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Happy New Year: Proposed Volcker Rule Regulation Would Ease Hedge Fund and Private Equity Fund Name-Sharing Restrictions

Attorneys
Mark V. Nuccio
Richard Loewy

The Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), enacted on May 24, 2018, amended section 13 of the Bank Holding Company Act ("BHC Act") (a section of the BHC Act commonly known as the "Volcker Rule") by modifying the definition of "banking entity" to exclude certain small banks from the Volcker Rule's restrictions and by permitting a banking entity to share a name with a hedge fund or private equity fund that it organizes and offers under certain circumstances. On December 21, hours before the federal government shut down, the Department of Treasury, Federal Reserve System, OCC, FDIC, SEC, and CFTC (the "Agencies") proposed to amend their respective Volcker Rule regulation's definition of banking entity to conform to the provisions of the EGRRCPA. The amendments proposed by the Agencies would exclude from the definition of banking entity any insured depository institution that, together with every entity that controls it, has total consolidated assets equal to or less than $10 billion and total consolidated trading assets and liabilities that are five percent or less than total consolidated assets. The proposed amendment makes clear that the exemption from the Volcker Rule is available to entities that do not exceed both the asset and trading activity thresholds. The proposal also clarifies that the exemption is unavailable to a foreign banking organization ("FBO") with a U.S. branch or agency, as EGRRCPA did not amend the definition of "banking entity" as it relates to a company that is treated as a bank holding company pursuant to Section 8 of the International Banking Act of 1978 ("IBA"). Comments can be expected on the incongruous treatment of U.S. banks and FBOs. In the time of "America First," the Agencies may ignore pleas for comity, content to keep foreign banks walled off from the exemption.

Prior to enactment of the EGRRCPA, the Volcker Rule provided that a banking entity (or an affiliate of the banking entity), including an investment adviser, that organized and offered a hedge fund or private equity fund, could not share the same name or a variation of the same name with the fund (the name-sharing restriction). Section 204 of the EGRRCPA amended the Volcker Rule to permit a hedge fund or private equity fund organized and offered by a banking entity to share the same name or a variation of the same name as a banking entity that is an investment adviser to the hedge fund or private equity fund, if: (1) the investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the IBA; (2) the investment adviser does not share the same name or a variation of the same name with any such entities; and (3) the name does not contain the word "bank." The proposal also includes a small conforming change in the definition of "sponsor." Comments on the proposed rule must be submitted within 30 days after its publication in the Federal Register.