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Informed analysis for the financial services industry

A Look at LIBOR

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We appreciate all the kind comments and support for our premiere issue of the new *Cabinet News and Views* last week.

For this week's issue, few topics have dominated the financial news over the past few years more than the transition away from LIBOR. We encourage you to take a look, in tandem, at our takeaways from the new federal LIBOR legislation and our Cadwalader Corner Q&A interview with Morgan Stanley's Tom Wipf, who also serves as the chair of the Federal Reserve's Alternative Reference Rates Committee (ARRC). Tom provides some insights into where the LIBOR transition stands now in light of President Biden's signing into law of the Consolidated Appropriations Act, 2022, which includes federal legislation that covers legacy financial contracts tied to LIBOR.

Speaking of topics in the news, in this week's In Depth article, Michael Ruder looks at possible SEC amendments to enhance and standardize registrants' climate-related disclosures for investors.

We continue to welcome your comments and questions. Just write to us here.

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

Federal LIBOR Legislation in Five Quick Bites

By **Lary Stromfeld**
Partner | Financial Regulation

Modelled on legislation prepared by the ARRC and enacted by New York and other states, on Tuesday the President signed federal legislation addressing legacy contracts that reference LIBOR after it ceases in June 2023. While it is an extremely important part of the LIBOR transition process, the legislation should not replace proactive management of LIBOR portfolios. The attached deck provides a quick overview of the legislation.

You can view it here.

SEC Amendments on Cybersecurity Disclosure

By **Peter Bariso**
Associate | Corporate

At an open meeting last week, the Securities and Exchange Commission (the "SEC") proposed amendments "to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incident reporting by public companies." Recognizing the growing risk of cybersecurity in today's digitally connected world, SEC chair Gary Gensler spoke on the benefits to investors of consistent and comparable disclosure on (i) material cybersecurity incidents affecting public companies and (ii) public companies' cybersecurity risk management policies, strategy and governance.

If adopted as proposed, public companies would be required to disclose cybersecurity incidents, update previously disclosed incidents and describe the company's cybersecurity policies and strategy. The SEC proposal defines "cybersecurity incident" broadly to include any "unauthorized occurrence on or conducted through a registrant's information systems that jeopardizes the confidentiality, integrity, or availability of a registrant's information systems or any information residing therein."

If adopted as proposed, the amendment would require, among other items:

- **Current Disclosure:** Upon the occurrence of a material cybersecurity incident, a company would be required to file a current report on Form 8-K within four business days, and disclose:
    - when the incident occurred or was discovered;
    - the nature and scope of the incident;
    - whether any data was stolen, altered, accessed or used for an unauthorized purpose;
    - the effect of the incident on the company's operations; and
    - whether the company has remediated or is currently remediating the incident.
- **Periodic Disclosure:** As part of the SEC's periodic reporting regime, a company would be required to disclose on its quarterly reports on Form 10-Q and annual reports on Form 10-K:
    - updates to previously disclosed material cybersecurity incidents or instances where any previously undisclosed immaterial incidents have become material;
    - the company's policies and procedures for the identification and management of risks from cybersecurity threats;

- identification of cybersecurity experts on the board, if any, and information on board oversight of cybersecurity policies and risks; and
- management's role and expertise in assessing and managing cybersecurity risk and implementing the company's cybersecurity policies, procedures, and strategies.

If adopted as proposed, foreign private issuers would also be subject to the new cybersecurity disclosure as part of the Form 6-K and Form 20-F filing requirements.

The current proposed amendments are focused on mandating previous SEC disclosure guidance of cybersecurity policies and risks and do not prescribe cybersecurity practices that companies must follow or outline any minimum standard for public companies. Additionally, if adopted as currently proposed, failure to timely file a required Form 8-K upon the occurrence of a material cybersecurity incident would not cause a company to lose Form S-3 eligibility to register securities. Before any final rule is promulgated, a public comment period will remain open for 60 days following publication of the proposing release on the SEC's website or 30 days following publication of the proposing release in the *Federal Register*, whichever period is longer.

The full text of the rule is available here.

Russia Sanctions Update: Lux Edition

By **James A. Treanor**
Special Counsel | White Collar Defense and Investigations

As the conflict in Ukraine grinds on, sanctions against Russia have continued to tighten. Since we published our Clients & Friends Memo last week, available here, President Biden issued Executive Order ("EO") 14068 of March 11, 2022, on Prohibiting Certain Imports, Exports, and New Investments with Respect to Continued Russian Federation Aggression. As its title suggests, the EO targets specified trade and investment activities, including prohibitions on:

1. The import of certain Russian Federation origin fish and seafood products, alcoholic beverages, non-industrial diamonds, as well as other products that might be named at a later date by the Secretary of the Treasury;
2. The export, to any person located in the Russian Federation, of luxury goods, and other items as may be determined by the Secretary of Commerce;
3. New investments in any sector of the Russian Federation economy identified by the Secretary of the Treasury; and
4. The export of U.S. dollar-denominated banknotes to the Government of the Russian Federation or any person located in the Russian Federation.

To date, no additional products have been added to the import prohibition, and no sectors of the Russian economy have been determined by the Secretary of the Treasury to be targeted by the prohibition on new investments. The Department of Commerce, however, has identified goods that are subject to the export ban (see here).

Along with EO 14068, OFAC issued General Licenses ("GLs") permitting certain imports until 12:01 EDT on March 25, 2022 (Russia-related GL 17), banknote transfers related to noncommercial, personal remittances (Russia-related GL 18), and transactions related to the personal maintenance of U.S. persons located in Russia (Russia-related GL 19). OFAC also issued a number of new FAQs, including FAQ 1,021 highlighting the risk of sanctions evasion related to the use of virtual currencies, and clarifying (not for the first time) that sanctions apply irrespective of whether covered transactions are conducted in traditional fiat currency or virtual currency.

While the immediate effect of this most recent round of sanctions is likely to be relatively limited, in some ways that is a testament to how many of the largest targets – among them Russian banks, financial transfers, energy exports and oligarchs – have already been sanctioned in previous rounds. There is clearly still room for additional measures to be implemented, however, including through the Secretary of the Treasury's authority to ban investments in specified sectors of the Russian economy. Unless the course of the conflict changes, we should expect to hear more from Treasury soon.

Statement from UK Financial Regulatory Authorities on Sanctions and the Cryptoasset Sector

By **Michael Sholem**
Partner | Financial Regulation

On March 11, 2022, the UK Financial Conduct Authority ("FCA"), the Office of Financial Sanctions Implementation (part of HM Treasury) and the Bank of England published a joint statement (the "Statement") on sanctions and the cryptoasset sector. The primary focus of the Statement is to reiterate existing AML and sanctions controls whilst making it clear that the cryptoasset sector is "expected to play their part in ensuring that sanctions are complied with." It makes clear that action will be taken against sanction breaches by registered firms and attempts by sanctioned parties to utilise cryptoassets to circumvent restrictions. The context of the Statement is the unprecedented range of financial sanctions on Russia and Belarus, introduced in response to Russia's invasion of Ukraine on February 24, 2022.

In the UK, cryptoasset firms such as exchanges and custodian wallet providers have been required, since 2020, to comply with UK anti-money laundering ("AML") laws and are supervised by the FCA for this purpose. The Statement sets out specific steps that the UK cryptoasset sector must take to ensure compliance with their legal obligations relating to sanctions. These include updating risk assessments to take into account the changing sanctions landscape and periodic re-screening as sanction lists are amended. The Statement includes a non-exhaustive list of examples of "*red flag indicators*" which suggest an increased risk of sanctions evasion. These indicators include: transactions to or from "*high-risk*" wallet addresses, transactions involving exchange providers known to have poor due diligence procedures and the use of tools designed to obfuscate either the location of the customer (*e.g.*, a virtual private network ("VPN") or proxy), or the source of cryptoassets (*e.g.*, mixing services which pool together potentially "tainted" funds from multiple inputs and then split and return them after a random time period).

Passing mention is made to the use of "*blockchain analytics solutions*" and how they can be utilised to identify higher-risk wallet addresses. Unfortunately, no further detail is provided, which is unhelpful in such a rapidly developing field. There will be not-insignificant costs associated with implementing new KYC software and manually reviewing the flags thrown up. In the context of the extensive Russian sanctions regime, it seems clear that the FCA will expect cryptoassets firms to be able to demonstrate that they have enhanced their systems and controls in short order to deal with the growing threat of sanctions evasion using cryptoassets.

Sarah Bloom Raskin Withdraws from Fed Nomination

By **Daniel Meade**
Partner | Financial Regulation

Earlier this week, Sarah Bloom Raskin withdrew her nomination to be Vice Chair of Supervision and a Governor at the Federal Reserve Board. The withdrawal follows the boycott of Ms. Raskin's nomination, along with four other Fed nominees, by Republicans on the Senate Banking Committee. By not attending Committee meetings, the Senate Banking Committee lacked the necessary quorum to vote on the nominations. The final blow to Ms. Raskin's nomination came when Sen. Joe Manchin (D-WV) announced that he had "come to the conclusion that I am unable to support her nomination to serve as a member of the Federal Reserve Board."

President Biden issued a statement thanking Ms. Raskin for her willingness to serve again after previously serving as a Federal Reserve Governor and a Deputy Secretary of the Treasury. President Biden again praised that past experience, but noted "[u]nfortunately, Senate Republicans are more focused on amplifying these false claims and protecting special interests than taking important steps toward addressing inflation and lowering costs for the American people." President Biden went on and urges the Senate Banking Committee "to move swiftly to confirm the four eminently qualified nominees for the Board of Governors – Jerome Powell, Lael Brainard, Philip Jefferson, and Lisa Cook – who are still waiting for an up-or-down vote."

The Senate Banking Committee did not take long to give the four other Fed nominees that up-or-down vote. The Committee acted later on Wednesday, and the four other Fed nominees (along with an FHFA nominee) held up by the boycott of the vote by Committee Republicans will now move to a vote by the full Senate.

Ms. Raskin's withdrawal is another obstacle in the Biden Administration's efforts to appoint leaders at the three federal bank regulatory agencies. The Vice Chair of Supervision seat at the Federal Reserve has been empty since Vice Chair Randal Quarles left late last year. The heads of the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation lead their agencies in an acting capacity with no current nominees to either role.

In Depth: New Climate-Related Disclosure Rules from the SEC? Here's What You Need to Watch Out For

By **Michael J. Ruder**
Special Counsel | Capital Markets

The SEC announced that it will consider whether to propose rules to enhance and standardize climate-related disclosures for investors at an open meeting scheduled to take place on March 21, 2022. The Commission's deliberations will be webcast at 11:00 a.m. Eastern Time on the SEC's website.

As we described previously, the SEC's announcement signals that regulatory change regarding climate risk is rapidly approaching. These rules changes, if adopted, could represent one of the largest overhauls of the corporate disclosure regime since the aftermath of the 2008 financial crisis.

What follows is a checklist of items to look for in any new climate risk disclosure rule proposal by the SEC:

1. Will the proposed rules require disclosure by reporting companies of their Scope 1 and Scope 2 greenhouse gas emissions (generally speaking, emissions from business operations and purchased energy)? Will greenhouse gas emission disclosure requirements be tiered or scaled so that larger reporting companies face more stringent disclosure requirements?
2. Will the proposed rules require disclosure of Scope 3 greenhouse gas emissions, which are generally greenhouse gases produced by a company's suppliers and by customers using its products? Given the difficulties in calculating Scope 3 greenhouse gas emissions, will compliance be preceded by a lengthy phase-in period and accompanied by a legal safe harbor from liability?
3. Will the proposed rules be incorporated as amendments into existing disclosure regulations such as Regulation S-K or Regulation S-X, or will an entirely new regulation on climate risk be proposed?
4. Will the proposed rules incorporate, explicitly or implicitly, existing voluntary sustainability disclosure recommendations from standards-setting organizations such as the Task Force on Climate-Related Financial Disclosures?
5. Will the proposed rules attempt to establish a standardized "taxonomy" for environmentally beneficial activities, similar to the European Union's Taxonomy Regulation? This may be an important consideration for investors with a global presence.
6. Will the proposed rules contain industry-specific standards like those promulgated by the Sustainability Accounting Standards Board? Will different climate change reporting standards apply to specific industries, such as oil and gas, real estate, or transportation?
7. Will the proposed rules offer a phased-in implementation so that smaller public companies face later compliance deadlines than larger public companies? Will the SEC give specific industries time to develop disclosure standards for industry participants? Will the proposed rules contain any

exceptions for specific issuers, such as asset-backed securities issuers?
8. Will disclosures be required to be audited, or subjected to another form of assurance?
9. To what extent will the SEC lay out its analysis as to the conformity of the proposed rules to the interpretation of materiality as defined by the U.S. Supreme Court? This could be a potential basis for legal challenge to any new rule.

If the Commission votes at the meeting to propose a new rule regarding climate-related disclosures, the proposal will be available for public comment for a specified period of time. Many investors, reporting companies, market participants and trade associations are expected to submit comment letters.

In sum, there is a lot to watch out for when the SEC meets on Monday to consider proposing new climate disclosure rules. New mandatory and uniform disclosure requirements regarding climate change may soon be promulgated that will clarify what disclosures are required for climate-related risks. The SEC's actions suggest a strong movement is underway to integrate ESG principles into the framework of financial regulations.

Executive Order on Ensuring Responsible Development of Digital Assets: The Intersection of Climate Change and Cryptocurrencies

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On March 9, 2022, President Biden issued an Executive Order on Ensuring Responsible Development of Digital Assets. The Executive Order acknowledges that there are climate risks posed by the proliferation of digital assets, specifically cryptocurrency mining. Among other directives, the Executive Order instructs the Director of the Office of Science and Technology Policy, in consultation with other agencies, to issue a report in 180 days addressing "potential uses of blockchain that could support monitoring or mitigating technologies to climate impacts, such as exchanging of liabilities for greenhouse gas emissions, water, and other natural or environmental assets" as well as the "implications for energy policy, including as it relates to grid management and reliability, energy efficiency incentives and standards, and sources of energy supply." This article evaluates current mitigation efforts that may be assessed or expanded on in the Report. Entities in the digital asset and blockchain ecosystem and investors should familiarize themselves with these climate risk mitigation efforts in advance of any policy or regulation that may come out of the Report.

Read our Clients & Friends Memo here.

Cadwalader Corner Q&A: Morgan Stanley's Thomas Wipf, Chairman of the Federal Reserve's Alternative Reference Rates Committee

Tom Wipf is the Vice Chairman of Institutional Securities at Morgan Stanley. He also serves as Chair of the Federal Reserve's Alternative Reference Rates Committee (ARRC), a group of private-market participants convened to help ensure a successful transition from USD LIBOR to a more robust reference rate. In his Morgan Stanley role, Tom manages the company's transition efforts to alternative reference rates to replace LIBOR through the firm's Global LIBOR Transition Steering Committee.

Earlier this week the President signed Federal legislation addressing LIBOR transition for legacy contracts. As Chair of the Alternative Reference Rates Committee, what does that mean for the financial markets?

First of all, this is an incredible accomplishment. To take this from start to finish – the conception of the idea, designing how it will work, getting it on the docket, collaborating between Cadwalader, the trade associations, the ARRC legal working group, the consumers and so on – few will appreciate just how much work went into this. And it wasn't without a lot of plot twists.

Secondly, the potential for uncertainty and overall disruption to the financial system stemming from the transition away from LIBOR was so staggeringly high. This legislation provides a huge piece of the puzzle for tough legacy contracts.

The legislation has been described as a safety net, not a transition strategy, for market participants with legacy LIBOR exposure. What do they need to know going forward?

Whether you're a large or small institution, you still need to know what's in your portfolio. You need to determine whether legacy contracts have workable fallback language – whether that be standard ARRC fallbacks, ISDA protocols, etc. If not, you need to know how this legislation impacts it. All of that requires a number of people across your organization to sit down and operationalize the transition. They need to do now what they have control over – we shouldn't yet go pencils down on that.

When you are not saving the world from LIBOR transition, what do you like to do?

If there's one thing I'm passionate about outside of work, it’s music. I'm a huge fan of the Grateful Dead and have probably attended well over 100 shows over the years. I even play in a band that covers a lot of the Grateful Dead’s catalog. We call ourselves Hell or High Water.
