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May Second Half Developments

Overview

Stress testing is being expanded to smaller, but still large, banks; the top 250 banks will soon have to complete their stress testing. This is expensive and will create the need for better risk management and compliance teams. Smaller banks may soon see that this is a “best practice” that all but the smallest banks should adopt. The Treasury will soon start assessing the larger banks to pay for the FSOC and the Office of Financial Research. This appears to be a bad practice, even if it is politically acceptable. If these agencies are valuable, let everyone pay for them. I am not a supporter of allocating costs to just a few parties for government functions except in those areas, such as examinations, where the actual costs for the government service can be identified and passed on. Isn't there a point where laws are just too complex? Maybe pitchers are throwing the baseball too fast, but if you want to play in the big leagues you have to adapt. The new joint CFTC and SEC rule on swaps, deceptively labeled as a rule on further definitions, is over 175 pages long and contains over 1600 footnotes. Not summer reading in the Hamptons. The Credit Union regulator is showing how efficient government can be by proposing a new rule on workouts on February 1st and finalizing it in May; try that with the Volcker rule.

Stress Test Guidance for Banks over \$10 billion in Assets

On May 17, 2012, the banking agencies published final supervisory guidance that laid out principles for stress-testing practices for banks over \$10 billion. This guidance is effective on July 23, 2012, and will apply to approximately 250 U.S. and foreign banks. The final guidance is found at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-17/html/2012-11989.htm>

Fees on Large Banks to Fund the Office of Financial Research

On May 21, 2012, the Treasury published a final rule on how it plans to assess the banks with over \$50 billion in consolidated assets to fund the OFR. This was required under the Dodd-Frank Act. Certain nonbank companies are also going to be assessed for this purpose. One of the expenses of the OFR is the FSOC itself. This seems like one of the biggest wastes of money

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and it is a form of taxation rather than an expense that would seem to be legitimate such as paying for bank examiners. Please see the assessment program at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-21/html/2012-12047.htm>

The Proposed rule may be found at:

<http://edocket.access.gpo.gov/2012/2011-33659.htm>

Proposed Swaps and Futures Position Limits Aggregation

On May 30, 2012, the CFTC published notice of a proposed rule that would modify the policy for aggregation under the position limits requirements. The issue is how the CFTC would combine trades of affiliated companies. The proposal would create three tiers; in the top tier, 50% ownership, aggregation of trades would always be required; between 10 and 50% ownership, companies may argue that a lack of knowledge and control should prevent aggregating trades. See the proposed rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-30/html/2012-12526.htm>

FinCEN Finding a Bank is of Primary Money Laundering Concern

On May 25, 2012, FinCEN published its finding that JSC CredexBank is a financial institution of primary money laundering concern. This finding is under section 311 of the Patriot Act.

FinCEN has not proposed any special measures at this time. See the finding at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-25/html/2012-12742.htm>

Imposition of Special Measures Against a Bank

On May 30, 2012, FinCEN published notice of its intent of imposing two special measures against JSC CredexBank, a bank that was determined to be of primary money laundering concern. The first special measure would impose requirements with respect to recordkeeping and reporting of certain financial transactions. The second special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for the identified institution by U.S. financial institutions and may be imposed only through the finalization of this proposed regulation. FinCEN wants to obtain comments on the nature of the reporting that would be useful to the government. The proposed rule is at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-30/html/2012-12747.htm>

Credit Unions Eased Compliance Burdens

On May 31, 2012, the NCUA published a final rule to ease some of the burdensome regulatory requirements on Credit Unions. The Board proposed to eliminate RegFlex and the charitable contributions rule, and amend the rules that apply to eligible obligations, nonmember deposits, fixed assets, and investments, so that all FCUs could engage in activities previously permitted only for RegFlex FCUs, subject to some conditions. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-31/html/2012-13212.htm>

The proposed rule may be found at:

<http://www.gpo.gov/fdsys/pkg/FR-2011-12-28/pdf/2011-33041.pdf>

Credit Unions Procedures for Appeals Streamlined

Because the NCUA is eliminating the RegFlex program, it published a final interpretative ruling on May 31, 2012, removing the appeals process for questioning staff determinations under the soon-to-be-eliminated program. See the final interpretation at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-31/html/2012-13210.htm>

Credit Unions Loan Workouts and Nonaccrual Policies

NCUA is amending its regulations to require federally insured credit unions to maintain written policies that address the management of loan workout arrangements and nonaccrual policies for loans, consistent with industry practice or Federal Financial Institutions Examination Council (FFIEC) requirements. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-31/html/2012-13214.htm>

The proposed rule can be found at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-01/html/2012-2206.htm>

Notice of Proposed Swaps Temporary Relief Amendments

On May 16, 2012, the CFTC published notice of additional temporary relief items to reflect that other rules have not been adopted in a timely fashion. The CFTC has had to publish other temporary relief rules already. In this rule, they are deleting certain references to defined terms that have been used in other rules; extended certain deadlines to December 31, 2012, allowed clearing of agricultural swaps. The CFTC commissioners recognize that the market needs comforting that these rules will not disrupt the markets. Please see the proposal at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-16/html/2012-11838.htm>

Yemen Order re Threats to Peace and Security

On May 18, 2012, the President issued an order regarding the Government of Yemen's actions that threaten the peace and stability of that country and that these actions present an extraordinary threat to the U.S. and thus a national emergency. Thus, their accounts and property in the U.S. are blocked. See the President's order at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-18/html/2012-12225.htm>

Definitions of Swap & Securities-Based Dealer, Major Swap Participant and ECP

The SEC and the CFTC published their joint final rule on May 23, 2012; this is another blockbuster rule with over 1600 footnotes alone. This final rule is to adopt new definitions and provide interpretive guidance. The agencies in December of 2010 originally proposed these new definitions and received almost 1000 comments. The Dodd Frank Act also defines these terms. Please see the final rules at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/html/2012-10562.htm>

Corrections to BSA regulations

On May 23, 2012 the FDIC published a final correction to its rules on monitoring BSA Compliance. The original final rule published on March 18, 2011, actually deleted the section of the FDIC's rules that set out the minimum requirements for an acceptable BSA program including controls, testing, management and training. This final rule reinstates these requirements. See the final rule at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/html/2012-12495.htm>

Proposal to Regulate Prepaid Debit Cards

On May 24, 2012, the CFPB published a proposal to regulate reloadable prepaid cards. The CFPB is seeking comment, data, and information from the public about general purpose reloadable (GPR) prepaid cards (GPR cards). GPR cards are a prepaid financial product that have been increasing in popularity and that some consumers now use in a manner similar to a debit card that is linked to a traditional checking account. The Bureau is particularly interested in learning more about this product, including its costs, benefits, and risks to consumers. The Bureau intends to issue a proposal to extend the Regulation E protections to GPR cards. See the Bureau's advance notice of rulemaking and request for comments at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-24/html/2012-12565.htm>

Procedures to Subject Nonbanks to Consumer Protection Rules

On May 25, 2012, the BCFP published proposed rules to establish procedures to implement its Dodd-Frank Act powers to regulate nonbanks. Pursuant to this provision, the Bureau has the authority to supervise a nonbank covered person when the Bureau has reasonable cause to determine, by order, after notice to the person and a reasonable opportunity to respond, that such person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. See the proposed procedures at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-05-25/html/2012-12718.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.