOTUS exemption that the purchase or sale not be "with or through" a U.S. entity (other than an unaffiliated market intermediary). This change permits FBOs to use their U.S. affiliates to broker and clear TOTUS transactions.

B. SOTUS Exemption for Covered Fund Activities

The Volcker Rule's "solely outside the United States," or "SOTUS," exemption is modified by removing the financing prohibition (*i.e.*, the requirement that no financing for the banking entity's ownership or sponsorship is provided by any branch, agency office, or affiliate that is located in the United States or organized under the laws of the United States or of any state).

In addition, the Amended Final Regulations codify the Agencies' FAQ 13 issued in 2015 regarding the SOTUS exemption's requirement that no ownership interest in the covered fund be offered for sale or sold to a U.S. resident. In this regard, the Amended Final Regulations clarify that an ownership interest in a covered fund is not considered to be offered for sale or sold to a U.S. resident for purposes of the SOTUS exemption unless sold in an offering that targets U.S. residents in which the banking entity or any affiliate participates. Otherwise, a FBO is permitted to acquire an ownership interest in a covered fund open to investment by U.S. residents. For this purpose, the Amended Final Regulations provide that (as in FAQ 13), if the banking entity or an affiliate sponsors or serves as the investment manager, investment adviser, commodity pool operator, or commodity trading advisor to the covered fund, then the banking entity will be deemed to have participated in the offer or sale of ownership interests in the covered fund.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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