NOVOGRADAC
& COMPANY LLP
CERTIFIED PUBLIC ACCOUNTANTS

September 6, 2012

The Honorable Spencer Bachus
Financial Services Committee Chairman
2129 Rayburn HOB
Washington, DC 20515

Re: Hearing on Volcker Rule Alternative

Dear Chairman Bachus and Members of the Financial Services Committee:

On behalf of the members of the New Markets Tax Credit ("NMTC") Working Group, we respectfully submit our comments in response to the request for public input on how to formulate a less burdensome legislative alternative to the implementation of Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010 (the "Act"). Section 619 prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds and private equity funds (the "Volcker Rule"). The members of the NMTC Working Group are participants in the NMTC industry who work together to help resolve technical NMTC Program issues and provide recommendations to make the NMTC Program even more efficient in delivering benefits to qualified businesses located in low-income communities around the country. Our group includes allocatees, nonprofit and for profit community development entities ("CDEs"), consultants, investors, accountants and lawyers.

For your convenience, we have attached our previously submitted letter of comments and recommendations in response to the Financial Stability Oversight Council's request for public input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds, dated November 5, 2010. We have also attached our previously submitted letter of comments and recommendations in response to the Notice of Proposed Rule Making's request for public input on the proposed rule that would implement Section 619 of the Act, dated February 13, 2012. All of the NMTC Working Group's comments regarding these issues, as well as many others, can be found on our website at www.nmtcworkinggroup.com. We would be happy to meet with you to discuss our comments in further detail.

As described in great detail in the attached letters, we recommend that the final rule specifically permit banking entities to continue making NMTC investments and not be limited by the Volcker Rule. We also recommend that banks be permitted to sponsor NMTC investments as well as be allowed to engage in "covered transactions" with NMTC investments they make and/or sponsor. We believe these recommendations are consistent with the intent of the Volcker Rule.

We commend you and the Financial Services Committee for your efforts in formulating a less burdensome legislative alternative to the Volcker Rule and to request public comments on the process. We believe that the recommendations included in the attached letters are consistent with the intent of the Volcker Rule. The FSOC realized that Congress may not have intended to capture certain private equity funds that are technically within the scope of the Volcker Rule. We believe that NMTC investments do not represent a means to circumvent the restrictions on proprietary trading or historically expose banking entities to high risks.

We are excited about the positive impact that the NMTC Program is having on the nation's low-income communities and low-income persons and the potential for future success[1]. However, we believe that the program could become less efficient and deliver fewer subsidies to the end users within low-income communities without the clarification we have requested above. We appreciate the opportunity to submit our recommendations and thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,

Novogradac & Company LLP

by
Michael J. Novogradac

Novogradac & Company LLP

by
Brad Elphick

Attachments

[1] "NMTC Program Outperforms Comparable Cash Grant Program," Novogradac & Company, 2011.

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November 5, 2010

Financial Stability Oversight Council
c/o United States Department of the Treasury
Office of Domestic Finance
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: FSOC-2010-0002
Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds

Dear Ladies and Gentlemen:

The membership of the NMTC Working Group includes over thirty participants in the New Markets Tax Credit ("NMTC") industry, including allocatees, investors, lenders, and professionals who work together to resolve technical NMTC Program issues. We respectfully submit our comments in response to the Financial Stability Oversight Council's ("FSOC") request for public input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (the "Study"). In the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010 (the "Act"), Section 619 prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds and private equity funds (the "Volcker Rule"). As described in more detail below, we recommend that the Study specifically permit banking entities to continue making NMTC investments and not be limited by the Volcker Rule. We believe that such an exemption would be consistent with Congress' intent and plan for the purpose of the NMTC Program. We have organized our comments below in order of the questions included in the notice and request for information.

Questions 3 and 4

While the Act prohibits certain activities by banking entities, Section 619(d)(1) allows several permissible activities as an exception. Specifically, investments that promote the public welfare are identified as a permitted activity (**emphasis added**):

> Investments in one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662), **investments designed primarily to promote the public welfare**, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), or investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

Paragraph 11 of Section 5136 of the Revised Statutes further states (**emphasis added**):

> To make investments designed primarily to promote the public welfare, **including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)**. A national banking association may make such investments directly or by purchasing interests in an entity primarily engaged in making such investments.

The NMTC community, as well as other similar tax credit communities, including the low-income housing tax credit and the renewable energy tax credit, applaud the inclusion of such language since we believe it recognizes and is consistent with Congress' legislative intent in enacting tax credits that provide incentives for banking entities to make investments in underserved economic areas (Section 45D), affordable rental housing (Section 42), and renewable energy resources (Sections 45 and 48), all of which promote the public welfare.

We request that the FSOC issue specific guidance that these tax credit programs, as well as state and local programs that were created for a similar purpose as these federal tax credit programs, qualify as permissible activities by a banking entity as they meet the requirements of promoting public welfare in Section 619(d)(1)(E) and paragraph 11 of Section 5136 of the Revised Statutes. We believe this would be consistent with the treatment that the historic rehabilitation tax credit has already received by being specifically identified in Section 619(d)(1)(E) of the Act. We believe such guidance in any final rule should be similar to the Joint Committee on Taxation's footnote 344[1] in its report on the Health Care and Education Affordability Reconciliation Act of 2010 which stated the following regarding the codification of the economic substance doctrine and its application to different tax credit programs (**emphasis added**):

> **If the realization of the tax benefits of a transaction is consistent with the Congressional purpose or plan that the tax benefits were designed by Congress to effectuate, it is not intended that such tax benefits be disallowed.** See, e.g., Treas. Reg. sec. 1.269-2, stating that characteristic of circumstances in which an amount otherwise constituting a deduction, credit, or other allowance is not available are those in which the effect of the deduction, credit, or other allowance would be to distort the liability of the particular taxpayer when the essential nature of the transaction or situation is examined in the light of the basic purpose or plan which the deduction, credit, or other allowance was designed by the Congress to effectuate. **Thus, for example, it is not intended that a tax credit (e.g., section 42 (low-income housing credit), section 45 (production tax credit), section 45D (new markets tax credit), section 47 (rehabilitation credit), section 48 (energy credit), etc.) be disallowed in a transaction pursuant to which, in form and substance, a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage.**

Question 5(i)

In addition to specifically identifying investments in NMTCs as a permissible activity, we further recommend that banking entities that make investments in NMTCs should not be deemed to be involved in a transaction in which there is a material conflict of interest with the banking entities' clients, customers or counterparties as limited in Section 619(d)(2)(A)(i). The size of the investments and loans by banking entities in the NMTC industry, when compared to the overall bank assets or activities, is very small and generally not material to the bank entities. Furthermore, in order to maintain the integrity of the tax credit program and ensure that investors are making the types of investments that Congress intended,

[1] Joint Committee on Taxation Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act", JCX-18-10, March 21, 2010, page 152.

participants are strictly monitored for compliance with the NMTC program's rules and regulations by the Community Development Financial Institutions Fund ("CDFI Fund") and the Internal Revenue Service (the "IRS"). Since the investments are in total small and not material to the banking entities and since there is a large amount of oversight by the CDFI Fund and the IRS, we believe that these transactions should be specifically identified as not being material.

Question 5(ii) and 5(iii)

In addition, to the investments in NMTC transactions not being material as discussed above, we believe that the investments would not result in material exposure, directly or indirectly, to high-risk assets or high-risk trading strategies or pose a threat to the safety and soundness of a banking entity. Based upon informal conversations with members of the NMTC industry and public statements made by members of the IRS, we are unaware of any events that have triggered recapture of any investor's NMTCs. We believe this a tremendous testament to the investment soundness that participants in the program have relied upon. We also believe that if a particular investment was deemed to have been made in an asset with a perceived higher risk because of its location within a low-income community, that the NMTC sufficiently mitigates the investor's risk through achievement of a reasonable return on its investment while Congress also achieves its intent of promoting public welfare through such investments. As such, we believe investments in NMTCs would not result directly or indirectly in any exposure to high risk assets or high risk trading activities or pose a threat to the safety and soundness of a banking entity and request that NMTC transactions be specifically identified as permissible activities.

Conclusion

If a banking entity were to be deemed to have a material conflict of interest or material exposure from investments in high risk assets or the investments pose a threat to the safety and soundness of a banking entity because of its investment in a NMTC transaction or its syndication of NMTC investments, the Volcker Rule would eliminate nearly all current NMTC syndicators or investors. Such a reduction in the number of syndicators or investors would dramatically reduce pricing for NMTCs, reducing the amount of subsidy to low income community development and potentially eliminate any ability of the NMTC program to achieve its objective of incentivizing investment in low income communities. Uncertainties about the permissibility of these types of transactions will create potential impediments to the growth and efficiency of the industry and the amount of investments in low income communities. For the same reasons described above in our comments on Questions 3 and 4, we do not believe the intent of the Volcker Rule was to limit banking entities to participate in tax credit transactions that, in form and substance, meet the intent for which they were created by Congress. Thus, we request further guidance exempting NMTC transactions, as banking entities will have serious concerns regarding future NMTC industry involvement if clear guidance is not received quickly.

The concern for participants in the NMTC program is that the definitions for items like "material conflict of interest" or "high risk assets" will be too broadly defined. This outcome could have unintended consequences on certain industries that were not meant to be affected by this rule. We believe that guidance on this issue will alleviate industry concerns and allow the NMTC program to better serve its intended purpose of bringing capital to a need that has historically had inadequate access to capital. We are excited about the positive impact that the NMTC Program is having on the nation's low-income communities and low-income persons and the potential for future success. However, we feel that the program can only become even more efficient and deliver more assistance to the end users if this guidance is provided. Thank you in advance for your time and careful consideration of this issue.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,
Novogradac & Company LLP

by
Michael J. Novogradac

Novogradac & Company LLP

by
Brad Elphick

NOVOGRADAC
& COMPANY LLP
CERTIFIED PUBLIC ACCOUNTANTS

February 13, 2012

Office of the Comptroller of the Currency
250 E Street, SW.
Mail Stop 2-3
RE: Docket ID OCC-2011-14
Washington, DC 20219

and

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Docket No. R-1432 and RIN 7100 AD 82
Washington, DC 20551

and

Robert E. Feldman
Executive Secretary
Attention: Comments - RIN 3064-AD85
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

and

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
RE: S7-41-11
Washington, DC 20549-1090

Dear Ladies and Gentlemen:

On behalf of the members of the New Markets Tax Credit ("NMTC") Working Group, we respectfully submit our comments in response to the Notice of Proposed Rule Making's ("NPRM") request for public input on the proposed rule that would implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010 (the "Act"). The members of the NMTC Working Group are participants in the NMTC industry who work together to help resolve technical NMTC Program issues and provide recommendations to make the NMTC Program even more efficient in delivering benefits to qualified businesses located in low-income communities around the country. Our group includes allocatees, nonprofit and for profit community development entities ("CDEs"), consultants, investors, accountants and lawyers. Section 619 prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds and private equity funds (the "Volcker Rule"). As described in more detail below, we recommend that the final rule specifically permit banking entities to continue making NMTC investments and not be limited by the

Volcker Rule. We also recommend that banks be permitted to sponsor NMTC investments as well as be allowed to engage in "covered transactions" with NMTC investments they make and/or sponsor. We believe these recommendations are consistent with the intent of the Volcker Rule. We have organized our comments below in order of the questions included in the NPRM.

Question 276. *Is the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?*

We believe that the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund is effective, but we believe it should specifically state that investments that qualify for NMTCs are permitted investments as explained in further detail in our response to Question 277.

Question 277. *Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?*

The Volcker Rule generally prohibits banking entities from investing in or sponsoring private equity funds;[1] however, Congress included exceptions for certain permitted activities.[2] One such carve-out or permitted activity is for "investments designed primarily to promote the public welfare."[3] Congress also recognized the benefits of continuing to allow banks to invest in historic tax credit ("HTC") funds and created a specific exemption for HTC investments.[4] The NMTC community, as well as other similar tax credit communities, including the Low-Income Housing Tax Credit ("LIHTC") and the Renewable Energy Tax Credit ("RETC"), applauds the inclusion of such language since we believe it recognizes and is consistent with Congress' legislative intent in enacting tax credits that provide incentives for banking entities to make investments in underserved economic areas (Section 45D), affordable rental housing (Section 42), and renewable energy resources (Sections 45 and 48), all of which promote the public welfare. We recommend that NMTC investments should be permitted by the Volcker Rule under the public welfare exception because public welfare investments include investments that serve low to moderate income families and communities[5] and NMTC investments are statutorily mandated to serve low-income communities.[6] The Office of the Comptroller of the Currency has issued publications which clearly express the view that investments in the NMTC program qualify as investments that promote the public welfare.[7] We believe the final regulations should specifically identify NMTC investments as "investments designed primarily to promote the public welfare."

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[1] Section 13(a)(1): "PROHIBITION- Unless otherwise provided in this section, a banking entity shall not…(B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund."

[2] Bank Holding Company Act, Section 13(d).

[3] Bank Holding Company Act, Section (d)(1)(E).

[4] Ibid.

[5] Under the Bank Holding Company Act, Section 13(d)(1)(E), Section 5136 of the Revised Statutes of the United States (12 U.S.C. 24) defines a permitted activity as making investments "directly or indirectly, each of which promotes the public welfare by benefiting primarily low- and moderate-income communities or families (such as by providing housing, services, or jobs)."

[6] The NMTC program is governed by Section 45D of the Internal Revenue Code and is designed to attract capital to low-income communities.

[7] The Office of the Comptroller of the Currency issued publications which refer to investments in the NMTC program as public welfare investments. See the following publication:
New Markets Tax Credits: Unlocking Investment Potential, Comptroller of the Currency, February 2007, page 11.

We request that the rule makers issue specific guidance that these tax credit programs, as well as state and local programs that were created for a similar purpose as these federal tax credit programs, qualify as permissible activities by a banking entity as they meet the requirements of promoting public welfare in Section 619(d)(1)(E) and paragraph 11 of Section 5136 of the Revised Statutes. We believe this would be consistent with the treatment that the HTC has already received by being specifically identified in Section 619(d)(1)(E) of the Act.

Section __.13(a)(1) of the proposed rule permits a banking entity to acquire or retain an ownership interest in, or act as sponsor to a covered fund "that is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. § 24), including the welfare of low- and moderate-income communities or families…" or "that is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar state historic tax credit program."[8] As stated above, we agree with the Agencies and believe the proposed rule permits a banking entity to sponsor tax credit investments because they either serve the communities or families of low- and moderate-income or qualify under Section 47 of the Internal Revenue Code. However, Section __.13 of the proposed rule does not specify whether or not this permitted activity overrides the prohibitions included in Section __.16 of the proposed rule. The guidance is unclear on whether or not a banking entity can sponsor a tax credit investment with which it has a certain relationship.[9] The proposed rule generally prohibits a banking entity from engaging in any transaction with a tax credit fund if the transaction "would be a covered transaction as defined in Section 23A of the Federal Reserve Act (12 U.S.C. 371c), as if such covered banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof."[10] The Federal Reserve Act states:

> "the term 'covered transaction' means with respect to an affiliate of a member bank--
> (1) a loan or extension of credit to the affiliate;
> (2) a purchase of or an investment in securities issued by the affiliate;
> (3) a purchase of assets, including assets subject to an agreement to repurchase, from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation;
> (4) the acceptance of securities issued by the affiliate as collateral security for a loan or extension of credit to any person or company; or
> (5) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate."[11]

We believe that Congress recognized the need for banking entities as tax credit investors by permitting tax credit investments in Section 13(d)(1)(E) of the Volcker Rule.[12] Similarly, the Agencies

[8] Proposed rule, Section __.13(a)(1)(ii) & (iii).
[9] "Regulators Prepare to Implement Volcker Rule," Novogradac Journal of Tax Credits, January 2012, Volume III, Issue I.
[10] Proposed rule, Section __.16(a)(1).
[11] Federal Reserve Act, Section 23A(b)(7)
[12] Bank Holding Company Act, Section 13(d) — PERMITTED ACTIVITIES-(1) IN GENERAL.—Notwithstanding the restrictions under subsection (a), to the extent permitted by any other provision of Federal or State law, and subject to the limitations under paragraph (2) and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine, the following activities (in this section referred to as 'permitted activities') are permitted: (E) Investments in one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662), investments designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), or investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

recognized the need for banking entities as sponsors of tax credit funds by permitting banking entities to continue sponsoring tax credit investments in Section 13(a)(1) of the proposed rule.[13] The Agencies exercised their authority granted in Section 13(d)(1)(J) of the Volcker Rule to permit this activity because it "generally would facilitate investment in small businesses and support the public welfare, would promote and protect the safety and soundness of banking entities and the financial stability of the United States."[14] We also believe that a banking entity should be permitted to engage in covered transactions[15] with investments that are permitted under Section __.13(a) of the proposed rule for many of the same reasons as those used to support why banking entities may sponsor tax credit investments.

Specifically with regard to tax credit investments, we believe it is equally important to permit banking entities to continue guaranteeing tax credit investments as it is to permit them to sponsor tax credit investments. We believe that a banking entity should be permitted to guarantee a tax credit investment because (1) guarantees generally expose a banking entity to less risk when compared to directly investing and (2) when selling assets, such as tax credit investments, banking entities are often required to provide certain representations and warranties which are similar in nature to a guarantee. Guarantees of tax credit investments often times pose less risk to a banking entity, as a guarantor, than making direct investments, as an investor, because guaranteed transactions have a built-in margin, or cushion, between the anticipated and guaranteed performance of the assets. The anticipated performance or "expected yield" is equal to management's expectations when the investment is originally made. The guaranteed performance is typically lower than what management expects and represents a "minimum yield". As such, the guarantor only absorbs a loss when the asset performs under the minimum yield. If the asset performs worse than expected but better than what is guaranteed, the guarantor incurs no loss. When directly investing, a banking entity absorbs a loss when the asset does not perform as anticipated; however, the guarantor only absorbs a loss when the asset does not perform above the minimum yield. A banking entity should also be able to guarantee a tax credit investment because many sales of such assets require representations and warranties which are similar to a guarantee.

Question 278. *Should the proposed rule permit a banking entity to sponsor an SBIC and other identified public interest investments? Why or why not? Does the Agencies' determination under section 13(d)(1)(J) of the BHC Act regarding sponsoring of an SBIC, public welfare or qualified rehabilitation investment effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?*

The proposed rule should permit a banking entity to sponsor an SBIC and other identified public welfare investments. Since the Volcker Rule carves out, and thereby allows, banking entities to make public welfare investments, including NMTC investments, as well as HTC investments, we agree with your conclusion that this carve out also allows banking entities to sponsor these investments. In short, if a banking entity is permitted to make a NMTC, LIHTC and/or HTC investment in which it assumes market risks, we agree it should also be permitted to sell it and similarly participate as a sponsor because this activity does not contradict a key objective of the Act which is to promote and protect the safety and soundness of banking entities and the financial stability of the United States. The Volcker Rule permits a banking entity to invest in these tax credit investments. Here, the permitted risk of investing is greater than the risk of sponsoring tax credit investments.

[13] Footnote 292 of the preamble to the proposed rule.
[14] Ibid.
[15] According to the Federal Reserve Act, Section 23A(b)(7), "covered transactions" include the following: extension of credit (loans); purchase or investment in securities; purchase of assets; acceptance of securities as collateral security; issuance of a guarantee, acceptance, or letter of credit.

Question 279. *What would the effect of the proposed rule be on a banking entity's ability to sponsor and syndicate funds supported by public welfare investments or low income housing tax credits which are utilized to assist banks and other insured depository institutions with meeting their Community Reinvestment Act ("CRA") obligations?*

The NPRM currently permits banking entities to continue sponsoring and investing in public welfare investments. We commend the Agencies for recognizing potential issues arising from a bank-sponsored tax credit fund and addressing these issues in the proposed rule. As the proposed rule stands, banking entities may continue to satisfy the investment test for the purpose of their community reinvestment goals through tax credit investments sponsored by other banking entities. Permitting this activity enables smaller banks to take advantage of a larger bank's ability to efficiently underwrite, select and package the investments into a private equity fund. Larger banks generally have larger community reinvestment goals and have therefore become more efficient because of economies of scale. Over time, many of the larger banking entities have sold these investments to other banks that do not have the same resources available for the underwriting and selection process. This efficiency has permitted a number of smaller banks to satisfy their community reinvestment goals and to provide meaningful benefits to the communities they serve.

Question 316. *What types of transactions or relationships that currently exist between banking entities and a covered fund (or another covered fund in which such covered fund makes a controlling investment) would be prohibited under the proposed rule? What would be the effect of the proposed rule on banking entities' ability to continue to meet the needs and demands of their clients? Are there other transactions between a banking entity and such covered funds that are not already covered but that should be prohibited or limited under the proposed rule?*

The Volcker Rule states that no banking entity, or affiliate thereof, that serves as a sponsor to a private equity fund may enter into a transaction with a private equity fund, or with any other fund controlled by such private equity fund, "that would be a covered transaction, as defined in Section 23A of the Federal Reserve Act."[16] The NPRM reiterates this provision is Section __.16(a)(1) (the "Super 23A Provisions"). Under the proposed rules, arguably, banking entities will no longer be able to provide guarantees, loans, or letters of credit to the NMTC investments they sponsor. As a result, NMTC investments will become less attractive and the availability of capital to develop areas of low- to moderate-income will decrease.

However, we believe that permitting banking entities to continue engaging in "covered transactions" with NMTC investments will not pose a threat to their safety and soundness. Based upon informal conversations with members of the NMTC industry and public statements made by members of the Internal Revenue Service, we are unaware of any events that have triggered recapture of any investor's NMTCs. We believe this is a tremendous testament to the investment soundness that participants in the program have relied upon. By continuing to permit banking entities to engage in "covered transactions" and sponsor NMTC investments, these investments will continue to flourish and satisfy the Congressional intent of promoting public welfare through such investments while not posing a threat to the safety and soundness of banking entities.

The prohibition on engaging in covered transactions with covered funds may not have been intended by Congress to apply to the permitted investments allowed by subsection (E) of Section 13(d) of

[16] Section 13(f)(1) of the BHC

the Volcker Rule. In a subsequent subsection (G), which is the exemption permitting banking entities to sponsor private equity and hedge funds under certain circumstances, the Volcker Rule specifically provides that the permitted activity in subsection (G) is subject to the Super 23A Provisions of subparagraph (f). There is no such specific limitation set forth to the exemption in subsection (E). Congress may not have intended to sweep public welfare investments and funds comprised of public welfare investments into the definitions of "private equity fund" or "hedge fund" and subject them to the Super 23A Provisions. If subparagraph (f) applied to all of the permitted activities, then the reference to subparagraph (f) in subsection (G) would be superfluous.

Conclusion

We commend the Agencies for their efforts in implementing Section 619 of the Dodd-Frank Act and to request public comments on the process. We believe that the recommendations included in this letter are consistent with the intent of the Volcker Rule based in part on the discussion included in the Financial Stability Oversight Counsel's ("FSOC") study. The FSOC realized that Congress may not have intended to capture certain private equity funds that are technically within the scope of the Volcker Rule. We believe that NMTC investments do not represent a means to circumvent the restrictions on proprietary trading or historically expose banking entities to high risks.

We are excited about the positive impact that the NMTC Program is having on the nation's low-income communities and low-income persons and the potential for future success[17]. However, we believe that the program could become less efficient and deliver less subsidy to the end users within low-income communities without the clarification we have requested above. We appreciate the opportunity to submit our recommendations and thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,

Novogradac & Company LLP

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Michael J. Novogradac

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Brad Elphick

[17] "NMTC Program Outperforms Comparable Cash Grant Program," Novogradac & Company, 2011.