Commodity Futures Trading Commission
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CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Question Regarding Certain Requirements under Section 13 of the Bank Holding Company Act of 1956 and Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act added a new section 13 to the Bank Holding Company Act of 1956 ("BHC Act"), commonly referred to as the Volcker rule, that generally prohibits insured depository institutions and any company affiliated with an insured depository institution from engaging in proprietary trading and from acquiring or retaining ownership interests in, sponsoring, or having certain relationships with a hedge fund or private equity fund. These prohibitions are subject to a number of statutory exemptions, restrictions, and definitions.

The Commodity Futures Trading Commission ("CFTC") is working closely with the other agencies charged with implementing the requirements of section 13, including the Federal Reserve Board, Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission (each an "Agency" and collectively with the CFTC "the Agencies"). While this frequently asked question ("FAQ") applies to banking entities for which the CFTC has jurisdiction under section 13 of the BHC Act, it has been developed by staffs of the Agencies and substantively identical versions will appear on the public websites of each Agency.

Seeding Period Treatment for Registered Investment Companies and Foreign Public Funds

1. Is a registered investment company or a foreign public fund a banking entity subject to section 13 of the BHC Act and implementing rules during its seeding period?

The rule implementing section 13 of the BHC Act and the accompanying preamble make clear that a registered investment company ("RIC") and a foreign public fund ("FPF") are not covered funds for purposes of the statute or implementing rules.[1] The preamble to the implementing rules also recognize that a banking entity may own a significant portion of the shares of a RIC or FPF during a brief period during which the banking entity is testing the fund's investment strategy, establishing a track record of the fund's performance for marketing purposes, and attempting to distribute the fund's shares (the so-called seeding period).[2]

Staff of the Agencies would not advise the Agencies to treat a RIC or FPF as a banking entity under the implementing rules solely on the basis that the RIC or FPF is established with a limited seeding period, absent

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[1] See §75.10(c)(1) (excluding a FPF from the definition of covered fund); §75.10(c)(12) (excluding from the definition of covered fund an issuer that is a RIC under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8)).

[2] See 79 FR at 5676-77; see also §75.10(c)(12) (excluding from the definition of covered fund an issuer formed and operated pursuant to a written plan to become a RIC); FAQ #5, available at: http://www.cftc.gov/ucm/groups/public/@externalaffairs/documents/file/volckerrule_faq060914.pdf (stating that "it would be appropriate that an issuer that will become an excluded foreign public fund be treated during its seeding period the same as an issuer that will become an excluded RIC").

other evidence that the RIC or FPF was being used to evade section 13 and the implementing rules. The staffs of the Agencies understand that the seeding period for an entity that is a RIC or FPF may take some time, for example, three years, the maximum period of time expressly permitted for seeding a covered fund under the implementing rules.[3] The seeding period generally would be measured from the date on which the investment adviser or similar entity begins making investments pursuant to the written investment strategy of the fund.[4] Accordingly, staff of the Agencies would not advise the Agencies to treat a RIC or FPF as a banking entity solely on the basis of the level of ownership of the RIC or FPF by a banking entity during a seeding period or expect an application to be submitted to the Board to determine the length of the seeding period.[5]

[3] See §75.10(c)(12); §75.12(a)(2)(i)(B)); §75.12(e); § 75.20(e).

[4] See §75.12(a)(2) (describing seeding periods for a covered fund that is not issuing asset-backed securities).

[5] The final rule requires a vehicle that is a covered fund (as opposed to a RIC or a FPF) during its seeding period and that is formed and operated pursuant to a written plan to become a RIC to apply to the Board for an extension of the one-year seeding period already granted to such covered funds. See §75.10(c)(12); in §75.12(a)(2)(i)(B)); §75.12(e); §75.20(e). The implementing rule also excludes from the definition of covered fund an issuer that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act and has not withdrawn that election ("SEC-regulated BDC"), or that is formed and operated pursuant to a written plan to become a business development company as described in §75.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 company. See §75.10(c)(12)(iii). The staffs, consistent with the final rule's parallel treatment of RICs, FPFs, and SEC-regulated BDCs, also would not advise the Agencies to treat an SEC-regulated BDC as a banking entity solely on the basis of the level of ownership of the SEC-regulated BDC by a banking entity during a seeding period.