CARLTON FIELDS

Dodd-Frank Rollback Benefits Insurers

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Marketing Private Life Insurance Separate Accounts to Smaller Banks

Subject to certain exceptions, the so-called “Volcker rule” provisions of the Dodd-Frank Act and regulations thereunder (collectively, the Volcker Rule) prohibit “banking entities” from, among other things, investing in “covered funds” (e.g., funds that rely on the private fund exemptions in Section 3(c)(1) or (7) of the Investment Company Act of 1940). However, the Volcker Rule’s so-called “BOLI exclusion” generally permits banks to purchase life insurance (i.e., bank-owned life insurance) that is funded by an insurance company’s separate account that relies on Section 3(c)(1) or (7) without violating the rule’s prohibition on investing in covered funds. Nevertheless, the BOLI exclusion and other Volcker Rule provisions relevant to banking entities can present interpretive, compliance, and disclosure issues that make it more cumbersome (a) for insurance companies to market such life insurance to banking entities; and (b) for such banking entities to ensure that they do not violate the rule.

The Act, however, provides a new exclusion under which a bank will not be deemed a banking entity – and thus will not be subject to the Volcker Rule’s prohibitions – if it does not have (and is not controlled by a company that has) (i) more than $10 billion in total consolidated assets and (ii) “total trading assets and trading liabilities … that are more than 5 percent of total consolidated assets.” This new exclusion can streamline the marketing of life insurance funded by private separate accounts to banking entities. Issuers of such insurance may need or want to consider revising their current procedures and disclosures to reflect the new exclusion.

Sharing Name with a Covered Fund

The Volcker Rule also prohibits a banking entity from sharing a name (or variation thereof) with a covered fund for corporate, marketing, promotional, or other purposes. “Covered funds” include entities that rely on Section 3(c)(1) or (7) (as noted above), as well as certain commodity pools. Also, for purposes of the rule, “banking entities” generally include both FDIC-insured banks and their affiliated entities. Therefore, if a life insurance company has an affiliate that is an FDIC-insured bank, covered funds have generally been precluded from sharing the name, or any derivative of the name, of that insurance company or of any other affiliated entity of that insurance company.

Under the Act, however, such name sharing will generally be permitted if (a) an investment adviser to the covered fund also uses that name; (b) no entity that is, or controls, an FDIC-insured bank uses that name or any variation thereof; and (c) that name does not contain the word “bank.” This change, as well as the Act’s above-described $10 billion threshold for banking-entity status, significantly reduces the instances in which the Volcker Rule may prevent an insurance company’s (or its affiliate’s) name from being shared with a covered fund.

SIFI Threshold Increased to $250 Billion

The Dodd-Frank Act empowered the Federal Reserve Board to apply enhanced prudential regulation to systemically important non-bank financial institutions (SIFIs) to prevent or mitigate risks to the financial stability of the United States that could be caused by large, interconnected financial companies. Such SIFIs can and have included large insurance companies or their holding companies. Although Dodd-Frank limited this enhanced regulation by the Federal Reserve Board to SIFIs with total consolidated assets of at least $50 billion, the Act increases this threshold to $250 billion.

The Act also requires that, in exercising its authority to impose enhanced regulation on a SIFI, the Federal Reserve Board differentiate among companies on an individual basis or by category, considering their capital structure, riskiness, complexity, financial activities (including those of their subsidiaries), size, and any other risk-related factors that the board deems appropriate. Before now, Dodd-Frank merely permitted (rather than required) the Federal Reserve Board to differentiate in this way.

These changes will reduce the number of insurance companies or insurance holding companies that could potentially be subject to enhanced prudential regulation as SIFIs by the Federal Reserve Board.

The changes relevant to SIFIs will take effect 18 months after enactment, in contrast to the other changes discussed above, which took effect immediately.

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