CADWALADER

Cabinet News and Views

Informed analysis for the financial services industry

Words and Actions

August 25, 2022

Table of Contents:

In This Issue ...

Another summer week and more significant guideline announcements from the CFPB, the FTC, the FRB and the CFTC. We're paying attention, and encouraging you to take a closer look in this week's *Cabinet News and Views*.

Any thoughts or questions? Just write to us here.

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

Bank Trade Associations Criticize FDIC Deposit Insurance Assessment Rate Proposal

By **Daniel Meade**
Partner | Financial Regulation

As we previously wrote in June, the Federal Deposit Insurance Corporation ("FDIC") proposed amendments to the Deposit Insurance Fund ("DIF") restoration plan originally adopted in September 2020 to implement a universal increase in initial base deposit insurance rates of 2 basis points. The FDIC noted in the proposal that it believes it needs to amend the restoration plan to ensure it meets the statutory minimum for the designated reserve ratio ("DRR") of 1.35%. As of March 31, 2022, the DRR stood at 1.27%.

The comment period on the proposal closed last week. Among the 18 comments received by the FDIC was a joint letter from six bank trade groups (American Bankers Association, Bank Policy Institute, Consumer Bankers Association, Independent Community Bankers of America ("ICBA"), Mid-Size Bank Coalition of America, and National Bankers Association) (the "Joint Letter"). The ICBA also submitted its own letter.

The Joint Letter questioned the FDIC's assumptions and projections for the DIF, and thus disagreed with the need for the 2-basis-point increase in deposit insurance assessment rates. The Joint Letter also questioned the need for the FDIC's long-term target DRR of 2.0%. The ICBA's own letter added that the FDIC's proposed universal 2-basis-point increase is not risk weighted or tailored to asset size but should be. Both letters also noted that the reasons for the decrease in the DRR were the extraordinary growth in deposits that occurred in the first two quarters of 2020 for various reasons associated with the Coronavirus pandemic, and thus is not a long-term impact.

FDIC Continues Cease and Desist Sweep Regarding Deposit Insurance and Crypto

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

A couple of weeks ago, we reported on the FDIC and the Federal Reserve Board sending a cease and desist ("C&D") letter to Voyager Capital to stop representing that customer funds were protected by deposit insurance. This past week, the FDIC sent five more letters to cryptocurrency-related companies on the same issue.

Demonstrating its now-robust enforcement authority to redress advertising by "any person" who falsely or knowingly, or who aids or abets another in falsely or knowingly, misrepresenting when deposit insurance is available to customers, the five C&Ds were sent to companies that are not otherwise supervised or regulated by the FDIC and to individuals who made statements regarding deposit insurance availability for crypto, one by merely owning a related domain name. (See our report regarding the updates to the FDIC's regulations as of June 2, 2022, here.) The takeaway from this round of C&Ds is that the FDIC is hyper-sensitive regarding any statements involving deposit insurance and cryptocurrency and is willing to take the most technical of positions to get this message across. Usually viewed to be a rather arcane issue, deposit insurance nevertheless is one of the foundations of monetary security for the average person in the United States, and it is meaningful that the FDIC is seeking so vigorously to protect that foundation.

Three of the companies in receipt of one of these C&Ds provide news and information on the cryptocurrency industry, only:

- CryptoNews was required to remove references to deposit insurance in its reviews of cryptocurrency exchanges;
- info was required to remove its "List of FDIC-Insured Cryptocurrency Exchanges"; and
- The *Smart Asset* newsletter that targets retirees was required to remove an article purporting to include its own list of cryptocurrency exchanges that offered FDIC insurance.

One cryptocurrency exchange, FTX US, received a C&D due to tweets made by the exchange's president, Brett Harrison, that referenced the *Smart Asset* newsletter article and stated that "direct deposits from employers to FTX US are stored in individually FDIC-insured banks accounts in the users' names." On the latter point, the FDIC found that the failure of the tweet to identify the insured bank(s) into which those funds were being placed was a material omission for purposes of the deposits advertising rules. Finally, the FDIC sent a C&D to an individual, Corey Harris, who had registered a website domain called www.fdiccrypto.com. In that case, the FDIC alleged that merely by having that website domain, the individual was involved in making false and misleading statements regarding the availability of deposit insurance for cryptocurrency products.