



**Community Development
Venture Capital Alliance**

Private equity for public good.

April 1, 2020

VIA ELECTRONIC SUBMISSION

Legislative and Regulatory Activities
Division
Office of the Comptroller of the
Currency
400 7th Street SW, Suite 3E-218
Washington, D.C. 20219
Docket ID OCC 2020-0002

Christopher Kirkpatrick, Secretary
Commodity Futures Trading
Commission
1155 21st Street, NW
Washington, D.C. 20551
RIN: 3038-AE93

Robert E. Feldman,
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429
RIN: 3064-AF17

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549
File No. S7-02-20

Ann E. Misback, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue,
NW
Washington, D.C. 20551
Docket No. R-1694; RIN 7100-AF70

Re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Dear Sirs and Madams:

The Community Development Venture Capital Alliance¹ (“CDVCA”) appreciates this opportunity to comment on the notice of proposed rulemaking (the “Proposal”) for revisions to the Agencies’

¹ The CDVCA is the network for the field of community development venture capital (“CDVC”) investing. CDVC funds provide startup and growth equity capital to businesses in low-income communities to create good jobs, wealth, and entrepreneurial capacity that benefit low-income people. CDVCA is working on many fronts to build and strengthen the CDVC field. CDVCA is certified as a Community development Financial Institution by the Department of the Treasury’s CDFI Fund. It promotes the field by combining advocacy, education, communications, and best-practice dissemination through conferences and workshops. CDVCA makes its expertise available to CDVC funds by providing consulting services and technical assistance. CDVCA also manages its own investment vehicle, the Central Fund. The Fund specializes in identifying areas with untapped market potential, investing in rapidly growing businesses across diverse industries.

regulations (the “Implementing Regulations”)² implementing section 13 of the Bank Holding Company Act of 1956 (the “BHC Act”), commonly referred to as the “Volcker Rule.”³

Background

This letter focuses on an issue of particular interest to CDVCA’s members. Specifically, we respond to the Agencies request for comment on whether investments that qualify for Community Reinvestment Act (“CRA”) credit have been avoided because of uncertainty as to whether they qualify for the exclusion from the covered fund definition for public welfare investments (*Question 18*), whether an exclusion from the covered fund definition for CRA-qualifying investments would promote transparency, clarity, consistency with other Federal banking regulations, and what policy considerations weigh in favor of an exclusion (*Question 19*), and whether such investments should be explicitly incorporated within the exclusion from the covered fund definition for public welfare investments (*Question 20*). As described in more detail below, to provide additional clarity and certainty, we recommend that the Agencies explicitly incorporate an exclusion for CRA-qualified investments into the exclusion from the covered fund definition for public welfare investments.

The “public welfare” exclusion is of interest to us because CDVCA’s members, composed of community development venture capital funds (“CDVC Funds”) organized across the United States and globally, often seek to raise capital from banking entities subject to the Volcker Rule. Thus, the ability of banking entities to avail themselves of the public welfare exclusion to invest in CDVC Funds is a critical issue for our members. To this end, we believe the Implementing Regulations should be revised to make clear that CRA-qualifying investments, which would include investments in most CDVC Funds, benefit from the public welfare exclusion and are not subject to the Volcker Rule’s covered funds prohibition. Below, we briefly provide background on this issue and discuss why we support a revision to the Implementing Regulations to make clear that CDVC Funds are excluded from the covered fund definition.

The Volcker Rule prohibits a “banking entity” from acquiring or retaining an ownership interest in or sponsoring a “covered fund.”⁴ The definition of “covered fund” includes, among others, an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (the “1940 Act”), but for section 3(c)(1) or 3(c)(7) of the 1940 Act.⁵ Privately offered funds, such as private equity, hedge and venture capital funds, often rely on those exclusions and, therefore, fall within the covered fund definition. Our member CDVC Funds often fit into this category.

The Implementing Regulations, however, exclude certain “public welfare” issuers from the definition of “covered fund.” Specifically, this exclusion covers issuers (1) that qualify as small business investment companies (or “SBICs”), as defined in section 103(3) of the Small Business Investment Act of 1958, or (2) the business of which is to make investments that are designed

² For purposes of this letter, we cite to the common sections of the Implementing Regulations as adopted by the five implementing agencies (the “Agencies”), which are the Federal Reserve Board (“FRB”), Commodity Futures Trading Commission (“CFTC”), Federal Deposit Insurance Corporation (“FDIC”), Office of the Comptroller of the Currency (“OCC”), and Securities and Exchange Commission (“SEC”). The Implementing Regulations are codified at: 12 CFR part 44 (OCC); 12 CFR part 248 (FRB); 12 CFR part 351 (FDIC); 17 CFR part 75 (CFTC); and 17 CFR part 255 (SEC).

³ 85 Fed. Reg. 12120 (February 28, 2020).

⁴ Implementing Regulations § __.10(a)(1).

⁵ Id. at § __.10(b)(1)(i).

primarily to promote the public welfare.⁶ The latter category appears to be a “catch-all” prong, which the Implementing Regulations do not describe in detail. However, in explaining the public welfare exclusion, the Agencies noted that the exclusion is intended to allow banking entities to make investments, including in funds, to achieve CRA goals.⁷

Subsequent to the adoption of the Implementing Regulations, the OCC, FRB and FDIC stated in regulatory guidance that “community development venture capital companies that promote economic development by financing small businesses” are examples of “qualified investments” for the purpose of meeting CRA obligations.⁸ Prior to this guidance, we felt investments by banking entities in our member CDVC Funds qualified for the exclusion. The subsequent guidance, however, reinforced and made abundantly clear our view that investments in CDVC Funds that are CRA-qualifying investments qualify for the exclusion.

**Banking entities have avoided making investments that are designed to receive credit as CRA-qualified investments because of uncertainty regarding whether the investments would qualify under the public welfare investment funds exclusion.
(Response to Question 18)**

Although this issue is clear to us and many of our banking entity partners, it is not as clear to all our member CDVC Funds nor is it clear among all banking entities with which our members partner. Our members report reluctance by banking entities in investing in CDVC Funds because of a lack of certainty as to whether the funds are “covered funds” subject to the Volcker Rule’s prohibitions. Thus, in light of the subsequent guidance mentioned above, we think this is an ideal opportunity to provide clarity on an issue of importance to our members by revising the Implementing Regulations to clarify that CRA-qualifying investments in funds, including CDVC Funds, qualify for the public welfare exclusion.

**An explicit exclusion for any vehicle that qualifies for CRA credit would promote transparency, clarity, and consistency with other Federal banking regulations.
(Response to Question 19)**

Explicitly including CRA-qualifying investments under the public welfare exclusion would provide much needed clarity to our member CDVC Funds and their banking entity partners. This approach would accomplish three objectives: (1) furthering the Agencies’ original intent for the exclusion to facilitate banking entities’ CRA investments; (2) promoting consistency with other Federal banking regulations; and (3) providing CDVC Funds and banking entities greater clarity and certainty, and thereby promoting the underlying policy objective of the public welfare exclusion.

- *First*, including CRA-qualifying investments under the public welfare exclusion would be consistent with and further the Agencies’ original intent. As noted above, the preamble to the Implementing Regulations notes that investments relying on this exclusion are intended to help

⁶ Id. at §__.10(c)(11).

⁷ 79 Fed. Reg. 5536, 5698 (Jan. 31, 2014) (describing the exclusion as permitting investments in funds designed to promote public welfare and that play a role “in the ability of banking entities, especially community and regional banks, to achieve their financial and [CRA] goals”).

⁸ 81 Fed. Reg. 48506, 48532 (July 25, 2016). A “qualified investment” is defined under the banking agencies’ CRA regulations as a “lawful investment, deposit, membership share, or grant that has as its primary purpose community development.” *See, e.g.*, 12 CFR 228.12(t).

banking entities meet their CRA goals. Explicitly incorporating CRA-qualifying investments into the “public welfare” exclusion, therefore, is entirely consistent with and facilitates the furtherance of the Agencies’ intent.⁹

- *Second*, including CRA-qualifying investments under the public welfare exclusion would promote consistency with other Federal banking regulations. For instance, this exclusion, as acknowledged by the Agencies, would provide consistency with the OCC’s regulations implementing 12 U.S.C. 24 (Eleventh), which provide that investments that receive consideration as CRA-qualified investments also satisfy the requirements to be treated as public welfare investments.¹⁰
- *Third*, and perhaps most fundamental, this addition helps support community development efforts, precisely what the “public welfare” exclusion was designed to promote.¹¹ As noted above, our members report reluctance by banking entities in investing in CDVC Funds because of a lack of certainty as to whether the funds are “covered funds” subject to the Volcker Rule’s prohibitions. That certainty seems to be the only missing ingredient here. Banking entities want to support community development activities and, in this case, have the added incentive of using these investment activities to satisfy CRA requirements. Our member CDVC Funds want to partner with and seek investments from banks, which are an important source of capital and have a vested interest in the local communities that they serve. The ambiguity and lack of precision in the Implementing Regulations ultimately deters innovative and effective ways to support small businesses and low- and moderate-income communities from being developed and tested. The Implementing Regulations should support such activities.

In sum, we think the addition we request provides a workable solution and furthers the purpose of the “public welfare” exclusion, without incentivizing any undue risk-taking or imposing any additional burdens on the Agencies.

The Agencies should incorporate the exclusion for CRA-qualified investments into the exclusion for public welfare investments. (*Response to Question 20*)

Incorporating the exclusion for CRA-qualified investments into the exclusion for public welfare investments would be a straightforward solution and provide the certainty needed to avoid any unintended chilling effect on public welfare investments. This straightforward solution would avoid

⁹ A “qualified investment” is defined under the banking agencies’ CRA regulations as a “lawful investment, deposit, membership share, or grant that has as its primary purpose community development.” *See, e.g.*, 12 CFR 228.12(t).

¹⁰ *See* 12 CFR 24.3 (“A national bank or national bank subsidiary may make an investment directly or indirectly under this part if the investment primarily benefits low- and moderate income individuals, low- and moderate income areas, or other areas targeted by a governmental entity for redevelopment, or the investment would receive consideration under 12 CFR 25.23 [the Community Reinvestment Act regulations] as a ‘qualified investment.’”); 12 CFR 25.12(t) (A “qualified investment” is defined under the banking agencies’ CRA regulations as a “lawful investment, deposit, membership share, or grant that has as its primary purpose community development.”); *see also* 12 CFR 228.12(t) (same).

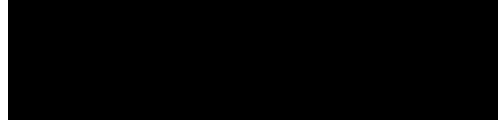
¹¹ 79 Fed. Reg. at 5698 (“The Agencies believe that permitting a banking entity to sponsor and invest in these types of public interest entities will result in banking entities being able to provide valuable expertise and services to these entities and to provide funding and assistance to small businesses and low- and moderate-income communities.”).

risking further complications or unintended consequences that may arise from the establishment of a separate exclusion.

* * *

We appreciate this opportunity to share our suggested improvements to the Implementing Regulations. If you have any questions regarding our comments or would like additional information, please feel free to contact me at ktesdell@cdvca.org. Thank you for your consideration of these comments.

Respectfully submitted,



Kerwin Tesdell
President
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