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The Volcker Rule—Implications for Bank Collective Investment Funds and Adviser-Sponsored Group Trusts

By William P. Wade

The Volcker Rule (the Rule)[1] prohibits most banks and their affiliates from acquiring or retaining an ownership interest in or, more importantly for present purposes, sponsoring hedge funds and private equity funds (referred to in the Rule as covered funds). The basic prohibition generally is intended to reduce risks posed to banking entities that have certain relationships to covered funds, such as pressure to rescue a fund encountering financial difficulty.[2] Read in light of favorable regulatory interpretations and exceptions, however, the Rule's broadly stated prohibitions at the same time appear to be consistent with the stated regulatory purpose "to allow a banking entity to engage in certain traditional asset management and advisory businesses," subject to certain limits imposed by the Rule.[3]

This article focuses specifically on how the Rule's covered fund provisions impact banks and trust companies that maintain collective investment funds and act as directed trustees for non-bank investment adviser-sponsored "group trusts." For the most part, banks engaging in these activities should be able to take comfort that the Rule's requirements will not be disruptive. As noted below, however, there are compliance implications and potential open questions that may merit further consideration by some institutions.

Overview

Subject to important exceptions, the Rule prohibits a banking entity, as principal, from directly or indirectly acquiring or retaining any ownership interest in or sponsoring a covered fund.[4] As relevant here, a "banking entity" that must comply with the Rule includes (i) an FDIC-insured depository institution; (ii) a company that controls an FDIC-insured depository institution; and (iii) any affiliate or subsidiary (within the meaning of the BHCA) of the foregoing.[5] Thus, for example, each member of a bank holding company controlled group that includes an FDIC-insured institution is subject to the Rule's covered fund prohibitions and requirements.

Limited purpose trust companies that have no, or only nominal, FDIC-insured deposits (and therefore are not considered "banks" under the BHCA[6]) are not considered FDIC-insured institutions for purposes of the Rule.[7] Consequently, none of the members of a control group that includes a non-bank limited purpose trust company (and no FDIC-insured depository institution) is deemed a banking entity for purposes of the Rule.[8] References below to a "bank," therefore, are intended to mean an FDIC-insured depository institution that is

treated as a "banking entity" for purposes of the Rule.

"Covered Fund" Definition

In developing the key definition of "covered fund," the Agencies sought to focus on privately offered vehicles investing or trading in securities or derivatives on behalf of institutional investors and high net worth individuals, which the Agencies believed may be more likely to engage in risky investment strategies.[9] Accordingly, the Rule defines "covered fund" to include an issuer of securities that would be an investment company, as defined by the Investment Company Act of 1940 (1940 Act), *but for* 1940 Act Section 3(c)(1) or 3(c)(7), exclusions normally relied upon by hedge and private equity funds not registered under the 1940 Act.[10]

The definition of covered fund also explicitly *in*cludes certain commodity pools,[11] and specifically *ex*cludes 1940 Act-registered funds[12] and issuers that may rely on an exclusion from the definition of investment company other than 1940 Act Section 3(c)(1) or 3(c)(7).[13] Although registered funds clearly are not intended to be subject to the Rule's restrictions, the Agencies added the express exclusion for those funds in response to concerns that registered investment companies in certain circumstances might be treated as covered funds if commodity pools, as defined, are so treated.[14]

As noted above, the Rule's prohibitions apply to banking entities acting "as principal." The "as principal" requirement reflects the Agencies' belief that the Rule is designed to address risks attendant to principal activity and not those borne by bank customers or for which the bank "lacks design or intent to take a proprietary interest as principal."[15] Thus, the prohibition against having an ownership interest in a covered fund does not apply where the interest is acquired by a bank as trustee or similar fiduciary capacity solely on behalf of a customer (which is not itself a covered fund).[16] This would include, for example, a situation in which a bank acquires an interest in a covered fund on behalf of a common or collective trust fund for which it acts as trustee.[17]

"Sponsor" Concept

As relevant here, a bank is considered to "sponsor" a covered fund if it serves as a trustee of the fund.[18] A bank also is viewed as "sponsoring" a covered fund if it shares with the fund (for corporate, marketing, promotional, or other purposes) the same name or a variation of the same name.[19]

Notably, a bank that serves only as investment adviser to a covered fund, without making any investment in the fund or conducting any "sponsor" activity, as defined by the Rule, would not be subject to the general covered fund prohibition.[20] A bank also will not be considered to sponsor a covered fund for which it acts as "trustee" if it acts only as a "directed trustee," that is, it does not exercise investment discretion with respect to a covered fund.[21] This includes acting as trustee subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to Section 403(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).[22] In such case, the party that directs the trustee or possesses authority and discretion to manage and control the covered fund's investment decisions will be considered a trustee of the fund.[23]

Collective Investment Funds

Banks maintain two main types of collective investment funds: (1) *common trust funds* for investment of assets held by the bank as trustee or a similar fiduciary capacity; and (2) *collective trust funds* for investment of assets of tax-qualified corporate employee benefit trusts, governmental employee benefit plans, and certain other types of tax-favored retirement arrangements. A bank typically acts as trustee of its collective investment funds and in that capacity exercises investment discretion over fund investments. As described above, acting as trustee is a "sponsor" activity, and the exercise of investment discretion precludes reliance on the "directed trustee" exception. Consequently, the threshold question is

whether a particular fund should be considered a covered fund for purposes of the Rule.

Funds Relying on "Traditional" Exclusions

Like hedge and private equity funds, bank collective investment funds are excluded from investment company status under the 1940 Act. However, the great majority of collective investment funds are intended to qualify as bank-maintained common trust funds excluded from investment company status pursuant to 1940 Act Section 3(c)(3) or bank-maintained collective trust funds excluded pursuant to 1940 Act Section 3(c)(11).[24] Since these funds, which for present purposes may be referred to as "traditional" collective investment funds, do not rely on 1940 Act Section 3(c)(1) or 3(c)(7), they are not covered funds.[25] Consequently, a bank need not concern itself with the Rule's basic prohibitions (or fiduciary exemption or Super 23A restrictions) to the extent it maintains collective investment funds in this manner.

Funds Not Relying Solely on Traditional Exclusions

Some unregistered collective investment funds do not conform to the pattern of the "traditional" fund insofar as 1940 Act exclusions are concerned. For example, a bank may choose, for various reasons, to maintain a collective trust fund in reliance on 1940 Act Section 3(c)(1) or 3(c)(7), rather than 1940 Act Section 3(c)(11).[26] Where the bank purposely relies solely on 1940 Act Section 3(c)(1) or 3(c)(7), without regard to Section 3(c)(3) or 3(c)(11), the fund presumably would be considered a covered fund.

Other situations are less clear. For example, some institutions maintain common trust funds in reliance on *both* 1940 Act Section 3(c)(3) *and* 1940 Act Section 3(c)(1) or 3(c)(7). A bank may prefer to take this approach for any of a number of reasons, including, among others, a recognition of the SEC Staff's historically narrow interpretations of 1940 Act Section 3(c)(3). Without attempting a complete description of those interpretations here, suffice it to note for present purposes that the Staff is on record as having stated that some kinds of trusts, although valid fiduciary relationships under applicable law, are ineligible to participate in a common trust fund relying on 1940 Act Section 3(c)(3) to the extent the trusts are created for "investment," as opposed to "fiduciary," purposes.[27] Consequently, in cases of less than complete certainty, an institution maintaining a common trust fund in reliance on 1940 Act Section 3(c)(3) may, in an abundance of caution, choose to conform also to 1940 Act Section 3(c)(1) or 3(c)(7) as a "backstop" exclusion.

The Rule does not address "dual reliance" situations specifically. However, there appears nonetheless to be strong support for the conclusion that common trust funds such as those described above should not be viewed as covered funds. As noted above, issuers that may rely on an exclusion from the definition of investment company other than 1940 Act Section 3(c)(1) or 3(c)(7) specifically are excluded from the definition of covered fund. Moreover, the Rule's primary purpose is to reduce risks peculiar to hedge and private equity fund activities.[28] In contrast, the Agencies noted that collective investment funds involve fiduciary activities that are subject to supervision and regulation by a federal banking agency, which thus distinguishes them from traditional hedge funds and private equity funds that generally are not subject to such supervision or regulation.[29]

Finally, the Agencies' discussion in the Rule's preamble suggests that a determination of a common trust fund's status as a covered fund is not dependent on whether trusts participating in the fund are created for "investment" or other purposes. Hence, the Agencies concluded it was unnecessary to provide a specific exclusion from the definition of covered fund for securities lending cash collateral pools, in part because, according to the Agencies, such pools may be operated as common trust funds in reliance on 1940 Act Section 3(c)(3).[30] This also is consistent with the OCC's prior conclusion that a fund established to invest cash collateral as part of a securities lending program a bank offered "as an adjunct to its

custodial service" would qualify as a common trust fund under Regulation 9.[31]

Fiduciary Exemption

In those limited cases where a bank intends or otherwise is required to treat its collective investment fund as a covered fund, the bank nonetheless may continue to "sponsor" (that is, act as trustee with investment discretion for) the fund by complying with the fiduciary exemption. The "fiduciary exemption" allows a banking entity to acquire interests in or sponsor a covered fund, activities otherwise prohibited under the Rule, as well as engage in non-prohibited activities, such as organizing and offering a covered fund, subject to various conditions.[32]

Conditions

Conditions of the fiduciary exemption potentially relevant here include the following:

(1) *Fiduciary Services.* The banking entity must provide bona fide trust, fiduciary, investment advisory, or commodity trading advisory services.[33]

(2) *Customers.* The covered fund must be organized and offered only in connection with the provision of bona fide fiduciary services to customers of such services.[34] There is no requirement that "customers" be pre-existing customers of the banking entity.[35]

(3) *Bank Interest in Fund.* The banking entity may not acquire or retain an ownership interest in the covered fund, except to the limited extent permitted by the Rule.[36]

(4) *"Super 23A."* The banking entity must comply with the requirements of the so-called "Super 23A" provisions of the Rule.[37] In short, the Super 23A provisions prohibit a banking entity and its affiliates from entering into a transaction with certain covered funds that would be a "covered transaction" under Section 23A of the Federal Reserve Act (FRA),[38] and require that transactions not within the scope of this prohibition conform to the arms-length standards of FRA Section 23B,[39] in either case as if the banking entity were a member bank and the related covered fund were an affiliate of the banking entity. (References below to "Super 23A" provisions are intended to include FRA Section 23B requirements, where applicable.)

The restrictions are called "Super" 23A because they *prohibit* transactions described in FRA Section 23A, whereas FRA Section 23A itself *permits* such transactions subject to certain limits and conditions.[40] Covered funds subject to the Super 23A restrictions—sometimes referred to as "related" covered funds—include, among others, a covered fund (i) for which the banking entity serves as investment manager or adviser, commodity trading adviser, *or* sponsor, or (ii) that is organized and offered by the banking entity pursuant to the fiduciary exemption.[41]

Importantly, the Super 23A provisions operate independently of the basic prohibitions against investing in or sponsoring a covered fund. In other words, a banking entity that serves as investment adviser for, but does not "sponsor" or have an ownership interest in, a covered fund nonetheless is prohibited from engaging with that fund in a transaction described in the Super 23A provisions.

(5) *No Bail Out.* The banking entity may not directly or indirectly guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests.[42] This condition is intended to prevent "bail outs" of covered funds.[43] On the other hand, a banking entity is not prohibited from providing "borrower default" indemnification to a covered fund in connection with securities lending transactions.[44]

(6) *Name Restriction.* The covered fund and the banking entity may not share the same name or a variation of the same name or use the word "bank" in its name.[45] The Agencies recognized that "rebranding" covered funds to conform

to the name-sharing prohibition would "prove expensive and limit the extent to which the entities may continue to benefit from brand equity they have developed," but concluded nonetheless that the name-sharing prohibition could reduce the risk that a banking entity would come under pressure for reputational reasons to assist a covered fund under distress that bears the entity's name.[46]

(7) *Director/Employee Interest in Fund.* A director or employee of the banking entity may have an ownership interest in the covered fund only if the director or employee provides investment advisory, commodity trading advisory, or other services to the covered fund at the time the ownership interest is acquired.[47] This allows banking entity personnel who also act as, for example, fund manager or adviser, to acquire an ownership interest that aligns the manager or adviser's incentives with those of the banking entity's customers.[48]

(8) *Disclosures.* The banking entity must "clearly and conspicuously" provide the following disclosures, in writing (for example, through the fund's offering documents), to prospective and actual fund investors:[49]

(A) "Any losses in the fund will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate";

(B) Such investor should read the fund offering documents before investing in the covered fund;

(C) "Ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity" (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund.

(9) *Other Requirements*. A banking entity that engages in covered fund activities pursuant to the fiduciary exemption is subject to additional requirements. First, the banking entity must comply with any additional rules of the appropriate Agency that are designed to ensure that fund losses are borne solely by investors.[50] Further, the banking entity may not engage in the activity if it would involve or result in a material conflict of interest,[51] a material exposure to high-risk assets or high-risk trading strategies,[52] or would pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.[53] Finally, the entity must implement a compliance program "reasonably designed to ensure and monitor compliance with the Rule's prohibitions and restrictions."[54]

Conforming to Fiduciary Exemption

Most conditions of the fiduciary exemption are consistent with normal collective investment fund practices. For example, the bank should have little or no difficulty satisfying the requirements that it provide bona fide trust, fiduciary, or investment advisory services to customers. In addition, existing regulations generally prohibit the bank from acquiring or retaining an ownership interest in a collective investment fund.[55] Directors and employees may be able to invest in a "covered" collective investment fund through a qualified retirement plan or individual retirement account (if such persons provide services to the fund), although such investments likely would be rare given potential securities law constraints.[56] Consequently, the fiduciary exemption's prohibitions and restrictions on investments by the bank or its directors and employees ordinarily should not be problematic. The anti-"bail out" condition also is consistent with existing bank regulatory policy.[57]

Other conditions of the fiduciary exemption, on the other hand, may present practical challenges. For example, collective investment fund names usually include the bank's name (often including the word "bank"). As a result, the bank might be required to incur "rebranding" expenses which, depending on the circumstances, could be significant. This would be in addition to potential administrative costs and burdens associated with the need to provide the special disclosures required by the Rule. Compliance with the Super 23A restrictions ordinarily should not be particularly problematic, although the bank may be precluded from relying on existing regulations that otherwise permit it to engage in transactions with the fund in certain limited circumstances.[58] Finally, a bank maintaining a collective investment fund treated as a covered fund would need to ensure that the bank includes appropriate references to the fund in its compliance program to the extent required by the Rule, as described above.

Adviser-Sponsored Group Trusts

A group trust essentially is an investment vehicle that takes the form of a tax-exempt trust in which tax-qualified corporate employee benefit trusts, governmental employee benefit plans, and certain other types of tax-favored retirement arrangements may participate.[59] The term "group trust" comes from Internal Revenue Service Revenue Ruling 81-100, as amended (RR 81-100), which sets forth conditions a group trust must satisfy in order to obtain tax-exempt status under the Internal Revenue Code. Although RR 81-100 does not require it, the trustee of a group trust typically is a bank or trust company.

Group Trusts as Covered Funds

Most bank-maintained collective trust funds are group trusts. As indicated above, such group trusts ordinarily are operated in reliance on 1940 Act Section 3(c)(11) and, consequently, are not considered covered funds.

However, group trusts frequently are sponsored and managed by non-bank registered investment advisers (RIAs) that retain a bank to serve as trustee and custodian, subject to the adviser's investment and other directions. Since the bank does not "maintain" the group trust within the meaning of 1940 Act Section 3(c)(11),[60] these group trusts typically are operated in reliance on 1940 Act Section 3(c)(1) or 3(c)(7). Consequently, "investment adviser-sponsored group trusts"—referred to below for convenience simply as "group trusts"—ordinarily will be considered covered funds for purposes of the Rule.

RIA Considerations

A threshold question for the RIA sponsoring the group trust is whether or not it is a banking entity as defined by the Rule. As noted above, even if the RIA is not itself an FDIC-insured depository institution, it nonetheless will be treated as a banking entity if it is affiliated with such an institution. In such case, the RIA, by reason of its management of group trust investments, will be considered to be a "trustee" (and therefore "sponsoring") the group trust. Consequently, the RIA would be required to conform to the fiduciary exemption (including, among other things, the Super 23A provisions) in order to continue that activity without violating the Rule's general prohibition. In addition, the RIA would be required to develop and administer a compliance program that meets the Rule's compliance program requirements mentioned above.

Bank Considerations

Whether or not the RIA is a banking entity, the bank acting as trustee of the group trust independently should consider the Rule's potential impact on its activities. As noted above, an RIA-sponsored group trust generally will be considered a covered fund. However, although acting as trustee of a covered fund generally is considered a "sponsor" activity, the Rule provides an express exception where the bank does not exercise investment discretion, that is, acts as "directed trustee." Therefore, the bank should not be subject to the Rule's basic prohibition or be required to conform to the fiduciary exemption with respect to the group trust.

Similarly, the Super 23A restrictions, which, as noted above, operate independently of the basic prohibition and fiduciary exemption, appear to be inapplicable because the group trust does not appear to be considered a "related" covered fund—that is, because the bank does not serve as investment manager or adviser or sponsor of the group trust and does not organize or offer the group trust pursuant to the fiduciary exemption. Nor does it appear that the bank should have to concern itself with the Rule's compliance program requirements referred to above.

Conclusion

All banking entities initially should determine whether they engage in covered fund investment or sponsor activities restricted by the Rule. As noted above, banks engaging in traditional collective investment fund and group trust activities generally may continue to do so with little or no disruption. There are, however, potential compliance implications for banks that act as trustee or investment adviser for funds—potentially including some collective investment funds—that may be treated as covered funds under the Rule.

Mr. Wade is a Partner in the Los Angeles office of K&L Gates LLP. He wishes to thank his partners Mark Duggan, Rebecca Laird, and Donald Smith for their helpful comments and suggestions for this article.

NOTES

1 Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which enacted § 13 of the Bank Holding Company Act of 1956, as amended (BHCA), commonly known as the Volker Rule, is implemented by regulations published at 79 Fed. Reg. 5536 (Jan. 31, 2014). The regulations were adopted jointly by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC) (collectively, the Agencies). BHCA § 13 became effective July 21, 2012, subject to a two-year conformance period until July 21, 2014. The FRB on December 10, 2013 further extended the conformance period an additional year to July 21, 2015. References below to the "Rule" generally are to the final "common rules" of the Agencies cited in the Federal Register (identified as "§ __. [number]"), but are intended to include corresponding provisions of BHCA § 13, as applicable.

2 79 Fed. Reg., at 5538, 5541.

3 79 Fed. Reg., at 5543.

4 Rule § __.10(a)(1).

5 Rule § __.2(c).

6 *See* BHCA § 2(c)(2)(D).

7 Rule § __.2(r).

8 The Rule does not prohibit a non-bank financial institution from engaging in covered fund activities. 79 Fed. Reg., at 5539. However, BHCA § 13(a)(2) provides that non-bank financial companies supervised by the FRB that engage in such activities shall be subject to additional capital charges, quantitative limits, and other restrictions imposed by rule.

9 79 Fed. Reg., at 5666.

10 Rule § __.10(b)(1)(i) (emphasis in original).

11 Rule § __.10(b)(1)(ii).

12 Rule § __.10(c)(12)(i).

13 Rule § __.10(c)(12)(ii).

14 79 Fed. Reg., at 5666.

15 79 Fed. Reg., at 5668.

16 Rule § __.10(a)(2).

17 79 Fed. Reg., at 5668, n.1653.

18 Rule § __.10(d)(9)(i). "Sponsor" activity also includes serving as general partner, managing member, or commodity pool operator with respect to a covered fund (*Id.*), or in any manner selecting a majority of the fund's directors, trustees, or management (Rule § __.10(d)(9)(ii)).

19 Rule § __.10(d)(9)(iii).

20 79 Fed. Reg., at 5715. As indicated below, however, the "Super 23A" provisions still are relevant to such a fund.

21 Rule § __.10(d)(10)(i)(A).

[22] ERISA § 403(a)(1) provides an exception to the general rule that the trustee of an employee benefit plan has "exclusive authority and discretion to manage and control" plan assets where the plan expressly provides that the trustee is subject to the direction of a named fiduciary of the plan, in which case the trustee is subject to proper directions of such fiduciary made in accordance with the plan's terms and which are not contrary to ERISA.

[23] Rule § __.10(d)(10)(ii).

[24] It is possible that a bank may choose to register a collective investment fund under the 1940 Act. This happened in the early 1980s when some banks, acknowledging the SEC's unalterable position that funds accepting IRA trusts could not rely on 1940 Act § 3(c)(3) or § 3(c)(11) (*see, e.g.*, Santa Barbara Bank & Trust, SEC No-Action Letter (avail. Nov. 1, 1991)), registered their collective investment funds for IRA trusts under the securities laws. Registered funds could take the form of either common or collective trust funds for tax and bank regulatory purposes. *See, e.g.*, OCC Interpretive Letter No. 442 (Mar. 23, 1988). Since 1940 Act-registered funds expressly are excluded from the definition of "covered fund," the Rule's basic prohibition (and "fiduciary exemption" described below) and Super 23A restrictions (also described below) should be inapplicable to registered collective investment funds.

[25] 79 Fed. Reg, at 5670 and n.1678.

[26] *See, e.g.*, Continental Bank, SEC No-Action Letter (avail. Sept. 2, 1982) (common trust fund for IRAs relying on 1940 Act § 3(c)(1)); Nat'l Bank of North Carolina, SEC No-Action Letter (avail. Aug. 19, 1983) (privately offered "closed-end common trust fund" relying on 1940 Act § 3(c)(1)). *See also* OCC Trust Interpretation No. 224 (July 7, 1989) (general discussion of application of 1940 Act § 3(c)(1) to collective investment funds for individual retirement accounts).

[27] *See, e.g.*, US Environmental Protection Agency (Common Trust Fund Exception), SEC No-Action Letter (avail. Nov. 19, 1980). *See also*, *Dunham & Associates Holdings, Inc., et al.*, Securities Act Release No. 8740, Securities Exchange Act Release No. 54489, Investment Advisers Act Release No. 2552, Investment Company Act Release No. 27495 (Sept. 22, 2006); Administrative Proceeding File No. 3-12427 (revocable trusts generally not established for fiduciary purpose), discussed in W. Wade and D. Smith, "SEC Enforcement Action Targets Common Trust Fund," *The Investment Lawyer*, Vol.13 No.11 (Nov. 2006).

[28] 79 Fed. Reg., at 5541.

[29] 79 Fed. Reg., at 5670, n.1678.

[30] 79 Fed. Reg., at 5710 and n.2030.

[31] OCC Interpretive Letter No. 865 (May 26, 1999). The OCC noted that the bank proposed to enter into a trust agreement with each of its customers that wished to lend its securities, under which the bank would act as trustee and the owner/lender of the securities would be settlor and beneficiary. The bank would retain discretion to manage the collateral on a pooled or non-pooled basis.

[32] Rule § __.11(a). *See also* 79 Fed. Reg., at 5715.

[33] Rule § __.11(a)(1). The Agencies noted that banking entities provide a wide range of customer-oriented fiduciary services, including, *e.g.*, trust services provided by national banks pursuant to OCC Regulation 9, that qualify under this requirement. 79 Fed. Reg., at 5716, n.2197.

[34] Rule § __.11(a)(2). The banking entity also must have a written plan or similar documentation outlining how the banking entity intends to provide advisory or similar services through organizing and offering the fund. *Id.*

[35] 79 Fed. Reg., at 5715.

[36] Rule § __.11(a)(3). Rule § __.12 describes the investment limits in detail.

[37] Rule §§ __.11(a)(4) and __.14.

[38] Rule § __.14(a)(1).

[39] Rule § __.14(b).

[40] An exception to the Super 23A provisions permit a banking entity to engage in certain "prime brokerage transactions" (*e.g.*, custody, settlement, securities lending) with a covered fund. Rule § __.14(a)(2)(ii). However, such transactions continue to be subject to FRA § 23B standards. Rule § __.14(c).

[41] Rule § 14(a)(1).

[42] Rule § __.11(a)(5).

[43] 79 Fed. Reg., at 5717.

[44] 79 Fed. Reg., at 5717 (borrower default indemnification represents a guarantee to the customer or borrower of the obligation of the counterparty to perform and not a guarantee of the performance or underlying obligations of the covered fund).

[45] Rule § __.11(a)(6).

[46] 79 Fed. Reg., at 5713, 5718.

[47] Rule § __.11(a)(7).

[48] 79 Fed. Reg., at 5718.

[49] Rule § __.11(a)(8)(i).

[50] Rule § __.11(a)(8)(ii).

[51] Rule § __.15(a)(1). The banking entity can avoid the conflict of interest prohibition by disclosing the conflict prior to engaging in the activity or by maintaining information barriers reasonably designed to prevent the conflict from having a material adverse effect on the client, customer, or counterparty in accordance with standards prescribed by the Rule. Rule § __.15(b)(2).

[52] Rule § __.15(a)(2).

[53] Rule § __.15(a)(3).

[54] Rule § __.20(a). The Rule establishes multi-tiered comprehensive compliance program requirements tailored to fit the size and scope of the banking entity's activities.

[55] 12 C.F.R. § 9.18(b)(8)(i).

[56] *See* PanAgora Group Trust, SEC No-Action Letter (avail. Apr. 29, 1994); Standish Ayer & Wood, Inc. Stable Value Group Trust, SEC No-Action Letter (avail Dec. 28, 1995); H.E. Butt Grocery Company, SEC No-Action Letter (avail. May 18, 2001) (SEC Staff letters discussing whether a fund relying on 1940 Act § 3(c)(1) or 3(c)(7) should have to "look through" to the beneficial owners of an entity participating in the fund, such as a participant-directed employee benefit plan, for purposes of compliance with the 100-investor limit of 1940 Act § 3(c)(1) or the qualified purchaser requirement of 1940 Act § 3(c)(7)).

[57] *See Interagency Policy on Banks/Thrifts Providing Financial Support to Funds Advised by the Banking Organization or its Affiliates* (Jan. 5, 2004).

[58] *See, e.g.*, 12 C.F.R. § 9.18(b)(8)(iii) (bank may purchase "defaulted investment" from fund subject to certain conditions).

[59] *See* W. Wade, "The Group Trust: An Essential Product for Money Managers," *The Investment Lawyer*, Vol.7, No.1 (Jan. 2000).

[60] *See Employee Benefit Plans*, Securities Act Release No. 6188 (Feb. 1, 1980) (bank must exercise "substantial investment responsibility" in order to "maintain" fund for purposes of federal securities law exclusions and exemptions applicable to collective trust funds).