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Bank & Thrift

Basel Committee Releases Final Monitoring Tools Guidance for Intraday Liquidity Management

The Bank for International Settlements' Basel Committee on Banking Supervision (Basel Committee) released the final version of its *Monitoring Tools for Intraday Liquidity Management* document on April 10, 2013. The document was developed in consultation with the Committee on Payment and Settlement Systems and introduces a new reporting framework that is intended to enable banking supervisors to better monitor a bank's management of intraday liquidity risk and its ability to meet payment and settlement obligations on a timely basis. The framework includes:

- The detailed design of the monitoring tools for a bank's intraday liquidity risk;
- Stress scenarios;
- Key application issues; and
- The reporting regime.

The set of seven quantitative monitoring tools are expected to complement the qualitative guidance on intraday liquidity management set out in the Basel Committee's 2008 *Principles for Sound Liquidity Risk Management and Supervision*. Internationally active banks are expected to apply the monitoring tools beginning January 2015. National supervisors will be permitted to determine the extent to which the tools apply to non-internationally active banks within their jurisdictions.

Federal Reserve Board Approves Final Rule to Define Terms for Designating Nonbanks for Supervision

On April 3, 2013, the Federal Reserve Board announced approval of a final rule that establishes (1) the requirements for determining if a company is "predominantly engaged in financial activities" and (2) definitions of the terms "significant nonbank financial company" and "significant bank holding company." These terms are relevant to various provisions of Title I of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, including section 113, which authorizes the Financial Stability Oversight Council ("Council") to designate a nonbank financial company for supervision by the Federal Reserve Board if the Council determines that the nonbank financial company could pose a threat to the financial stability of the United States. The final rule will become effective May 6, 2013.

A nonbank financial company can be designated by the Council for supervision by the Federal Reserve Board only if it is "predominantly engaged in financial activities." A company is considered to be predominantly engaged in financial activities if 85 percent or more of the company's revenues or assets are related to activities that are defined as financial in nature under the *Bank Holding Company Act*. The final rule provides that the 85 percent threshold need only be met during the fiscal year rather than as reflected on the year-end consolidated financial statements.

Federal Reserve Finalizes Rules Governing Foreign Exchange Transactions with Retail Customers

The Federal Reserve Board (Federal Reserve) announced on April 4, 2013, the finalization of standards for banking organizations regulated by the Federal Reserve that engage in certain types of foreign exchange transactions with retail customers. The rule will become effective on May 13, 2013.

The rule is issued pursuant to the *Dodd-Frank Wall Street Reform and Consumer Protection Act* and establishes requirements for risk disclosures to customers, recordkeeping, business conduct, and documentation for retail foreign exchange transactions. Regulated institutions engaging in such transactions will be required to notify the Federal Reserve, be well capitalized and collect margin for retail foreign exchange transactions.

The types of transactions covered by the rule include foreign exchange transactions that are futures or options on futures, over-the-counter options on foreign currency, and so-called rolling spot transactions. The rule applies to entities regulated by the Federal Reserve including state-chartered member banks, bank and savings and loan holding companies, Edge Act and agreement corporations, and uninsured, state-licensed branches and agencies of foreign banks.

The Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation have each developed similar rules.

OCC and Federal Reserve Board Release Joint Study of Banks with High Concentrations of Construction and Commercial Real Estate Lending

The Office of the Comptroller of the Currency and the Federal Reserve Board have released a white paper presenting the results of their joint study of banks with high concentrations of construction and total commercial real estate (CRE) lending. In particular, the agencies studied bank performance in the context of the 2006 interagency guidance entitled, *Concentration in Commercial Real Estate Lending, Sound Risk Management Practices*, which established supervisory criteria for banks that exceeded 100 percent of capital in construction lending and 300 percent of capital in total CRE lending. The study covered national- and state-chartered commercial banks but did not include savings associations. The agencies identify the following key findings from their study:

- Thirteen percent of banks that exceeded only the 100 percent construction criterion failed.
- Among banks that exceeded both the construction and total CRE lending supervisory criteria expressed in the 2006 guidance, 23 percent failed during the three-year economic downturn from 2008 through 2011, compared with 0.5 percent of banks for which neither of the criteria was exceeded.
- Construction lending was a key driver in many failures. An estimated 80 percent of the losses to the Federal Deposit Insurance Corporation insurance fund from 2007 to 2011 can be attributed to banks exceeding the 100 percent construction criterion.
- Banks that were public stock companies and exceeded the supervisory criteria on CRE concentrations tended to experience greater deterioration in condition than banks below the criteria, as assessed by market participants. Banks with CRE concentrations higher than the guidance criteria experienced larger declines in their market capital ratio during the recent economic downturn.

FDIC Issues First in a Series of Technical Assistance Videos

On April 3, 2013, the Federal Deposit Insurance Corporation (FDIC) announced the release of the first in a series of technical assistance videos to provide information to bank directors, officers, and employees on areas of supervisory focus and proposed regulatory changes. A total of six videos will be released, three that will address the roles and responsibilities of a director, and three that will provide information about the FDIC's Risk Management and Compliance Examination processes. The videos and additional information are available on the FDIC Web site.

The recently released first installment is intended to provide new bank directors with information to prepare them for their fiduciary role. A second installment is scheduled to be released by June 30, 2013 and will be a virtual version of the FDIC's Directors' College Program that regional offices deliver throughout the year. It will consist of six modules covering interest rate risk, third party relationships, corporate governance, the *Community Reinvestment Act*, information technology, and the *Bank Secrecy Act*. A third video installment is expected to be released by year-end and will provide virtual technical training for bank officers and employees on topics such as Fair Lending, appraisals and evaluations, interest rate risk, troubled debt restructurings, the allowance for loan and lease losses, evaluation of municipal securities, and flood insurance.

Enterprise & Consumer Compliance

CFPB Now Accepting Complaints for Money Transfer Transactions

Through an April 4, 2013 blog posting, the Bureau of Consumer Financial Protection (CFBP or Bureau) announced that it is now accepting consumer complaints for money transfer transactions. The Bureau suggests that complaints should be submitted for issues such as:

- Failures to make funds available when promised.
- Incorrect amounts charged or received (Transfer amounts, fees, exchange rates, taxes, etc.).
- Incorrect/missing disclosures or information provided.
- Other transaction issues (unauthorized transaction, cancellation, refund, etc.).
- Other service issues (advertising or marketing, pricing, privacy, etc.).
- Identified or suspected frauds or scams.

The Bureau also provides a telephone number through which it states it can accept complaints in more than 180 languages.

CFPB Releases Small Entity Compliance Guide for Ability-to-Repay and Qualified Mortgage Rule

On April 10, 2013, the Bureau of Consumer Financial Protection (CFPB or Bureau) released a *Compliance Guide to the Ability-to-Repay and Qualified Mortgage Rule*. The guide is

specifically directed to small entities and the Bureau states that it is intended to “provide a comprehensive rule summary in a plain language and FAQ [(frequently asked question)] format, which makes the content more accessible and consumable for a broad array of industry constituents, especially smaller businesses with limited legal and compliance staff.”

The Bureau expects to release similar compliance guides for each of the new mortgage rules previously released in January of this year.

CFPB Proposes Amendments to Escrow Rule

The Bureau of Consumer Financial Protection (CFPB or Bureau) released a proposed rule on April 12, 2013, that is intended to make clarifications and technical amendments to its final rule on escrow requirements issued in January 2013. The proposed amendments:

- Clarify the determination method for designating a county as “rural” or “underserved” for purposes of applying the exemption for certain creditors that operate predominantly in areas meeting these designations. The designations would also apply to other mortgage rules finalized by the CFPB pursuant to the *Dodd-Frank Wall Street Reform and Consumer Protection Act* and contain provisions that reference “rural” or “underserved” areas.
- Add a temporary provision to ensure existing protections remain in place for higher-priced mortgage loans until the expanded provisions take effect in January 2014.

Comments will be accepted for a period of 15 days following publication in the *Federal Register*. The CFPB also states that it will be releasing additional proposals to clarify other provisions in the mortgage rules released by the CFPB earlier this year.

FDIC Schedules Banker Teleconferences on CFPB Mortgage-Related Rules

The Federal Deposit Insurance Corporation (FDIC) announced that it will host three banker teleconferences between May and June 2013 on the following topics:

- Final rules released by the Bureau of Consumer Financial Protection (CFPB) on the ability to repay, qualified mortgage standards, escrow requirements, and the loan originator compensation requirements. This teleconference is scheduled for May 2.
- Final rules released by the CFPB on mortgage servicing. This teleconference is scheduled for May 15.
- Final rule released by the CFPB on loan originator compensation and changes to the *Home Ownership and Equity Protection Act* (HOEPA). This call is scheduled for June 6.

Registration is required and additional information is available on the FDIC Web site. Institutions are encouraged to submit questions on related topics in advance of the calls.

Regulatory Reporting

FDIC Guidance Addresses March 31 Call Report

The Federal Deposit Insurance Corporation (FDIC) released Financial Institution Letters 15-2013 and 16-2013 on April 2 and 4, respectively, to provide guidance to depository institutions regarding the Consolidated Reports of Condition and Income (Call Report) due for the first quarter of 2013 (March 31, 2013 report date).

The guidance reminds institutions that new Schedule RI-C, *Disaggregated Data on the Allowance for Loan and Lease Losses*, is being added to the Call Report effective March 31, 2013. The new schedule is applicable to institutions with \$1 billion or more in total assets.

In addition, all institutions are reminded to provide information on the level of auditing work performed by independent external auditors during 2012 and on their fiscal year-end date (Schedule RC, Memorandum items 1 and 2). This information is reported only as of the March 31 report date each year.

Capital Markets & Investment Management

SEC and CFTC Approve Joint Final Rules and Guidelines to Require Regulated Entities to Establish Programs to Address Identity Theft

The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) (collectively, Commissions) jointly approved final rules and guidelines on April 10, 2013, that require certain regulated entities to establish programs to address risks of identity theft. These rules and guidelines implement provisions of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which amended the *Fair Credit Reporting Act* (FCRA) and directed the Commissions to adopt rules requiring entities that are subject to the Commissions' respective enforcement authorities to address identity theft.

The rules:

- Require entities that meet the definition of "financial institution" or "creditor" under the FCRA to develop and implement a written identity theft prevention program designed to detect, prevent, and mitigate identity theft in connection with certain existing accounts or the opening of new accounts. Guidelines are provided to assist entities in the formulation and maintenance of programs that would satisfy the requirements of the rules.
- Establish special requirements for any credit and debit card issuers that are subject to the Commissions' respective enforcement authorities, to assess the validity of notifications of changes of address under certain circumstances.

- Become effective 30 days after publication in the *Federal Register* and compliance will be required 6 months after the effective date.

IOSCO and CPSS Propose Guidance for Trade Repositories Related to Data Requests

The Bank for International Settlements released a consultative paper on April 11, 2013 prepared by the International Organization of Securities Commissions (IOSCO) and the Committee on Payment Settlement Systems (CPSS). The paper provides proposed guidance to trade repositories (TRs) and authorities on the principles to guide authorities' access to data held in TRs for "typical and non-typical" data requests. The report also sets out possible approaches to addressing confidentiality concerns and access constraints. Comments are requested by May 10, 2013.

SEC Report of Investigation Permits Use of Social Media for Company Announcements

On April 2, 2013, the Securities and Exchange Commission (SEC) released a Report of Investigation that clarifies companies may use social media sites such as Facebook and Twitter to announce key information as long as investors have been alerted to which social media sources the company will use to disseminate such information.

The SEC's Report of Investigation also confirms that Regulation Fair Disclosure (Regulation FD) applies to social media and other emerging means of communication used by public companies the same way it applies to company websites, and information provided to the sites must comply with those rules. The report further clarifies that company communications made through social media channels could "constitute selective disclosures and, therefore, require careful Regulation FD analysis."

SEC Amends Rule Filing Requirements for Dually-Registered Clearing Agencies

The Securities and Exchange Commission (SEC) approved a final rule on April 3, 2013 that modifies the process for rulemaking by clearing agencies that are registered with both the SEC and the Commodity Futures Trading Commission (CFTC).

In particular, the final rule:

- Amends an interim rule (adopted in 2011) that allows rule changes filed with the SEC by clearing agencies to become effective as soon as they are filed when they are not related primarily to securities futures and do not significantly affect the clearing agencies' securities clearing operations.
- Expands the rule to permit effectiveness upon filing for rule changes that concern other products that are not securities, including swaps that are neither mixed swaps nor security-based swaps, and forwards that are not security forwards, provided those rule changes do not significantly affect the clearing agencies' securities clearing operations.
- Adds a provision that under certain conditions permits temporary immediate effectiveness for rules that significantly affect the clearing agency's securities-clearing operations when the products themselves are not securities.

The amendments become effective 60 days after publication in the *Federal Register*.

CFTC No-Action Letter Delays Certain Recordkeeping Requirements Under Part 23 Until June 30

The Commodity Futures Trading Commission's (CFTC) Division of Swap Dealer and Intermediary Oversight issued time-limited no-action relief for swap dealers (SDs) and major swap participants (MSPs) concerning certain recordkeeping obligations under Part 23 of the CFTC's regulations. In particular, the no-action relief delays until June 30, 2013, the compliance date for:

- The requirement that SDs and MSPs make and keep records of all oral communications related to pre-execution swap trade information (and communications that lead to the conclusion of a related cash or forward transaction) for landline telephones that are not located in one of these geographic jurisdictions: United States, United Kingdom, Singapore, Hong Kong, Japan, Australia, Switzerland, and Canada.
- The requirement that SDs and MSPs maintain all transaction records and daily trading records in a manner "identifiable and searchable" by transaction and counterparty, subject to the condition that firms continue to maintain such records using existing search capabilities in their relevant systems.
- The requirement that SDs and MSPs use a Coordinated Universal Time (UTC) timestamp when recording quotations prior to and at the time of execution of a swap, subject to the condition that the date recorded in local time is convertible to UTC within a reasonable timeframe after a regulatory request and subject to the condition that the firm will continue to commit to using a UTC time standard in new installed or upgraded system.
- The requirement that SDs and MSPs retain swap records at their principal places of business or such other principal offices as designated by the SD or MSP, subject to the condition that records be promptly available at the designated principal place of business or other such principal office located in the United States, its territories, or possessions within 72 hours upon request from the CFTC.

CFTC Finalizes Rule on Swaps Between Affiliates; Issues No-Action Letter Related to Certain Reporting Requirements

The Commodity Futures Trading Commission (CFTC) issued a final rule on April 1, 2013 that exempts swaps between certain affiliated entities within a corporate group from the clearing requirement, subject to certain conditions.

In particular, the rule permits affiliated counterparties to elect not to clear a swap subject to the clearing requirement if those counterparties are majority-owned affiliates whose financial statements are included in the same consolidated financial statements. In addition:

- Both affiliated counterparties must elect not to clear the swap,
- The terms of the swap must be documented in a swap trading relationship document (or comply with the requirements of CFTC regulation 23.504, if one of the affiliated counterparties is a swap dealer (SD) or a major swap participant (MSP)),
- The swap must be subject to a centralized risk management program that is reasonably designed to monitor and manage the risks associated with the swap (or if one of the affiliated counterparties is a swap dealer or a major swap participant, the requirements of CFTC Regulation 23.600 must be met), and
- Each swap entered into by the affiliated counterparties with unaffiliated counterparties must be cleared. Two, time-limited alternative compliance frameworks for swaps entered into with unaffiliated counterparties in jurisdictions outside of the United States are provided as part of the final rule.

The final rule requires the reporting counterparty to report to a swap data repository (SDR) (or if no SDR is available, to the CFTC) the following information for each swap for which the inter-affiliate exemption applies:

- Confirmation that both affiliated counterparties to the swap are electing not to clear the swap and that each of the electing eligible affiliate counterparties satisfies the requirements of the rule;
- Information regarding how both affiliated counterparties generally meet their financial obligations associated with entering into non-cleared swaps; and
- Certain information, if the affiliated counterparties are issuers of securities registered under CFTC section 12, or are required to file reports under section 15(d), of the *Securities Exchange Act of 1934*.

The effective date of the rulemaking will be 60 days after publication in the *Federal Register*. The CFTC indicates the clearing requirement “will not apply until the effective date of these final rules to swaps executed between affiliated counterparties that are majority-owned, report their financial statements on a consolidated basis, and elect not to clear such swaps.”

Separately on April 5, 2013, the CFTC’s Division of Market Oversight and Division of Clearing and Risk issued no-action relief for swaps entered into between affiliates of certain wholly-owned and majority-owned market participants from the requirement to report their intra-group swaps to a registered SDR. In particular, the no-action relief provides that:

- For wholly-owned affiliated counterparties that are neither SDs or MSPs, nor affiliated with an SD or MSP, no enforcement action will be taken for failure to comply with obligations to report swap data for certain intra-group swaps to an SDR provided the swap is not executed on a trading facility, all outward-facing swaps with unaffiliated counterparties are reported to an SDR, and the affiliated counterparties retain records of the intra-group swaps.
- Reporting for swaps between majority-owned affiliates will be permitted on a quarterly basis, subject to similar conditions as applicable to wholly-owned affiliates.

This relief does not apply to the reporting requirements under the inter-affiliate exemption from mandatory clearing adopted by the CFTC on April 1, 2013.

Enforcement Actions

The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) recently announced the following enforcement actions:

- The SEC charged a former partner in an accounting firm and another individual with insider trading. The investigation is ongoing though the SEC’s complaint seeks a final judgment permanently ordering the individuals to disgorge ill-gotten gains and pay prejudgment interest and financial penalties. It would also enjoin them from future violations of these provisions of the federal securities laws.
- The SEC charged a corporate employee and a relative with insider trading. The charges are part of an ongoing investigation that has already resulted in the relative being sentenced to one year in jail and criminal forfeiture of \$400,000.
- The CFTC issued an Order filing and settling charges against two individuals and their company for fraudulently soliciting customers to trade foreign currency and violating CFTC registration requirements. The Order requires the defendants to jointly and severally pay a \$750,000 civil monetary penalty and imposes permanent trading and registration bans against them.

- The CFTC filed an Order requiring an online brokerage firm to pay \$225,000 civil monetary penalty for failing to calculate the amount of customer funds on deposit, the amount of funds required to be on deposit in customer segregated accounts, failing to maintain sufficient U.S. dollars (USD) in customer segregated accounts in the United States to meet all USD-denominated obligations, and supervision failures

Recent Supervisory Actions against Financial Institutions

Last Updated: April 15, 2013

Agency	Institution Type	Action	Date	Synopsis of Action
Consumer Financial Protection Bureau	Mortgage Insurance Companies	Consent Order	04/04	The Consumer Financial Protection Bureau entered into Consent Orders with four separate mortgage insurance companies to stop practices that the CFPB has identified as violating Federal consumer financial laws. Among other things, the companies have agreed to prohibitions against entering into new captive mortgage reinsurance arrangements with affiliates of mortgage lenders and obtaining mortgage reinsurance on any new mortgage for ten years. In addition, the companies will pay a total of \$15 million civil money penalties as well s to be subject to CFPB monitoring and reporting requirements.
Federal Reserve Board	Foreign Bank; U.S. Branch	Written Agreement	04/04	The Federal Reserve Board entered into a Written Agreement with a foreign bank and its US branch to address deficiencies related to Bank Secrecy Act and Anti-Money Laundering compliance including: compliance review, compliance program, management oversight, customer due diligence, suspicious activity monitoring and testing, independent testing and Office of Foreign Assets Control compliance.
Federal Reserve Board	Bank Holding Company	Written Agreement	03/19	The Federal Reserve Board entered into a Written Agreement with an Illinois-based bank holding company to address dividends and distributions and debt and stock redemptions to ensure it serves as a source of strength for its state nonmember bank and nonbank subsidiaries.
Federal Reserve Board	Savings and Loan Holding Company	Written Agreement	02/12	The Federal Reserve Board entered into a Written Agreement with an Alabama-based bank holding company to address dividends and distributions and debt and stock redemptions to ensure it serves as a source of strength for its Federal savings bank and nonbank subsidiaries.
Federal Reserve Board	Bank Holding Company	Written Agreement	02/07	The Federal Reserve Board entered into a Written Agreement with a Montana-based bank holding company to address dividends and distributions and debt and stock redemptions to ensure it serves as a source of strength for its national bank and nonbank subsidiaries.
Office of the Comptroller of the Currency	National Bank	Civil Money Penalty	01/25	The Office of the Comptroller of the Currency assessed a \$10 million civil money penalty against a South Dakota-based national bank to address violations of the Bank Secrecy Act.
Federal Reserve Board	Bank Holding Company	Written Agreement	01/22	The Federal Reserve Board entered into a Written Agreement with a Montana-based bank holding company to address dividends and distributions and debt and stock redemptions to ensure it serves as a source of strength for its state nonmember bank subsidiary.
Federal Reserve Board	State Member Bank	Civil Money Penalty	01/17	The Federal Reserve Board assessed civil money penalties against an Ohio-based state member bank for violations of the National Flood Insurance Act.

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