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December First Half Developments

Overview

As the year approaches its close, one can wonder about the ever increasing volume of regulation and the numbers of bureaucrats needed to enforce these rules and maybe the number of banking lawyers needed to sort through this maze. The FT recently had a few articles that put things into perspective. It reported that at the FSA in 2007 one human being was responsible for the investment banking activities of Barclays and RBS. The RBS team alone now has 23 members. To some, this seems insufficient, but how many would be enough. The FT also had a piece on the worldwide volume of regulations and determined that thousands of new rules are being adopted each year. We have our own cross to bear in the U.S. in this regard, but it highlights the burdens imposed on multinational institutions and their operations. As one compliance officer said, "Thank God for Dodd-Frank." I selfishly agree, but worry that the goals sought by our obsessive desire to regulate and "protect" will never be achieved.

Capital Plans for Large Bank Holding Companies

On December 1, 2011, the Fed issued its final rule to require large bank holding companies to submit capital plans to the Federal Reserve on an annual basis and to require such bank holding companies to obtain approval from the Federal Reserve under certain circumstances before making a capital distribution. This rule applies only to bank holding companies with \$50 billion or more of total consolidated assets. There were approximately 34 large bank holding companies. The final rule will not apply to a foreign bank or foreign banking organization that is itself a bank holding company or treated as a bank holding company, but generally will apply to any U.S.-domiciled bank holding company subsidiary of the foreign bank or foreign banking organization that meets the final rule's size threshold. The readers from the 34 interested banks can find the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-01/html/2011-30665.htm>

Streamlining Consumer Regulations

To fulfill the dream of bureaucrats, the CFPB is asking the public how it could streamline the regulations it inherited from the prior federal agencies. The Bureau wants to know what regulations it should make the highest priority for updating, modifying, or eliminating because they are outdated, unduly burdensome, or unnecessary. This document discusses several specific requirements that may warrant review. The Bureau supervises 14 laws. The notice discusses areas where definitions are inconsistent and perhaps unclear. See the request at: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-05/html/2011-31030.htm>

Disclosure of Credit Card Complaint Data

On December 8, 2011 the CFPB published a proposed policy statement on the CFPB's proposed initial disclosure of credit card complaint data. It also identifies additional ways that the CFPB may disclose credit card complaint data but as to which the CFPB will conduct further study before finalizing its position. The CFPB proposes to make the information on complaints public through a database updated on a 30-day lag time. See the policy statement at: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-08/html/2011-31153.htm>

Sudan Sanctions Rules

On December 8, 2011, OFAC published a final rule amending the Sudan sanctions regulations by issuing two general licenses that authorize all activities and transactions relating to the petroleum and petrochemical industries in South Sudan and related financial transactions and the transshipment of goods, technology, and services through Sudan to or from South Sudan and related financial transactions. OFAC also is amending an existing general license to broaden its authorization with respect to the importation of certain Sudanese-origin services and to add an authorization for activities related to Sudanese persons' travel to the United States. See the final rule at: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-08/html/2011-31557.htm>

OCC Corrects its Rule on Finance Subsidiaries

On December 9, 2011, the OCC published a correction to its proposed rule on the use of external credit ratings to correct the erroneous impression that only a national bank that is among the 100 largest insured banks could control or hold an interest in financial subsidiary. The creditworthiness requirement does not apply to an insured depository institution that is not among the largest 100 insured depository institutions and therefore does not affect the ability of such an institution to control or hold an interest in a financial subsidiary. See the corrected language at: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/html/2011-31574.htm>

Mutual Insurance Holding Company in Liquidation

On December 13, 2011, the FDIC published its proposed rule that a mutual insurance holding company should be treated as an insurance company for the purposes of the liquidation rules under the Dodd-Frank Act. The FDIC could be appointed receiver for a mutual insurance holding company in financial distress if that company posed a significant risk to the financial stability of the U.S. As part of an earlier rulemaking, commenters had encouraged the FDIC to give deference to state insolvency regimes for insurance companies and treat mutual companies under those regimes. The FDIC has a number of questions for the public for consideration. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-13/html/2011-31885.htm>

Interpretation of the Term “Actual Delivery” as used in Commodities Law

On December 14, 2011, the CFTC issued an interpretation of the term “actual delivery” as used in the Commodities Exchange Act. The Commission would like the public to weigh in and give views on whether the CFTC has properly construed the law. This stems from the CFTC’s proposal to regulate retail foreign currency transactions that could defraud consumers. See the definition at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-14/html/2011-31355.htm>

Making Swaps Available to Trade

On December 14, 2011, the CFTC proposed rules for Swap Execution Facilities and Designated Contract Markets that would establish a process to make swaps “available to trade.” The CFTC has posed various questions about this process and requests public comment on the proposed approach. This proposal will bring transparency to the process for making a swap available to trade. It also will provide appropriate oversight of the process through Commodity Futures Trading Commission review. See the proposal at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-14/html/2011-31646.htm>

Investment Securities Due Diligence Guidance

On December 15, 2011, the FDIC published its proposed guidance on how savings associations could satisfy the due diligence needed to justify an investment in a corporate debt security by determining that the issuer has adequate capacity to make good on all its commitments under the security. An issuer satisfies this requirement if, based on the assessment of the savings association, the issuer presents a low risk of default and is likely to make full and timely repayment of principal and interest. The investment also must be consistent with safe and sound banking practices. See the FDIC proposal at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-15/html/2011-31884.htm>

Investment Securities for Savings Associations

On December 15, 2011, the FDIC published a proposed rule for insured savings associations regarding the requirements for investing in corporate debt securities. The rule would prohibit any insured savings association from acquiring and retaining a corporate debt security unless it determines, prior to acquiring such security and periodically thereafter, that the issuer has adequate capacity to meet all financial commitments under the security for the projected life of the investment. Although savings associations would be permitted to consider an external credit assessment for purposes of such determination, they must supplement any external credit assessment with due diligence processes and analyses that are appropriate for the size and complexity of the investment. See the proposal at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-15/html/2011-31883.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.