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# Financial Institutions Regulation Group Client Alert:

# Inequitable: Investments in Non-Financial Companies Under the Volcker Rule

The recent passage of the final rule[1] (**Final Rule**) implementing Section 619 of the Dodd-Frank Act[2] has prompted much discussion about the extent to which the Final Rule curtails the ability of financial holding companies (**FHCs**) to make equity investments in non-financial companies.[3] FHCs have been making such investments under several provisions of federal banking law, including pursuant to Section 4 of the Bank Holding Company Act of 1956 (**Bank Holding Company Act**). The ability to make equity investments in non-financial companies[4] is a key advantage for FHCs. They can diversify their sources of revenue (as well as risk) and remain competitive with non-U.S. financial institutions, many of which are permitted under their home-country laws to make these types of investments. The economy at large also benefits from this authority as it enables FHCs to serve as an additional source of capital necessary to establish and operate various types of businesses.

[1] Board of Governors of the Federal Reserve System (**Board**), Office of the Comptroller of the Currency (**OCC**), Federal Deposit Insurance Corporation (**FDIC**), and Securities and Exchange Commission (**SEC**), "Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds," 79 Fed. Reg. 5535 (Jan. 31, 2014). The Commodity Futures Trading Commission (**CFTC**) simultaneously published a final rule that is substantively the same. 79 Fed. Reg. 5808 (Jan. 31, 2014). We refer to all of these agencies collectively as the **Agencies**. We refer to the final rule issued by the Board, OCC, FDIC, and SEC, including its formal commentary (**Preamble**), in this alert.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, July 21, 2010.

[3] The definition of "banking entity," to which the Final Rule applies, includes, among other entities, "[a]ny company that controls an insured depository institution" and "[a]ny company that is treated as a bank holding company for purposes of Section 8 of the International Banking Act." This definition encompasses both FHCs and foreign banks treated as FHCs under the Bank Holding Company Act. Final Rule §_.2(c). In this alert we use the term FHC to refer to both U.S.-licensed FHCs and foreign banks that are treated as FHCs under the Bank Holding Company Act. Insured depository institution subsidiaries of FHCs, which are also considered to be "banking entities," are subject to separate restrictions on equity investments, which we do not address in this alert.

[4] We refer to "non-financial company" to mean a company that is engaged primarily in activities that an FHC is not authorized to engage in under the Bank Holding Company Act because they neither are, nor have a sufficient connection to, banking or financial activities.

The Final Rule has been perceived by many as a throwback to an earlier stage of United States banking regulation ushered in by the Glass-Steagall Act, during which a primary motivation of Congress and the federal banking regulators was to maintain a strict separation between the banking business and the securities business.[5] Similarly, the adoption of the Bank Holding Company Act in 1956 reflected a further congressional policy to separate the business of banking from non-financial commerce.[6] However, the Final Rule stops far short of confining an FHC's investments to banking entities. The Final Rule does scale back certain non-traditional activities of FHCs by limiting an FHCs' ability to engage in proprietary trading and invest in or sponsor a "covered fund."[7] Although the covered fund provisions do place significant limitations on the *types of structures* an FHC may use to make various types of investments, several avenues remain for an FHC to make equity investments in non-financial companies and investments in funds that make equity investments in non-financial companies.[8] Contrary to public opinion, such investments will remain a viable activity for FHCs, albeit one that requires them to contend with more onerous restrictions that have been introduced by the Final Rule and various other recent regulatory reforms.[9]

Below, we discuss some of the different options that FHCs have to invest in non-financial companies in accordance with the Final Rule.

## 1. Investments Addressed in the Final Rule

As broad as the Final Rule is, by its terms it excludes or exempts certain types of investments by banking entities.

### a. Funds that are not covered funds

Perhaps the most obvious category of investments that remains outside the scope of the Final Rule is an FHC's investment in funds that are explicitly carved out from the definition of "covered funds."[10] An FHC could use several of the fourteen excluded

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[5] For example, Robert Weissman, the head of Public Citizen, remarked that "The Volcker Rule is Glass-Steagall light." *Senate Democrats not with Warren on reinstating Glass-Steagall bank act*, The Hill, (May 31, 2012). In addition, Bart Chilton, a commissioner of the CFTC asserted that the Volcker Rule "would go back [to] pre-Glass Steagall" and that it would mean that "if you're a bank, you're a bank and you look out for your customers." Interview by Ed Schultz with Bart Chilton, Comm'r, CFTC, *The ED Show*, MSNBC, May 14, 2012.

[6] 12 U.S.C. § 1841, *et.seq*.

[7] The definition of "covered fund" broadly includes any issuer that would be an investment company, as defined in the Investment Company Act of 1940, but for section 3(c)(1) or 3(c)(7) of that Act; certain commodity pools; and certain foreign funds. Final Rule §_.10(b).

[8] This client alert focuses on the covered funds provisions of the Final Rule as they are most relevant to our discussion of permissible investments.

[9] In addition to the restrictions in the Final Rule, an FHC that makes equity investments in non-financial companies also has to consider the final Basel III regulatory capital rules, enhanced prudential standards and liquidity requirements, and other recent changes to the regulatory framework for FHCs in determining which types of investments are still worthwhile. For example, a proposed rule issued by the Board to implement the enhanced prudential standards applicable to foreign banking organizations under section 165 of the Dodd-Frank Act would require an FHC that is a foreign banking organization to include its investments in U.S. companies in the calculation of its U.S. assets for the purpose of determining whether it has to establish an intermediate holding company. 77 Fed. Reg. 76,628, 76,680 (Dec. 28, 2012).

[10] Final Rule §_.10(b).

types of entities to invest, either directly or indirectly, in non-financial companies, so long as the FHC is authorized to make such an investment under existing law. For example, an FHC may do the following:

- create a wholly-owned subsidiary, provided the FHC or an affiliate owns all of the outstanding ownership interests aside from certain de minimis ownership interests of the FHC's employees and directors and certain third parties[11];
- make investments through a joint venture (**JV**) between the FHC or any of its affiliates and one or more unaffiliated persons, provided that the JV (i) is comprised of no more than 10 unaffiliated co-venturers; (ii) is in the business of engaging in activities that are permissible for the FHC or affiliate, other than investing in securities for resale or other disposition; and (iii) is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities[12];
- invest in the equity of an issuer that is a small business investment company, as defined in the Small Business Investment Act of 1958[13];
- invest in an issuer that is a registered investment company[14];
- invest in an issuer that may rely on an exclusion or exemption from the definition of "investment company" under the Investment Company Act of 1940 other than the exclusions contained in section 3(c)(1) or 3(c)(7) of that Act[15]; and
- invest in an issuer that has made, but not withdrawn, an election to be regulated as a business development company pursuant to the Investment Company Act of 1940.[16]

Notably, the Final Rule does not prohibit an FHC from investing in an unaffiliated excluded fund that in turn invests in a covered fund.

### b. Permissible investments in covered funds

Not all relationships with covered funds are prohibited by the Final Rule. An FHC may acquire or retain an ownership interest in a covered fund that it organizes and offers,[17] subject to certain conditions, including, among other things, that (i) the FHC provides bona fide trust, fiduciary, investment advisory, or commodity trading

[11] Final Rule §_.10(c)(2).

[12] Final Rule §_.10(c)(3).

[13] Final Rule §_.10(c)(11).

[14] Final Rule §_.10(c)(12)(i).

[15] Final Rule §_.10(c)(12)(ii).

[16] Final Rule §_.10(c)(12)(iii).

[17] Examples of what constitute "organizing and offering" a covered fund include serving as a general partner, managing member, trustee or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing.

advisory services; and (ii) the covered fund is organized and offered only in connection with, and only to customers of, such services pursuant to appropriate documentation.[18] An FHC may generally make and retain an investment in any single covered fund that it organizes and offers in an amount (including the amount of any affiliate's investments) of up to three percent of the total number or value of the outstanding ownership interests in the fund, but the aggregate amount of all of the FHC's ownership interests (together with those of its affiliates) in all covered funds may not exceed three percent of the FHC's tier 1 capital.[19] Furthermore, an FHC may establish a covered fund it permissibly offers and organizes and provide the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, as long as the FHC actively seeks unaffiliated investors to reduce the aggregate amount of its ownership interests in the covered fund to the 3 percent per-fund limit and conforms its investments to this limit within one year of the establishment of the fund or obtains an extension from the Board.[20]

An FHC could use this authority to organize and offer, as well as invest in, a covered fund that invests in non-financial companies. For example, an FHC could establish and fully fund the seed investments in a private equity fund that focuses on investing in manufacturing companies, provided that the FHC organizes and offers the fund and attracts sufficient investments from unaffiliated investors to enable it to conform its investments in the fund to the 3 percent per-fund limit within a year. Even after the first year, the FHC would be able to continue to retain investments in such fund so long as they comply with the applicable limits, thus potentially allowing the FHC to reap the benefits of a strong performance by the manufacturing companies.

A foreign FHC may also make investments in, and sponsor, covered funds without restriction outside the U.S.[21] The Milbank Financial Institutions Regulation Group addressed this authority in a separate client alert.[22]

### 2. Other Viable Investments

In addition to the investments expressly excluded from, or otherwise permitted under, the Final Rule, several other options remain for FHCs seeking to acquire an equity investment in a non-financial company.

#### a. Merchant banking authority under the Bank Holding Company Act

Granted to FHCs in the 1999 revisions to the Bank Holding Company Act,[23] an FHC's merchant banking authority represents a significant shift away from the principle that banking entities should be insulated from non-financial commercial activities. The Preamble clarifies that an FHC may continue to make direct

[18] Final Rule §_.11(a).

[19] Final Rule §_.12(a)(1)(ii).

[20] Final Rule §_.12(a)(1)(i).

[21] Final Rule §_.13(b).

[22] Still Global: The Final Volcker Rule and its Impact on Foreign Banks," Dec. 17, 2013.

[23] The Gramm-Leach-Bliley Act, Publ. L. 106-102 (Nov. 12, 1999). The Board implemented these revisions in Subpart J of Regulation Y at 12 CFR § 225.170, *et.seq*.

investments pursuant to its merchant banking authority.[24] That an FHC's merchant banking authority remains intact belies any attempt to characterize the Final Rule as a sweeping reform that resurrects strict barriers between banking and non-financial investments.

### i. Private equity fund investments

An FHC's merchant banking authority encompasses the ability of an FHC to, among other things, own, control, or hold any interest (**invest**) in a "private equity fund," which is a non-operating company with a maximum term of fifteen years whose sole activity is investing in financial and *non-financial* companies for resale or other disposition, and no more than 25 percent of the total equity of which is held, owned, or controlled directly or indirectly, by an FHC and its directors, officer, employees and principal shareholders.[25] An FHC generally may invest in a private equity fund for up to fifteen years, subject to certain limitations on the ability of such FHC or private equity fund to routinely manage, operate, or provide financing to a portfolio company in which the private equity fund invests.[26]

Given that many such private equity funds will likely be considered "covered funds," the Final Rule will impose significant constraints on an FHC's ability to invest in private equity funds under its merchant banking authority. Notwithstanding these obstacles, however, nothing in the Final Rule expressly prohibits an FHC from making these types of investments under its merchant banking authority. Therefore, an FHC may continue to make investments that are otherwise permitted under the Final Rule in a private equity fund that in turn invests directly in non-financial companies.

The Final Rule does provide some flexibility to FHCs making investments in private equity funds. In particular, the definition of "banking entity" excludes a covered fund that is not itself an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of Section 8 of the International Banking Act.[27] This means that a covered private equity fund in which an FHC invests under its merchant banking authority in accordance with the Final Rule (and which is not one of these three types of entities) would not itself be subject to the Final Rule's restrictions on investing in covered funds, even if the private equity fund is affiliated with the FHC. Therefore, such private equity fund would, for example, be able to hold ownership

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[24] Preamble at p. 5704.

[25] 12 C.F.R. § 225.173.

[26] Regulation Y and additional Board guidance provide detailed explanations of when an FHC would either be presumed or considered to be routinely managing or operating a portfolio company. This provision restricts certain interlocks and supervisory relationships between an FHC and the portfolio company and prohibits contractual arrangements between an FHC and the portfolio company that restricts the portfolio company's ability to make routine business decisions. However, an FHC may still exert a certain degree of influence over the portfolio company, such as by selecting directors that do not routinely manage and operate the portfolio company; requiring the portfolio company to consult with it on actions that are outside the ordinary course of business (e.g., significant acquisitions; significant changes to the business plan; removal of executive officers; redemption of debt or equity securities; and the sale, merger, dissolution or sale of substantially all of its assets); and providing certain advisory and underwriting services to the portfolio company. 12 C.F.R. § 225.171.

[27] Final Rule §_.2(c)(2)(i).

interests in a covered fund it does not organize or offer. Moreover, any investment made by such a private equity fund would not count towards the FHC investor's per-fund and aggregate investment limits, even if it is otherwise considered to be the FHC's affiliate, since a "covered fund" is generally not treated as an affiliate of a banking entity for the purpose of calculating these limits under the Final Rule.[28]

### ii. Portfolio company investments

An FHC's merchant banking investment authority under the Bank Holding Company Act is not limited solely to investments in private equity funds. Largely unscathed by the Volcker Rule, other provisions in the Bank Holding Company Act permit an FHC to acquire or control any amount of shares, assets, or ownership interests in any "portfolio company" (**Covered Investment**), which is an entity engaged in any activity otherwise impermissible for an FHC. An FHC may generally hold such Covered Investment for up to ten years, provided that the Covered Investment is not acquired or controlled by a depository institution or subsidiary of a depository institution, the FHC maintains strict corporate separation from the portfolio company in order to limit the FHC's liability for the portfolio company's obligations, and the FHC does not routinely manage or operate the portfolio company, except as may be necessary to obtain a reasonable return on investment upon resale or disposition of the portfolio company.[29]

The Preamble clarifies that the Final Rule "does not prohibit a banking entity, to the extent otherwise permitted under applicable law, from making a venture capital-style investment in a company or business so long as that investment is not through or in a covered fund, such as through a direct investment made pursuant to merchant banking authority."[30] The survival of this authority leads to the anomalous result that an FHC may be severely restricted (if not outright prohibited) by the Final Rule from investing in a covered fund that invests in a non-financial company, but it meanwhile may directly acquire up to 100 percent of the ownership interests in the exact same company under its merchant banking authority. Interestingly, nothing in the Final Rule prohibits an FHC from paying a non-affiliated investment adviser to advise it on which direct investments it should make in portfolio companies (but not covered funds) under its merchant banking authority, even if such investment adviser advises the FHC to make the same investments as those made by a covered fund sponsored and advised by that adviser. Thus, it appears that an FHC could make direct investments with the same risk profile as those made by a covered fund while being prohibited from making any investments in the covered fund itself.

Also, it remains to be seen under what circumstances the Agencies would permit an FHC to make "parallel investments" in which it simultaneously (i) acquires ownership interests in a covered fund it organizes and offers (which fund in turn invests in a non-financial company) and (ii) directly invests in the very same non-

[28] Final Rule §_.12(b)(1)(iii).

[29] 12 C.F.R. § 225.171.

[30] Preamble at p. 5704.

financial company. While the Preamble does limit certain parallel investments, the Agencies declined to include an absolute prohibition in the Final Rule, recognizing that FHCs make many parallel investments to serve the "legitimate needs of customers and shareholders," rather than to circumvent the Final Rule.[31]

This remaining investment authority demonstrates how the Final Rule makes a seemingly arbitrary distinction between an FHC's direct and indirect ownership interests in non-financial companies, which does not appear to be supported by any safety and soundness rationale. Consequently, an FHC may have a greater degree of flexibility when making direct equity investments in a non-financial company than when making investments in a fund that in turn makes such investments, even if its economic exposure to such non-financial company is substantively the same.

The Final Rule provides flexibility to an FHC that invests in a portfolio company under its merchant banking authority. The definition of "banking entity" excludes a portfolio company that is held by an FHC under its merchant banking authority if the portfolio company is not itself an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of Section 8 of the International Banking Act.[32] This means that any portfolio company in which an FHC invests under its merchant banking authority would not itself be subject to the restrictions in the Final Rule on investing in covered funds as long as it is not one of these three types of entities, even if it is an affiliate of the FHC. Therefore, an FHC may invest in a portfolio company that in turn holds ownership interests in a covered fund it does not organize or offer. Furthermore, the restrictions on an FHC making loans to and engaging in certain other "covered transactions" with a covered fund it sponsors or advises (the so-called "Super 23A" restrictions), do not apply to transactions between an FHC and a portfolio company in which it invests.

### iii. Other considerations

Even though an FHC's authority to make merchant banking investments in portfolio companies remains largely intact, there are important considerations an FHC must take into account when making a merchant banking investment. In particular, the Final Rule restricts the ability of an FHC to use a JV to engage in merchant banking activities. Although the Final Rule excludes certain types of JVs from the definition of "covered fund," a JV does not qualify for this exclusion if it raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.[33] Therefore, an FHC may not use a JV to engage in merchant banking activities because this entails the acquisition or

[31] The Preamble discusses size limitations on the following types of parallel investments made by a banking entity: (i) a side by side co-investment with a covered fund sponsored by the banking entity in a privately negotiated investment; (ii) a co-investment made through a co-investment vehicle that is itself a covered fund; and (iii) an investment made side by side in substantially the same positions as the covered fund. Preamble at p. 5734.

[32] Final Rule §_.2(c)(2)(ii).

[33] Final Rule §_.10(c)(3).

retention of shares, assets, or ownership interests for the purpose of ultimate resale or disposition of the investment.[34]

Given that many, if not all, private equity funds in which an FHC invests under its merchant banking authority will be considered "covered funds," an FHC may choose to focus its efforts on making investments in portfolio companies. An FHC accustomed to making investments in private equity funds under its merchant banking authority should keep in mind that investments in portfolio companies are subject to tighter constraints in certain respects. First of all, an FHC may generally invest in a private equity fund for a maximum of fifteen years, but it may generally only invest in a portfolio company for a maximum of ten years.[35] Second of all, an FHC may not make as large of an investment in a portfolio company as it may in a private equity fund.[36]

There are, however, certain advantages to investing in a portfolio company as opposed to a private equity fund. While an FHC (together with its directors, officers, employees and principal shareholders) may not hold, own or control more than 25 percent of the equity of a private equity fund, an FHC may acquire or control up to 100 percent of the equity of a portfolio company as long as the FHC does not routinely manage or control the portfolio company.[37] This means that an FHC could conceivably be the sole investor in a non-financial company.

### b. Non-merchant banking investments under the Bank Holding Company Act

While the merchant banking authority is available only to FHCs, the Bank Holding Company Act also affords all bank holding companies (**BHCs**), including FHCS, other options for making equity investments in non-financial companies without violating the Final Rule.

Regardless of whether it is organized under U.S. or foreign law, a BHC may make certain *de minimis* investments in a non-financial company, irrespective of the location of the company or where the company conducts its activities. In particular, Section 4(c)(6) authorizes a BHC to acquire voting securities of a non-financial company that, in the aggregate, represent 5 percent or less of the outstanding shares of any class of voting securities of the company, provided that the BHC does not control the company.[38] Furthermore, the Board generally permits a BHC to hold up

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[34] Preamble at p. 5681.

[35] 12 C.F.R. §§ 225.172(b); 225.173(c).

[36] Whereas an FHC may make an investment in a private equity fund whose carrying value is 30 percent or less of the FHC's tier 1 capital (as long as the aggregate carrying value of all merchant banking investments combined do not exceed 30 percent of the FHC's tier 1 capital), an FHC may only make an investment in a portfolio company whose carrying value is 20 percent or less of the FHC's tier 1 capital (as long as the aggregate carrying value of all merchant banking investments combined do not exceed 30 percent of the FHC's tier 1 capital).

[37] 12 C.F.R. §§ 225.170(a); 225.173(a)(3).

[38] 12 C.F.R. § 225.22(d)(5). Regulation Y defines "control" to mean (i) ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities of the company, directly or indirectly or acting through one or more other persons; (ii) control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising certain functions) of the

to as much as 25 percent of the voting equity and as much as one-third of the total equity of a non-financial company, absent any other indication that a BHC has a "controlling influence" over the management or policies of the company.[39]

Other options are available for BHCs seeking investment opportunities abroad. Section 4(c)(13) of the Bank Holding Company Act permits a U.S. BHC to make portfolio investments in a non-financial company that does not have U.S. operations, subject to certain conditions specified in the Board's Regulation K.[40] Section 4(c)(9) of the Bank Holding Company Act permits non-U.S. BHCs to invest in foreign non-financial companies, subject to certain conditions specified in the Board's Regulation K.[41]

Similar to an FHC's merchant banking investment authority, these provisions lead to the anomalous result that a BHC may, on the one hand, be prohibited from investing in a covered fund that invests in a non-financial company, but, on the other hand, be permitted to make a substantial direct investment in the very same non-financial company. Moreover, because the terms of the Final Rule generally only apply to banking entities, the Final Rule does not prohibit a banking entity, including a BHC, from investing in a non-affiliated company that holds an investment in a covered fund, as long as the banking entity does not itself make impermissible investments. Therefore, if a BHC uses its authority under one of these provisions to invest in a non-affiliated non-financial company that in turn invests in a covered fund, the BHC may end up having some degree of economic exposure to the covered fund notwithstanding the Final Rule's prohibition on fund ownership.

## Conclusion

An FHC still has several options for making equity investments in non-financial companies without running afoul of the Final Rule. We recognize that these investments, as well as other types of investments, have fallen under increased congressional and regulatory scrutiny in recent years, and it is possible that either Congress or the Board could further limit an FHC's investment authority.[42] For the time being, however, such investments remain a viable activity for FHCs.

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bank or other company; (iii) the power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as determined by the Board after notice and opportunity for hearing; or (iv) conditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another company. 12 C.F.R. § 225.1(e).

[39] "Policy Statement on Equity Investments in Banks and Bank Holding Companies." (September 22, 2008).

[40] 12 C.F.R. § 211.8(c)(3).

[41] 12 C.F.R. § 211.23(f).

[42] *See* Dodd-Frank Act § 620 (requiring the federal banking agencies to review and prepare a report on the activities that a banking entity may engage in under federal and state law); Board's Advance Notice of Proposed Rulemaking titled "Complementary Activities, Merchant Banking Activities, and Other Activities of Financial Holding Companies related to Physical Commodities," (Jan. 14, 2014), p.17 (stating that the Board is "considering a number of actions to address the potential risks associated with merchant banking investments").

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