

Cabinet News and Views

Informed analysis for the financial services industry



Challenging Times

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In This Issue ...

The U.S. regulatory agencies were out in full force this week, with significant activity and pronouncements that will have a meaningful impact on the financial services industry.

It's hard to summarize these important developments in this short introduction to this week's issue, so we encourage readers to carefully review our authors' insightful contributions.

In addition, our firm was honored last week to be named at the *IFLR* Americas Awards as the "Team of the Year" in the "Financial Services Regulatory" category for our work in the crypto and LIBOR spaces. We are also so proud of our colleague Lary Stromfeld, who heads our LIBOR Preparedness Team, for receiving an "Outstanding Achievement Award" in recognition of his critical role in the drafting and ultimate passage of LIBOR legacy contract legislation at the New York State and federal levels. What a well-deserved honor!

As we prepare this weekend in the U.S. to honor our Armed Forces, especially those who made the Ultimate Sacrifice, we cannot help but also acknowledge the tragic events in Uvalde, Texas and, just a week earlier, in Buffalo, New York and Laguna Woods, California. The sadness is deep and overwhelming.

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

FDIC Updates Guidelines for Appeals of Material Supervisory Determinations



By **Daniel Meade**
Partner | Financial Regulation

On May 17, the Federal Deposit Insurance Corporation (“FDIC”) issued [Financial Institutions Letter 22-2022](#) updating the FDIC’s *Guidelines for Appeals of Material Supervisory Determinations*. The revised Guidelines restore the Supervision Appeals Review Committee (“SARC”) as the final level of review in the agency’s supervisory appeals process. The SARC had previously been the final level of review until the FDIC established the Office of Supervisory Appeals in [2021](#). The revised Guidelines took effect May 17, 2022, but the FDIC is soliciting comment on the revised Guidelines with a comment period of 30 days.

The membership of the SARC will be similar to how it was composed before 2021. The SARC will include: one inside member (*i.e.*, not the Comptroller of the Currency or CFPB Director) of the FDIC’s Board of Directors (serving as Chairperson); a deputy or special assistant to each of the other inside Board members; and the FDIC General Counsel as a non-voting member. The restoration of the SARC is the main change to the updated Guidelines. The revised Guidelines also permit electronic submission of appeals and provide e-mail addresses that institutions may use to submit a request for review to the appropriate Division Director or an appeal to the SARC. Otherwise, the Guidelines remain largely unchanged.

Material supervisory determinations subject to the Guidelines include CAMELS, CRA and other exam ratings; Truth in Lending Act (Regulation Z) restitution; decisions to initiate informal enforcement actions (such as memoranda of understanding); and matters requiring board attention. Material supervisory determinations do not include appointment of a conservator or receiver for an insured depository institution; prompt corrective action pursuant to section 38 of the FDI Act; determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations); and formal enforcement-related actions and decisions.

Protecting Depositors by Enforcing Proper Advertising of FDIC Insurance



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

During an open session of the Federal Deposit Insurance Corporation (“FDIC”) this week, the Board of Directors voted to finalize a new regulation that will give the FDIC, and the public, better tools to ensure that deposits advertising does not mislead the public, consumers and businesses alike, regarding whether the deposits will be insured. The Consumer Financial Protection Bureau (“CFPB”) issued the first of its [regulatory Circulars](#) to provide [guidance](#) regarding the same issues, but extended the scope of products that could include misleading advertising regarding deposit insurance to certain kinds of cryptocurrency products that purport to offer stability that is akin to deposits. As the FDIC explains in the [Federal Register notice](#) that contains the final rule, the FDIC has broad statutory authority to address these kinds of problems in the marketplace, but to date has not put into place specific regulations. The rule, which will be published as 12 CFR Part 328, is focused upon advertising that: (1) falsely represents that any deposit is FDIC-insured by using the FDIC’s name or logo; (2) knowingly misrepresents that any deposit is insured by the FDIC if such an item is not so insured; or (3) knowingly misrepresents the extent to which or the manner in which any deposit is insured by the FDIC, if such an item is not insured to the extent or manner represented. In addition, anyone that “aids or abets another in any of the foregoing” is also viewed as being in violation of the rule, which extends the potential liability for violations of the rule well beyond just the advertiser, but also possibly advertising agencies or others involved in the dissemination of such advertising.

ESAs Publish Questions on SFDR and EU Taxonomy Regulation Interpretation



By **Michael Sholem**
Partner | Financial Regulation

On Monday, May 16, 2022, the European Securities and Markets Authority published a [document](#) (dated May 13, 2022) from the Joint Committee of the European Supervisory Authorities (“ESAs”) setting out further questions for the European Commission on the interpretation of the Sustainable Finance Disclosure Regulation ((EU) 2019/2088) (“SFDR”) and Taxonomy Regulation ((EU) 2020/852) (“TR”). The ESAs published an [updated supervisory statement](#) on the application of the SFDR on March 24, 2022, which was covered in more detail in a previous [article](#) published in *Cabinet News and Views*.

The European Commission has yet to respond to the questions, but they give an indication of the issues that market participants and financial advisers are currently facing when interpreting the legislation.

The 10 questions primarily focus on the following topics:

- Question 1: Principal adverse impact (“PAI”) disclosures and if a market participant is able to not consider adverse impacts of investment decisions at entity level yet still consider PAI under SFDR Article 7 for some of the financial products it manages, and whether they can disclose this under SFDR Article 4(1)(b).
 - Questions 2-5: Financial advisers and their recommendations of financial products.
 - Questions 6-7: Transparency of the integration of sustainability risks and rules for financial products that are no longer available.
 - Questions 8-9: Good governance practices including for financial products solely investing in government issued bonds.
 - Question 10: Scope of TR Articles 5 (“Transparency of environmentally sustainable investments in pre-contractual disclosures and in periodic reports”) and 6 (“Transparency of financial products that promote environmental characteristics in pre-contractual disclosures and in periodic reports”).
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A Sea Change in FARA Enforcement



By **Keith M. Gerver**

Associate | White Collar Defense and Investigations

In what may mark a sea change in enforcement of the Foreign Agent Registration Act, for the first time in more than 30 years, the Department of Justice has filed a [complaint](#) seeking to compel an individual – the former Finance Chair of the Republican National Committee, Stephen A. Wynn – to register as a foreign agent.

Generally speaking, FARA is a disclosure regime that requires individuals to register with the Attorney General if, on behalf of foreign clients, they lobby U.S. government officials or seek to influence the American public.

The DOJ alleges that in 2017, the then-Deputy Finance Chair of the RNC, Elliott Broidy, acting as an agent for both the former Vice Minister of Public Security for the People's Republic of China, Sun Lijun, as well as for the PRC itself, enlisted Mr. Wynn to assist in lobbying President Trump and his administration to remove a Chinese billionaire businessman, Guo Wengui, from the United States. After leaving China in 2014, Mr. Guo was [charged](#) by the PRC government with various forms of corrupt dealings, as well as kidnapping and rape. Mr. Guo sought [asylum](#) in the United States in 2017 and has been living in Manhattan. In 2020, Mr. Broidy [pleaded guilty](#) to one count of conspiracy to violate FARA for his role in the PRC's influence campaign.

DOJ's complaint likely did not come as a surprise to Mr. Wynn. The Justice Department brought this action only after advising Mr. Wynn on three separate occasions that he was required to register as a foreign agent. According to the complaint, in a letter dated April 13, 2022, DOJ informed him that he had 30 days to register.

The action continues DOJ's recent, aggressive [enforcement](#) of FARA, including the [indictment](#) last year of a top advisor to the Trump campaign, Thomas Barrack, for alleged efforts on behalf of the United Arab Emirates to influence the campaign and subsequently the Trump administration, to take pro-UAE foreign policy positions. DOJ's efforts have not been without setbacks, notably the 2019 acquittal of Greg Craig, former White House Counsel for President Obama, who was charged with failing to register as a foreign agent for work he and his law firm performed on behalf of Ukraine. Despite that loss, the complaint shows that DOJ will not shy away from using the machinery of the courts, short of criminal prosecution, to force individuals to comply with FARA when it believes registration is required.

In Depth: What's in a Name? 'Defense Stocks' Highlight the Challenges for Asset Managers in Navigating Sustainability Taxonomies as They Characterize Investments as ESG-Compliant



By **Jason M. Halper**
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By **Timbre Shriver**
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By **Jayshree Balakrishnan**
Law Clerk | Global Litigation

It is hardly news that ESG investing is a significant aspect of the asset management industry. According to Barron's, \$400 billion was invested in U.S. mutual funds and assets that have an ESG orientation in 2021. However, it remains a challenge for issuers, asset managers, regulators and other industry participants to determine whether a particular business, industry, or product promotes or is harmful to ESG considerations. The Russian invasion of Ukraine shines a spotlight on this larger issue due to shifting attitudes about “defense stocks” – *i.e.*, stock in weapons and ammunition manufacturers and other companies in the defense industry. The defense industry does not immediately come to mind when thinking about ESG issues.

The notion that a particular business or product can give rise to tension between the environmental and social aspects of ESG, or raise disputes about whether it is sustainable or socially beneficial at all, is not limited to the defense industry. For instance, in the United States, there have been significant investor complaints and confusion, as well as regulatory scrutiny surrounding the question of what constitutes a “sustainable” company. Thus, while there are any number of examples, the defense industry provides a useful lens through which to examine the challenges for the asset management industry in classifying investments as sustainable or not.

Read our Clients & Friends Memo [here](#).

Welcoming Leading Finance Partner Angie Batterson



Angela Batterson has joined Cadwalader’s Finance Group as a partner in our New York office. She joins from Jones Day, where she was a partner.

Angie has advised clients in complex leveraged financing transactions across a broad array of industries, including health care, telecommunications, media, manufacturing, and energy, for 20 years. She represents financial institutions, sponsors, issuers, and mezzanine providers in all manners of private debt financings, including in connection with secured and unsecured senior credit facilities, first lien/second lien credit facilities, unitranche facilities, and mezzanine financings.

In addition, Angie has significant experience advising non-bank lenders in fund finance transactions, with particular expertise in net asset value (“NAV”) lending, an area in which Cadwalader’s Fund Finance Group is the acknowledged market leader.

Angie also advises on intercreditor agreements and distressed debt financings, including debtor-in-possession (“DIP”) financings, fund to fund loans, and senior housing loans.

“Cadwalader is so highly regarded for its excellence in finance and its dominant position advising financial institutions,” Angie said. “My many years of experience in leveraged finance and fund finance, along with other financing areas, is a great fit with Cadwalader’s existing, first-rate capabilities.”

Read the full announcement [here](#).
