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March Second Half Developments

Overview

Everybody makes mistakes; there have even been mistakes in this Newsletter. So many mistakes in fact that I have stopped offering the \$1000 reward for finding a mistake. But it is somewhat unusual to see an agency republish a proposed rule because of “numerous errors”. Because the people at this agency are neither stupid nor lazy (my excuses), something like this only happens when people are under stress and time pressure to produce work product and do not have enough hours in their day. For a small agency, the CFTC has done an amazing job in producing thousands of pages of new rules to implement the Dodd-Frank Act and it is only due to the competence of their staff that an outbreak of “errors” has not occurred earlier. The agencies have issued proposed guidance on leveraged lending that will require new policies and procedures for banks engaged in that business. There should also be enhanced scrutiny of that business line at the next examination and this may prompt greater focus on these activities.

Proposed Guidance on Leveraged Lending

On March 30, 2012, the agencies published proposed guidance on leveraged lending activities. Banks will have to define leveraged lending for themselves, although the agencies have provided a number of examples. For the agencies, leveraged finance or leveraged transactions means the entire debt structure of a leveraged obligor (including senior loans and letters of credit, mezzanine tranches, senior and subordinated bonds). This guidance is to update the last statement on this subject from 2001. This guidance will form the basis for examinations of loan portfolios going forward. The agencies estimate that only 75 institutions will be affected by the guidance but that seems an artificially low guess. See the proposal at: <http://www.gpo.gov/fdsys/pkg/FR-2012-03-30/html/2012-7620.htm>

Confidential Treatment of Privileged Information

On March 15, 2012, the BCFP published proposed rules relating to the confidential treatment of information obtained from persons in connection with its exercise of authorities under Federal

consumer financial law. The proposed amendments will provide that the submission by any person of any information to the Bureau in the course of the Bureau's supervisory or regulatory processes will not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity. In addition, the Bureau is proposing that the Bureau's provision of privileged information to another Federal or State agency does not waive any applicable privilege, whether the privilege belongs to the Bureau or any other person. See the proposed rules at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-15/html/2012-6254.htm>

Minimum Block Sizes for Swap Trades

On March 15, 2012, the CFTC published proposed regulations that would define the criteria for grouping swaps into separate swap categories and would establish methodologies for setting appropriate minimum block sizes for each swap category. In addition, the Commission is proposing further measures under the Commission's regulations to prevent the public disclosure of the identities, business transactions and market positions of swap market participants. The block rule proposal promotes both pre-trade and post-trade transparency. See the CFTC's proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-15/html/2012-5950.htm>

FinCEN Collection of Information on International Currency Shipments

On March 19, 2012, FinCEN published a notice that it would not change the information collected as part of the Report of International Transportation of Currency or Monetary Instruments (CMIR). This covers physical shipments of currency or monetary instruments. See the FinCEN notice at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-19/html/2012-6477.htm>

FinCEN Collection of Information on Customer Identification Programs

On March 19, 2012, FinCEN invited comment on a proposed renewal, without change, to information collections found in regulations requiring futures commission merchants, introducing brokers, banks, savings associations, credit unions, certain non-federally regulated banks, mutual funds, and broker-dealers, to develop and implement customer identification programs. The shocking part of this is that FinCEN thinks that the record-keeping element of these rules takes affected entities a grand total of 10 hours per year to manage! This is an insult to everyone's intelligence. See the notice at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-19/html/2012-6479.htm>

FinCEN Collection of Information from MSBs, Mutual Funds et al

On March 20, 2012, FinCEN published a notice that it does not intend to change the information

it collects from money services businesses, mutual funds, operators of credit card systems, dealers in precious metals, stones, or jewels, and certain insurance companies in connection with their AML programs. See the notice at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-20/html/2012-6478.htm>

Payments of U.S. Savings Bonds and Notes

On March 20, 2012, the Treasury published a final rule changing the procedures for financial institutions to transmit and receive settlement for redeemed definitive (paper) savings securities (savings bonds and savings notes) from the EZ Clear system to an image-based securities process through the Federal Reserve. By changing the procedures, Treasury will reduce costs. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-20/html/2012-6351.htm>

OFAC Defining an Entity owned by the Government of Iran

On March 20, 2012, OFAC published its final rule to redefine what an it means to be owned or controlled by the Government of Iran so that the existing Iranian Transactions regulations will be consistent with the new Iranian Financial Sanctions regulations. This rule was effective on March 20, 2012. This change insures that all such entities will be covered by both rules. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-20/html/2012-6606.htm>

Comments on Stress Tests for National Banks

On March 21, 2012, the OCC extended the comment period on annual stress tests for banks with over \$10 billion in assets. The comment period will be extended to April 30, 2012. See the OCC's notice and some background information on stress testing at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/html/2012-6811.htm>

Comments on Payday Lending

On March 22, 2012, the BCFP asked for comments on the transcript of the hearing it held on the proposed regulation of so-called payday lenders. The Bureau wants some feedback from the public on this form of lending. See the Bureau's request at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-22/html/2012-6851.htm>

Guidelines for Appeals of Supervisory Actions and Insurance Assessments

On March 23, 2012, the FDIC published revised guidelines for appealing material supervisory

determinations and deposit insurance assessment determinations. The changes made were ministerial in nature, but perhaps the important thing to note is that there are these guidelines and there is a mechanism to appeal adverse judgments by the FDIC. See the changes to the FDIC guidelines at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-23/html/2012-7049.htm>

CPO and CTA Compliance Obligations

Because of numerous errors, the CFTC on March 26, 2012, republished a corrected version of its summary of the compliance obligations of Commodity Pool Operators and Commodity Trading Advisors. In addition, numerous sections of the proposed rule were reprinted as well to catch errors in the prior rule making. See the corrected rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-26/html/C1-2012-3390.htm>

Deposit Insurance Assessments for Large Complex Banks

On March 27, 2012, the FDIC proposed a rule to amend its regulations that determine the deposit insurance assessment rates for large complex banks. These are generally institutions over \$50 billion in assets which are owned by holding companies with over \$500 billion in assets. On February 7, 2011, the FDIC had adopted a final rule that established a new methodology for determining assessment rates for large and highly complex institutions. This proposed rule redefines the various types of loans that the FDIC looks at to determine the risk profile of these banks. These loans are generally higher risk types of loans and a higher proportion of such loans will lead to higher assessments. See the proposed assessment methodology at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-27/html/2012-7268.htm>

Bankruptcy of Significant Nonbanking Company

On March 27, 2012, the FDIC published its proposed rule that would permit the FDIC, as receiver for a financial company whose failure would pose a significant risk to the financial stability of the United States, to enforce contracts of subsidiaries or affiliates of such a company despite contract clauses that purported to terminate, accelerate, or provide for other remedies based on the insolvency, financial condition or receivership of such a company. As a condition to maintaining these subsidiary contracts in full force and effect, the FDIC must either: transfer any supporting obligations of the covered financial company that back the obligations of the subsidiary or affiliate under the contract to a bridge financial company or qualified third-party transferee by the statutory one-business-day deadline; or provide adequate protection to such contract counterparties. See the FDIC's proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-03-27/html/2012-7051.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.