

Statement of Policy Regarding the Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities

Introduction

On February 9, 2011, the Board issued its final rule to implement the provisions of section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ that grant banking entities and nonbank financial companies supervised by the Board a period of time to conform their activities and investments with the prohibitions and restrictions imposed by that section on proprietary trading activities and on hedge fund and private equity funds activities. Subsequently, the Board received a number of requests for clarification of the manner in which this conformance period would apply to various activities and investments covered by the requirements of section 619 of the Dodd-Frank Act. The Board is issuing this interpretation to address this question.

As more fully explained in this statement, the Board confirms that banking entities by statute have two years from July 21, 2012, to conform all of their activities and investments to section 619, unless that period is extended by the Board. During the conformance period, banking entities should engage in good-faith planning efforts, appropriate for their activities and investments, to enable them to conform their activities and investments to the requirements of section 619 and final implementing rules by no later than the end of the conformance period. This may include complying with reporting or recordkeeping requirements if such elements are included in the final rules

¹ See Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities, 76 FR 8265 (Feb. 14, 2011).

implementing section 619 and the agencies determine such actions are required during the conformance period.

Background

Section 619 of the Dodd-Frank Act added a new section 13 to the Bank Holding Company Act (“BHC Act”) that imposes certain prohibitions and requirements on a banking entity² and a nonbank financial company supervised by the Board³ that engages in proprietary trading and has certain interests in, or relationships with, a hedge fund or private equity fund (each a “covered fund”).⁴ As required by section 13(b)(2) of the BHC Act, the Board, the Office of the Comptroller of the Currency (“OCC”), Federal Deposit Insurance Corporation (“FDIC”), and Securities and Exchange Commission (“SEC”) in October 2011 invited the public to comment on proposed rules implementing that section’s prohibitions and requirements.⁵ Those proposed rules may be found at 76 FR 68846 et seq. (Nov. 7, 2011). The period for filing public comments on this proposal

² The term “banking entity” includes any insured depository institution (other than certain limited purpose trust institutions), any company that controls an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing. See 12 U.S.C. 1851(h)(1); see also Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 FR 68846, 68944 (Nov. 7, 2011).

³ A “nonbank financial company supervised by the Board” is a nonbank financial company or other company that the Financial Stability Oversight Council (“Council”) has determined, under section 113 of the Dodd-Frank Act, shall be subject to supervision by the Board and prudential standards. See 12 U.S.C. 1851(h)(3); 76 FR at 68945.

⁴ See 12 U.S.C. 1851. Section 13 of the BHC Act defines the terms “hedge fund” and “private equity fund” as any issuer that would be an investment company, as defined under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), but for section 3(c)(1) or 3(c)(7) of that Act, or any such similar funds as the appropriate Federal banking agencies, the SEC, and the CFTC may, by rule, determine should be treated as a hedge fund or private equity fund. See 12 U.S.C. 1851(h)(2); see also 76 FR at 68950.

⁵ See 12 U.S.C. 1851(b)(2).

was extended for an additional 30 days, until February 13, 2012. On January 11, 2012, the CFTC requested comment on a substantially similar proposed rule to implement section 13 of the BHC Act and invited public comment through April 16, 2012.⁶

Section 13(c)(6) of the BHC Act required the Board, acting alone, to adopt rules regarding the conformance periods for activities and investments restricted by section 13.⁷ The Board issued its final conformance rule (“Conformance Rule”) on February 9, 2011.⁸

Board Guidance

After adoption by the Board of the Conformance Rule, a number of commenters on the interagency proposed rules to implement section 13 requested advice regarding the period of time a banking entity would have to conform its activities and investments to the requirements of section 13 and the implementing rules and whether certain activities would be prohibited prior to the expiration of the conformance period.⁹ In particular, commenters sought confirmation that the Conformance Rule would allow a banking entity the full period permitted by statute to conform all of its investments and activities to section 13 and the final implementing rules. In addition, commenters sought

⁶ This proposed rule may be found at 77 FR 8332 (Feb. 14, 2012).

⁷ See 12 U.S.C. 1851(c)(6).

⁸ See 76 FR 8264. The Board proposed to relocate the Board’s Conformance Rule, which was added as §§ 225.180-182 of the Board’s Regulation Y, as subpart E of the Board’s proposed rule to implement the substantive portions of section 13 of the BHC Act. See 76 FR at 68850, 68968. As part of that proposed rule, the Board also sought public comment on whether any part of the Conformance Rule should be revised. See id. at 68923.

⁹ See, e.g., comment letters to the agencies from the Securities Industry and Financial Markets Association et al., “Comment Letter on the Notice of Proposed Rulemaking Implementing the Volcker Rule - Proprietary Trading” (Feb. 13, 2011); The Bank of New York Mellon Corporation et al. (Feb. 13, 2012); and Credit Suisse, “Covered Funds Issues in the Volcker Rule Proposal” (Feb. 13, 2012).

confirmation that activities conducted and investments made during the conformance period would not be subjected to the requirements of the implementing rules during the conformance period.

Section 13 of the BHC Act generally provides that, unless the period for conformance is extended by the Board, a banking entity must conform its activities and investments to the prohibitions and requirements of that section and any final implementing rules no later than 2 years after the statutory effective date of section 13.¹⁰ The effective date of section 13 is July 21, 2012.¹¹

As noted in the issuing release for the Conformance Rule and the legislative history of section 13, the conformance period for banking entities is intended to give markets and firms an opportunity to adjust to the prohibitions and requirements of that section and any implementing rules adopted by the agencies.¹² Consistent with this purpose and the statute, the Conformance Rule provides each banking entity with a

¹⁰ See 12 U.S.C. 1851(c)(2); see also proposed 12 CFR 248.31(a), 76 FR 68969. Pursuant to section 13(c)(2) of the BHC Act, the Board may, by rule or order, extend the two-year conformance period provided in the Conformance Rule for not more than one year at a time, with a maximum of three one-year extensions, if the Board determines that such an extension is consistent with the purposes of this section and would not be detrimental to the public interest. See 12 U.S.C. 1851(c)(2), proposed 12 CFR 248.31(a)(3), 76 FR at 68969. The Board may further extend the period of time within which a banking entity may acquire or retain an ownership interest in, or otherwise provide additional capital to, an illiquid fund, provided that certain criteria are satisfied. See 12 U.S.C. 1851(c)(3), proposed 12 CFR 248.31(b), 76 FR at 68969.

¹¹ Section 13(c)(1) of the BHC Act provides that section 13 shall take effect on the earlier of (i) 12 months after the date of issuance of final rules implementing that section, or (ii) 2 years after the date of enactment of section 13, which is July 21, 2012. See 12 U.S.C. 1851(c)(1). Because the agencies did not issue final rules implementing section 13 of the BHC Act by July 21, 2011, section 13 of the BHC Act specifies that the effective date for its provisions will be July 21, 2012. Id.

¹² See 76 FR at 8265 (citing 156 Cong. Reg. S5898 (daily ed. July 15, 2010) (statement of Sen. Merkley)).

period of 2 years after the effective date of section 13 (i.e., until July 21, 2014) in which to fully conform its activities and investments to the prohibitions and requirements of section 13 and the final implementing rules, unless that period is extended by the Board (the “conformance period”). The Conformance Rule also provides a nonbank financial company supervised by the Board with 2 years after the date the company becomes a nonbank financial company supervised by the Board to comply with any applicable requirements of section 13 of the BHC Act, including any applicable capital requirements or quantitative limitations adopted thereunder, unless that period is extended by the Board.¹³

Under the Conformance Rule, all proprietary trading activity conducted by each banking entity must conform to the prohibitions and requirements of section 13 of the BHC Act and any final implementing rules by no later than the end of the conformance period. Similarly, all activities, investments and transactions with or involving a covered fund, including a covered fund organized and offered or sponsored by the banking entity, must conform to section 13 of the BHC Act and final implementing rules by no later than the end of the relevant conformance period.

During the conformance period, every banking entity that engages in an activity or holds an investment covered by section 13 is expected to engage in good-faith efforts, appropriate for its activities and investments, that will result in the conformance of all of its activities and investments to the requirements of section 13 of the BHC Act by no later

¹³ See proposed 12 CFR 248.32, 76 FR 68970. As noted in the October 2011 proposed rule to implement section 13 of the BHC Act, the Board has not proposed at this time to require any additional capital requirements, quantitative limits, or other restrictions on nonbank financial companies pursuant to section 13, in light of the fact that the Council has not yet finalized the criteria for designation of, nor yet designated, any nonbank financial company. See 76 FR at 68847.

than the end of the conformance period. This includes evaluating the extent to which the banking entity is engaged in activities and investments that are covered by section 13 of the BHC Act, as well as developing and implementing a conformance plan that is as specific as possible about how the banking entity will fully conform all of its covered activities and investments with section 13 of the BHC Act and any final implementing rules by July 21, 2014, unless that period is extended by the Board. These good-faith efforts should take account of the statutory provisions in section 13 of the BHC Act as they will apply to the activities and investments of the banking entity at the end of the conformance period as well as any applicable implementing rules adopted in final by the primary financial regulatory agency for the banking entity. Good-faith conformance efforts may also include complying with reporting or recordkeeping requirements if such elements are included in the final rules implementing section 13 of the BHC Act and the agencies determine such actions are required during the conformance period.

Nothing in this guidance restricts in any way the authority of any agency to use its supervisory or other authority to limit any activity the agency determines to be unsafe or unsound or otherwise in violation of law.