Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency

December 22, 2020

Revised Statement Regarding Status of Certain Investment Funds and Their Portfolio Investments for Purposes of Regulation O and Reporting Requirements under Part 363 of FDIC Regulations

The Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "federal banking agencies") are issuing this Revised Statement to supersede the *Statement Regarding Status of Certain Investment Funds and Their Portfolio Investments for Purposes of Regulation O and Reporting Requirements under Part 363 of FDIC Regulations*, which they issued on December 27, 2019, and which is set to expire on January 1, 2021.[1] This Revised Statement extends the expiration of the no-action relief previously provided and clarifies eligibility criteria.

Pursuant to section 22(h) of the Federal Reserve Act,[2] extensions of credit by banks[3] to executive officers, directors, and principal shareholders (and related interests of such persons) (collectively "insiders")[4] must comply with certain individual and aggregate lending limits, and large extensions of credit by banks to insiders must be approved in advance by a majority of disinterested directors.[5]

Certain banking firms have raised concerns about the application of Regulation O to companies that sponsor, manage, or advise investment funds and institutional accounts that invest in voting securities of banking organizations (such investment vehicles, collectively

[1] SR 19-16 (Federal Reserve), Bulletin 2019-65 (OCC), and FIL-85-2019 (FDIC).

[2] 12 U.S.C. 375b.

[3] Section 22(h) covers both state and federally chartered insured commercial banks, savings associations, and savings banks. *See* 12 U.S.C. 1828(j)(2); 12 U.S.C. 1468. *See also* 12 CFR part 31 (application of 12 CFR part 215 to national banks and federal savings associations).

[4] Unless otherwise defined, terms used in this statement have the same meaning as under section 22(h) of the Federal Reserve Act and the Board's Regulation O, 12 CFR part 215, which implements the provisions of section 22(h).

[5] Extensions of credit to insiders also must be made on substantially the same terms as those prevailing at the time for comparable transactions and not involve more than normal risk of repayment or present other unfavorable features.

"funds," and, together with the company that sponsors, manages, or advises them, "fund complexes").[6] Over the past few years, fund complexes have acquired, or have approached acquiring, more than 10 percent of a class of voting securities of a wide range of public companies, including banks and non-bank companies. Upon acquiring more than 10 percent of a class of voting securities of a banking organization, a fund complex would be a "principal shareholder" of the bank for purposes of Regulation O (a "principal shareholder fund complex"). Likewise, under Regulation O, any company in which a principal shareholder fund complex owns more than 10 percent of a class of voting securities could, in some instances, be presumed to be a "related interest" of the fund complex ("fund complex-controlled portfolio company"). In that event, the principal shareholder fund complex and its controlled portfolio companies would be considered insiders of the bank under Regulation O. Accordingly, the bank's lending to the principal shareholder fund complex and its fund-complex controlled portfolio companies would be subject to the strict lending limits and other restrictions and standards of Regulation O.

Banks have indicated that the treatment of fund complex-controlled portfolio companies as "related interests" under Regulation O could require the sudden and disruptive unwinding of substantial pre-existing lending relationships and reduce credit availability to a wide swath of financial and non-financial companies.

The Federal Reserve, in consultation with the OCC and the FDIC, continues to actively consider whether to amend Regulation O to address the treatment of extensions of credit to fund complex-controlled portfolio companies under Regulation O. In the interim, the federal banking agencies believe it is appropriate to articulate supervisory expectations with respect to the application of Regulation O in this specific context in order to provide banks flexibility to lend to certain fund complex-controlled portfolio companies, subject to the following eligibility criteria:

(1) With regard to the fund complex:
    a. The fund complex does not directly or indirectly control:
        i. 15 percent or more of any class of voting securities of the bank;[7] or
        ii. 20 percent or more of any class of voting securities of the bank if it has received applicable agency correspondence referencing at least such a percentage,[8] if:

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[6] Such fund complexes are not, and are not affiliated with, a bank holding company or savings and loan holding company.

[7] For purposes of this Regulation O relief only, the federal banking agencies will presume that a fund complex that (1) has provided passivity commitments to the Board in connection with a legal opinion issued by the Board's General Counsel, (2) has provided a rebuttal of control to the OCC, or (3) has entered into a passivity agreement with the FDIC, in each case permitting the fund complex to directly or indirectly acquire up to 15 percent of the shares of a bank without making a filing under the Change in Bank Control Act, Bank Holding Company Act, or Home Owners' Loan Act meets the eligibility criteria with respect to its investment in the bank.

[8] Applicable agency correspondence means that a fund complex (1) has provided passivity commitments to the Board in connection with a legal opinion issued by the Board's General

1. No individual fund in the fund complex owns more than 10 percent of any class of voting securities of the bank. For this purpose, two or more funds that share the same or substantially the same investment objective and asset composition are treated as an individual fund; and
2. Non-index funds in the fund complex do not collectively own more than 10 percent of any class of voting securities of the bank.[9]

b. The fund complex does not have or seek to have any representative serve as an officer, agent, or employee of the bank; and
c. The fund complex does not exercise or attempt to exercise a controlling influence over the management or policies of the bank, including attempting to influence the dividend polices, loan, credit, or investment decisions or policies, pricing of services, personnel decisions, operations activities, or any other similar activities or decisions of the bank.

(2) With regard to the bank, the bank does not knowingly make an extension of credit to a fund complex-controlled portfolio company, unless the terms of such extension of credit are on substantially the same terms as those prevailing for comparable transactions with unaffiliated third parties and do not involve more than normal risk of repayment or present other unfavorable features.

Therefore, while the federal banking agencies continue to consider whether to amend Regulation O to address these issues, the federal banking agencies would not take action against banks or principal shareholder fund complexes with respect to extensions of credit by the banks to fund complex-controlled portfolio companies that otherwise would violate Regulation O, provided the fund complexes and banks satisfy the foregoing criteria.[10] The relief provided

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Counsel, (2) has provided a rebuttal of control to the OCC, or (3) has entered into a passivity agreement with the FDIC, in each case permitting the fund complex to directly or indirectly acquire up to 20 percent or more of the shares of a bank without making a filing under the Bank Holding Company Act, or Home Owners' Loan Act and with non-objection to a notice filed under the Change in Bank Control Act.

[9] For purposes of this Regulation O relief only, an index fund is a fund that seeks to track the performance of a third party reference index by buying and holding all or a representative sample of the securities in the index in approximately the same proportions as their representation in the index. A third-party reference index is an index not controlled by the principal shareholder fund complex.

[10] This relief does not cover a fund complex-controlled portfolio company that may be an insider of a bank for a reason other than its status as a related interest of a principal shareholder fund complex, such as by virtue of the portfolio company's status as a principal shareholder of the bank. In addition, this relief does not preclude a person from seeking rebuttal of the presumption of control pursuant to 12 CFR 215.2(c)(4).

herein covers extensions of credit to fund complex-controlled portfolio companies only, and does not extend to any extension of credit to principal shareholder fund complexes. This no-action relief will apply until January 1, 2022, unless amended, extended, or superseded in writing prior to that time.[11]

Principal shareholder fund complexes and banks that satisfy the eligibility criteria of this Revised Statement and receive Regulation O relief continue to be subject to all other applicable laws and regulations not addressed in this Revised Statement. This Revised Statement does not insulate a principal shareholder fund complex or bank from actions the federal banking agencies may take with respect to any other violations of law or regulation or from safety and soundness criticisms related to loans made or actions taken pursuant to this relief.

The federal banking agencies remind fund complexes that federal securities laws require the public disclosure of beneficial ownership stakes under various conditions. These disclosure obligations may change based on several factors, including whether the investing fund complex is acquiring the securities with the purpose or effect of "changing or influencing the control of the issuer."[12] Fund complexes should consult the rules and guidance of the Securities and Exchange Commission (SEC) to determine their disclosure obligations given the facts and circumstances around whether an investor or group would be viewed as acquiring or holding the securities with the purpose or effect of changing or influencing the control of an issuer under the SEC's rules.

[11] The federal banking agencies will not take action against an insured depository institution (IDI) for failure to report, for purposes of section 363.2 of the FDIC's Regulations (12 CFR 363.2), extensions of credit by IDIs to fund complex-controlled portfolio companies that otherwise would violate Regulation O but are covered by this Regulation O no-action position.

[12] This includes whether investors (including legally distinct investors acting as a "group") are required to file on Schedule 13D or the short-form Schedule 13G and the timing for doing so. *See* 17 CFR 240.13d-1(a), 240.13d-1(b) and 240.13d-1(c). Other factors include whether (1) in the case of qualified institutional investors, the investor "acquired such securities in the ordinary course of [] business;" and (2) in the case of passive investors, the investor "is not directly or indirectly the beneficial owner of 20 percent or more of the class" of securities.