

Financial Services Alert

Goodwin Procter LLP, a firm of 700 lawyers, has one of the largest financial services practices in the United States.

New Subscribers, Past Issues and Background

Material: If you would like anyone else to receive issues of the Financial Services Alert, would like to receive any past issues, or would like the background materials for any of the matters discussed in this issue, please contact **Greg Lyons, Eric Fischer, Elizabeth Shea Fries** or **Jackson Galloway** at 617.570.1000 or at the e-mail addresses referenced at the end of this newsletter.

Alert on the Web:

Back issues of the *Alert* are available at www.goodwinprocter.com/Publications/Financial%20services%20Alerts.aspx

Disclaimer:

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys.

©2007 Goodwin Procter LLP
All rights reserved.

In this issue:

Developments of Note

1. U.S. House Committee Holds Hearings Regarding Industrial Bank Legislation
2. FRB Proposes Amendments to Five Regulations to Clarify Requirements for Electronic Consumer Disclosures
3. FinCEN Delays Implementation of Revised SAR Forms
4. SEC Announces Roundtable Discussions Regarding Proxy Process
5. President's Task Force on Identity Theft Issues Report Outlining Strategic Plan

Developments of Note

➤ U.S. House Committee Holds Hearings Regarding Industrial Bank Legislation

The Committee on Financial Services of the U.S. House of Representatives ("House Committee") held hearings on H.R. 698: *Industrial Bank Holding Company Act of 2007*. H.R. 698 generally would prohibit companies with more than 15% of consolidated revenues attributable to activities that are not financial in nature from acquiring an industrial loan company ("ILC"). As currently drafted, the legislation also would subject any company that owns an ILC to registration with, and examination by, the FDIC, unless the company already is a bank holding company or a savings and loan holding company. (The *American Banker* recently reported that the federal regulators also have agreed that brokerage firms regulated on a consolidated basis by the SEC would not be subject to FDIC registration and examination.)

In his comments at the hearings, FRB Governor Kohn first discussed the history of ILCs, and then recommended that Congress amend the legislation to eliminate the 15% exception that the bill provides from the general restriction on the ability of a commercial firm to acquire an ILC. He noted that, if such an exemption remained, a large financial firm could acquire a commercial company the size of Office Depot or Nike and still be eligible to acquire an ILC. As to financial firms, he suggested that the bill be amended to subject ILCs owned by financial firms to the same capital, managerial and CRA standards as banks with parents that are financial holding companies pursuant to the Gramm-Leach-Bliley Act.

FDIC Chairman Bair commended the Committee for drafting a bill to address ILCs, and discussed the FDIC's moratorium and proposed rulemaking. She asked that the bill be amended to provide the FDIC with more equivalent supervisory tools to those that the FRB has available to supervise bank holding companies. As a specific example, she stated that "the FDIC should have the same express authority as the FRB to impose consolidated capital requirements on the holding company." In his statement, OTS Director Reich commended the Committee for recognizing that the OTS should be deemed an equivalent consolidated regulator to the FRB. His requests for amendments focused on a proposed provision that would provide that if any foreign bank seeks to acquire an ILC, the FRB and FDIC would make a determination that the foreign bank is subject to comprehensive supervision and regulation. Mr. Reich asserted that the OTS should also be eligible to make that determination if the holding company seeking to acquire the ILC is a savings and loan holding company.

SEC Deputy Director Robert Colby first thanked House Committee Chairman Frank for discussions (referred to above) regarding adding the SEC as a permissible consolidated supervisor of large broker dealers, such as Goldman Sachs, owning ILCs. Mr. Colby then devoted much of his speech to explaining the supervision that consolidated supervised entities receive from the SEC, and why Congress need not have the FDIC as another blanket regulator to protect the ILCs in such circumstances. G. Edward Leary, the Utah Commissioner of Financial Institutions, also spoke at the hearing. He stated that Utah Department of Financial Institutions opposed the legislation as “an effort to restrict and restrain state-chartered industrial banking without valid safety and soundness concerns or a crisis.” His remarks focused on the strength of ILCs, providing that there “has not been an insurance loss in twenty plus years of FDIC insurance of Utah industrial banks” and providing detailed information about the existing and pending Utah ILCs.

➤ **FRB Proposes Amendments to Five Regulations to Clarify Requirements for Electronic Consumer Disclosures**

The FRB requested public comment on proposed amendments to five regulations (Regulations B, E, M, Z, and DD) to clarify the requirements for providing consumer disclosures in electronic form. The FRB had published interim final rules on electronic delivery of disclosures in 2001, but later lifted the mandatory compliance date. The proposals are intended to reduce confusion about the status of electronic disclosures and to simplify the regulation.

In particular, the proposals would withdraw certain portions of the interim final rules that are redundant with the E-Sign Act (a self-effectuating statute), or that the FRB now finds to be burdensome or unnecessary for consumer protection. For example, the proposals would eliminate the rule that creditors make a good faith attempt to redeliver disclosures that were returned undelivered. Commenters had generally opposed electronic delivery via email as burdensome as well as in light of concerns about data security, identity theft, and phishing. The proposals would, however, retain or revise certain provisions of the interim final rules that provide guidance on the use of electronic disclosures. For example, the proposals would specify the circumstances under which disclosures may be given in electronic form without consumer consent, and when disclosures must be made electronically (such as when the consumer accesses a credit card application online). Finally, the proposals would also implement certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which mandates certain disclosures for online credit card solicitations. Comments on the proposed amendments must be received on or before June 29, 2007.

➤ **FinCEN Delays Implementation of Revised SAR Forms**

The Financial Crimes Enforcement Network (“FinCEN”) announced that the previously announced June 30, 2007 effective date for the use of revised suspicious activity report (“SAR”) forms (the “Revised Forms”) for depository institutions, insurance companies, the securities and futures industries, casinos and card clubs is being delayed. No new effective date was announced.

The Revised Forms allow for joint filings among, *e.g.*, holding companies and multiple financial institutions that handle a single transaction they believe is suspicious. FinCEN states that the reason for delaying the use of the Revised Forms is to allow FinCEN and the IRS to have more time to address concerns related to the operation of their joint Bank Secrecy Act (“BSA”) database and data management program before introducing the Revised Forms. FinCEN noted that the delay in use of the Revised Forms does not affect BSA filing requirements, and financial institutions should continue to file reports using the current SAR forms. Finally, FinCEN stated that new SAR forms for money services businesses (“MSBs”), which became effective on March 31, 2007, will still become mandatory on October 1, 2007.

Lynne B. Barr
Gary A. Beller
Kay E. Bondehagen
Raymond P. Boulanger
Agnes Bundy Scanlan
Margaret B. Crockett
Eric R. Fischer
Martin J. Flynn
Elizabeth Shea Fries
Jackson B.R. Galloway
Geoffrey R.T. Kenyon
Satish M. Kini
Thomas J. LaFond
Paul W. Lee
Gregory J. Lyons
Robin J. H. Maxwell
William P. Mayer
Philip H. Newman
Christopher E. Palmer
Regina M. Pisa
Mark S. Raffman
Victoria E. Schonfeld
William E. Stern
Michael P. Whalen
Meryl E. Wiener

To e-mail any of the above attorneys, use first initial of first name followed by last name followed by @goodwinprocter.com. For example, the e-mail address for Gregory J. Lyons would be glyons@goodwinprocter.com

➤ **SEC Announces Roundtable Discussions Regarding Proxy Process**

The SEC announced that it will host a series of roundtable discussions in May on shareholder rights and the federal proxy rules. The first of three roundtables will take place on May 7, 2007 and will consist of panels addressing:

- The federal role in upholding shareholders' state law rights
- The purpose and effect of the federal proxy rules
- Non-binding proposals under the proxy rules
- Binding proposals under the proxy rules

The second and third roundtables will take place on May 24 and 25, 2007, respectively. A final agenda and list of participants and moderators for each roundtable will be published closer to the roundtable's date. The SEC has indicated that it will consider public comment regarding any of the topics to be addressed at the roundtables, which may be submitted in electronic form via the SEC's internet submission form at www.sec.gov/news/press.shtml or via e-mail to rule-comments@sec.gov, or in paper form. Submissions will become part of the roundtables' public record. The SEC currently has two rule proposals affecting the proxy process outstanding: (a) mandatory internet availability of proxy materials (comment period ended March 30, 2007, see the January 30, 2007 *Alert*) and (b) security holder director nominations (comment period ended December 22, 2003, see the October 21, 2003 *Alert*). In 2006, the NYSE Proxy Working Group issued a report making a number of recommendations, including proposals to end discretionary broker voting on uncontested director elections and study the fee arrangements for NYSE member distribution of proxy materials (see the June 13, 2006 *Alert*). The Investment Company Institute subsequently issued a report analyzing the cost to registered funds of implementing the proposal to end discretionary broker voting on uncontested director elections (see the December 26, 2006 *Alert*).

➤ **President's Task Force on Identity Theft Issues Report Outlining Strategic Plan**

President's Task Force on Identity Theft, established in May 2006, issued a strategic plan designed to improve the federal government's efforts in the areas of identity theft awareness, prevention, detection and prosecution. In broad terms, the plan's goals are to (1) strengthen the efforts of federal, state, and local law enforcement officers in combating identity theft; (2) educate consumers and businesses about deterring, detecting and defending against identity theft; (3) assist law enforcement officers in apprehending and prosecuting identity thieves; and (4) increase the safeguards used by federal agencies and the private sector to protect the personal data they hold. Among the Task Force's recommendations are the following: (a) establishing national standards for private sector data protection notice requirements, including requirements regarding notice of breaches; (b) developing a comprehensive record on private sector use of social security numbers; (c) developing and promoting better identity authentication methods; and (d) improving the assistance provided to identity theft victims. In the area of law enforcement, recommendations include (i) coordination of domestic law enforcement efforts, information and intelligence sharing (including enhanced information sharing by financial institutions); (ii) coordination with foreign law enforcement; (iii) new prosecution approaches and initiatives; (iv) legislative action to close gaps in statutes criminalizing identity theft; (v) law enforcement training; and (vi) tracking efforts designed to measure the impact of initiatives in this area.