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Cabinet **News and Views**

Informed analysis for the financial services industry

Where Things Stand

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Our partner Peter Malyshev checks in this week from Spain, where he is attending the first in-person International Swaps and Derivatives Association ("ISDA") annual general meeting since the COVID-19 pandemic. In recent weeks, Peter also attended the first in-person Futures Industry Association Law and Compliance ("FIA L&C") annual conference in Washington, D.C., along with a number of other Cadwalader partners.

In many ways, things are really getting back to normal. In the financial regulatory space in the U.S. and the UK, that means increased guidance on crypto and ESG, along with continued attention to more traditional areas of focus, including new legislation (or calls for legislation) and CFPB activity on fair lending. We also take a bit of a deeper look this week at the interagency proposal on Community Reinvestment Act rules.

So how do you feel about where things are right now? We'd love to hear from you. Just write to us here.

Daniel Meade and **Michael Sholem**
Co-Editors, *Cabinet News and Views*

Priorities for Derivatives Markets from ISDA's Annual General Meeting

By **Peter Y. Malyshev**
Partner | Financial Services

The first in-person ISDA annual general meeting ("AGM") after the COVID-19 pandemic is wrapping up today in Madrid, Spain. This conference follows the Futures Industry Association Law and Compliance ("FIA L&C") annual conference held in Washington, D.C. at the end of April, and the topics addressed were essentially similar, albeit approached from a different angle.

First and foremost, emerging regulation, documentation and the infrastructure of digital assets markets were discussed extensively. Participants acknowledged that markets in cryptos have matured beyond being a mere curiosity and, from a regulatory perspective, now pose significant systemic risks that need to be addressed by regulators. Commodity Futures Trading Commission ("CFTC") Chairman Russ Behnam noted the CFTC's efforts at policing digital assets markets, and Securities and Exchange Commission ("SEC") Chairman Gary Gensler specifically addressed jurisdictional issues of regulation, asserting that most digital assets contracts would likely constitute "securities." Emerging documentation issues for crypto derivatives were addressed in the context of ISDA's working groups. From this discussion, it is clear that many issues are left for further regulatory resolution, such as a proposed memorandum of understanding between the CFTC and the SEC, as well as the CFTC's and SEC's coordination with other U.S. federal and international regulators.

Second, sustainability-linked derivatives ("SLDs") and broader matters relating to ESG investing and markets in ESG products were also addressed. Socially responsible business practices, as well as climate change and the incident risks to world financial markets were discussed, although at this stage, few solutions were proposed to reach net zero goals. The CFTC has identified as one of its priorities the development of reliable markets in carbon credits and other environmental products (both over-the-counter and exchange-traded) and, at the same time, gaining greater expertise in policing fraud and "greenwashing." Many market participants stressed that the development of verifiable key performance indicators ("KPIs") of environmentally sustainable products and SLDs will be one of the solutions to a sustainable market infrastructure.

Third, regulators and market participants alike addressed other issues that either came to light in the wake of the COVID-19 pandemic or remain on the regulatory agenda for implementation. These priorities include implementation of Phase 6 for initial margin, reporting rules and the use of reliable data, LIBOR transition, intermediation and clearing of crypto products, and protection of retail participants.

Finally, representatives from ISDA had identified several documentation initiatives and published several consultative papers relating to these market regulatory priorities.

CFPB: Consumers Who Have Already Received Credit Are Protected by Fair Lending Laws

By **Mercedes Kelley Tunstall**
Partner | Financial Regulation

The Consumer Financial Protection Bureau (CFPB) issued an advisory opinion on May 9, confirming that for purposes of the Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B, the intended breadth of the provisions prohibiting discrimination on the basis of race, color, religion, national origin, sex, marital status and age is to cover not just applicants for credit, but also customers who have already been extended credit.

The CFPB states that this advisory opinion "is an interpretive rule issued under the Bureau's authority to interpret ECOA and Regulation B," which means that the opinion should be viewed as regulatory guidance and is not subject to public comment or rulemaking procedures. Read about the CFPB's advisory opinion process here.

This advisory opinion was deemed necessary by the CFPB because there are some district court opinions that have limited the meaning of "applicants" in ECOA and Regulation B to those whom have not yet received credit. When the definition of "applicant" is limited in that manner, then creditors could revoke or modify existing extensions of credit (such as credit card maximum credit limits) without having to comply with ECOA and Regulation B, which would require the creditor to send a statement of reasons for the action taken (or a notice describing how to receive a statement of reasons), thus allowing the borrower to assess whether there had been a mistake and what steps the borrower may need to take to safeguard available credit going forward. This advisory opinion is consistent with positions taken by the Federal Reserve since 1976, when ECOA became law.

Yellen to Senate Banking Committee: Stablecoins Should Be Regulated

By **Mercedes Kelley Tunstall**
Partner | Financial Regulation

Earlier this week, Department of the Treasury Secretary Janet Yellen provided testimony and responded to questions from the Senate Banking Committee regarding volatility in cryptocurrencies that are designated to be "stablecoins," meaning that the value is supposed to remain fixed, on a one-to-one basis with the dollar, and emphasized that a federal framework for regulating digital assets is necessary to avoid "risks to financial stability," as reported by *The Wall Street Journal*.

In December 2021, the Financial Stability Oversight Council ("FSOC") addressed the potential risks to financial markets that cryptocurrencies and digital assets present in its 2021 Annual Report, and in her comments regarding that report, Yellen highlighted FSOC's conclusion that "regulatory attention and coordination regarding stablecoins and other crypto assets" is of critical importance. These messages are all consistent with the Biden administration's position, as articulated in the Executive Order issued on March 9, 2022, that strong steps must be taken "to reduce the risks that digital assets could pose to consumers, investors, and business protections [as well as] financial stability and financial system integrity."

Queen's Speech 2022: UK Government to Revoke EU Financial Regulations (Eventually)

By **Michael Sholem**
Partner | Financial Regulation

On May 10, 2022, Prince Charles announced in the Queen's Speech that the Government would bring in new legislation to "strengthen" the UK's financial services industry to ensure that it acts "in the interest of all people and communities."

The Government will introduce a Financial Services and Markets Bill during the course of the coming year. In a press release published by HM Treasury, the Government states that the purpose of the bill is to "maintain and enhance the UK's position as a global leader in financial services having left the EU." The briefing notes published by the Government highlight that the primary benefits of the Bill would be: "Cutting red tape," "Harnessing the opportunities of innovative technologies," and "Supporting individuals' confidence … by ensuring continued access to cash … and protecting people from scams."

The main elements of the Bill announced thus far are:

- Revoking and replacing retained EU law on financial services. This includes the Solvency II legislation governing the prudential regulation of insurers;
- Updating the objectives of regulators to ensure a focus on growth and international competitiveness;
- Reform of rules regulating the UK's capital markets to promote investments;
- Protecting access to cash to ensure a continued availability of withdrawal and deposit facilities; and
- Introducing further protections for investors of financial products to enhance safety and support for scam victims.

Many important pieces of UK financial regulation, such as the regulations relating to securitization, derivatives trading and bank capital requirements, are EU laws that were "onshored" into UK law at the end of the Brexit process in 2021. To repeal and replace these laws with substantively different content is likely to be a long process, with implications for the ability for UK financial institutions to access EU markets. The Government has yet to provide any specifics on the Financial Services and Markets Bill. It is likely that, until the Bill is formally introduced to Parliament later in the year, details will remain sparse.

In Depth: A Look at Federal Banking Agencies' Proposal to Update Community Reinvestment Act Rules

By **Daniel Meade**
Partner | Financial Regulation

As we mentioned briefly in our newsletter last week, the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board ("FRB") and the Office of the Comptroller of the Currency ("OCC") (together, "The Agencies") issued a notice of proposed rulemaking to amend and update the rules implementing the Community Reinvestment Act ("CRA"). The comment period on the proposal will be open until August 5, 2022.

The proposal reflects progress among the Agencies in terms of cooperation and coordination. The OCC had previously gone its own way in a June 2020 rulemaking, rather than following the tradition of issuing a joint rulemaking. In 2021, the OCC then rescinded that rule and reverted back to the 1995 interagency version of the rule. At that time, the OCC stated that it was the agency's intention "to facilitate the ongoing interagency work to modernize the CRA regulatory framework and promote consistency for all insured depository institutions." Last week's action is a reflection of that intent to modernize the CRA on an interagency basis and to "maintain a unified approach." FDIC Acting Chair Gruenberg noted during the FDIC's open meeting that the FRB's Advanced Notice of Proposed Rulemaking in 2020 served as the blueprint for this proposal and helped to bring the agencies back together.

As pointed out in the Federal Reserve's staff memo to the Board of Governors summarizing the proposal, the Agencies hope to achieve the following objectives:

(1) Strengthen the achievement of the purpose of the statute. The CRA should continue to be a strong and effective tool to support a robust and inclusive financial services industry. To achieve this objective, the draft proposal evaluates bank engagement across geographies and activities, and promotes financial inclusion and transparency by providing enhanced data disclosures.

(2) Adapt to changes in the banking industry, including the expanded role of mobile and online banking. There have been significant changes in how banking services are delivered, including through the use of internet and mobile banking and hybrid models that combine physical footprints with online lending. To achieve this objective, the proposal updates assessment areas, while maintaining a focus on branch-based assessment areas and proposes a tailored assessment area approach.

(3) Provide greater clarity and consistency in the application of the regulations. The proposal addresses feedback on the need for more clarity and consistency in the application of CRA regulations. To achieve this objective, the proposal introduces the use of standardized metrics in CRA evaluations for certain banks and clarifies eligible CRA activities focused on LMI communities and non-metropolitan communities.

(4) Tailor performance standards to account for differences in bank sizes, business models, and local conditions. The Agencies seek to tailor the CRA framework to recognize differences in bank sizes and business models. To achieve this objective, the proposal tailors performance standards for small (less than $600 million in assets), intermediate ($600 million to $2 billion in assets), and large banks (more than $2 billion in assets).

(5) Tailor data collection and reporting requirements and use existing data whenever possible. The proposal aims to strike an appropriate balance between providing greater clarity and consistency in how banks are assessed by establishing the use of standardized metrics and tailoring the associated data collection and reporting requirements.

(6) Promote transparency and public engagement. The proposal recognizes that transparency and public engagement are fundamental aspects of the CRA evaluation process.

(7) Confirm that CRA and fair lending examinations are mutually reinforcing. The Agencies are invested in ensuring that banks meet the credit needs of their communities and do so in a fair and equitable manner, and the Agencies seek to coordinate CRA and fair lending examinations where feasible to do so.

(8) Create a consistent regulatory approach that applies to banks regulated by all three agencies. The proposal reflects a unified proposal to apply to banks regulated by all three agencies, and reflects feedback from stakeholders as provided in meetings, roundtables, and comment letters on prior agency actions.

As discussed in our summary last week, the proposal states that it would make substantive changes in five key areas:

1. Delineation of Assessment Areas: The proposal would retain the current "facility-based assessment areas" (focused on where banks have physical facilities, such as branches), but also adds a "retail lending assessment area" for large banks in locations where the bank originates over 100 home mortgage loans or over 250 small business loans in each of the preceding two years.
2. Overall Framework, and Performance Standards and Metrics: The three bank size categories of the current rules would be retained, but all would have higher thresholds, with small banks being defined as having assets up to $600 million, large banks having assets of more than $2 billion, and intermediate banks in between those two levels. Large banks generally would be evaluated under these four proposed tests: (1) Retail Lending, (2) Community Development Financing, (3) Retail Services and Products, and (4) Community Development Services. Intermediate banks would be evaluated under the proposed retail lending test and the current community development test. Small banks would continue to be evaluated under the current small bank standards, but would have the option of opting into the new proposed tests. The proposed tests would also incorporate broader use of metrics.
3. Community Development Activities: The proposed rule would continue to include activities that currently receive CRA credit as community development activities, but would also create more criteria for the type of activities that qualify for CRA community development credit, with possibly

fewer geographic restrictions.

4. Data Collection, Maintenance, and Reporting: The proposal would aim to tailor data requirements based on bank size.
5. Performance Conclusions and Ratings: The proposal would assign ratings in the component tests under the familiar current ratings of Outstanding, High Satisfactory, Low Satisfactory, Needs to Improve and Substantial Noncompliance to result in the overall final ratings called for in the statute (*i.e.*, no differentiation between high satisfactory and low satisfactory).

As previously stated, the CRA regulations in place today were mainly authored in 2015, and both industry advocates and community development advocates agree that the rules need to be updated. Case in point: the use of smartphones for transacting with a bank was clearly not contemplated by the 1995 rules. While the initial reaction to the proposal has not necessarily been universal praise by both the banking industry and community development advocates, it hasn't brought universal criticism either. Community development advocates have commented that they hope the proposal might add more requirements in terms of supporting LMI communities, and they seem to like that there may be some "stricter grading" of CRA evaluations. Likewise, while the banking industry may not be enthused by the "stricter grading," the industry seems to welcome the efforts to provide more standardization and more predictability on what community development activities would receive CRA credit. Reading the comments will certainly be interesting.

Cadwalader Corner Q&A: Rare Recruitment's Raphael Mokades

Raphael Mokades is the Founder and Managing Director of Rare, an award-winning leader in diversity graduate recruitment. Rare works with over 80 of the world's most prestigious employers, with a particular emphasis on the financial services industry in the UK, has some 10,000 candidates on its books, and builds cutting-edge software that is making a real difference for companies and the people they hire.

What should companies/organizations know today about recruiting and retention?

Data compilation and analysis are critical to effective recruitment and retention and can provide an important early warning system about issues that could potentially bubble up to the surface.

For instance: our applicant-tracking system, Candid, provides real-time grade-adjusted adverse impact reporting. In plain English, this tells companies how effectively they are reaching a pool of qualified diverse candidates.

All industries today, including financial services, are emphasizing active diversity hiring programs. What advice are you giving your clients?

We regularly advise our clients to do targeted outreach to under-represented groups. As mentioned previously, we stress how important it is to use data when recruiting but also to continue using data-driven analysis even when not actively hiring in order to find trends on what high-potential candidates look like. To accomplish this, companies need to invest in applicant-tracking and HR information systems that are fit for this purpose.

In our view, an organization that says it can't afford the software it needs to do proper data analysis should halt its hiring and put its money in a piggy bank until it can. This process is really that critical. We also help our clients develop an understanding that hires from under-represented groups will experience their work cultures differently, and that, in turn, creates important opportunities to have conversations about work culture, fairness and other workplace imperatives.

What advice would you give to companies and organizations that have not fully embraced this organizational imperative?

Align yourself with the industry leaders, who have concluded that investment here produces important results and avoids a number of potential negative outcomes.

These leaders are using targeted outreach and data-driven assessment to make real progress in this area.

As a company, we've thought long and hard about these critical issues and share our philosophy at www.racefairnesscommitment.com.

What is the best piece of advice you've ever received?

When I started my business in 2005, I met a man called Martin who advised me on the initial stages of getting the thing off the ground. "If you haven't put on ten pounds in weight by Christmas," he told me, "you'll have been doing it wrong." He told me to take everyone I could for lunch – potential clients, suppliers, employees, etc. Relationships are different and stronger when you break bread together and people tend to be more open and more inclined to collaborate. He was right, and "food" has actually become one of Rare's six values (the others are fun, flexibility, friendliness, fairness, and focus).

What are you most proud of?

The honest answer is the family I've created. When I think about how my wife and my parents grew up, and the leap between their childhoods and the one we've created for our kids, I feel deeply proud. Professionally, for sure, it feels good to have created a business that has done meaningful good for the clients we serve the best part of two decades. The facts that we have a smart, diverse, happy team, and that the business is commercially successful are definite bonuses!
