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DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 9

[Docket ID OCC-2020-0031]

RIN 1557-AE99

Collective Investment Funds: Prior Notice Period for Withdrawals

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Interim final rule; request for comment.

SUMMARY: OCC regulations permit a national bank or Federal Savings association (collectively, a bank) administering a collective investment fund (CIF) that is invested primarily in real estate or other assets that are not readily marketable to require a prior notice period, not to exceed one year, for withdrawals from the fund. The OCC interprets this notice provision as requiring the bank to withdraw an account within the prior notice period or, if permissible under the CIF's written plan, within one year after prior notice was required (standard withdrawal period). The OCC is issuing an interim final rule to codify the standard withdrawal period and create a limited exception that allows a bank, with OCC approval, to withdraw an account from the CIF up to one year beyond the standard withdrawal period, with opportunities for further extensions, provided that certain conditions are satisfied. The exception is intended to enable a bank to preserve the value of the CIF's assets for the benefit of fund participants during unanticipated and severe market conditions, such as those resulting from the current national health emergency concerning the coronavirus disease (COVID-19) outbreak.

DATES: The interim final rule is effective [INSERT DATE OF PUBLICATION IN THE

FEDERAL REGISTER]. Comments on the interim final rule must be received no later than [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Collective Investment Funds: Prior Notice Period for Withdrawals” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

Federal eRulemaking Portal—“Regulations.gov Classic or Regulations.gov Beta”:

Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0031” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. For help with submitting effective comments please click on “View Commenter’s Checklist.” Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov Site*” from the *Regulations.gov* Classic homepage. Enter “Docket ID OCC-2020-0031” in the Search Box and click “Search.” Public comments can be submitted via the “Comment” box below the displayed document information or by clicking on the document title and then clicking the “Comment” box on the top-left side of the screen. For help with submitting effective comments please click on “Commenter’s Checklist.” For assistance with the *Regulations.gov* Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail regulations@erulemakinghelpdesk.com.

- **E-mail:** regs.comments@occ.treas.gov.
- **Mail:** Chief Counsel’s Office, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, Washington, DC 20219.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2020-0031” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically – Regulations.gov Classic or Regulations.gov Beta:**
Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0031” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen. Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov Site*” from the *Regulations.gov* Classic homepage. Enter “Docket ID OCC-2020-0031” in the Search Box and click “Search.” Click on the “Comments” tab. Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. Supporting materials can be viewed by clicking

on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. For assistance with the *Regulations.gov* Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail regulations@erulemakinghelpdesk.com.

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

FOR FURTHER INFORMATION CONTACT:

Patricia Dalton, Director for Asset Management Policy, David Stankiewicz, Technical Expert for Asset Management Policy, Market Risk Policy Division, Bank Supervision Policy, 202-649-6360; Beth Kirby, Assistant Director, Asa Chamberlayne, Counsel, or Daniel Perez, Senior Attorney, Chief Counsel’s Office, (202) 649-5490, for persons who are deaf or hearing impaired, TTY, (202) 649-5597, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Background

A collective investment fund (CIF) is a bank-managed fiduciary fund that holds pooled assets. A national bank or Federal savings association (collectively, a bank) that establishes and operates a CIF must do so in accordance with the criteria established under the OCC fiduciary activities regulation at 12 CFR 9.18.¹ A CIF is funded through contributions by the CIF’s participants, which are the beneficial owners of the fund’s assets. A bank admitting a CIF participant or withdrawing all or part of its participating interest (that is, allowing the participant

¹ Pursuant to 12 CFR 150.260, the terms “bank” and “national bank” as used in 12 CFR 9.18 are deemed to include a Federal savings association.

to, in effect, redeem a proportionate interest in the assets of the CIF) must do so on the basis of a valuation of the CIF's assets.²

A bank administering a C IF invested primarily in real estate or other assets that are not readily marketable may be required to make withdrawals.³ The OCC has interpreted this notice as requiring the bank to withdraw an account within the prior notice period or, if permissible under the CIF's written plan, within one year after prior notice was required (standard withdrawal period).⁴ The OCC has also recognized, however, that there may be circumstances when a longer withdrawal period is appropriate. For example, during the 2009 financial crisis, the OCC permitted a bank to extend the time period for withdrawals, subject to certain conditions.⁵

During normal market conditions, a bank can typically satisfy withdrawal requests within the standard withdrawal period. However, in the event of unanticipated and severe market conditions, a bank may be faced with an increased number of withdrawal requests and reduced market liquidity. If the bank is required to sell assets held by a CIF to satisfy withdrawals within the standard withdrawal period, it may have difficulty realizing a fair value for those assets. This could compel "fire sales" of CIF assets and lead to avoidable economic harm for CIF participants, which would be contrary to general fiduciary principles that require a CIF trustee to act in the interests of CIF participants. Similarly, an in-kind distribution⁶ of CIF assets to CIF participants would be generally impractical and involve considerable difficulties and transaction costs for the participants, who may be ill-equipped to receive, manage, and liquidate such assets.

² 12 CFR 9.18(b)(5)(i).

³ 12 CFR 9.18(b)(5)(iii).

⁴ *See, e.g.*, OCC Interpretive Letter No. 1121 (Aug. 2009) (Interpretive Letter 1121).

⁵ *Id.*

⁶ *See* 12 CFR 9.18(b)(5)(iv) (a bank may withdraw an account from a fund in cash, ratably in kind, a combination of cash and ratably in kind, or in any other manner permitted under state law where the bank national maintains the fund).

Extending the time period for acting upon withdrawal requests beyond the standard withdrawal period would allow a bank administering a CIF to take appropriate steps to satisfy the requests within the context of current market conditions, including allowing for an orderly liquidation of sufficient assets to raise cash through prudent and appropriate sales, as the return of more normal market conditions permit.

II. Interim Final Rule

The OCC is issuing an interim final rule that clarifies the standard withdrawal period and establishes a limited exception to that withdrawal period.

Under 12 CFR 9.18(b)(5)(iii), a bank administering a CIF invested primarily in real estate or other assets that are not readily marketable may require a prior notice period of up to one year for withdrawals. As described above, the OCC has interpreted this notice provision as requiring payment of the withdrawal requests within the standard withdrawal period. The IFR adds new paragraph (b)(5)(iii)(B) to § 9.18, which codifies the standard withdrawal period as a distinct provision of the rule and provides that a bank that requires a prior notice period for withdrawals generally must withdraw an account within the prior notice period or, if permissible under the CIF's written plan, within one year after prior notice was required.

The IFR also adds new paragraph (b)(5)(iii)(C) to § 9.18 to create an exception to the standard withdrawal period that may be invoked under exceptional circumstances. Specifically, under the exception, a bank may withdraw an account from a CIF up to one year beyond the standard withdrawal period described in new paragraph (b)(5)(iii)(B), if the OCC approves and certain conditions are met. Namely, the fund's written plan (including its notice and withdrawal policy) must authorize an extended withdrawal period and be fully disclosed to fund participants. In addition, the bank's board of directors, or a committee authorized by the board of directors,

must make certain determinations and commitments. The bank's board of directors, or a committee authorized by the board of directors, must determine that (1) due to unanticipated and severe market conditions for specific assets held by the fund, an extended withdrawal period is necessary in order to preserve the value of the fund's assets for the benefit of fund participants; and (2) the extended withdrawal period is consistent with 12 CFR part 9 and applicable law. The bank's board of directors, or a committee authorized by the board of directors, must also commit that the bank will act upon any withdrawal request as soon as practicable. Finally, the rule provides discretion for the OCC to impose additional conditions if the OCC determines that the conditions are necessary or appropriate to protect the interests of fund participants.

The conditions established by this interim final rule are intended to ensure that the exception is only granted if it is consistent with fiduciary principles, applicable law, and the CIF's written plan.⁷ To ensure that the exception is consistent with these principles and requirements, and as described above, the OCC may impose additional conditions, such as requiring periodic progress reports from the bank.

If, due to ongoing severe market conditions, a bank has been unable to satisfy withdrawal requests during the one-year extension period without causing harm to participants, the bank may request OCC approval under new paragraph (b)(5)(iii)(D) for up to two additional one-year extensions. The OCC may only approve each additional one-year extension if the OCC determines that the bank has made a good faith effort to satisfy withdrawal requests during the original extension period and the bank has been unable to satisfy such requests without causing harm to participants due to ongoing severe market conditions. The bank must also continue to satisfy the conditions described in new paragraph (b)(5)(iii)(C). In the OCC's experience, the

⁷ See 12 CFR 9.18(b)(1) (written plan requirements).

initial one-year extension should be sufficient in most cases to avoid a “fire sale” of CIF assets during stressed market conditions. Additional extensions are available in one-year increments to allow the OCC to review the bank’s ongoing efforts to satisfy withdrawal requests. The additional requests are capped at two years based on the OCC’s experience with stressed market events and the need to balance the bank’s and participants’ interest in satisfying withdrawal requests at fair value with the participants’ interest in timely withdrawals.

For example, under normal circumstances and pursuant to the standard withdrawal period in new paragraph (b)(5)(iii)(B), a bank that requires notice of withdrawal by December 31, 2020, is required to withdraw an account no later than December 31, 2021. However, if, due to exceptional circumstances, the bank receives a one-year extension of the standard withdrawal period pursuant to new paragraph (b)(5)(iii)(C), the bank is required to withdraw the account no later than December 31, 2022. If the bank later receives an additional one-year extension pursuant to new paragraph (b)(5)(iii)(D), the bank is required to withdraw the account no later than December 31, 2023.

III. Request for Comment

The OCC invites comment on all aspects of this rulemaking. In particular, the OCC invites comment on whether the OCC approval requirement and associated conditions for an extended withdrawal period are (1) sufficient to ensure that any extension of the withdrawal period would be consistent with fiduciary principles and applicable law; and (2) consistent with general business practices.

IV. Administrative Law Matters

A. Administrative Procedure Act

The OCC is issuing the interim final rule without prior notice and the opportunity for public comment and the 30-day delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).⁸ Pursuant to section 553(b) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁹

The OCC is concerned that the disruption and stress in the real estate markets and other markets for not readily marketable assets resulting from the outbreak of the COVID-19 emergency, coupled with requiring a bank to withdraw an account within the standard withdrawal period, may undermine the ability of a bank to realize an appropriate value for CIF assets and be harmful in preserving the value of the CIF’s assets for the benefit of fund participants. Accordingly, the OCC finds that the public interest is best served by implementing the interim final rule immediately upon publication in the *Federal Register*.

The APA also requires a 30-day delayed effective date, except for (1) substantive rules, which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.¹⁰ Because the rule relieves a restriction on banks, the interim final rule is exempt from the APA’s delayed

⁸ 5 U.S.C. 553.

⁹ 5 U.S.C. 553(b)(B).

¹⁰ 5 U.S.C. 553(d).

effective date requirement.¹¹ In addition, for the same reasons set forth above under the discussion of section 553(b)(B) of the APA, the OCC finds good cause to publish the interim final rule with an immediate effective date.

While the OCC believes that there is good cause to issue the interim final rule without advance notice and comment and with an immediate effective date as of the date of *Federal Register* publication, the OCC is interested in the views of the public and requests comment on all aspects of the interim final rule.

B. Congressional Review Act

For purposes of Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule.¹² If a rule is deemed a “major rule” by OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.¹³

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.¹⁴

¹¹ 5 U.S.C. 553(d)(1).

¹² 5 U.S.C. 801 *et seq.*

¹³ 5 U.S.C. 801(a)(3).

¹⁴ 5 U.S.C. 804(2).

For the same reasons set forth above, the OCC is adopting the interim final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.¹⁵ In light of the potential economic harm described above, the OCC finds that delaying the effective date of the interim final rule would be contrary to the public interest.

As required by the Congressional Review Act, the OCC will submit the interim final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid OMB control number. The interim final rule contains reporting requirements under the Paperwork Reduction Act. With the OCC's approval, and if certain conditions are satisfied, a bank may withdraw an account from a collective investment fund up to one year after the end of the standard withdrawal period.¹⁶ In addition, a bank may request that the OCC approve an extension beyond the one-year extension period, if certain conditions are satisfied.¹⁷ Extensions past the initial one-year extension must be requested and approved annually, for a maximum of two years after the initial one-year extension period.¹⁸

Title of Information Collection: Fiduciary Activities.

¹⁵ 5 U.S.C. 808.

¹⁶ 12 CFR 9.18(b)(5)(iii)(C) introductory text.

¹⁷ 12 CFR 9.18(b)(5)(iii)(D).

¹⁸ *Id.*

OMB Control No.: 1557-0140

Frequency: On occasion.

Affected Public: Businesses or other for-profit.

Estimated number of respondents: 4.

Total estimated annual burden: 220 burden hours.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology;
and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁹ requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.²⁰

The RFA applies only to rules for which an agency publishes a general notice of proposed

¹⁹ 5 U.S.C. 601 *et seq.*

²⁰ Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less. *See* 13 CFR 121.201.

rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the OCC has determined for good cause that general notice and opportunity for public comment is impracticable and contrary to the public's interest, and therefore the OCC is not issuing a notice of proposed rulemaking. Accordingly, the OCC concludes that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Nevertheless, the OCC is interested in receiving feedback on ways that the OCC can reduce any potential burden of the interim final rule on small entities.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),²¹ in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form, with certain exceptions, including for good cause.²² For the reasons described above, the OCC finds good cause exists under section 302 of RCDRIA to publish the interim final rule with an immediate effective date.

²¹ 12 U.S.C. 4802(a).

²² 12 U.S.C. 4802.

F. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act²³ requires the Federal banking agencies to use “plain language” in all proposed and final rules published after January 1, 2000. In light of this requirement, the OCC has sought to present the interim final rule in a simple and straightforward manner. The OCC invites comments on whether there are additional steps the OCC can take to make the rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

G. Unfunded Mandates Act

As a general matter, the Unfunded Mandates Act of 1995 (UMRA), 2 U.S.C. 1531 et seq., requires the preparation of a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

²³ 12 U.S.C. 4809.

However, the UMRA does not apply to final rules for which a general notice of proposed rulemaking was not published. *See* 2 U.S.C. 1532(a). Therefore, because the OCC has found good cause to dispense with notice and comment for this interim final rule, the OCC concludes that the requirements of UMRA do not apply to this interim final rule.

List of Subjects

12 CFR Part 9

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

Office of the Comptroller of the Currency

12 CFR CHAPTER I

Authority and Issuance

For the reasons set forth in the preamble, the OCC amends chapter I of Title 12 of the Code of Federal Regulations as follows:

PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

1. The authority citation for part 9 continues to read as follows:

Authority: 12 U.S.C. 24 (Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q-1, and 78w.

2. Section 9.18 is amended by revising paragraph (b)(5)(iii):

§9.18 Collective investment funds.

* * * * *

(b) * * *

(5) * * *

(iii) Prior notice period for withdrawals from funds with assets not readily marketable—

(A) A bank administering a collective investment fund described in paragraph (a)(2) of this section that is invested primarily in real estate or other assets that are not readily marketable may require a prior notice period, not to exceed one year, for withdrawals.

(B) A bank that requires a prior notice period for withdrawals must withdraw an account from the fund within the prior notice period or, if permissible under the fund's written plan, within one year after the date on which notice was required, except as described in paragraph (b)(5)(iii)(C) of this section.

(C) A bank may withdraw an account from the fund up to one year after the withdrawal period described in paragraph (b)(5)(iii)(B) of this section, with the OCC's approval, provided that the following conditions are met:

(1) The fund's written plan, including its notice and withdrawal policy, authorizes an extended withdrawal period and is fully disclosed to fund participants;

(2) The bank's board of directors, or a committee authorized by the board of directors, determines that, due to unanticipated and severe market conditions for specific assets held by the fund, an extended withdrawal period is necessary in order to preserve the value of the fund's assets for the benefit of fund participants;

(3) The bank's board of directors, or a committee authorized by the board of directors, determines that the extended withdrawal period is consistent with 12 CFR part 9 and applicable law;

(4) The bank's board of directors, or a committee authorized by the board of directors, commits that the bank will act upon any withdrawal request as soon as practicable; and

(5) Any other condition imposed by the OCC, if the OCC determines that the condition is necessary or appropriate to protect the interests of fund participants.

(D) Upon request by a bank, the OCC may approve an extension beyond the one-year extension period described in paragraph (b)(5)(iii)(C) of this section if the OCC determines that the bank has made a good faith effort to satisfy withdrawal requests and the bank has been unable to satisfy such requests without causing harm to participants due to ongoing severe market conditions. The bank must also continue to satisfy the conditions described in paragraph (b)(5)(iii)(C) of this section. Extensions under this paragraph must be requested and approved annually, for a maximum of two years after the initial one-year extension period.

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Brian P. Brooks,
Acting Comptroller of the Currency

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