

## **FEDERAL RESERVE SYSTEM**

### **12 CFR Part 225**

#### **Regulation Y; Docket No. R-1397**

#### **RIN 7100-AD58**

### **CONFORMANCE PERIOD FOR ENTITIES ENGAGED IN PROHIBITED PROPRIETARY TRADING OR PRIVATE EQUITY FUND OR HEDGE FUND ACTIVITIES.**

**AGENCY:** Board of Governors of the Federal Reserve System (“Board”).

**ACTION:** Final rule.

**SUMMARY:** The Board is adopting a final rule to implement the conformance period during which banking entities and nonbank financial companies supervised by the Board must bring their activities and investments into compliance with the prohibitions and restrictions on proprietary trading and relationships with hedge funds and private equity funds imposed by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Section 619 is commonly referred to as the “Volcker Rule.” The final rule is similar to the proposal issued for comment in November 2010. The Board, however, has incorporated a number of changes to the final rule to address issues raised by public commenters, to reduce potential regulatory burdens, and to clarify application of the rule.

**DATES:** The final rule will become effective on April 1, 2011.

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#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background.**

The Dodd-Frank Act was enacted on July 21, 2010.<sup>1</sup> Section 619 of the Dodd-Frank Act adds a new section 13 to the Bank Holding Company Act of 1956 (“BHC Act”) (to be codified at 12 U.S.C. § 1851) that generally prohibits banking entities<sup>2</sup> from engaging in proprietary trading

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> The term “banking entity” is defined in section 13(h)(1) of the BHC Act, as amended by section 619 of the Dodd-Frank Act. See 12 U.S.C. § 1851(h)(1). The term means any insured depository institution (other than certain limited-purpose trust institutions), any company that controls an insured depository institution, any company that is

or from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund.<sup>3</sup> The new section 13 of the BHC Act also provides that nonbank financial companies supervised by the Board that engage in such activities or have such investments shall be subject to additional capital requirements, quantitative limits, or other restrictions.<sup>4</sup> These prohibitions and other provisions of section 619 are commonly known, and referred to herein, as the “Volcker Rule.”

The Board and several other agencies have responsibilities with respect to the Volcker Rule. As required by the Dodd-Frank Act, the FSOC recently issued a study of the Volcker Rule, which included several recommendations regarding the implementation of its prohibitions and restrictions.<sup>5</sup> As a general matter, authority for developing and adopting regulations to implement the prohibitions and restrictions of the Volcker Rule is divided between the Board, the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the SEC and the CFTC in the manner provided in section 13(b)(2) of the BHC Act.<sup>6</sup> The Board and these other agencies are directed to adopt implementing rules not later than 9 months after completion of the FSOC’s study.<sup>7</sup> The restrictions and prohibitions of the Volcker Rule become effective 12 months after issuance of final rules by the agencies, or July 21, 2012, whichever is earlier.

The Board, however, is solely charged with adopting rules to implement the provisions of the Volcker Rule that provide a banking entity or a nonbank financial company supervised by the Board a period of time after the effective date of the Volcker Rule to bring the activities, investments, and relationships of the banking entity or company that were commenced, acquired, or entered into before the Volcker Rule’s effective date into compliance with the Volcker Rule

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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.

<sup>3</sup> The Volcker Rule defines the terms “hedge fund” and “private equity fund” as an 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 Securities and Exchange Commission (“SEC”), and the Commodity Futures Trading Commission (“CFTC”) may, by rule, determine should be treated as a hedge fund or private equity fund. *See* 12 U.S.C. § 1851(h)(2).

<sup>4</sup> *See* 12 U.S.C. § 1851(a)(2) and (f)(4). A “nonbank financial company supervised by the Board” is a nonbank financial company or other company that has been designated by the Financial Stability Oversight Council (“FSOC”) under section 113 of the Dodd-Frank Act as requiring supervision and regulation by the Board on a consolidated basis because of the danger such company may pose to the financial stability of the United States.

<sup>5</sup> *See* FSOC, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds (January 18, 2011), available at <http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf>.

<sup>6</sup> *See* 12 U.S.C. § 1851(b)(2). The Secretary of the Treasury, as Chairperson of the FSOC, is responsible for coordinating the agencies’ rulemakings under the Volcker Rule. *See id.* at § 1851(b)(2)(B)(ii).

<sup>7</sup> *See id.* at § 1851(b)(2)(A).

and the agencies' implementing regulations.<sup>8</sup> This period is intended to give markets and firms an opportunity to adjust to the Volcker Rule.<sup>9</sup>

In November 2010, the Board requested public comment on a proposed rule that would implement the conformance period provisions of the Volcker Rule.<sup>10</sup> The proposed rule included the general two-year conformance period available to all banking entities and nonbank financial companies supervised by the Board, as well as the provisions of the Volcker Rule that allow the Board to extend, by rule or order, this two-year period by up to three, one-year periods.<sup>11</sup> In addition, the proposal implemented the special five-year extended transition period available for certain qualifying investments in hedge funds and private equity funds that are "illiquid funds."<sup>12</sup> The proposed rule also defined certain terms related to the conformance period, specified how an application or request for extension should be submitted, and identified the factors that the Board may consider when evaluating such a request. The public comment period on the proposed rule closed on January 10, 2011.

## II. Overview of Comments.

The Board received 12 comments on the proposed rule. Commenters included financial trade associations, banking entities, individuals, and a member of Congress. In general, commenters supported the proposed rule but recommended one or more changes to specific provisions of the proposal. A majority of the commenters focused on the 5-year extended transition period available to banking entities to the extent necessary to fulfill a contractual obligation in place on May 1, 2010, to take or retain an interest in a hedge fund or private equity fund that qualifies as an "illiquid fund" under the Volcker Rule. For example, some commenters suggested that the Board broaden its definition of "illiquid assets," which is used in determining whether a hedge fund or private equity fund is an illiquid fund. Others requested that the Board lower the proposed rule's requirement that at least 75 percent of a fund's assets be invested in "illiquid assets" (either as of May 1, 2010, or on a future date) in order for the fund to qualify for the extended transition period. Many commenters also asserted that the proposed rule's definition of when a banking entity has a "contractual obligation" to invest or remain invested in an illiquid fund was too narrow and would limit the number of hedge funds and private equity funds that could take advantage of the extended transition period for illiquid funds.

Some commenters also asked that the Board, in the final rule, address several aspects of the Volcker Rule that were not covered by the proposal. For instance, some commenters requested that the final rule state that section 13 of the BHC Act does not prohibit insurance companies from conducting their normal business operations, or does not prohibit foreign companies from engaging in prohibited proprietary trading in the securities of U.S. companies if such trades were booked outside of the United States.

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<sup>8</sup> See *id.* at § 1851(c)(6).

<sup>9</sup> See 156 Cong. Rec. S5898 (daily ed. July 15, 2010) (Statement of Senator Merkley).

<sup>10</sup> See 75 FR 72741 (Nov. 26, 2010).

<sup>11</sup> 12 U.S.C. § 1851(c)(2).

<sup>12</sup> 12 U.S.C. § 1851(c)(3), (c)(4), and (h)(7).

Additionally, some commenters addressed the procedural aspects of the proposed rule governing the receipt and review of applications for an extension of the conformance period. For example, some commenters requested that the rule permit the Board to grant all possible extensions to a banking entity at a single time. Other commenters suggested that the final rule permit banking entities to submit a request for extension well in advance of the date an extension might be needed, and expressly provide for a standard time period for the Board to review any extension requests. The comments received on the proposed rule are discussed in greater detail in the following parts of this Supplementary Information.

### **III. Explanation of Final Rule**

In developing this final rule, the Board has carefully considered the comments received on the proposal, as well as the language and legislative history of the Volcker Rule, and the Board's experience in supervising and regulating banking entities' trading activities and investments in, or relationships with, hedge funds and private equity funds. The Board also consulted with the Department of the Treasury, the OCC, the FDIC, the SEC, and the CFTC.

After this review, the Board has determined to adopt a final rule that is substantially similar to the proposed rule. However, in response to comments, the Board has modified the proposed rule in a number of respects. For example, the Board has—

- Expanded the conditions under which an asset may be considered an “illiquid asset” to include situations where an asset is subject to a contractual restriction on sale or redemption for a period of 3 years or more;
- Broadened the types of documents that may be considered in determining whether a hedge fund or private equity fund is “contractually committed” to principally invest in illiquid assets or whether a banking entity that has sponsored a hedge fund or private equity fund is “contractually obligated” to invest or remain invested in the fund;
- Extended, from 90 days to 180 days, the number of days in advance a request for an extension of the conformance period by a specific company must be filed with the Board; and
- Clarified that the Board expects to act on extension requests within 90 days from receipt of a complete record.

These changes as well as the Board's responses to the comments received are discussed in greater detail below.

The final rule does not address definitional or other aspects of the Volcker Rule that are subject to, or more appropriately addressed as part of, the separate interagency rulemaking to be conducted under section 13(b)(2) of the BHC Act.<sup>13</sup> For example, the final rule incorporates without modification the definitions of “banking entity,” “hedge fund,” and “private equity fund” contained in the Dodd-Frank Act. In addition, the final rule does not address several topics suggested by commenters – such as, for example, the general application of the Volcker Rule to banking entities that are insurance companies or foreign entities, or whether banking entities

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<sup>13</sup> See *id.* at § 1851(b)(2).

should also have an extended period of time to conform investments in funds that do not qualify for the statute’s extended transition period for illiquid funds – that are appropriately addressed through the coordinated interagency rulemaking process provided for in section 13(b)(2) of the BHC Act.<sup>14</sup> The Board expects to review the final rule after completion of the interagency rulemaking process under section 13(b)(2) to determine whether modifications or adjustments to the rule are appropriate in light of the final rules adopted under that section.

#### **A. General Conformance Period.**

The prohibitions and restrictions of the Volcker Rule do not take effect until the earlier of July 21, 2012, or 12 months after the issuance of final regulations by the rulewriting agencies under section 13(b)(2) of the BHC Act. However, in order to allow the markets and firms to adjust to these prohibitions and restrictions, the Volcker Rule, by its terms and without any action by the Board, provides banking entities and nonbank financial companies supervised by the Board an additional conformance period during which the entity or company can wind down, sell, or otherwise conform its activities, investments, and relationships to the requirements of the Volcker Rule. Under the statute, this conformance period generally extends through the date that is 2 years after the date on which the prohibitions become effective or, in the case of a nonbank financial company supervised by the Board, 2 years after the company is designated by the FSOC for supervision by the Board, if that period is later.

Section 225.181(a) of the final rule implements these provisions. In addition, section 225.181(a)(2) of the final rule clarifies how the conformance period applies to a company that first becomes a banking entity after July 21, 2010 (the date of enactment of the Dodd-Frank Act), because, for example, the company acquires or becomes affiliated with an insured depository institution for the first time. In these circumstances, the restrictions and prohibitions of the Volcker Rule would first become effective with respect to the company only at the time it became a banking entity. Accordingly, the final rule (like the proposal) provides that such a company generally must bring its activities, investments, and relationships into compliance with the requirements of the Volcker Rule before the later of: (i) the date the Volcker Rule’s prohibitions would otherwise become effective with respect to the company under section 225.181(a)(1) of the rule; or (ii) 2 years after the date on which the company first becomes a banking entity. Thus, for example, a company that first becomes a banking entity on January 1, 2015, would have until January 1, 2017, to bring its activities and investments into conformance with the requirements of section 13 of the BHC Act and its implementing regulations. In this way, the final rule provides comparable treatment to “new” banking entities and nonbank financial companies supervised by the Board, and is consistent with the manner in which newly established bank holding companies are treated for purposes of the nonbanking restrictions under section 4 of the BHC Act.<sup>15</sup>

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<sup>14</sup> See, e.g., 12 U.S.C. § 1851 (d)(1)(F), (H), (I), and (J).

<sup>15</sup> See 12 U.S.C. § 1843(a)(2).

## **B. Extension of Conformance Period.**

The Volcker Rule also permits the Board, by rule or by order, to extend the generally available two-year conformance period by up to three additional one-year periods, for an aggregate conformance period of 5 years.<sup>16</sup> In order to grant any extension, the Board must determine that the extension is consistent with the purposes of the Volcker Rule and would not be detrimental to the public interest.<sup>17</sup> The process and standards for obtaining a one-year extension are discussed in Part III.E of this Supplementary Information.

Several commenters requested that the Board modify the rule to allow the Board to grant a banking entity at one time all three of the one-year extensions potentially available under section 13(c)(2) of the BHC Act.<sup>18</sup> One commenter, however, suggested that multiple extensions of the conformance period would not be in keeping with the purpose of the Volcker Rule and urged the Board to restrict extensions to a single one-year general extension (with potentially one additional one-year extension in the case of an illiquid fund investment). Section 13(c)(2) of the BHC Act specifically provides that the “Board may, by rule or order, extend [the general two-year conformance period] for not more than one year at a time,” with a maximum of three, one-year extensions.<sup>19</sup> Accordingly, the Board has modified the rule to clarify that the Board may only grant up to three separate one-year extensions of the general conformance period (and may not grant all three one-year extensions at a single time).

Several commenters requested that the Board clarify that the final rule provides a conformance period for both investments in hedge funds and private equity funds and activities prohibited under the Volcker Rule. The general conformance period (including any extension thereof) is available to both banking entities and nonbank financial companies supervised by the Board for activities commenced prior to the Volcker Rule’s effective date and applies to any activities, investments and relationships that may be prohibited or restricted by the Volcker Rule.

## **C. Extended Transition Period for Illiquid Funds.**

Section 619 of the Dodd-Frank Act includes a special provision to address the difficulty banking entities may experience in conforming investments in illiquid funds. This provision expressly permits a banking entity to request the Board’s approval for an additional extension of up to 5 years in order to permit the banking entity to meet contractual commitments in place as of May 1, 2010, to a hedge fund or private equity fund that qualifies as an “illiquid fund.” Specifically, the statute provides that the Board may extend the period during which a banking entity may take or retain an ownership interest in, or otherwise provide additional capital to, an illiquid fund, but only if the extension is necessary to allow the banking entity to fulfill a contractual obligation that was in effect on May 1, 2010.<sup>20</sup> The statute also provides that any

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<sup>16</sup> 12 U.S.C. § 1851(c)(2).

<sup>17</sup> Id.

<sup>18</sup> If the extension request pertained to an investment in an illiquid fund, some commenters also requested that the rule allow the Board, at the same time, to also approve a five-year extended transition period for the investment.

<sup>19</sup> See 12 U.S.C. § 1851(c)(2) (emphasis added).

<sup>20</sup> Id. at § 1851(c)(3)(A).

extended transition period granted with respect to an illiquid fund automatically terminates on the date during any such extension on which the banking entity is no longer under a contractual obligation to invest in, or provide capital to, the illiquid fund.

As provided in the Volcker Rule, the Board may grant a banking entity only one extended transition period with respect to any illiquid fund, which may not exceed 5 years.<sup>21</sup> Any extended transition period granted may be in addition to the conformance period available under other provisions of the Volcker Rule.<sup>22</sup> The purpose of this extended transition or “wind-down” period for investments in an illiquid fund is to minimize disruption of existing investments in illiquid funds and permit banking entities to fulfill existing obligations to illiquid funds while still steadily moving banking entities toward conformance with the prohibitions and restrictions of the Volcker Rule.<sup>23</sup>

Section 225.181(b) of the final rule implements the statute’s extended transition period for illiquid funds.<sup>24</sup> As a general matter, and consistent with the terms of the Volcker Rule, the final rule requires that a banking entity’s investment in, or relationship with, a hedge fund or private equity fund must meet two sets of criteria to qualify for the statute’s extended transition period. The first set of criteria focuses on the nature, assets and investment strategy of the hedge fund or private equity fund itself. The second set of criteria focuses on the terms of the banking entity’s investment in the hedge fund or private equity fund.

#### 1. Fund-focused Criteria.

As noted above, the extended transition period under section 13(c)(3) of the BHC Act is available only with respect to investments made in an “illiquid fund,” and then only with respect to investments in or obligations to these funds made as of May 1, 2010. In accordance with the language of the Volcker Rule, the final rule retains the definition of an “illiquid fund” to mean a hedge fund or private equity fund that: (i) as of May 1, 2010, was principally invested in illiquid

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<sup>21</sup> The statute provides that a banking entity may apply for a single extension with respect to an illiquid fund, and that such extension may not exceed 5 years. In light of the statutory language, and as noted in the notice of proposed rulemaking, the Board retains the right to grant an extended transition period of less than 5 years if, based on all the facts and circumstances, it determines a limited extension is appropriate.

<sup>22</sup> Id. at § 1851(c)(3)(B).

<sup>23</sup> See 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Merkley).

<sup>24</sup> Section 13(h)(7)(B) of the BHC Act provides that, for purposes of the definition of an “illiquid fund,” the term “hedge fund” shall not include a “private equity fund,” as such term is used in section 203(m) of the Investment Advisors Act of 1940 (15 U.S.C. 80b-3(m)). See 12 U.S.C. § 1851(h)(7)(B). However, section 203(m) of the Investment Advisors Act, as added by section 408 of the Dodd-Frank Act, does not contain a definition of, nor does it use the term, “private equity fund.” Moreover, as the Board noted in the proposal, Congress’ intent in adopting this exclusion is unclear. For example, a fund that invests primarily in nonpublic portfolio companies, which are commonly referred to in the investment community as “private equity funds,” appears to be the type of fund that the Volcker Rule intended to potentially qualify as an “illiquid fund.” The Board does not believe that it is necessary to resolve the ambiguity surrounding this provision because the exclusion would not have any effect on the ability of a fund to qualify as an illiquid fund. This is because the Volcker Rule defines a “hedge fund” and a “private equity fund” synonymously. 12 U.S.C. § 1851(h)(2). Thus, any illiquid fund that would have been excluded from the definition of “hedge fund” because it met the missing definition of a “private equity fund” in the Investment Advisors Act could still qualify for the extended conformance period afforded to illiquid funds as a “private equity fund” under the Volcker Rule itself.

assets, or was invested in, and contractually committed to principally invest in, illiquid assets; and (ii) makes all investments pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets.<sup>25</sup> In determining how to implement the definition of an illiquid fund, the Board has considered, among other things, the terms of the statute, as well as public comments submitted on the proposed rule, information (including confidential supervisory information) concerning the terms of investments in hedge funds or private equity funds, the characteristics of liquid and illiquid assets, and the ability of a fund to divest assets held by the fund.

a. “Illiquid Asset.”

The final rule, like the proposal, generally defines an “illiquid asset” as any asset that is not a liquid asset. In turn, the final rule defines “liquid assets” to include:

- cash or cash equivalents;
- any asset that is traded on a recognized, established exchange, trading facility or other market on which there exist independent, bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined for the asset almost instantaneously;
- any asset for which there are bona fide, competitive bid and offer quotations in a recognized inter-dealer quotation system or similar system or for which multiple dealers furnish bona fide, competitive bid and offer quotations to other brokers and dealers on request;
- any asset the price of which is quoted routinely in a widely disseminated publication that is readily available to the general public or through an electronic service that provides indicative data from real-time financial networks;
- any asset with an initial term of one year or less and the payments on which at maturity may be settled, closed-out, or paid in cash or one or more other liquid assets described above; and
- any other asset that the Board determines, based on all the facts and circumstances, is a liquid asset.<sup>26</sup>

These standards are designed to capture the wide range of instruments and assets (or their equivalents) that one actively or routinely trades on markets or trading facilities, or for which bid, offer or price quotations are widely available. For example, these standards would treat as a liquid asset: (i) equity and debt securities, derivatives, and commodity futures traded on a registered securities exchange, board of trade, alternative trading system, electronic trading platform or similar market that provides independent, bona fide offers to buy and sell; (ii) assets traded on an electronic inter-dealer quotation system, such as OTC Bulletin Board or the system maintained by PINK OTC Markets, Inc., as well as over-the-counter derivatives, debt securities (such as corporate bonds), and syndicated commercial loans for which active inter-dealer

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<sup>25</sup> 12 CFR 225.180(f).

<sup>26</sup> 12 CFR 225.180(h).

markets exist; and (iii) financial instruments for which indicative price data is supplied by an electronic service, such as Markit Group Limited.

The standards contained in the second, third, and fourth standards above are based on existing standards in the Federal banking and securities laws that are designed to identify securities that are liquid and may be sold promptly at a price that is reasonably related to its fair value. Specifically, the second standard above is based in part on the SEC's definition of securities for which a "ready market" exists for purposes of the net capital rules applicable to broker-dealers under the Securities Exchange Act of 1934 ("Exchange Act").<sup>27</sup> Similarly, the third standard above is based, in part, on the actions regularly taken by a "qualified OTC market maker" as defined in the SEC's Rule 3b-8, with respect to securities under the Exchange Act.<sup>28</sup> The fourth standard above is based, in part, on the criteria used to identify whether a security or other asset is a "marketable security" or a "liquid asset" for purposes of the Board's Regulation W governing transactions between member banks and their affiliates.<sup>29</sup> In each instance, the Board has modified the standard as incorporated into the final rule to reflect the broader range of financial instruments (including derivatives) or other assets that may be held by a hedge fund or private equity fund and that should be considered "liquid" if traded or quoted in the manner described.

The fifth standard is designed to capture instruments with a relatively short (one year or less) duration and that can be monetized or converted at maturity into a liquid asset. In light of these features, the Board believes it is appropriate to treat such instruments as liquid assets for purposes of the Volcker Rule's conformance period. The final rule recognizes that there may be situations where other, non-enumerated assets may be liquid even though they are not included in the standards contained in sections 225.181(h)(1) – (5) of the final rule. In order to address these situations, the Board has expressly retained the ability to determine that any other asset is a liquid asset, based on all the facts and circumstances.

On the other hand, consistent with the language of the Volcker Rule, the definition of illiquid assets in the final rule should generally encompass investments made by hedge funds or private equity funds in privately-held portfolio companies, real estate (other than those made through publicly traded REITs), and venture capital opportunities, as well as investments in other hedge funds or private equity funds where such investments do not qualify as liquid assets.<sup>30</sup> The Volcker Rule specifically refers to portfolio company investments, real estate investments,

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<sup>27</sup> See 15 CFR 240.15c3-1(c)(11)(i).

<sup>28</sup> See 15 CFR 240.3b-8(a).

<sup>29</sup> See 12 CFR 223.42(e) and (f)(5).

<sup>30</sup> Some commenters requested that the Board specifically include in the definition of "illiquid asset" any investment in real estate or a portfolio company and venture capital investments. While the Board agrees that such investments are typically illiquid, the Board does not believe it appropriate to include as illiquid assets all investments that potentially could be characterized as a real estate, portfolio company, or venture capital investment. For example, the Board believes that an investment in the equity securities of a small or recently established company should be considered a liquid asset for purposes of the Volcker Rule if such equity securities are traded on a national security exchange.

and venture capital investments as examples of the types of investments that should normally be considered illiquid assets for these purposes.<sup>31</sup>

In addition, the final rule, like the proposed rule, provides that an asset – including a liquid asset such as a security – may be considered an “illiquid asset” if, because of statutory or regulatory restrictions applicable to the hedge fund, private equity fund or asset, the asset cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund to a person that is unaffiliated with the banking entity. This exception to the general “liquid asset” definition recognizes that funds frequently acquire assets that are normally liquid in transactions that cause the asset to be subject to one or more statutory or regulatory restrictions under the Federal securities laws that temporarily prohibit the transferability or resale of the security. For example, hedge funds or private equity funds often acquire equity securities in private transactions that result in the security being subject to restrictions on resale (such as under Rule 144A of the Securities Act of 1933).<sup>32</sup> Several commenters requested that the final rule also permit an asset to be an illiquid asset due to contractual restrictions on sale or transfer (in addition to statutory or regulatory restrictions). In response to comments, the Board has modified the final rule to provide that an asset may be considered an illiquid asset if contractual restrictions applicable to the hedge fund, private equity fund or asset prohibit the fund from offering, selling, or otherwise transferring the asset to a person that is unaffiliated with the relevant banking entity for a period of 3 or more years.

Similarly, the proposed rule also provided that an asset would be considered illiquid only for so long as the relevant statutory or regulatory restriction was applicable. In light of the foregoing, as well as the forward-looking nature of the “principally invested” and “contractually committed” to principally invest in illiquid assets tests discussed below, the Board has removed those provisions of the proposal. Accordingly, assets subject to the type of statutory, regulatory, or contractual restrictions specified in the final rule would generally be considered illiquid assets for purposes of the Volcker Rule. However, because these restrictions may lapse at a future date (including prior to the point in time when a banking entity submits its request for an extended transition period), the final rule has been modified to specifically provide that, in connection with its review of a banking entity’s request for an extended transition period, the Board will consider the extent to which the fund’s current assets are no longer illiquid (e.g. due to the lapse of applicable restrictions on an investment because a previously illiquid venture capital or portfolio company investment has become liquid, such as through the initial public offering of the company’s stock).

Some commenters requested that the Board broaden the definition of “illiquid assets” to specifically include assets that would otherwise meet the rule’s definition of a liquid asset, but that the relevant fund may have difficulty selling (or selling at a price the fund believes to be reasonable) because the size of the fund’s position in the security or instrument is large relative to daily trading volume in the security or instrument or the outstanding number of securities or instruments of the same class or type. Some commenters also requested that the rule provide the Board flexibility to determine, on a case-by-case basis, that an asset that otherwise meets the

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<sup>31</sup> 12 U.S.C. § 1851(h)(7)(A)(i)

<sup>32</sup> See 15 CFR 230.144a.

definition of a liquid asset was illiquid. Similarly, some commenters asked that the rule specifically provide that a liquid asset could be considered illiquid due to adverse market conditions that might make it difficult for the fund to sell the security or instrument or sell it at a price the fund believes is reasonable.

The Board recognizes that market conditions (including trading volumes) at the time a security or instrument is being sold may have a material effect on the price of the security or instrument. However, by including only investments in portfolio companies, real estate investments, and venture capital investments as examples of illiquid assets, the Volcker Rule itself suggests that the term “illiquid asset” was intended to encompass only those types of investments that are illiquid by their nature, rather than those that may be illiquid due only to prevailing market conditions or the size of a particular fund’s holdings of the security or instrument. This intent is reinforced by the fact that the statute requires that a banking entity determine whether a hedge fund or private equity fund is an illiquid fund as of May 1, 2010.<sup>33</sup> If the status of an investment by a fund as a liquid or illiquid asset was dependent on market conditions at a future date, it would be difficult or impossible for banking entities and the Board to determine which funds qualify as illiquid funds and, potentially, all hedge funds and private equity funds could qualify as illiquid funds. The statute provides a general conformance period of up to 5 years for any asset, which should assist banking entities in transitioning large positions or assets to the requirements of the Volcker Rule. Moreover, as discussed in Part III.E below, for those funds that do qualify as illiquid funds, the Board may consider market conditions, as well as the actions taken by the banking entity to divest the impermissible investment, in determining whether to grant up to a 5-year extended transition period with respect to the fund. For these reasons, the Board has not modified the rule to allow an asset to be considered illiquid based on market conditions or the absolute or relative size of a fund’s holdings.

b. “Principally invested.”

The statute’s fund-related criteria also require that the hedge fund or private equity fund either (1) have been principally invested in illiquid assets as of May 1, 2010, or (2) have been invested to some degree in illiquid assets and contractually committed to principally invest in illiquid assets as of such date. In addition, in either case, the fund must make all of its investments pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets. The proposed rule provided that a hedge fund or private equity fund would be considered to be “principally invested” in illiquid assets if at least 75 percent of the fund’s consolidated total assets are, or were expected to be, comprised of illiquid assets or risk-mitigating hedges entered into in connection with, and related to, individual or aggregated positions in, or holdings of, illiquid assets. The proposal allowed a fund to count risk-mitigating hedging positions that are related to the fund’s holdings of illiquid assets towards the 75 percent asset test because such positions are, by definition, associated with the fund’s illiquid holdings.

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<sup>33</sup> 12 U.S.C. § 1851(h)(7)(A)(i).

Commenters supported the inclusion of risk-mitigating hedging positions related to illiquid assets in the determination of whether a fund is “principally invested” in illiquid assets.<sup>34</sup> However, many commenters asserted that the proposed 75 percent threshold for a fund to be principally invested in illiquid assets was too high and requested that a lower threshold – no higher than approximately 50 percent – be included in the final rule. Many of these commenters noted that the Board had previously interpreted the phrase “engaged principally” in section 20 of the Glass-Steagall Act (previously codified at 12 U.S.C. § 377) to mean between 5 percent and 25 percent of the relevant firm’s revenue.<sup>35</sup> On the other hand, one commenter asserted that the 75 percent test was appropriate.

The Board continues to believe that 75 percent is an appropriate threshold for determining whether a fund is “principally invested” in illiquid assets for purposes of the Volcker Rule. As noted in the proposed rule, many types of hedge funds and private equity funds have investment strategies that focus almost exclusively on one type of illiquid assets, such as real estate or start-up companies (including new or emerging companies in the technology, life sciences, alternative energy, or “clean tech” areas).<sup>36</sup> These types of hedge funds and private equity funds typically request capital contributions from their investors only when particular investment opportunities have been identified and hold only a small portion of their assets in cash or other liquid assets (other than during brief periods pending the investment of capital or the distribution of proceeds from the sale of an investment). The Board continues to believe that by limiting the availability of the extended transition period to hedge funds or private equity funds that “principally invest” in and have an investment strategy to principally invest in illiquid assets, such as real estate, nonpublic portfolio companies, and venture capital opportunities, Congress appears to have intended the extended transition period to be available to those types of funds that principally focus and direct their capital towards investments in illiquid assets. Moreover, the Volcker Rule’s extended transition period is available only to banking entities that are contractually obligated to invest or remain invested in the fund. Funds that have (or expect to have) a substantial majority of their investments in illiquid assets are more likely to prohibit investors from withdrawing their investments prior to the expiration of the general conformance period under the Volcker Rule (which, as noted above, may potentially extend to 2017).

As the courts have recognized, statutory terms must be read in light of the purposes of the relevant statutory provision and, thus, the same or similar terms may appropriately be interpreted differently when used in different acts.<sup>37</sup> The Board notes, moreover, that while commenters

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<sup>34</sup> The Board expects to interpret the language concerning risk-mitigating hedges consistent with the manner in which such language is implemented through the rulemaking process conducted under section 13(b)(2) of the BHC Act.

<sup>35</sup> Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities, 61 FR 68750 (Dec. 30, 1996); see also J.P. Morgan & Co., Inc., The Chase Manhattan Corp., Bankers Trust New York Corp., Citicorp, and Security Pacific Corp., 75 Federal Reserve Bulletin 192 (1989); Citicorp, J.P. Morgan & Co., and Bankers Trust New York Corp., 73 Federal Reserve Bulletin 473 (1987).

<sup>36</sup> Accordingly, institutional investors, such as pension plans and endowments, that seek exposure to different types of assets typically invest in a range of different types of hedge funds or private equity funds to obtain diversification across asset classes.

<sup>37</sup> See Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 575 (2007); see also U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001); Robinson v. Shell Oil Co., 519 U.S. 337, 343-344 (1997).

requested a lower threshold, commenters did not provide specific examples of funds that would potentially satisfy the “principally invested” asset test if it was set at 50 percent as opposed to 75 percent or supporting explanations as to why treating such funds as illiquid funds would be more consistent with the purposes of the Volcker Rule.

As noted above, by the terms of the statute, a fund qualifies as an illiquid fund if, as of May 1, 2010, it (i) was “principally invested in illiquid assets,” or (ii) was invested in illiquid assets to some degree and contractually committed to principally invest in illiquid assets. In addition, the fund must actually make all of its investments (including investments made after May 1, 2010,) pursuant to and consistent with an investment strategy to principally invest in illiquid assets.<sup>38</sup>

The final rule provides that the determination of whether a fund was “principally invested” in illiquid assets as of May 1, 2010, must be made based on the fund’s financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles (“GAAP”) or other applicable accounting standards. Several commenters noted that funds often prepare their financial statements at the end of each calendar quarter and, thus, may not have financial statements dated as of May 1, 2010. In recognition of this, a banking entity may use a fund’s most recent financial statements prepared under GAAP or other appropriate accounting standards as of any date between February 28, 2010, and May 1, 2010, to determine whether the fund was principally invested in illiquid assets as of May 1, 2010. Thus, if a fund prepares financial statements at the end of each calendar quarter, the banking entity could use the fund’s financial statements as of March 30, 2010, to determine whether the fund was principally invested in illiquid assets as of May 1, 2010 (assuming the fund did not prepare additional financial statements between March 30 and May 1, 2010).

Under the proposed rule, a fund would have been considered to be “contractually committed to principally invest” in illiquid assets as of May 1, 2010, if the fund’s organizational documents (such as the limited partnership agreement in the case of a fund organized in this manner), or other documents that constitute a contractual obligation of the fund (such as a binding side letter agreement entered into with investors) that was in effect as of May 1, 2010, provided for the fund to be principally invested in illiquid assets. The proposed rule would have required that any such contractual commitments require the fund to be principally invested in illiquid assets during the period beginning on the date when capital contributions are first received by the fund for the purpose of making investments and ending on the fund’s expected termination date. Additionally, the proposed rule provided that a fund would be considered to have an “investment strategy to principally invest” in illiquid assets if the fund either: (i) markets or holds itself out to investors as intending to principally invest in illiquid assets; or (ii) has a documented investment policy of principally investing in illiquid assets.

The Board has made several changes to the corresponding provisions of the final rule in response to comments received on the proposal. First, the Board has modified the final rule to provide that, in determining whether a fund is contractually committed to principally invest, or has an investment strategy to principally invest, in illiquid assets, a banking entity may take into account written representations contained in the fund’s offering documents regarding its

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<sup>38</sup> See 12 U.S.C. § 1851(h)(7)(i) and (ii).

investment obligations and strategy (in addition to the fund’s organizational documents). Funds typically are bound to comply with any written representations contained in the fund’s private placement memorandum or other offering documents and a fund’s failure to do so may subject the fund to liability under the Federal securities laws.<sup>39</sup>

Second, the final rule has been modified so that a fund will be considered “contractually committed to principally invest” in illiquid assets if the fund’s organizational documents or offering documents provide for the fund to be principally invested in illiquid assets at all times other than during limited temporary periods. Some commenters noted that, after its initial pre-investment organizational period, an illiquid fund may naturally experience certain limited periods of time when more than 25 percent of its assets may be in liquid assets, such as when investments are exited and capital has not yet been reinvested or distributed to investors.

Several commenters also asked that the Board clarify when the determination of whether a fund is “contractually committed to principally invest” in illiquid assets must be made and how such determination should be made with respect to investments not yet made. The Volcker Rule expressly provides that the determination of whether a fund is “contractually committed to principally invest” in illiquid assets is to be made “as of May 1, 2010.”<sup>40</sup> Thus, a fund that was contractually committed to principally invest in illiquid assets on May 1, 2010, would meet this prong of the test to be an illiquid fund.

In considering whether a hedge fund or private equity fund’s organizational documents, marketing materials, or investment policy provide for the fund to principally invest in illiquid assets, banking entities should consider whether the assets to be acquired by the fund (as specified in such materials) are of the type and nature that would make the assets “illiquid assets” or “liquid assets” for purposes of the rule. For example, if a fund’s investment strategy provides for the fund to primarily invest in publicly traded stocks or OTC derivatives that are regularly bought and sold in the inter-dealer market, the fund would not be considered to have an investment strategy to principally invest in illiquid assets. This would be the case even if the fund’s investment strategy did not indicate that the assets acquired by the fund must be traded on a recognized exchange, trading facility, or market of the type described in section 225.180(h)(2) or quoted on inter-dealer systems of the type described in section 225.180(h)(3). On the other hand, a fund generally would be considered to have an investment policy of principally investing in illiquid assets if the fund’s organizational documents or offering materials provide for the fund to invest in the equity of early-stage nonpublic companies, even if the fund’s documents do not specify that the equity of such companies must not be traded or quoted in the manner described in section 225.180(h)(2)-(4). This would be true even if such investments may later be converted into publicly traded securities of the company (such as, for example, in connection with an initial public offering of the company) in order to facilitate the fund’s sale of the investment.

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<sup>39</sup> See, e.g., 17 CFR §240.10b-5. Some commenters requested that the Board provide that a fund is “contractually committed” to principally invest in illiquid assets if that was consistent with the reasonable expectations of investors in the fund. The Board has not modified the rule in this manner because such expectations may not represent a legally binding obligation of the fund and would be difficult to verify, thus potentially allowing evasions of the Volcker Rule.

<sup>40</sup> 12 U.S.C. § 1851(h)(7)(A)(i).

## 2. Criteria focused on the banking entity's investment.

Besides meeting the criteria described above, a banking entity's interest in a hedge fund or private equity fund may qualify for the extended transition period in section 13(c)(3) of the BHC Act only if the banking entity's retention of that ownership interest in the fund, or provision of additional capital to the fund, is necessary to fulfill a contractual obligation of the banking entity that was in effect on May 1, 2010.<sup>41</sup> This statutory restriction complements and reinforces the fund-related criteria discussed above because a fund that is principally invested in liquid assets is unlikely to require its investors to commit to remaining invested in the fund for, or provide additional capital over, the extended period of time covered by the Volcker Rule's extended transition period.

The proposed rule provided that a banking entity would be considered to have a "contractual obligation" to remain invested in a fund only if the banking entity, under the contractual terms of its equity, partnership, or other ownership interest in the fund or other contractual arrangements with the fund that were in effect as of May 1, 2010, is prohibited from both: (i) redeeming all of its equity, partnership, or other ownership interests in the fund; and (ii) selling or otherwise transferring all such ownership interests to a person that is not an affiliate of the banking entity. Similarly, the proposed rule specified that a banking entity has a contractual obligation to provide additional capital to an illiquid fund only if the banking entity is required, under the contractual terms of its equity, partnership, or other ownership interest in the fund or other contractual arrangements with the fund (such as a side letter with the fund that is binding on the banking entity) that were in effect as of May 1, 2010, to provide additional capital to the fund. The proposal also provided that either of the contractual obligations described above will be considered not to impose a contractual obligation to invest or remain invested for purposes of the Volcker Rule if: (i) the obligation may be terminated by the banking entity or any of its subsidiaries or affiliates; or (ii) the obligation may be terminated with the consent of other persons unless the banking entity and its subsidiaries and affiliates have used their reasonable best efforts to obtain such consent and such consent has been denied.

The Board received a number of comments on these aspects of the proposal. For example, some commenters noted that a banking entity's contractual obligation to remain invested in a fund may be subject to one or more contractual provisions whereby the obligation may be excused or otherwise terminated if the banking entity's compliance with the obligation would cause, or would be reasonably likely to cause, the banking entity or the fund to be in violation of applicable laws or regulations (so-called "regulatory-out" provisions). Commenters requested that the final rule permit a banking entity to qualify for the extended transition period and remain invested in an illiquid fund despite such regulatory-out provisions. These commenters asserted that otherwise the purpose of the extended transition period would not be fulfilled because those banking entities that exercised prudence in obtaining regulatory outs in their agreements with illiquid funds would be forced to exit these investments and could not take advantage of the Volcker Rule's extended transition period for illiquid funds. These commenters also asserted that such forced sales could have adverse consequences on the banking entity, other investors in the fund, or the markets for illiquid assets.

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<sup>41</sup> 12 U.S.C. § 1851(c)(3)(A).

In addition, some commenters requested that the Board strike the provisions of the final rule that provide that the extended transition period automatically terminates upon expiration of the banking entity's contractual obligation to remain invested in, or provide capital to, an illiquid fund. One commenter specifically requested that the final rule provide a 6-month "grace period" which would allow a banking entity to conform its investment in and relationship with an illiquid fund upon termination of the extended transition period. Several commenters also requested that the final rule allow a banking entity to use "commercially reasonable efforts" instead of "reasonable best efforts" to obtain any consents or approvals necessary to terminate the banking entity's contractual obligation to a fund, and allow the banking entity to remain invested so long as such efforts are not successful.

The Board has carefully considered these comments. The plain language of the Volcker Rule permits a banking entity to potentially receive an extended transition period with respect to an investment in an illiquid fund only if and to the extent necessary to fulfill a contractual obligation that was in effect on May 1, 2010.<sup>42</sup> Moreover, the Volcker Rule specifically provides that any extended transition granted by the Board will automatically, by operation of law, terminate on the date on which the contractual obligation to invest in the illiquid fund terminates.<sup>43</sup>

If, pursuant to the terms of its obligation in effect on May 1, 2010, a banking entity has the contractual right to terminate its investment or commitments to an illiquid fund because such investments would be prohibited by the Volcker Rule after the expiration of the general conformance period (and any extensions thereof), then an extended transition period would not be necessary to fulfill the banking entity's contractual obligation to the fund because the banking entity could legally withdraw from its investments or commitments without violating its contractual obligation at the end of the general conformance period (and any extensions thereof). Thus, the Board does not believe the statute permits it to grant an extended transition period to a banking entity if its contractual obligation in place on May 1, 2010, permits the banking entity to terminate those obligations because they would violate the Volcker Rule after the end of the general conformance period (and any extensions thereof).<sup>44</sup>

Whether a banking entity has the right to withdraw its investments or terminate its obligations to an illiquid fund based on the contractual provisions in effect on May 1, 2010, will depend on the specific terms of those obligations. For example, if those obligations provide the banking entity the right and ability to redeem or sell its investment if the banking entity determines that continued ownership of the investment would violate the Volcker Rule, the banking entity must exercise that right no later than the end of the Volcker Rule's general conformance period and any extensions thereof and should begin to plan for such actions. In some instances, however, the banking entity's right or ability to redeem or sell its investments under a regulatory-out provision pertaining to its obligations in effect as of May 1, 2010, may be

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<sup>42</sup> 12 U.S.C. § 1851(c)(3).

<sup>43</sup> *Id.* at § 1851(c)(4)(B).

<sup>44</sup> For similar reasons, the Board does not have discretion to permit the extended transition period to continue after the date the relevant banking entity's contractual obligation terminates. As such, the final rule does not provide any "grace period" and retains the requirement that any extended transition period automatically terminates on the date on which the contractual obligation to invest in, or provide additional capital to, the illiquid fund terminates.

dependent on the consent of an unaffiliated party (such as the general partner or other investors of the fund).<sup>45</sup> In such circumstances, the banking entity and its affiliates must use their reasonable best efforts to obtain such consent.<sup>46</sup> The Board will consider whether a banking entity and its affiliates have used their reasonable best efforts to obtain the unaffiliated party's consent in determining whether to grant the banking entity an extended transition period with respect to the investment.<sup>47</sup> For example, the Board will consider whether the banking entity used its reasonable best efforts, but an unaffiliated general partner or other investors denied the request due to the failure of the banking entity to agree to unreasonable demands by the general partner or investors.

As noted above, the statute provides that the extended transition period is only available to banking entities in order to take or retain an interest in an illiquid fund, and then only to the extent necessary to fulfill a contractual obligation that was in effect on May 1, 2010. The Board recognizes that there may be instances where, in connection with its ownership interest in an illiquid fund, a banking entity serves as the general partner or managing member of, or otherwise "sponsors," an illiquid fund. In such situations, a banking entity will usually hold some ownership interest in the fund, and that ownership interest may be in excess of the *de minimis* interest permitted under the Volcker Rule.<sup>48</sup> Accordingly, if a banking entity is granted an extended transition period to take or retain an interest in an illiquid fund, the banking entity may continue to serve as the general partner, managing member, or sponsor of the illiquid fund to the extent such service is related to the banking entity's retention of its permitted ownership interest. If, however, a banking entity was not acting as general partner, managing member, or sponsor of the illiquid fund as of May 1, 2010, then it may not begin to serve that role during the extended transition period.

#### **D. Nonbank Financial Companies Supervised by the Board.**

As noted above, the Volcker Rule does not prohibit nonbank financial companies supervised by the Board from engaging in proprietary trading, or from having the types of investments in or relationships with hedge funds or private equity funds that banking entities are prohibited or restricted from having under the Volcker Rule. However, the Volcker Rule provides that the Board or other appropriate agency impose additional capital charges, quantitative limits, or other restrictions on nonbank financial companies supervised by the Board

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<sup>45</sup> For example, the terms of the banking entity's regulatory-out provision in its contractual obligation may allow the banking entity to redeem or sell its investments only with the approval of the general partner, or only if the general partner concurs that retention of the banking entity's ownership interest would result in a violation of the law.

<sup>46</sup> The Board believes that requiring a banking entity to use its "reasonable best efforts" to terminate its obligation appropriately reflects the Volcker Rule's intent that banking entities should use all reasonable efforts to conform to the requirements of the Volcker Rule.

<sup>47</sup> Some commenters noted that some contractual obligations in place as of May 1, 2010, may require a banking entity to provide additional capital to a fund even after the banking entity has fully sold its investment in the fund (such as, for example, if the person that acquired the banking entity's ownership interest fails to comply with any related obligation to provide such additional amounts). Subject to the conditions and restrictions described above and in the final rule, such obligations may constitute a contractual obligation to provide additional capital to the fund.

<sup>48</sup> See 12 U.S.C. § 1851(d)(4).

or their subsidiaries that are engaged in such activities or maintain such relationships.<sup>49</sup> The Volcker Rule generally gives nonbank financial companies supervised by the Board the same general two-year conformance period (with the potential of up to three, one-year extensions) to bring their activities into compliance with any requirements or limits established as is available to banking entities. Accordingly, section 225.182 of the final rule provides a nonbank financial company supervised by the Board two years after the date the company first becomes a nonbank financial company supervised by the Board to conform its activities to any applicable requirements of the Volcker Rule, including any capital requirements or quantitative limitations adopted thereunder and applicable to the company. Consistent with the conformance period available to banking entities, the final rule also provides the Board the ability to extend this two-year conformance period by up to three additional one-year periods, if the Board determines that such an extension is consistent with the purpose of the Volcker Rule and would not be detrimental to the public interest.<sup>50</sup>

#### **E. Procedures Governing Extension Requests.**

The proposed rule also addressed the process for banking entities and nonbank financial companies supervised by the Board to request a one-year extension of the general conformance period and for banking entities to request up to a five-year extended transition period with respect to an illiquid fund. The proposed rule generally required that any request for an extension must: (1) be submitted in writing to the Board at least 90 days prior to the expiration of the applicable time period; (2) provide the reasons why the banking entity or nonbank financial company supervised by the Board believes the extension should be granted; and (3) provide a detailed explanation of the plan of the banking entity or nonbank financial company supervised by the Board for divesting or conforming the activity or investment(s). The proposed rule also described the factors that the Board may consider in reviewing any requests for an extension.

The Board received several comments on the procedures for requesting an extension and the standards for reviewing these requests set forth in the proposed rule. In general, commenters requested that the Board allow a firm to submit an extension request well in advance of the end of the applicable time period. Commenters noted that winding down the activities and operations subject to the restrictions of the Volcker Rule could take significant time, and, as a result, companies subject to the Volcker Rule would benefit from knowing as early as possible whether or not they had been granted an extension. Some commenters additionally suggested that the Board modify the final rule to expressly provide for a standard time period for its review of any specific extension request, accompanied by an automatic approval of an extension if the review was not completed in the specified period. One commenter suggested that the Board require banking entities to provide extensive information on the steps that the banking entity has taken to conform to the requirements of the Volcker Rule.

Several comments also addressed the proposed rule's list of factors that the Board would take into account in reviewing any request for a conformance period extension. For example, commenters suggested that the Board take into account the impact that an extension (or denial of

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<sup>49</sup> See *id.* at § 1851(a)(2), (d)(4).

<sup>50</sup> See *id.* at § 1851(c)(2).

an extension) related to investments in a hedge fund or private equity fund would have on unaffiliated, third-party investors in the fund, including the potential creation of conflicts of interest between a banking entity that sponsored a private equity or hedge fund and other investors in such fund.

After considering the comments, the Board has modified the provisions governing the submission and review of extension requests in several respects. First, the final rule provides that a banking entity or nonbank financial company supervised by the Board seeking an extension of the conformance period must submit its request at least 180 days prior to the expiration of the applicable time period, rather than 90 days as proposed. This additional period is designed to provide the Board additional time to review any submission, as well as to request additional information from the requesting company if necessary or appropriate. This deadline is the date by which an extension request must be filed. Firms are encouraged to submit their extension requests to the Board as early as possible. If additional requests are contemplated as being necessary after a permissible extension has been granted, a banking entity or nonbank financial company supervised by the Board may submit an additional request after the first day of the newly-extended period, and the Board would consider each request submitted in accordance with the procedures contained in the final rule. The final rule also provides that the Board will seek to act on any extension request no later than 90 days after receipt of all necessary information relating to the request.<sup>51</sup>

The proposed rule provided that, in reviewing a request for an extension, the Board may consider all the facts and circumstances related to the activity, investment, or fund, including each of the following factors (to the extent they are relevant): (i) whether the activity or investment (A) involves or results in material conflicts of interest between the banking entity (or nonbank financial company supervised by the Board) and its clients, customers or counterparties; (B) would result, directly or indirectly, in a material exposure by the banking entity (or company) to high-risk assets or high-risk trading strategies; (C) would pose a threat to the safety and soundness of the banking entity (or company); or (D) would pose a threat to the financial stability of the United States; (ii) market conditions; (iii) the nature of the activity or investment; (iv) the date that the banking entity's contractual obligation to make or retain an investment in the fund was incurred and when it expires; (v) the contractual terms governing the banking entity's interest in the fund; (vi) the degree of control held by the banking entity over investment decisions of the fund; (vii) the types of assets held by the fund; (viii) the date on which the fund is expected to wind up its activities and liquidate or its investments may be redeemed or sold; (ix) the total exposure of the banking entity (or company) to the activity or investment and the risks that disposing of, or maintaining, the investment or activity may pose to the banking entity (or company); (x) the cost to the banking entity (or company) of disposing of the activity or investment within the applicable period; and (xi) any other factor that the Board believes appropriate

After consideration of the comments, the Board has modified one existing factor and added two additional factors to this list. The first additional factor is whether divestiture or conformance of the activity or investment would involve or result in a material conflict of interest between the banking entity (or nonbank financial company supervised by the Board) and

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<sup>51</sup> See 12 CFR 225.181(d)(2) and 225.182(d)(2).

unaffiliated clients, customers, or counterparties to which the banking entity owes a duty. Because the Volcker Rule is intended to help prevent material conflicts of interest between a banking entity or nonbank financial company supervised by the Board and its clients, customers or counterparties, the Board believe this is an appropriate factor to consider in reviewing extension requests.<sup>52</sup> The Board expects that this factor may be relevant when the banking entity serves as general partner or sponsor to a fund in which unaffiliated persons are investors, but generally would not be relevant when the banking entity (in addition to having an investment) serves only as investment advisor to the fund, because serving as an investment advisor would generally be a permissible activity for a banking entity even if it divests its ownership interests in the fund itself. In addition, the Board has modified the list of factors to specify that the Board may consider the firm's prior efforts to divest or conform the activity or investments, including, with respect to an illiquid fund, the extent to which the banking entity has made reasonable best efforts to terminate or obtain a waiver of its contractual obligation to take or retain an equity, partnership, or other ownership interest in, or provide additional capital to, the illiquid fund. The Board expects all banking entities and nonbank financial companies supervised by the Board to make reasonable and good-faith efforts to divest or otherwise conform their prohibited activities and investments within the prescribed time periods. This includes taking all reasonable steps to divest the firm's interests in private equity and hedge funds covered by the restrictions in the Volcker Rule, such as making requests of a general partner or other applicable person(s) to withdraw from or transfer its interest in the fund whenever authorized or permitted by the relevant fund documents. The factors listed in the rule are not exclusive, and the Board retains the ability to consider other factors or considerations that it deems appropriate.

As noted in the proposed rule, the Board expects to carefully review requests for an extended transition period to ensure that the banking entity's interest in the fund and the fund's assets and investment strategy satisfy the requirements contained in the rule in order to be eligible for an extended transition period. As noted above in Part III.C.1.a of this Supplementary Information, the final rule provides that in evaluating the merits and appropriateness of a request for an extended transition period for an investment in an illiquid fund, the Board will consider the extent to which the fund's current assets are no longer illiquid (e.g. due to lapse of applicable restrictions on an investment because a previously illiquid venture capital or portfolio company investment has become liquid, such as through the initial public offering of the company's stock). The Board has modified the list of factors the Board may consider in the final rule to make this clear.

The final rule retains the proposed rule's provision that allows the Board to impose conditions on any extension granted if the Board determines such conditions are necessary or appropriate to protect the safety and soundness of banking entities or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the BHC Act and the final rules.<sup>53</sup> In cases where the banking entity is primarily supervised by another Federal banking agency, the SEC, or the

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<sup>52</sup> See 12 U.S.C. § 1851(d)(2)(A)(i).

<sup>53</sup> Nothing in the Volcker Rule or the final rule limits or otherwise affects the authority that the Board, the other Federal banking agencies, the SEC, or the CFTC may have under other provisions of law. In the case of the Board, these authorities include, but are not limited to, section 8 of the Federal Deposit Insurance Act and section 8 of the BHC Act. See 12 U.S.C. §§ 1818, 1847.

CFTC, the Board will consult with such agency prior to approving any extension request by the banking entity, as well as before imposing conditions in connection with the approval of any extension request by the banking entity.

#### **IV. Administrative Law Matters**

##### **A. Paperwork Reduction Act Analysis**

In accordance with the Paperwork Reduction Act of 1995 (“PRA”),<sup>54</sup> the Board has reviewed this final rule under the authority delegated to the Board by Office of Management and Budget (“OMB”). The Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number.

Sections 225.181(c) and 225.182(c) of the final rule contain collections of information that are subject to the PRA. The OMB control number for these information collections will be assigned. These collections of information would only be required for banking entities and nonbank financial companies supervised by the Board that voluntarily decide to seek an extension of time to conform their activities to the Volcker Rule or divest their interest in an illiquid hedge fund or private equity fund. As discussed in the Supplementary Information, the Dodd-Frank Act generally requires banking entities and nonbank financial holding companies supervised by the Board to conform their activities and investments to the restrictions in the Volcker Rule within 2 years of the effective date of the Volcker Rule’s restrictions. The final rule implements this conformance period and, as permitted by the Dodd-Frank Act, permits a banking entity or nonbank financial company supervised by the Board to request an extension of time to conform its activities to the Volcker Rule. Section 225.181(c) would require an application for an extension by a banking entity to be (1) submitted in writing to the Board at least 180 days prior to the expiration of the applicable time period, (2) provide the reasons why the banking entity believes the extension should be granted, and (3) provide a detailed explanation of the banking entity’s plan for divesting or conforming the activity or investment(s). Section 225.182(c) would require an application for an extension by a nonbank financial holding company to be (1) submitted in writing to the Board at least 180 days prior to the expiration of the applicable time period, (2) provide the reasons why the nonbank financial holding company believes the extension should be granted, and (3) provide a detailed explanation of the company’s plan for coming into compliance with the requirements of the Volcker Rule. A request by a banking entity or nonbank financial company supervised by the Board also must address the relevant factors set out in section 225.181(d). A banking entity or nonbank financial company supervised by the Board may request confidential treatment of information submitted as part of an extension request in accordance with the Freedom of Information Act.

In connection with the proposal, the Board estimated that there were approximately 7,200 banking entities as of December 31, 2009. Of that number, the Board estimated that approximately 720 banking entities would request an extension of the conformance period under the proposed rule. The number of nonbank financial companies supervised by the Board will be determined by the FSOC in accordance with the procedures established under the Dodd-Frank Act. Accordingly, the Board was unable and remains unable at this time to estimate the number

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<sup>54</sup> 44 U.S.C. § 3506; 5 C.F.R. § 1320, Appendix A.1

of nonbank financial companies supervised by the Board that might request an extension of the Volcker Rule conformance period under the proposed rule. In the proposal, the Board estimated the burden request as 1 hour, for a total estimated amount of annual burden of 720 hours.

Some commenters asserted that the Board's proposal underestimated the regulatory burden and stated that it would take substantially longer than one hour to prepare a request for an extension and relevant supporting information. One commenter specifically noted that a banking entity could potentially be required to submit up to four extension requests with respect to a single illiquid fund (three requests for extension of the general conformance period and one request for the extended transition period provided for illiquid funds). In light of the comments received, the Board has revised its estimated burden per request to be 3 hours, and estimates that each of the 720 banking entities that are estimated to request an extension will file, on average, 10 requests for an extension, for a total estimated annual burden of 21,600 hours.

## **B. Regulatory Flexibility Act Analysis**

In accordance with Section 4(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, ("RFA"), the Board must publish a final regulatory flexibility analysis with this rulemaking. The RFA requires an agency either to provide a final regulatory flexibility analysis with a final rule for which a general notice of proposed rulemaking is required or to certify that the final rule will not have a significant economic impact on a substantial number of small entities. Based on this analysis and for the reasons stated below, the Board believes that the final rule would not have a significant economic impact on a substantial number of small entities. Nevertheless, the Board is publishing a final regulatory flexibility analysis.

The Volcker Rule, adopted as a new section 13 of the BHC Act, applies to all banking entities and nonbank financial companies supervised by the Board, regardless of size. The Board is amending Regulation Y to implement the provisions of the Dodd-Frank Act that allow a banking entity – including a small banking entity – or a nonbank financial company supervised by the Board to obtain, with the Board's approval, an extended period of time to conform its activities and investments to the requirements of the Volcker Rule. Under the rule, a banking entity of any size may request up to three one-year extensions of the general two-year conformance period provided under section 13 of the BHC Act, as well as one extension of up to five years to divest certain ownership interests in a hedge fund or private equity fund that qualifies as an "illiquid fund" under the statute and proposed rule. The **Supplementary Information** provides additional information regarding the reasons for, and the objective and legal basis of, the rule.

Under regulations issued by the Small Business Administration ("SBA"), a bank or other depository institution is considered "small" if it has \$175 million or less in assets.<sup>55</sup> As of December 31, 2009, there were approximately 2450 small bank holding companies, 293 small savings association, 132 small national banks, 73 small State member banks, 665 small State nonmember banks, and 21 small foreign banking organizations that are subject to section 8 of the International Banking Act of 1978. As of that date, there were no nonbank financial companies supervised by the Board. The Volcker Rule would affect only those entities that engage in

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<sup>55</sup> 13 CFR 121.201.

activities or that hold investments prohibited or restricted under the terms of the Volcker Rule. As explained above, the Board estimates that of the total number of banking entities that would be affected by the Volcker Rule, approximately 10 percent would likely file an extension request under the proposed rule. Based on its supervisory experience, the Board believes that small banking entities are less likely to be engaged in the types of activities or hold investments prohibited under the Volcker Rule, and as such estimates that only 5 percent of small banking entities likely would file an extension request under the rule. The Board specifically requested comment on whether this estimate is appropriate, and no comments were received on this issue. The Board notes that the impact of the rule on entities choosing to take advantage of the rule's extended conformance period would be positive and not adverse. This is because the rule would allow affected entities to seek and obtain an extended period of time to conform their activities, investments, or relationships to the requirements of the Volcker Rule. The Board also has taken several steps to reduce the potential burden of the rule on all banking entities, including small banking entities. For example, the rule establishes a straightforward process for banking entities, including small banking entities, to request an extension of the conformance period or an extended transition period with respect to an investment in an illiquid fund, and permits such requests to be submitted in letter form. The rule also uses standards drawn from existing federal banking and securities regulations to help define the types of funds that may qualify as an "illiquid fund" under the statute and the rule, which should assist small banking entities in determining whether their investments qualify for the extended transition period available for investments in illiquid funds.

As discussed in the **Supplementary Information**, the Dodd-Frank Act requires that the Board adopt rules implementing the Volcker Rule's conformance period. The Board does not believe that the final rule duplicates, overlaps, or conflicts with any other Federal rules.

### **Plain Language**

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invited comment on whether the proposed rule was written plainly and clearly, or whether there were ways the Board could make the rule easier to understand. The Board received no comments on these matters and believes that the final rule is written plainly and clearly.

### **List of Subjects**

#### **12 CFR Part 225**

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities

### **Authority and Issuance**

For the reasons stated in the preamble, the Board is amending Regulation Y, 12 CFR part 225, as set forth below:

#### **PART 225— REGULATION Y – BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)**

1. The Authority citation for part 225 is revised to read as follows:

**Authority:** 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1844(b), 1851, 1972(1), 3106, 3108, 3310, 3331-3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.

2. Section 225.1(c)(11) is revised to read as follows:

**§ 225.1 Authority, purpose, and scope.**

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(c) \*\*\*

(11) *Subpart K* governs the period of time that firms subject to section 13 of the Bank Holding Company Act (12 U.S.C. § 1851) have to bring their activities, investments and relationships into compliance with the requirements of such section.

**3. Subpart L – Conditions to Orders**

Add a new subpart L heading as set forth above, and designate § 225.200 under subpart L.

4. Subpart K, is revised to read as follows:

**Subpart K – Proprietary Trading and Relationships with Hedge Fund and Private Equity Funds**

Sec.

225.180 Definitions

225.181 Conformance Period for Banking Entities Engaged in Proprietary Trading or Private Fund Activities

225.182 Conformance Period for Nonbank Financial Companies Supervised by the Board Engaged in Proprietary Trading or Private Fund Activities

**Subpart K – Proprietary Trading and Relationships with Hedge Funds and Private Equity Funds**

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**§ 225.180 Definitions.**

For purposes of this subpart:

(a) Banking entity means –

(1) Any insured depository institution;

(2) Any company that controls an insured depository institution;

(3) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978; and

(4) Any affiliate or subsidiary of any of the foregoing entities.

(b) Hedge fund and private equity fund mean an issuer that would be an investment company, as defined in 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 such similar funds as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule, as provided in section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)), determine.

(c) Insured depository institution has the same meaning as given that term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), except that for purposes of this subpart the term shall not include an institution that functions solely in a trust or fiduciary capacity if—

(1) All or substantially all of the deposits of such institution are in trust funds and are received in a bona fide fiduciary capacity;

(2) No deposits of such institution which are insured by the Federal Deposit Insurance Corporation are offered or marketed by or through an affiliate of such institution;

(3) Such institution does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others or make commercial loans; and

(4) Such institution does not—

(i) Obtain payment or payment related services from any Federal Reserve bank, including any service referred to in section 11A of the Federal Reserve Act (12 U.S.C. 248a); or

(ii) Exercise discount or borrowing privileges pursuant to section 19(b)(7) of the Federal Reserve Act (12 U.S.C. 416(b)(7)).

(d) Nonbank financial company supervised by the Board means a nonbank financial company supervised by the Board of Governors, as defined in section 102 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5311).

(e) Board means the Board of Governors of the Federal Reserve System.

(f) Illiquid fund means a hedge fund or private equity fund that:

(1) As of May 1, 2010—

(i) Was principally invested in illiquid assets; or

(ii) Was invested in, and contractually committed to principally invest in, illiquid assets;

and

(2) Makes all investments pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets.

(g) Illiquid assets means any real property, security, obligation, or other asset that—

(1) Is not a liquid asset;

(2) Because of statutory or regulatory restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund to a person that is unaffiliated with the relevant banking entity; or

(3) Because of contractual restrictions applicable to the hedge fund, private equity fund or asset, cannot be offered, sold, or otherwise transferred by the hedge fund or private equity fund for a period of 3 years or more to a person that is unaffiliated with the relevant banking entity.

(h) Liquid asset means:

(1) Cash or cash equivalents;

(2) An asset that is traded on a recognized, established exchange, trading facility or other market on which there exist independent, bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined for the particular asset almost instantaneously;

(3) An asset for which there are bona fide, competitive bid and offer quotations in a recognized inter-dealer quotation system or similar system or for which multiple dealers furnish bona fide, competitive bid and offer quotations to other brokers and dealers on request;

(4) An asset the price of which is quoted routinely in a widely disseminated publication that is readily available to the general public or through an electronic service that provides indicative data from real-time financial networks;

(5) An asset with an initial term of one year or less and the payments on which at maturity may be settled, closed-out, or paid in cash or one or more other liquid assets described in paragraphs (h)(1), (2), (3), or (4); and

(6) Any other asset that the Board determines, based on all the facts and circumstances, is a liquid asset.

(i) Principally invested and related definitions.—A hedge fund or private equity fund:

(1) Is principally invested in illiquid assets if at least 75 percent of the fund's consolidated total assets are—

(i) Illiquid assets; or

(ii) Risk-mitigating hedges entered into in connection with and related to individual or aggregated positions in, or holdings of, illiquid assets;

(2) Is contractually committed to principally invest in illiquid assets if the fund's organizational documents, other documents that constitute a contractual obligation of the fund, or written representations contained in the fund's offering materials distributed to potential investors provide for the fund to be principally invested in assets described in paragraph (i)(1) at all times other than during temporary periods, such as the period prior to the initial receipt of capital contributions from investors or the period during which the fund's investments are being liquidated and capital and profits are being returned to investors; and

(3) Has an investment strategy to principally invest in illiquid assets if the fund—

(i) Markets or holds itself out to investors as intending to principally invest in assets described in paragraph (i)(1); or

(ii) Has a documented investment policy of principally investing in assets described in paragraph (i)(1).

**§ 225.181 Conformance Period for Banking Entities Engaged in Prohibited Proprietary Trading or Private Fund Activities**

(a) Conformance Period. (1) In general.—Except as provided in paragraph (b)(2) or (3) of this section, a banking entity shall bring its activities and investments into compliance with the requirements of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart no later than 2 years after the earlier of:

(i) July 21, 2012; or

(ii) 12 months after the date on which final rules adopted under section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)) are published in the Federal Register.

(2) New banking entities.—A company that was not a banking entity, or a subsidiary or affiliate of a banking entity, as of July 21, 2010, and becomes a banking entity, or a subsidiary or affiliate of a banking entity, after that date shall bring its activities and investments into compliance with the requirements of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart before the later of—

(i) The conformance date determined in accordance with paragraph (a)(1) of this section;  
or

(ii) 2 years after the date on which the company becomes a banking entity or a subsidiary or affiliate of a banking entity.

(3) Extended conformance period. The Board may extend the two-year period under paragraph (a) (1) or (2) of this section by not more than three separate one-year periods, if, in the judgment of the Board, each such one-year extension is consistent with the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart and would not be detrimental to the public interest.

(b) Illiquid funds. (1) Extended transition period.—The Board may further extend the period provided by paragraph (a) during which a banking entity may acquire or retain an equity, partnership, or other ownership interest in, or otherwise provide additional capital to, a private equity fund or hedge fund if—

(i) The fund is an illiquid fund; and

(ii) The acquisition or retention of such interest, or provision of additional capital, is necessary to fulfill a contractual obligation of the banking entity that was in effect on May 1, 2010.

(2) Duration limited. The Board may grant a banking entity only one extension under paragraph (b)(1) and such extension—

(i) May not exceed 5 years beyond any conformance period granted under paragraph (a)(3) of this section; and

(ii) Shall terminate automatically on the date during any such extension on which the banking entity is no longer under a contractual obligation described in paragraph (b)(1)(ii).

(3) Contractual obligation. For purposes of this paragraph (b)—

(i) A banking entity has a contractual obligation to take or retain an equity, partnership, or other ownership interest in an illiquid fund if the banking entity is prohibited from redeeming all of its equity, partnership, or other ownership interests in the fund, and from selling or otherwise transferring all such ownership interests to a person that is not an affiliate of the banking entity—

(A) Under the terms of the banking entity's equity, partnership, or other ownership interest in the fund or the banking entity's other contractual arrangements with the fund or unaffiliated investors in the fund; or

(B) If the banking entity is the sponsor of the fund, under the terms of a written representation made by the banking entity in the fund's offering materials distributed to potential investors;

(ii) A banking entity has a contractual obligation to provide additional capital to an illiquid fund if the banking entity is required to provide additional capital to such fund—

(A) Under the terms of its equity, partnership or other ownership interest in the fund or the banking entity's other contractual arrangements with the fund or unaffiliated investors in the fund; or

(B) If the banking entity is the sponsor of the fund, under the terms of a written representation made by the banking entity in the fund’s offering materials distributed to potential investors; and

(iii) A banking entity shall be considered to have a contractual obligation for purposes of paragraph (b)(3)(i) or (ii) of this section only if—

(A) The obligation may not be terminated by the banking entity or any of its subsidiaries or affiliates under the terms of its agreement with the fund; and

(B) In the case of an obligation that may be terminated with the consent of other persons, the banking entity and its subsidiaries and affiliates have used their reasonable best efforts to obtain such consent and such consent has been denied.

(c) Approval Required to Hold Interests in Excess of Time Limit.

The conformance period in paragraph (a) of this section may be extended in accordance with paragraph (a)(3) or (b) only with the approval of the Board. A banking entity that seeks the Board’s approval for an extension of the conformance period under paragraph (a)(3) or for an extended transition period under paragraph (b)(1) must—

(1) Submit a request in writing to the Board at least 180 days prior to the expiration of the applicable time period;

(2) Provide the reasons why the banking entity believes the extension should be granted, including information that addresses the factors in paragraph (d)(1) of this section; and

(3) Provide a detailed explanation of the banking entity’s plan for divesting or conforming the activity or investment(s).

(d) Factors governing Board determinations.

(1) Extension requests generally.—In reviewing any application by a specific company for an extension under paragraph (a)(3) or (b)(1) of this section, the Board may consider all the facts and circumstances related to the activity, investment, or fund, including, to the extent relevant—

(i) Whether the activity or investment--

(A) Involves or results in material conflicts of interest between the banking entity and its clients, customers or counterparties;

(B) Would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(C) Would pose a threat to the safety and soundness of the banking entity; or

(D) Would pose a threat to the financial stability of the United States;

- (ii) Market conditions;
- (iii) The nature of the activity or investment;
- (iv) The date that the banking entity's contractual obligation to make or retain an investment in the fund was incurred and when it expires;
- (v) The contractual terms governing the banking entity's interest in the fund;
- (vi) The degree of control held by the banking entity over investment decisions of the fund;
- (vii) The types of assets held by the fund, including whether any assets that were illiquid when first acquired by the fund have become liquid assets, such as, for example, because any statutory, regulatory, or contractual restrictions on the offer, sale, or transfer of such assets have expired;
- (viii) The date on which the fund is expected to wind up its activities and liquidate, or its investments may be redeemed or sold;
- (ix) The total exposure of the banking entity to the activity or investment and the risks that disposing of, or maintaining, the investment or activity may pose to the banking entity or the financial stability of the United States;
- (x) The cost to the banking entity of divesting or disposing of the activity or investment within the applicable period;
- (xi) Whether the divestiture or conformance of the activity or investment would involve or result in a material conflict of interest between the banking entity and unaffiliated clients, customers or counterparties to which it owes a duty;
- (xii) The banking entity's prior efforts to divest or conform the activity or investment(s), including, with respect to an illiquid fund, the extent to which the banking entity has made efforts to terminate or obtain a waiver of its contractual obligation to take or retain an equity, partnership, or other ownership interest in, or provide additional capital to, the illiquid fund; and
- (xiii) Any other factor that the Board believes appropriate.

(2) Timing of Board review. The Board will seek to act on any request for an extension under paragraph (a)(3) or (b)(1) of this section no later than 90 calendar days after the receipt of a complete record with respect to such request.

(3) Consultation. In the case of a banking entity that is primarily supervised by another Federal banking agency, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, the Board will consult with such agency prior to the approval of a request by the banking entity for an extension under paragraph (a)(3) or (b)(1).

(e) Authority to impose restrictions on activities or investments during any extension period.

(1) In general. The Board may impose such conditions on any extension approved under paragraph (a)(3) or (b)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart.

(2) Consultation. In the case of a banking entity that is primarily supervised by another Federal banking agency, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, the Board will consult with such agency prior to imposing conditions on the approval of a request by the banking entity for an extension under paragraph (a)(3) or (b)(1) of this section.

**§ 225.182 Conformance Period for Nonbank Financial Companies Supervised by the Board Engaged in Proprietary Trading or Private Fund Activities.**

(a) Divestiture Requirement. A nonbank financial company supervised by the Board shall come into compliance with all applicable requirements of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart, including any capital requirements or quantitative limitations adopted thereunder and applicable to the company, not later than 2 years after the date the company becomes a nonbank financial company supervised by the Board.

(b) Extensions. The Board may, by rule or order, extend the two-year period under paragraph (a) by not more than three separate one-year periods, if, in the judgment of the Board, each such one-year extension is consistent with the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart and would not be detrimental to the public interest.

(c) Approval Required to Hold Interests in Excess of Time Limit. A nonbank financial company supervised by the Board that seeks the Board's approval for an extension of the conformance period under paragraph (b) must—

(1) Submit a request in writing to the Board at least 180 days prior to the expiration of the applicable time period;

(2) Provide the reasons why the nonbank financial company supervised by the Board believes the extension should be granted; and

(3) Provide a detailed explanation of the company's plan for conforming the activity or investment(s) to any applicable requirements established under section 13(a)(2) or (f)(4) of the Bank Holding Company Act (12 U.S.C. 1851(a)(2) and (f)(4)).

(d) Factors governing Board determinations.

(1) In general. In reviewing any application for an extension under paragraph (b) of this section, the Board may consider all the facts and circumstances related to the nonbank financial company and the request including, to the extent determined relevant by the Board, the factors described in § 225.181(d)(1).

(2) Timing. The Board will seek to act on any request for an extension under paragraph (b) of this section no later than 90 calendar days after the receipt of a complete record with respect to such request.

(f) Authority to impose restrictions on activities or investments during any extension period. The Board may impose conditions on any extension approved under paragraph (b) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the nonbank financial company or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart.

**THIS SIGNATURE PAGE PERTAINS TO THE FINAL RULE TITLED, “CONFORMANCE PERIOD FOR ENTITIES ENGAGED IN PROHIBITED PROPRIETARY TRADING AND HAVING CERTAIN RELATIONSHIPS WITH A PRIVATE EQUITY FUND OR HEDGE FUND” (REGULATION Y)**

By order of the Board of Governors of the Federal Reserve System, February 8, 2011

Jennifer J. Johnson (signed)

Jennifer J. Johnson,  
Secretary of the Board