

Foreign Public Fund Seeding Vehicles

5. The final rule excludes from the definition of covered fund a registered investment company and business development company, including an entity that is formed and operated pursuant to a written plan to become one of these entities. Would an entity that is formed and operated pursuant to a written plan to become a foreign public fund receive the same treatment?

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Section 351.10(c)(12) of the final rule explicitly excludes an issuer that is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), or that is formed and operated pursuant to a written plan to become a registered investment company ("RIC") in accordance with the banking entity's compliance program as described in § 351.20(e)(3), and that complies with the requirements of section 18 of the Investment Company Act (15 U.S.C. 80a-18).¹ Section 351.10(c)(1) of the final rule also excludes from the definition of covered fund a foreign public fund that is an issuer that is organized or established outside of the United States; is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and sells ownership interests predominantly through one or more public offerings outside of the United States. Foreign public funds that meet these qualifications are therefore treated the same as RICs for purposes of the definition of "covered fund" under the final rule. Although the final rule excludes from the definition of covered fund certain seeding vehicles that will become RICs, as discussed above, the final rule does not address a seeding vehicle that will become a foreign public fund.

Staffs of the Agencies believe that, with respect to determining whether an entity is a covered fund, it would be appropriate that an issuer that will become an excluded foreign public fund be treated during its seeding period the same as an issuer that will become an excluded RIC. Accordingly, staffs of the Agencies do not intend to advise the Agencies to treat as a covered fund under the final rule an issuer that is formed and operated pursuant to a written plan to become a qualifying foreign public fund. Any written plan would be expected to document the banking entity's determination that the seeding vehicle will become a foreign public fund, the period of time during which the vehicle will operate as a seeding vehicle, the banking entity's plan to market the vehicle to third-party investors and convert it into a foreign public fund within the time period specified in § 351.12(a)(2)(i)(B) of subpart C, and the banking entity's plan to operate the seeding vehicle in a manner consistent with the investment strategy, including leverage, of the issuer upon becoming a foreign public fund. For purposes of the definition of covered fund, this would treat an issuer that becomes a qualifying foreign public fund the same as an issuer that becomes a RIC during the seeding period for the fund.

¹ The final rule also explicitly excludes an issuer that has elected to be regulated as a business development company ("BDC") pursuant to section 54(a) of that Act (15 U.S.C. 80a-53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a BDC as described in § 351.20(e)(3) and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a-60).