

September 10, 2014

Volcker Rule

Agencies Release New FAQ on CEO Certification Requirement, Setting March 31, 2016 Deadline for Initial Submissions

Earlier today, the Board of Governors of the Federal Reserve System (the “Federal Reserve”), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission and the Commodity Futures Trading Commission (collectively, the “Agencies”) provided an addition to their existing list of Frequently Asked Questions (“FAQs”) addressing the implementation of section 13 of the Bank Holding Company Act of 1956, as amended, commonly known as the “Volcker Rule.”

The Volcker Rule imposes broad prohibitions on proprietary trading and investing in and sponsoring private equity funds, hedge funds and certain other investment vehicles by “banking entities” and their affiliates. The final rule implementing the Volcker Rule issued by the Agencies (the “Final Rule”) requires a banking entity to implement a compliance program the specifics of which are linked to the size of the business. For certain larger banking entities (generally those with total consolidated assets of \$50 billion or more or, in the case of a foreign banking organization, total U.S. assets of \$50 billion or more),¹ the CEO must annually attest in writing to the relevant Agency that “the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under [the Final Rule] in a manner reasonably designed to achieve compliance” with the Volcker Rule and Final Rule.²

Given that banking entities are generally not required to have fully established their compliance programs until July 21, 2015, there has been uncertainty with respect to exactly when a banking entity’s initial CEO attestation will be due.³ The newly released FAQ indicates that “[t]he staffs of the Agencies believe” that banking entities subject to the CEO attestation requirement should submit their initial CEO attestations

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after July 21, 2015 and no later than March 31, 2016; subsequent attestations will then be due within one year of the filing of the previous attestation. The March 31, 2016 deadline is described as “allow[ing] the CEO time to review the design and operation of the entity’s compliance program after the program is fully implemented to ensure it is reasonably designed to achieve compliance.”

Finally, the FAQ also provides that a banking entity that becomes subject to the CEO attestation requirement after July 21, 2015 should submit its first CEO attestation within one year of becoming subject to the requirement.

A copy of the new FAQ is attached as Appendix A.

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ENDNOTES

¹ Section 20(c) of the Final Rule imposes the enhanced minimum standards for compliance programs provided in Appendix B of the Final Rule (including the CEO attestation) on banking entities that:

- 1) engage in permitted proprietary trading and are required to comply with the quantitative metrics reporting requirements under Appendix A of the Final Rule based on the extent of their trading assets and liabilities (generally \$50 billion beginning on June 30, 2014, \$25 billion beginning on April 30, 2016 and \$10 billion beginning on December 31, 2016);
- 2) as of the previous calendar year-end, had total consolidated assets of \$50 billion or more or, in the case of a foreign banking organization, had total U.S. assets of \$50 billion or more; or
- 3) are notified by the relevant Agency that it must satisfy the standards of Appendix B.

² In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States. The FAQ does not address the possible use of multiple certifications by foreign banking entities.

³ The Agencies have to date provided very limited public guidance on the implementation of the Volcker Rule. For a discussion of the six FAQs previously released by each of the Agencies, see our Memorandum to Clients, dated June 10, 2014, “[Agencies Release Limited Volcker Rule Guidance](#).”

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Annual CEO Attestation

Under the final rule, banking entities subject to the enhanced minimum standards for compliance programs under Appendix B of the final rule must provide an annual CEO attestation regarding the banking entity's compliance program. When must the first annual CEO attestation required under Appendix B be provided to the relevant Agency?

Appendix B of the final rule provides that, based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the relevant Agency that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under Appendix B and § 351.20 of the final rule in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and the final rule.¹

As noted in the Board Order extending the conformance period under section 13 of the BHC Act, each banking entity must conform its proprietary trading activities and covered fund activities and investments to the prohibitions and requirements of section 13 and the final rule by no later than the end of the conformance period. As a result, banking entities must meet the compliance program requirements of the final rule by the end of the conformance period, which is currently July 21, 2015.

The CEO attestation under Appendix B of the final rule is an annual requirement. The staffs of the Agencies believe that banking entities subject to Appendix B as of the end of the conformance period should submit the first CEO attestation required under Appendix B after the end of the conformance period but no later than March 31, 2016. A banking entity may provide the required annual attestation in writing at any time prior to the March 31 deadline to the relevant Agency. This allows the CEO time to review the design and operation of the entity's compliance program after the program is fully implemented to ensure it is reasonably designed to achieve compliance with section 13 and the final rule. Banking entities that become subject to Appendix B after the end of the conformance period should submit their first CEO attestation within one year of becoming subject to Appendix B.² Thereafter, banking entities should provide the CEO attestation annually within one year of its prior attestation.

¹ 12 CFR Part 351, Appendix B.

² For example, a banking entity with between \$25 billion and \$50 billion in trading assets and liabilities, as described in §§351.20(c)(1) and (d), will be required to implement an enhanced compliance program by April 30, 2016. This banking entity would be required to provide its first CEO attestation to the relevant Agency by April 30, 2017.