

ALERT

Block Trade Procedures – Volcker Rule/Investment Company Act

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Financial Institution/Bank members of ASIFMA are frequently approached by shareholders of non-US listed companies to assist in the sale of all or part of their shareholdings by way of an undocumented block trade. The selling shareholders may request several banks to bid for the trade in an auction process, frequently, with limited advance notice.

ASIFMA members would like to bring to the attention of market participants a specific issue and concern that should be addressed by prospective selling shareholders and their legal counsel ahead of commencing a block trade auction. This is the status of the underlying non-US issuer as (a) a “covered fund” for purposes of the US Volcker Rule, and/or (b) an “investment company” as defined in the US Investment Company Act of 1940. These are both complex and wide-ranging concepts, and non-US issuers that would not be considered “investment companies” or “funds” in their home jurisdiction may be caught by these definitions. Prospective sellers of shares in such issuers should be aware that these concepts may have material implications for the execution of block trades, even where no US offers or sales are planned.

In order to avoid risking a delay or adverse pricing impact in the execution of a block trade, selling shareholders and their US legal counsel should conduct this analysis as a routine matter in advance of banks being invited to participate in block trade auctions. ASIFMA members expect that a determination would be based on a review of, among other things, publicly available information regarding the relevant issuer, including prior offering documentation, the issuer’s most recent annual report and latest published balance sheet, income statement and other financial statements and disclosure.

We request that sellers inform banks of the conclusion that has been reached in respect of an underlying issuer’s “Volcker Covered Fund” status and “US Investment Company” status as a part of the information supplied to them at the time they are requested to submit a bid to execute the block trade. **In particular, a determination that an issuer either relies, or would be expected to rely, on the “private fund” exemptions provided by Sections 3(c)(1) and 3(c)(7) of the Investment Company Act should be identified as early as possible by a prospective selling shareholder and/or its advisers.** In addition, any applicable exclusions from “Volcker Covered Fund” status, such as for “foreign public funds”, or other exceptions from “US Investment Company” status should similarly be flagged.

We recognise that, in some cases, it may not always be possible for selling shareholders and their US counsel to reach a definitive conclusion as to whether an issuer is a “Volcker Covered Fund” or a “US Investment Company”, especially without the involvement of the issuer and its own advisers assisting with the analysis. In such a case, a best estimate view from selling shareholder’s US counsel of the

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issuer's status based on the available facts and circumstances or even a view that the position is, after reasonable analysis and consideration, unclear would be of value and assist in the efficient execution of the block trade, which in turn benefits the seller. What banks consider important is that the seller has sought the advice of US counsel and given the matter due and appropriate consideration on a timely basis.

In addition, we would like to remind market participants that, in cases where a conclusion is reached that the issuer relies, or would be expected to rely, on Sections 3(c)(1) or 3(c)(7) of the Investment Company Act, selling shareholders and their counsel should ensure that any block trade documentation provided to banks, including investor representation letters, properly reflect the additional steps and procedures required to ensure that any US sales are consistent with the relevant exception.

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