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July Second Half Developments

Overview

"It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow." (James Madison)

The above quote from Madison captures the situation with the BCFP's practice of continually adopting final rules and then proposing amendments to those rules shortly thereafter. The latest area where the agency is providing substantial revisions to its rules is in the mortgage area. The CFTC has granted a blanket exemption that is of particular interest to foreign organizations and provides a respite for certain swap transactions. In addition, the CFTC has issued its final guidance on cross-border application of its swap rules. Both the exemption and the guidance have triggered a debate within the CFTC that has spilled over into Congress with regard to the scope of the CFTC's jurisdiction over foreign swap participants. The dissent to the guidance is interesting reading.

CFTC Exemptive Order on Compliance with Swap Rules

On July 22, 2013, the CFTC published an Exemptive Order in order to facilitate transition to the Dodd-Frank swaps regime. On January 7, 2013, the CFTC issued a final order that granted market participants temporary conditional relief from certain provisions of the Commodity Exchange Act as amended by Title VII of the Dodd-Frank Act. This rule extends the exemption. The January Order: (1) Applies, for purposes of the January Order, a definition of the term "U.S. person" based on the counterparty criteria set forth in CFTC Letter No. 12-22,16\ with certain modifications; (2) provides relief concerning SD de minimis and MSP threshold calculations; (3) classifies, for purposes of the January Order, requirements of the CEA and Commission regulations as either "Entity-Level Requirements" or "Transaction-Level Requirements;" (4) allows non-U.S. persons that register as SDs or MSPs to delay compliance with certain Entity-Level Requirements and Transaction-Level Requirements; and (5) allows foreign branches of U.S. SDs or MSPs to delay compliance with certain Transaction-Level Requirements. See the Order at:

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<http://www.gpo.gov/fdsys/pkg/FR-2013-07-22/html/2013-17467.htm>

CFTC Guidance and Policy on Compliance with Certain Swap Rules

On July 26, 2013, the CFTC published its final guidance on the cross-border application of its swap rules. The Commission's Interpretive Guidance and Policy Statement addresses the scope of the term "U.S. person," the general framework for swap dealer and major swap participant registration determinations (including the aggregation requirement applicable to the de minimis calculation with respect to swap dealers), the treatment of swaps involving certain foreign branches of U.S. banks, the treatment of swaps involving a non-U.S. counterparty guaranteed by a U.S. person or "affiliate conduit," and the categorization of the Dodd-Frank swaps provisions as "Entity-Level Requirements" or "Transaction-Level Requirements." A commissioner wrote a lengthy dissent to the guidance and attacked it on a variety of grounds—including that it had weak statutory foundation.

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/html/2013-17958.htm>

Proposed: <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/html/2012-16496.htm>

Further Proposed: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-07/html/2012-31734.htm>

Retail Foreign Exchange Transactions for Broker-Dealers

On July 16, 2013, the SEC published its final rule to permit a registered broker-dealer to engage in a retail forex business. The SEC had previously adopted an interim final temporary rule on this subject. Banks and other financial institutions are also engaged in this activity. The final rule imposes requirements on other foreign currency transactions that are functionally or economically similar, including so-called "rolling spot" transactions that an individual enters into with a foreign currency dealer, usually through the Internet or other electronic platform, to transact in foreign currency. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-16/html/2013-17015.htm>

Interim: <http://www.gpo.gov/fdsys/pkg/FR-2011-07-15/html/2011-18009.htm>

Extension: <http://www.gpo.gov/fdsys/pkg/FR-2012-07-16/html/2012-17261.htm>

Insurance for Terrorism Risk

On July 16, 2013, the Treasury requested comments from the public on the availability and affordability of insurance for terrorism risk. The Terrorism Risk Insurance Program Reauthorization Act of 2007 requires the President's Working Group on Financial Markets to perform an ongoing analysis of, and to submit a report to Congress on the terrorism risk insurance market. See the request for comments and a description of the background at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-16/html/2013-16977.htm>

FinCEN continues Special Measures on Commercial Bank of Syria

On July 18, 2013, FinCEN published a notice that it was continuing the special measures

imposed on Commercial Bank of Syria, including its subsidiary Syrian Lebanese Commercial Bank, as a financial institution of primary money laundering concern. See the notice and request for comments at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-18/html/2013-17077.htm>

SEC Ends Supervised Investment Bank Holding Companies

On July 18, 2013, the SEC published a final rule that rescinded its rules for supervising so-called investment bank holding companies. The Commission is taking this action pursuant to section 617 of the Dodd-Frank Act, which eliminated the applicable section effective July 21, 2011. See the SEC's final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-18/html/2013-17194.htm>

Iranian License for Personal Communications Equipment

On July 19, 2013, OFAC published its General License D to authorize the exportation and reexportation to persons in Iran of certain services, software, and hardware incident to the exchange of personal communications, subject to certain limitations. See the License at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/html/2013-17359.htm>

Continuation of National Emergency with Liberia

On July 19, 2013, the President published an Executive Order continuing the national emergency regarding Liberia. Thus the measures adopted to deal with the emergency will be continued for one year. See the order at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/html/2013-17605.htm>

Risk-based Capital Market Risk Rules

On July 22, 2013, the Fed published its proposed capital market risk rules. The Board is proposing to revise its market risk rule to address recent changes to the country risk classifications (CRCs) published by the Organization for Economic Cooperation and Development (OECD); clarify the treatment of certain traded securitization positions; make a technical amendment to the definition of covered position; and clarify the timing of required market risk disclosures. These proposed changes would conform the Board's current market risk rule to the material requirements in the Board's new capital framework and thereby allow the current market risk rule to serve as a bridge until the new capital framework becomes fully effective for all banking organizations. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-22/html/2013-16434.htm>

Mortgage Rules under RESPA and Truth in Lending

On July 24, 2013, the BCFP published its final rules to amend the final rules that were published in January. These amendments clarify, correct, or amend provisions on the relation to State law of Regulation X's servicing provisions; implementation dates for adjustable-rate mortgage servicing; exclusions from requirements on higher-priced mortgage loans; the small servicer exemption from certain servicing rules; the use of government-sponsored enterprise and Federal agency purchase, guarantee or insurance eligibility for determining qualified mortgage status; and the determination of debt and income for purposes of originating qualified mortgages. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-24/html/2013-16962.htm>

Proposed: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-02/html/2013-09750.htm>

Minority-Owned Credit Unions

On July 31, 2013, the NCUA published a proposed interpretive ruling to support and preserve minority depository institutions. The program, to be administered by NCUA's Office of Minority and Women Inclusion, would consist of outreach efforts, various forms of technical assistance, and educational opportunities to benefit eligible credit unions. See the proposed interpretation at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-31/html/2013-18300.htm>

Continuation of National Emergency in Lebanon

On July 31, 2013, the President published notice that the national emergency declared in 2007 with regard to Lebanon would be continued for one year until July 29, 2014. The arms transfers to Lebanon continue to constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. See the Notice at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-31/html/2013-18632.htm>

Treasury Auctions of Floating Rate Notes

On July 31, 2013, the Treasury published its final rule for auctions of a new type of marketable security with floating rates of interest indexed to the 13-week Treasury bill auction. See the Treasury final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2013-07-31/html/2013-18178.htm>

Proposed: <http://www.gpo.gov/fdsys/pkg/FR-2012-12-05/html/2012-29307.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.