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Fed Warns Of 'Stigma' In Appeal Over Bailout Docs

By **Leigh Kamping-Carder**

Law360, New York (January 11, 2010) -- A three-judge panel of the U.S. Court of Appeals for the Second Circuit grilled attorneys for the Federal Reserve on Monday, seeking an explanation for why the agency refused to hand over documents related to its emergency lending program to Bloomberg LP and Fox Business Network.

In an almost two-hour hearing, Judges Dennis Jacobs, Peter W. Hall and Richard C. Wesley heard oral arguments from the Fed and the news organizations concerning whether the agency's actions were covered under exemptions to the Freedom of Information Act.

The court agreed to hear the cases "in tandem," since the media organizations are seeking roughly the same information, including the identity of the banks that took out loans under the Fed's discount window loan program, the dollar amounts and the maturity dates.

"This is the equivalent of saying, 'I want all the loan applications submitted,'" said Matthew M. Collette, the Fed's attorney.

Collette argued that a discount window loan is more like a line of credit, with the specific eligibility terms set in advance by the agency, and the disbursement of funds "essentially a ministerial task."

For this reason, the "information" at issue comes from the individual borrowers — not the government agency — and therefore is protected under FOIA's Exemption 4, which covers "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," Collette contended.

Releasing this information would be "extremely damaging" to the borrowers, since they would face "stigma" in the perception that the bank is in trouble, potentially causing clients to flock to a competitor, Collette said.

But the panel questioned whether publicizing the fact that a bank has used the discount window could actually stigmatize it, given that institutions in varying states of financial health take out the loans to address short-term liquidity problems.

Banks only go to the discount window as a last resort, meaning there is an assumption that those borrowers are in financial trouble, Collette said.

But banks could stop using the discount window if they knew their identities might not remain confidential, according to Yvonne F. Mizusawa, an attorney for the agency. This could have a ripple effect, undermining the Fed's ability to exert downward pressure on interest rates, she added.

"Banks simply won't use the discount window unless they have no other choice whatsoever," if the information is not private, said Robert J. Giuffra of Sullivan & Cromwell LLP, an attorney for Intervenor The Clearinghouse Association LLC, an organization that represents banks such as Citibank NA, UBS AG and Bank of America Corp.

The judges were skeptical of this assertion, questioning whether banks would rather collapse than risk the "stigma" of the emergency loan program.

"Samurai-style, they would fall on their swords rather than come to the discount window?" Judge Wesley said.

According to Bloomberg's attorney, Thomas H. Golden of Willkie Farr & Gallagher LLP, disclosure breeds certainty in the market, and the court should give no deference to the agency's administrative decision.

Fox's attorney, Steven G. Mintz of Mintz & Gold LLP, argued that FOIA is designed to reveal the actions of the federal government. The agency's "major error" was passing on a blanket disapproval for the FOIA requests, Mintz said.

"This is not a day-to-day loan. This is the implementation of national policy on behalf of the board to loan billions of dollars," Mintz said.

Still, Golden acknowledged that banks could face substantial competitive harm if the information were released within 20 days, the typical time frame for an agency to rule on a FOIA request. But Bloomberg's suit is seeking documents that are at least 18 months old, Golden added.

Supreme Court decision in *Winter* did not displace the longstanding Second Circuit standard for granting preliminary injunctions," he said.

According to Mintz, VCG will file a motion soon for en banc review of the case. Given the stance the panel took in opposition to the Supreme Court's precedents, the rest of the judges "may want to collectively decide whether the entire circuit court feels the same way," Mintz said.

Then again, a confrontation with the Supreme Court may be exactly what the appeals court had in mind.

"Judge Walker wanted to justify 50 years of law," Mintz said, and to tell the Supreme Court, if you want that body of law to change, "you better tell us loud and clear directly."

Mintz, Terence W. McCormick, and Joshua H. Epstein, Mintz & Gold, New York, represented VCG. Arffa, and Karen R. King, Paul, Weiss, Rifkind, Wharton & Garrison, New York, represented CGMI.

BY TOM P. TAYLOR

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