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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: Final rule.

SUMMARY: The OCC is adopting as final, with one minor change, the interim final rule published in the *Federal Register* on August 13, 2020, that codifies and creates an exception to the standard withdrawal period for a bank administering a collective investment fund invested primarily in real estate or other assets that are not readily marketable (a covered CIF). Pursuant to the interim final rule, a bank administering a covered CIF may request OCC approval to extend the standard withdrawal period under limited circumstances and if certain conditions are met. The final rule adopts as final the changes made by the interim final rule and introduces a minor revision to one of the conditions necessary for the extension.

DATES: The interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Beth Kirby, Assistant Director, Asa Chamberlayne, Counsel, or Daniel Perez, Counsel, Chief Counsel's Office, (202) 649-5490; or David Stankiewicz, Technical Expert for Asset Management Policy, Market Risk Policy Division, Bank Supervision Policy, 202-649-6360, 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 fiduciary activities regulation of the Office of the Comptroller of the Currency (OCC) 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 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 CIF invested primarily in real estate or other assets that are not readily marketable must provide a notice period for withdrawals.³ The OCC previously interpreted this notice period requirement 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 also recognized, however, that there were circumstances when a longer withdrawal period was 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. In such conditions, a bank that is required to sell CIF assets to satisfy withdrawals within the standard withdrawal period could 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 best interests of CIF participants.

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.

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.*

II. Interim Final Rule

On August 13, 2020, the OCC published an interim final rule in the *Federal Register* that codified the standard withdrawal period for a bank administering a covered CIF and established a limited exception to that withdrawal period. The exception was intended to enable a bank to preserve the value of a 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.

Under the interim final rule, to satisfy the standard withdrawal period requirement, a bank administering a covered CIF 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.

Under the exception established by the interim final rule, a bank may withdraw an account from a CIF up to one year beyond the standard withdrawal period with OCC approval and if 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 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 were intended to ensure that the exception is only granted if it is consistent with

fiduciary principles, applicable law, and the CIF's written plan.⁶ 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.

In addition to the above, the interim final rule provided that 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 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 above.

By creating a limited exception to the standard withdrawal period, the IFR permits a bank administering a covered CIF to take appropriate steps to satisfy account withdrawal requests during severe market conditions, while permitting an orderly liquidation of sufficient assets to raise cash through prudent and appropriate sales, as the return of more normal market conditions permit.

III. Comments Received

The OCC received comment letters from two commenters—a trade association and a law firm—that were relevant to the scope of the rulemaking.

Both commenters requested that the OCC revise the interim final rule to accommodate state-chartered banks that are required to comply with the OCC's regulations under 12 CFR 9.18, either by reason of the Internal Revenue Code, state law, or a CIF's written plan. In particular, the commenters expressed concern that state-chartered banks that are required to comply with 12 CFR 9.18 would be unable to comply with the requirement for OCC approval. Accordingly, commenters suggested that the exception to the standard withdrawal period be revised to allow

⁶ See 12 CFR 9.18(b)(1) (written plan requirements).

for notice or disclosure instead of requiring approval, provided the interim final rule's enumerated conditions were satisfied. Alternatively, the commenters suggested the OCC clarify the application of the interim final rule to state-chartered banks.

The OCC uses the review and approval process to assess, among other things, current market conditions, the number and dollar amount of account withdrawals received, whether the bank satisfies the enumerated conditions, whether additional conditions are necessary or appropriate, and the bank's efforts to satisfy withdrawal requests. Accordingly, and because the OCC does not determine requirements for non-OCC-regulated institutions, the OCC is not revising the approval requirement in this final rule. However, the OCC clarifies that it would not expect a state-chartered bank to request OCC approval to extend its withdrawal period, nor does the OCC have the authority to approve a request received from a state-chartered bank.

Commenters also objected to the requirement that, in order for a bank to receive an exception to the standard withdrawal period, the bank's board of directors, or a committee authorized by the board of directors, must "commit that the bank will act upon any withdrawal request as soon as practicable." In particular, commenters raised concerns that the term "commit" in this context was ambiguous and raised compliance concerns. In response to this comment, the OCC is revising this condition, as described in the subsequent section.

One commenter raised concerns with the requirement that the bank's board of directors, or a committee authorized by the board of directors, "determine 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." The commenter argued that the conditions set by the interim final rule should be aligned with past OCC guidance and that a bank should be able to avail itself of the exception to the standard withdrawal period if it has "valid reasons" or if the extension is in the best interest of the fund's participants, rather than having to prove that the exception is necessary to "preserve the value of the fund's assets." The OCC believes that a narrower and more specific requirement is necessary

to avoid ambiguity and that it provides more concrete support for the conclusion that an extension to the standard withdrawal period would be in the interest of fund participants. Accordingly, the OCC is not revising this requirement.

This commenter also requested that the OCC clarify the number of submissions to the OCC required for the exception to the withdrawal period. Namely, the commenter suggested that the OCC clarify that a bank may submit a single approval request to the OCC for a one-year extension to the standard withdrawal period that would cover any and all account withdrawal requests that the bank has received or may receive in the future in the given year. The commenter suggested that a bank should be able to request additional extensions even if it has not yet received additional redemption requests.

In response to this comment, the OCC is clarifying that a bank may submit a single request for OCC approval covering any account withdrawal requests that were received prior to the bank's submission to the OCC. A bank is not required to prepare different submissions for every account withdrawal request received. However, the OCC would not approve an application to extend the withdrawal period in connection with account withdrawal requests that have not yet been received by the bank. Under the standard withdrawal period, a bank may withdraw an account from a CIF up to one year after the date on which notice was required, if permitted by the CIF's written plan. Approving an application with respect to future withdrawal requests would require the OCC to make a determination, using incomplete information, as to an extended time horizon over which conditions may change.

IV. Final Rule

This final rule adopts as final the changes made by the interim final rule, but revises, in response to comments received, one of the enumerated conditions for extending the standard withdrawal period. As described above, in order to receive an exception to the standard withdrawal period, a bank's board of directors (or a committee authorized by the board of directors) must commit that the bank will act upon any withdrawal request as soon as practicable.

Pursuant to this final rule, the OCC is revising this condition to read, “The bank’s board of directors, or a committee authorized by the board of directors, represents that the bank will act upon any withdrawal request as soon as practicable and consistent with fiduciary duties.” The OCC believes that the revised condition accomplishes its intended purpose without imposing unintended legal and compliance risk.

V. Administrative Law Matters

A. Administrative Procedure Act

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The OCC issued the August 13, 2020, interim final rule without notice and comment based on concerns 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, could 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 found that the public interest was best served by implementing the interim final rule immediately upon publication in the *Federal Register*.

The effective date of these corrections is [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. This final rule implements one change relative to the August 13, 2020, interim final rule. The change is being made in response to a commenter and is intended to reduce ambiguity and compliance risks for banks seeking an exception under the rule. Because the severe market conditions related to the COVID-19 outbreak are ongoing as of the date of issuance of this final

rule, the OCC finds that notice and public procedure is contrary to the public interest and that good cause exists for dispensing with the delayed effective date requirement.

B. Congressional Review Act

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule.⁷ If a rule is deemed a “major rule” by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.⁸

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.⁹

As required by the Congressional Review Act, the agencies will submit the 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 contained 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

⁷ 5 U.S.C. 801 *et seq.*

⁸ 5 U.S.C. 801(a)(3).

⁹ 5 U.S.C. 804(2).

investment fund up to one year after the end of the standard withdrawal period. In addition, a bank may request that the OCC approve an extension beyond the one-year extension period, if certain conditions are satisfied. 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. OMB provided emergency PRA approval for the interim final rule. Renewal of the emergency approval is currently underway.

Title of Information Collection: Fiduciary Activities.

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 continue to be invited on:

- a. Whether the collections of information are necessary for the proper performance of the OCC’ 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)¹⁰ requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.¹¹ The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the OCC 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 did not issue a notice of proposed rulemaking prior to issuing the August 13, 2020, interim final rule. Because the agency did not publish a notice of proposed rulemaking, the OCC concludes that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply to this final rule. Nevertheless, when issuing the August 13, 2020, interim final rule, the OCC requested feedback on ways that the OCC could reduce any potential burden of the interim final rule on small entities. No comments were received in response to this request.

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),¹² 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

¹⁰ 5 U.S.C. 601 *et seq.*

¹¹ 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.

¹² 12 U.S.C. 4802(a).

or after the date on which the regulations are published in final form, with certain exceptions, including for good cause.¹³ For the reasons described above, the OCC finds good cause exists under section 302 of RCDRIA to publish the final rule with an immediate effective date.

F. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act¹⁴ 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 final rule in a simple and straightforward manner. The OCC invited comment at the interim final rule stage on whether there were additional steps the OCC could take to make the rule easier to understand. No comments were received in response to this request.

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. 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 found good cause to dispense with notice and comment for this final rule, the OCC concludes that the requirements of UMRA do not apply.

List of Subjects in 12 CFR Part 9

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

Authority and Issuance

¹³ 12 U.S.C. 4802.

¹⁴ 12 U.S.C. 4809.

Accordingly, for the reasons set forth in the preamble, the interim final rule amending 12 CFR part 9 that was published at 85 FR 49229 on August 13, 2020, is adopted as final with the following change:

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)(C)(4) to read as follows:

§ 9.18 Collective investment funds.

* * * * *

(b) * * *

(5) * * *

(iii) * * *

(C) * * *

(4) The bank’s board of directors, or a committee authorized by the board of directors, represents that the bank will act upon any withdrawal request as soon as practicable and consistent with its fiduciary duties; and

* * * * *

Michael J. Hsu,
Acting Comptroller of the Currency