Office of the Comptroller of the Currency
Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Securities and Exchange Commission

Statement regarding Treatment of Certain Collateralized Debt Obligations Backed by Trust Preferred Securities under the Rules implementing Section 619 of the Dodd-Frank Act

Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") added a new section 13 to the Bank Holding Company Act of 1956 ("BHC Act") (codified at 12 U.S.C. 1851) that generally prohibits banking entities from engaging in proprietary trading and from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund ("covered funds"). These prohibitions are subject to a number of statutory exemptions, restrictions and definitions.[1]

The Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, and the Securities and Exchange Commission issued final rules implementing section 619, which become effective on April 1, 2014 ("Final Rule").[2] The Final Rule contains important definitions and descriptions of permissible and impermissible activities and requires banking entities to implement comprehensive compliance programs to ensure they do not engage in impermissible activities. In particular, the Final Rule requires that a banking entity engaged in covered activities or investments establish a variety of limits, written policies, internal review processes and controls related to its market-making, underwriting and hedging activities; and restructure and limit certain of its investments in and relationships with covered funds, including securitizations of non-loan assets.[3]

Another provision of the Dodd-Frank Act, section 171, separately provides that Trust Preferred Securities ("TruPS") issued by depository institution holding companies must be phased out of such companies' calculation of regulatory capital for purposes of determining Tier 1 capital. However, section 171 further provides for the permanent grandfathering of TruPS issued before May 19, 2010 by certain depository institution holding companies with total consolidated assets of less than $15 billion. These grandfathered capital-raising instruments were issued to capital markets by community banks frequently through securitization pools.

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[1] See, e.g., sections 1851(d)(1)(G), (d)(1)(J), (d)(4) and (h)(2).

[2] These final rules will be codified at 12 CFR part 44 (OCC), 12 CFR part 248 (FRB), 12 CFR part 351 (FDIC), 17 CFR part 75 (CFTC), and 17 CFR part 255 (SEC).

[3] Banking entities are required to conform their activities to the restrictions and requirements of the Final Rule no later than July 21, 2015. See Federal Reserve Board's Statement of Policy Regarding the Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities. http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20131210b.htm.

Following the issuance of the Final Rule implementing section 619, a number of community banking organizations have expressed concern that the Final Rule conflicts with the Congressional determination under section 171(b)(4)(C) of the Dodd-Frank Act to grandfather TruPS. On December 19, 2013, the Federal Reserve Board, FDIC and OCC issued a joint statement outlining some of the issues that must be resolved in order to determine whether ownership of an interest in a securitization vehicle that holds primarily TruPS would be subject to the provisions of section 619 of the Dodd-Frank Act and the final implementing rules.[4] As noted in the statement, the question of whether an investment is covered by the statute and implementing rules depends on the facts of the structure, type and circumstances governing the particular investment.

The Federal Reserve Board, FDIC, OCC and SEC (the "Agencies") are currently reviewing this matter and are considering whether it is appropriate and consistent with the provisions of the Dodd-Frank Act not to subject pooled investment vehicles for TruPS, such as collateralized debt obligations (CDOs) backed by TruPS (TruPS CDOs), to the prohibitions on ownership of covered funds in section 619 of the Dodd-Frank Act. The Agencies are aware that the provisions of section 171(b)(4)(C) are important to community banking organizations and, based on information recently received, understand that the investments and capital levels of a number of these organizations might be adversely affected if pooling vehicles formed for the purpose of holding TruPS are treated as covered funds. The Agencies are therefore evaluating whether it is appropriate not to cover pooling vehicles that invest in TruPS in order to eliminate restrictions that might otherwise have consequences that are inconsistent with the relief Congress intended to provide community banking organizations under section 171(b)(4)(C) of the Dodd-Frank Act.

The Agencies intend to address this matter no later than January 15, 2014. The accounting staffs of the agencies believe that, consistent with generally accepted accounting principles, any actions in January 2014 that occur before the issuance of December 31, 2013 financial reports, including the FR Y-9C and the Call Report, should be considered when preparing those financial reports.

[4] See FAQ issued by the Federal Reserve Board, FDIC and OCC Regarding Collateralized Debt Obligations Backed by Trust Preferred Securities under the Final Volcker Rule, December 19, 2013, http://www.federalreserve.gov/newsevents/press/bcreg/20131219d.htm; http://www.fdic.gov/news/news/press/2013/pr13123.html; http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-195.html.