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February Second Half Developments

Overview

Traditional bank regulatory developments seem to have dried up. Hardly any new rules are emanating from the Fed or the OCC or the FDIC. Instead, the CFTC and the BCFP seem to be dominating the action. Maybe the rules the mainstream agencies have issued are such blockbusters, i.e. the Volcker rule, that there is no energy left to track down the mundane aspects of regulation. The CFTC must be a lively meeting place. The commissioners tend to write up their own confirming statements on new rules as well as some blistering dissents. Recently, one of the commissioners called the CFTC's approach on one issue "illogical" and makes "no sense." This commissioner characterized the CFTC's own rules as "far too overreaching" and perhaps not justified by law and unlikely to withstand judicial scrutiny. These are strong words coming from a member of the body that is issuing the rules and lends additional credence to the steady criticism of spate of new rules as counterproductive.

Regulation of Debt Collection and Consumer Reporting

The BCFP published a proposed rule on February 17, 2012, to define large participants in markets that the BCFP plans to regulate. In this proposal, the Bureau proposes to define larger participants in the markets for consumer debt collection and consumer reporting. The Bureau intends that this proposal and subsequent initial rule will be followed by a series of rulemakings covering additional markets for consumer financial products and services. The Bureau also proposes to include provisions in this proposal that will facilitate the supervision of nonbank covered persons. For Debt collectors gross receipts over \$10 million covers you and for consumer reporters a mere \$7 million in gross receipts will sweep you into the coverage by the BCFP. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-17/html/2012-3775.htm>

Business Conduct Standards for Swap Dealers and Major Swap Participants

On February 17, 2012, the CFTC published its final rule on business conduct standards for swap participants. The rules prohibit fraud and certain other abusive practices. They also implement requirements for swap dealers and major swap participants to deal fairly

with customers, provide balanced communications, and disclose material risks, conflicts of interest and material incentives before entering into a swap. The rules include restrictions on certain political contributions from swap dealers to municipal officials, known as "pay to play" prohibitions. The rules also implement the Dodd-Frank heightened duties on swap dealers and major swap participants when they deal with certain entities, such as pension plans, governmental entities and endowments. One rule that the Commission has determined not to adopt at this time would have required registrants to comply with swap execution standards. The proposed rule was published at 75 FR 80638, Dec. 22, 2010, see <http://edocket.access.gpo.gov/2010/2010-31588.htm>.

The final rule may be seen at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-17/html/2012-1244.htm>

Establishment of a Consumer Advisory Board

On February 23, 2012, the BCFP announced the establishment of the Consumer Advisory Board, which will advise and consult with the Bureau in the exercise of the Bureau's functions under the Federal consumer financial protection laws, and which will provide information to the Bureau concerning emerging trends and practices in the financial services and products industry. See the details regarding the Board and the request for nominations at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-23/html/2012-4240.htm>

Compliance Obligations of CPOs and CTAs

On February 24, 2012, the CFTC published its final rule making various changes to its rules thereby increasing the transparency to regulators of commodity pool operators (CPOs) and commodity trading advisors (CTAs) acting in the derivatives marketplace--for both futures and swaps. In part these changes were driven by the increased participation of investment advisers offering commodity pools to retail investors. See the proposed rule at: 76 FR 7976 (Feb. 11, 2011). <http://edocket.access.gpo.gov/2011/2011-2437.htm> The final rule may be seen at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/html/2012-3390.htm>

Compliance by Investment Advisers with CPO rules

On February 24, 2012, the CFTC published its proposed rule regarding requirements applicable to investment companies registered under the Investment Company Act of 1940 ("registered investment companies") whose advisors will be subject to registration as commodity pool operators. . The regulations will require, among other things, that investment advisors of certain registered investment companies register as CPOs and operate under a dual SEC/CFTC regulatory regime. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/html/2012-3388.htm>

Iranian Sanctions

On February 27, 2012, OFAC published its revisions to the Iranian sanctions regulations to substantially toughen the restrictions on Iranian banking organizations. On December 31, 2011, the President signed into law the National Defense Authorization Act for fiscal year 2012 (Pub. L. 112-81) ("NDAA"). Section 1245(d)(1) of the NDAA requires the President to prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury pursuant to IEEPA. On February 5, 2012, the President, invoking the authority of, inter alia, IEEPA and section 1245 of the NDAA, issued Executive Order 13599 ("Blocking Property of the Government of Iran and Iranian Financial Institutions"). The names of the foreign financial institutions sanctioned under either Sec. 561.201 or Sec. 561.203 will be added to the List of Foreign Financial Institutions Subject to Part 561 (the "Part 561 List"), which is a new list to be maintained on the Office of Foreign Assets Control's Web site (www.treasury.gov/ofac) on its Iran Sanctions page, and published in the Federal Register. This list also will state the prohibition or strict condition(s) that apply with respect to each sanctioned foreign financial institution. See the new regulations on Iran at: <http://www.gpo.gov/fdsys/pkg/FR-2012-02-27/html/2012-4472.htm>

Public Asked to Comment of Overdraft Practices of Banks

On February 28, 2012, the BCFP has asked for public comments on bank overdraft practices. The Bureau is reviewing existing regulations and supervisory guidance issued by various regulators pertaining to the use of overdraft programs by financial institutions. The BCFP has posed dozens of questions for the public regarding how they perceive overdraft programs of their banks. The BCFP made reference to a FDIC study from 2008 which they say found that 5% of all bank customers incur over 20 overdrafts per year and these 5% pay average fees of \$1600 per year, this is astounding to a degree that is almost unbelievable. Less than 10% of accountholders account for 85% of all fees and charges for overdrafts. See the request for information at: <http://www.gpo.gov/fdsys/pkg/FR-2012-02-28/html/2012-4576.htm>

Electronic Filing for BSA and AML Reports

On February 29, 2012, FinCEN published its notice that almost all BSA reports have to be done electronically starting July 1, 2012. See FinCEN's notice at: <http://www.gpo.gov/fdsys/pkg/FR-2012-02-29/html/2012-4756.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.