

Agencies Release New Volcker Rule Guidance on the Ability of Non-U.S. Banks to Invest in Third-Party Covered Funds

March 10, 2015

On February 27, 2015, the regulatory agencies responsible for implementing the Volcker Rule released a [Frequently Asked Question](#) (FAQ) on the Volcker Rule. The FAQ clarifies that a non-U.S. banking entity may invest in "covered funds" that are marketed to U.S. residents by unaffiliated third parties, as long as the non-U.S. banking entity (including its affiliates) does not engage in the offer or sale of interests in the covered funds (and provided certain other conditions are met). A non-U.S. banking entity is a banking entity that is not organized, and is not directly or indirectly controlled by a banking entity that is organized, under U.S. or state laws. Covered funds include private funds that would be investment companies but for Section 3(c)(1) or 3(c)(7) of the Investment Company Act and certain commodity pools.

The Volcker Rule generally prohibits banking entities from acquiring or retaining an ownership interest in or sponsoring a covered fund.^[1] However, under an exemption to the Volcker Rule, referred to as the "SOTUS Exemption," non-U.S. banking entities may invest in covered funds subject to certain conditions, including the requirement that "no ownership interest in the covered fund is offered for sale or sold to a resident of the United States" (the Marketing Restriction). The FAQ clarifies that the Marketing Restriction only applies to the activities of the non-U.S. banking entity investing in a covered fund, and not to the activities of a third party that is unaffiliated with the non-U.S. banking entity. The FAQ also provides that a non-U.S. banking entity that sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund will be considered to be engaged in the offering and sale of ownership interests in such fund, and thus the SOTUS Exemption will not be available to the non-U.S. banking entity if such ownership interests are offered or sold to U.S. residents.

Accordingly, while a non-U.S. banking entity may not invest in a covered fund with respect to which the *non-U.S. banking entity* (including its affiliates) offers or sells ownership interests to U.S. residents, a non-U.S. banking entity may invest in a covered fund sponsored by an *unaffiliated third party* with respect to which an *unaffiliated third party* offers or sells ownership interests to U.S. residents, subject to certain conditions.

If you have any questions regarding the agencies' guidance set forth in the new FAQ or the SOTUS Exemption, please feel free to contact your usual contact at Proskauer or any of the Proskauer lawyers listed in this alert.

[\[1\]](#) The Volcker Rule permits a banking entity to act as sponsor to, and to acquire and retain a *de minimis* ownership interest in, a covered fund organized in connection with the provision of advisory services by the banking entity to its customers.

[Related Professionals](#)

- **Amanda H. Nussbaum**
Partner
- **Scott S. Jones**
Partner
- **Charles (Chip) Parsons**
Partner
- **Jamiel E. Poindexter**
Partner
- **Marc A. Persily**
Partner
- **Ira G. Bogner**
Managing Partner
- **Sarah K. Cherry**
Partner
- **Bruce L. Lieb**
- **Nigel van Zyl**
Partner
- **Michael R. Suppappola**

Partner

- **Arnold P. May**

Partner

- **Timothy W. Mungovan**

Chairman of the Firm

- **Mary B. Kuusisto**

Partner

- **David W. Tegeler**

- **Howard J. Beber**

Partner

- **Robin A. Painter**

- **Christopher M. Wells**

- **Stephen T. Mears**

Partner