

CONNELL & ANDERSEN LLP
545 FIFTH AVENUE
NEW YORK, NEW YORK 10017

WILLIAM F. CONNELL
ROY C. ANDERSEN

TELEPHONE: (212) 687-6900
FACSIMILE: (212) 687-6999
randersen@connellandersen.com

OF COUNSEL
GEORGE A. SCHNEIDER
LUCA CANTELLI

April First Half Developments

Overview

In a major slap at a fellow agency in Washington, the banking agencies in their requests for comments on their rules start by stating: "Because paper mail in the Washington, DC area and at the OCC is subject to delay..." Maybe the US Post Office should submit a comment on this traitorous sentiment. A number of final rules were issued during this period including a variety of swap rules on clearing and customer documentation. These were based on almost 10 proposed rules that were published as far back as mid 2010. The Fed published a final rule on what constitutes being "Predominantly Engaged in Financial Activities." This will guide the FSOC in selecting nonbank companies for regulation by the Fed. The FSOC itself issued a final rule on how it will select the nonbank companies for regulation.

What is Predominantly Engaged in Financial Activities?

On April 10, 2012 the Fed published a notice of proposed rulemaking that amends a notice of proposed rulemaking that was published over a year ago. The proposed rule would establish the criteria for determining whether a company is "predominantly engaged in financial activities" and define the terms "significant nonbank financial company" and "significant bank holding company" for purposes of Title I of the Dodd-Frank Act. The proposed appendix is not intended to amend section 4(k) of the BHC Act for purposes of defining those activities that are permissible for financial holding companies or the manner in which bank holding companies and financial holding companies are permitted to conduct those activities. See the Fed's proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-10/html/2012-8515.htm>

Authority to Supervise Nonbank Financial Companies

On April 10, 2012 the FSOC published a notice of a final rulemaking on how FSOC will determine the companies that the Fed will regulate. This final rule and the interpretive guidance describe the manner in which the Council intends to determine that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration,

interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/html/2012-8627.htm>

The FSOC issued an Announcement of a Notice of Proposed Rulemaking on October 6, 2010 (75 FR 61653). On January 26, 2011, the Council issued a notice of proposed Rulemaking:

<http://edocket.access.gpo.gov/2011/2011-1551.htm>

On October 18, 2011, the FSOC issued a second notice of proposed rulemaking and proposed interpretive guidance: <http://www.gpo.gov/fdsys/pkg/FR-2011-10-18/html/2011-26783.htm>

Increase in Charges Allowed under Fair Credit Reporting

On April 3, 2012, the BCFP published a notice informing the industry that it will be permissible to charge \$11.50 to provide disclosures to consumers that are in addition to the free annual disclosure. Please see the BCFP notice at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-03/html/2012-7916.htm>

Swap Reporting and Recordkeeping

On April 3, 2012, the CFTC published final rules requiring reporting and recordkeeping and daily trading records for swap dealers and major swap participants. These regulations also set forth certain duties with regard to: risk management procedures; monitoring of trading to prevent violations of applicable position limits; diligent supervision; business continuity and disaster recovery; disclosure and the ability of regulators to obtain general information; and antitrust considerations. In addition, these regulations establish conflicts-of-interest requirements with regard to firewalls between research and trading and between clearing and trading. Finally, these regulations also require a chief compliance officer. See the CFTC's final regulations at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-03/html/2012-5317.htm>

This rule was proposed in five different areas: 75 FR 76666 (Dec. 9, 2010); 75 FR 71397 (Nov. 23, 2010); 75 FR 70152 (Nov. 17, 2010); 75 FR 71391 (Nov. 23, 2010) and 75 FR 70881 (Nov. 19, 2010)

Clearing Agency Security-based Swaps Exemptions

On April 5, 2012, the SEC adopted final rules regarding exempting certain security-based swaps from the Securities laws. The rule adopts exemptions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 for security-based swaps issued by certain clearing agencies satisfying certain conditions. The final rules exempt transactions by clearing agencies in these security-based swaps from all provisions of the Securities Act, other than the anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the Trust Indenture Act, provided certain conditions are met. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-05/html/2012-8141.htm>

The SEC proposed this rule on June 15, 2011: <http://www.gpo.gov/fdsys/pkg/FR-2011-10->

[24/html/2011-26889.htm](http://www.gpo.gov/fdsys/pkg/FR-2011-26889/html/2011-26889.htm)

Clearing Documentation for Swaps and Timely Trade Processing

On April 9, 2012, the CFTC adopted final rules regarding clearing documentation. These rules address: the documentation between a customer and a futures commission merchant that clears on behalf of the customer; the timing of acceptance or rejection of trades for clearing by derivatives clearing organizations and clearing members; and the risk management procedures of futures commission merchants, swap dealers, and major swap participants that are clearing members. The rules are designed to increase customer access to clearing, to facilitate the timely processing of trades, and to strengthen risk management at the clearing member level. As usual at the CFTC, this rule was not adopted unanimously, but the dissenting commissioner sadly did not publish a dissent. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-09/html/2012-7477.htm>

This rule is based on 4 proposed rule makings: See <http://www.gpo.gov/fdsys/pkg/FR-2011-08-01/html/2011-19362.htm> (Aug. 1, 2011); <http://edocket.access.gpo.gov/2011/2011-4707.htm> (Mar. 10, 2011); <http://www.gpo.gov/fdsys/pkg/FR-2011-08-01/html/2011-19365.htm> (Aug. 1, 2011) and <http://www.gpo.gov/fdsys/pkg/FR-2011-06-07/html/2011-12270.htm> (Jun. 6, 2011).

Fiduciary Short Term Investment Funds

On April 9, 2012, the OCC published proposed rules on fiduciary short-term investment funds. This rule applies only to banks with collective investment funds. The proposal would add safeguards designed to address the risk of loss to principal, including measures governing the nature of investments, ongoing monitoring of mark-to-market value and forecasting of potential changes in mark-to-market value under adverse market conditions, greater transparency and regulatory reporting about holdings, and procedures to protect fiduciary accounts from undue dilution of their participating interests in the event unstable net asset value. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-09/html/2012-8467.htm>

Credit Card Fees

On April 12, 2012, the BCFP published a proposed rule regarding the amount of fees a credit card issuer may impose on an account. Currently, this limit is 25% of the credit limit of the account. The BCFP is considering applying this limit only during the first year that the account is opened. See the proposal at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-04-12/html/2012-8534.htm>

Check Collection and Fedwire

On April 12, 2012, the Fed published a final rule making various technical changes to Regulation

J to reflect other changes. The final rule eliminates references to "as-of adjustments" consistent with final amendments to Regulation D to simplify reserves administration; clarifies that an institution's Administrative Reserve Bank is deemed to have accepted deposit of a check or other item even if the institution sends the item directly to another Federal Reserve Bank; further clarifies that Regulation J continues to apply to a Fedwire funds transfer even if the funds transfer also meets the definition of "remittance transfer" under the Electronic Fund Transfer Act. <http://www.gpo.gov/fdsys/pkg/FR-2012-04-12/html/2012-8563.htm>
On October 18, 2011, the Board proposed amendments to Regulation J: <http://www.gpo.gov/fdsys/pkg/FR-2011-10-18/html/2011-26811.htm>

Reserve Requirements

On April 12, 2012, the Fed published a final rule amending its Regulation D. The final rule creates a common two-week maintenance period for all depository institutions, creates a penalty-free band around reserve balance requirements in place of carryover and routine penalty waivers, discontinues as-of adjustments related to deposit report revisions, replaces all other as-of adjustments with direct compensation, and eliminates the contractual clearing balance program. See the final rule at: <http://www.gpo.gov/fdsys/pkg/FR-2012-04-12/html/2012-8562.htm>
See the proposed rule published on October 18, 2011: <http://www.gpo.gov/fdsys/pkg/FR-2011-10-18/html/2011-26770.htm>

This advisory is a service of Connell & Andersen LLP for our clients and friends. It is not a full recitation of all developments. The descriptions are summaries of complex and detailed laws and regulations and may be incomplete or misleading. We invite any of our readers to contact us to discuss any items contained herein for further elaboration.