Banking and Finance Law Daily Wrap Up, TOP STORY—FDIC proposes tailoring Volcker Rule restrictions, (May 31, 2018)

Banking and Finance Law Daily Wrap Up

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The Federal Deposit Insurance Corporation has proposed amending a 2013 final rule that restricts banks' ability to engage in some proprietary trading or investment fund activities. At its meeting on May 31, the FDIC approved a Notice of Proposed Rulemaking, jointly developed with the Federal Reserve Board, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, which would amend the Volcker Rule. On May 30, the Fed announced its proposed amendments to regulations implementing Volcker Rule restrictions (see *Banking and Finance Law Daily*, May 30, 2018).

Federal Deposit Insurance Corporation Chairman, Martin J. Gruenberg, issued a statement on the proposed rule, noting that his agency worked with the other agencies participating in the rulemaking "to explore modifications to the regulation intended to provide clarity to the requirements of the rule, to simplify compliance, and to improve supervision and implementation, but only within certain parameters under which the core principles of the Volcker Rule would be preserved." According to Gruenberg, the central goal of the proposed rulemaking is to preserve the core principles of the Volcker Rule as the agencies seek to provide greater clarity and simplicity to facilitate compliance.

There will be a 60-day public comment period on the proposed rule after its publication in the *Federal Register*.

The Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174), which was recently signed into law on May 24, 2018, fully exempts from the Volcker Rule banks that have less than $10 billion in total consolidated assets and total trading assets and liabilities of no more than five percent of those consolidated assets. Additionally, it eliminates a Dodd-Frank Act ban so that some hedge and private equity funds will be able to share the name of a bank-affiliated investment advisor.

Overview of revisions. According to the FDIC Staff Memorandum, the agencies have targeted several areas for revision. First, they propose tailoring the application of the 2013 final rule based on a banking entity's risk profile and the size and scope of its trading activities. The proposal would also further streamline compliance obligations for smaller and mid-sized banking entities. The proposal would streamline and clarify certain definitions and requirements related to the proprietary trading prohibition and limitations on covered fund activities and investments. It would reduce recordkeeping and compliance program requirements for all banking entities, streamline metrics reporting, and expand tailoring to make the scale of compliance commensurate with a firm's size and risk profile. And it would establish a presumption of compliance for banking entities with limited trading activities.

Scope of proposed rule. The proposed rule would establish three categories of banking entities based on trading activity and risk profile. The first category would include banking entities with "significant" trading assets and liabilities, at least $10 billion. These banking entities would be required to comply with the most extensive set of requirements under the rule.

The second category would include banking entities with "moderate" trading assets and liabilities, less than $10 billion, but above the threshold described below for banking entities with limited trading assets and liabilities. These banking entities would be subject to reduced compliance requirements and a more tailored approach in light of their significantly smaller and less complex trading activities.

The third category would include banking entities with limited trading assets and liabilities, less than $1 billion. The proposal would establish a presumption of compliance for all banking entities with limited trading assets and

liabilities, under which these banking entities would have no obligation to demonstrate compliance with subparts B and C of the rule on an ongoing basis.

This presumption may be overcome, however, if upon examination or audit, the relevant agency "determines that the banking entity has engaged in prohibited proprietary trading or covered fund activities, and the banking entity may be subject to the compliance requirements applicable to a banking entity with significant or moderate trading assets and liabilities."

Applicability to FDIC-Supervised Institutions. According to the FDIC Staff Memorandum, as of Dec. 31, 2017, there are six state non-member insured depository institutions that would be deemed to have significant trading assets and liabilities that exceed $10 billion. In addition, there are seven state non-member insured depository institutions that would be deemed to have moderate trading assets and liabilities. According to the Memorandum, the remaining state non-member insured depository institutions would be deemed to have limited trading assets and liabilities and would qualify for the presumption of compliance. Five of these entities are subject to Appendix B under the 2013 final rule.

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