

Volcker Rule: agencies propose to implement community bank exemption and revise name-sharing rule

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Introduction

Community bank and small banking organisation exclusion Amendments to name-sharing restrictions

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The five US federal agencies responsible for implementing the Volcker Rule⁽¹⁾ have individually released, or are expected to release, a related notice of proposed rulemaking.⁽²⁾ The notice proposes amendments to the Volcker Rule regulations⁽³⁾ that would implement the following two statutory changes required by the Economic Growth, Regulatory Relief and Consumer Protection Act:⁽⁴⁾

- exclusion from all Volcker Rule restrictions for community banks and other banking organisations below certain asset size and trading thresholds; and
- modification of the name-sharing restrictions of the Volcker Rule to permit certain banking entities that are investment advisers to share a name with a covered fund, subject to certain continuing limitations.

The notice is separate from the broader Volcker Rule revisions proposed by the agencies in June 2018, which are still pending.⁽⁵⁾ Comments in response to the notice must be received by the agencies within 60 days of its publication in the Federal Register.

Community bank and small banking organisation exclusion

The Volcker Rule restricts the ability of banking entities to engage in proprietary trading or to hold ownership interests in, sponsor or have certain other relationships with covered funds. The term 'banking entity' is broadly defined and includes:

- insured depository institutions;
- companies that control an insured depository institution;
- companies treated as bank holding companies for purposes of Section 8 of the International Banking Act 1978 (an IBA-BHC);⁽⁶⁾ and
- any affiliates or subsidiaries of any of those entities.

There are specified exclusions from the definition, both in the statute and in the existing regulations.

The Economic Growth, Regulatory Relief and Consumer Protection Act modified the statutory definition of 'banking entity' by excluding certain insured depository institutions and affiliates thereof. The exclusion is available if an insured depository institution and each company that directly or indirectly controls that insured depository institution all meet two requirements:

- First, neither the insured depository institution nor any company that directly or indirectly controls it may have more than \$10 billion in total consolidated assets.

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- Second, neither the insured depository institution nor any company that directly or indirectly controls it may have total trading assets and trading liabilities that exceed 5% of such entity's total consolidated assets. The exclusion is not available to IBA-BHCs.

Given that the definitional change was statutory, the exclusion has been available to qualifying institutions since the act came into force. Thus, the notice seeks only to conform existing regulations with the language of the act by amending the definition of 'insured depository institution' in the regulations.

Amendments to name-sharing restrictions

The Volcker Rule restricts the ability of a banking entity to share a name with a covered fund in two ways:

- First, sharing a name (or a variation thereof) with a covered fund is one prong of the definition of 'sponsor', and thus it is covered by the Volcker Rule's restrictions on the ability of a banking entity to sponsor a covered fund.
- Second, the regulations include an exemption that allows a banking entity to organise and offer a covered fund, subject to certain conditions, in connection with the banking entity's asset management and fiduciary activities.

However, a banking entity will not qualify for the exemption if the banking entity and the covered fund share a name or a variation of a name.

The Economic Growth, Regulatory Relief and Consumer Protection Act amended the statute to permit a banking entity that is an investment adviser to a covered fund to share a name (or a variation thereof) with such a fund if certain criteria are met. Those criteria of the act are that the investment adviser banking entity may not:

- be an insured depository institution, a company that controls an insured depository institution or an IBA-BHC;
- share a name, or a variation of a name, with an insured depository institution, any company that controls an insured depository institution or an IBA-BHC; or
- have a name that contains the word 'bank'.

If adopted, the notice would conform the existing Volcker Rule regulations to the changes in the act. It proposes to amend the definition of 'sponsor' in the regulations to conform to the statutory definition as revised by the act. The notice would also amend the asset management exemption accordingly. The notice would not need to alter the current regulatory prohibition on a banking entity having a name that contains the word 'bank', as the act simply codified the existing regulatory prohibition in this regard.

The changes proposed in the notice and indeed required by the act will be helpful only to those investment adviser banking entities that currently do not share a name (or a variation thereof) with an insured depository institution or a company that controls an insured depository institution. Those investment adviser banking entities that do share a name (or a variation thereof) with such entities have been, and will continue to be, prohibited from marketing their covered funds using their own names (or a variation thereof). To rely on the relief, any such investment adviser banking entity would need to change its name to one that is not associated with the larger organisation. The renamed investment adviser banking entity would then again be permitted to organise and offer its funds using its own name, subject to the other conditions of the Volcker Rule that may apply.

For further information on this topic, please contact [Benson Cohen](#) or [Connie M Friesen](#) at Sidley Austin LLP's New York office by telephone (+1 212 839 5300) or email (brcohen@sidley.com or cfriesen@sidley.com). Alternatively, contact [William S Eckland](#) or [Michael D Lewis](#) at Sidley Austin LLP's Washington DC office by telephone (+1 202 736 8000) or email (weckland@sidley.com or michael.lewis@sidley.com). The Sidley Austin LLP website can be accessed at www.sidley.com.

Endnotes

(1) The Volcker Rule, also known as Section 13 of the Bank Holding Company Act 1956 was added by Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(2) The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC); Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC).

(3) The agencies published lengthy supplementary information when they adopted the final rule implementing the Volcker Rule. See 79 Federal Regulation 5536 (31 January 2014) (Board of Governors of the Federal Reserve System, FDIC, OCC and SEC); 79 Federal Regulation 5808 (31 January 2014) (CFTC).

(4) Pub L 115-174 (2018).

(5) For more information please see www.sidley.com/en/insights/newsupdates/2018/06/volcker-rulechanges-proposed-by-us-federal-agencies.

(6) 12 USC Section 3101.

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