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FDIC Finalizes Volcker Rule Revisions (Currently) Effective January 1, 2020

The FDIC on Tuesday voted to finalize revisions to the Volcker Rule – notably increasing the threshold for the highest-tier compliance level, dropping the initially proposed accounting measure for certain trading assets, and including new exemptions to the definition of proprietary trading. Overall, the finalized rule will provide greater flexibility for firms and decreases the compliance burden relative to the original 2013 rule. The threshold for holding "significant" trading assets and liabilities necessitating the highest tier of compliance is raised from $10 billion to $20 billion. A revised rebuttable presumption is maintained to determine whether a trade falls under the definition of proprietary trading and is presumed to be in compliance if held for longer than 60 days. Possible legal challenges to the finalized rule will be something to watch as they may delay the rule's implementation. A separate rulemaking on covered fund provisions is expected later this year.

Revisions to original proposal. The finalized rule raises the threshold for the highest compliance tier with a six pillar compliance program from the originally proposed $10 billion to $20 billion in trading assets and liabilities. Firms with "moderate" trading assets/liabilities between $1-20 billion will fall under a simplified program, and firms with "limited "trading assets/liabilities of less than $1 billion will be presumed compliant. The thresholds are also clarified to solely encompass foreign banks' U.S. operations. Exclusions from the proprietary trading definition now cover securities issued by GSEs, a broader range of instruments for liquidity management, certain customer-driven swaps, hedges of mortgage servicing rights, corrections of error trades, and purchases or sales of instruments that do not meet the definition of trading assets or liabilities.

The accounting prong originally proposed in the trading account definition is removed, but a modified rebuttable presumption is maintained. The original Volcker Rule presumption that trades held for less than 60 days are presumed to be prohibited is adjusted to assume trades held longer than 60 days are presumed compliant, shifting compliance determination to regulators rather than firms. Our full overview of the original proposal, most of which remains a part of the final rule unless covered above, is available here.

Outlook. The finalized rule carries an effective date of January 1, 2020 and a compliance date of January 1, 2021. The FDIC and OCC have now approved the rule, and approval votes by the Fed, SEC, and CFTC are expected to follow soon. A further rulemaking on covered funds is expected to be issued later this year.

We will be watching potential legal and political challenges for the revised rule going forward. The collective agencies are proceeding with a finalized rule with revisions that have not been put forward for public comments. This fact may invoke a legal challenge for not abiding by the Administrative Procedure Act (APA) notice and comment requirements for the adjusted provisions. Although a challenge could theoretically delay the rule's implementation, we expect it to ultimately be effective. Even in the event of a Democrat winning the White House in 2020, the terms of the current federal banking regulators extend well into the next presidential term – significantly lessening the chances that a new President could change the course of Volcker revisions.

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