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What's Next?

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Table of Contents:

- In This Issue ...
- Fifth Circuit Ruling Chills Consumer Financial Protection
- FDIC Acting Chair Talks Prudential Regulation of Crypto-Assets
- Disclosure: Financial Institution Advertisement Banned by UK Regulator
- Disclosure: ‘Green Hushing’ Climate Targets
- ESG Ratings: A Call for Greater Transparency and Precision Amid the Chaos of the Current Landscape

In This Issue ...

The major headline grabber in the past week has been the decision by a three-judge panel for the U.S. Court of Appeals for the Fifth Circuit to find that the Consumer Financial Protection Bureau's funding structure is unconstitutional.

As my colleague Rachel Rodman, a former senior counsel and enforcement attorney for the CFPB, wrote in a *Bloomberg Law* article published on Tuesday, "This ruling threatens to undo many, if not all, of the bureau's past actions, and may make it impossible to perform its responsibilities under the Consumer Financial Protection Act." And I might add, the ruling's logic seems to implicitly question the off-budget funding of the Fed, FDIC and OCC as well. You'll want to read the article, written by Rachel and associates Keith Gerver and Ken Bergman, in this week's newsletter.

Not to be outdone, crypto is in the news again. This time, in an important speech at the Brookings Institution, FDIC Acting Chair Martin Gruenberg emphasized the importance of disclosure and consumer protection in his examination of stablecoin oversight. My colleague Mercedes Tunstall and I take a closer look down below.

This issue also includes reprints of several timely and relevant articles: a Clients & Friends Memo on ESG ratings and two news items from our new Cadwalader Climate newsletter that we thought would be of interest to the financial services industry.

Any comments or questions? Just drop me a note here.

Daniel Meade
Editor, *Cabinet News and Views*

Fifth Circuit Ruling Chills Consumer Financial Protection

By **Rachel Rodman**
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By **Keith M. Gerver**
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By **Ken Bergman**
Associate | Global Litigation

In *Community Financial Services Association of America v. CFPB*, a three-judge panel for the U.S. Court of Appeals for the Fifth Circuit became the first federal court to find that the Consumer Financial Protection Bureau's funding structure is unconstitutional.

This ruling threatens to undo many, if not all, of the bureau's past actions, and may make it impossible to perform its responsibilities under the Consumer Financial Protection Act. It also raises the possibility of future litigation against similarly funded agencies.

You can read our *Bloomberg Law* article here.

FDIC Acting Chair Talks Prudential Regulation of Crypto-Assets

By **Daniel Meade**
Partner | Financial Regulation

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

Last week, Martin Gruenberg, Acting Chair of the Federal Deposit Insurance Corporation ("FDIC"), gave remarks at the Brookings Institution on the Prudential Regulation of Crypto-Assets.

In the speech, Acting Chair Gruenberg focused on three broad topics: (1) an overview of banking innovation and crypto assets, generally; (2) approach to prudential regulation of banks' crypto-asset related activities; and (3) potential benefits, risks and policy questions related to stablecoins.

Mr. Gruenberg spoke of the important role that innovation has played in banking. He noted numerous innovations that were beneficial and met a need, such as credit cards, mobile payments, remote check deposit, online bill pay, direct deposit, and automated teller machines. However, he "sounded several notes of caution with regard to the development of crypto assets." He said that these positive innovations were designed to operate "in a manner that is safe and sound for banks and that provides important consumer protections." He then noted five elements that "banks and other stakeholders should consider when assessing new innovations." Those five elements are (1) accessibility, (2) convenience, (3) efficiency, (4) safety and soundness, and (5) consumer protection.

Mr. Gruenberg went on to note that, "[f]rom the perspective of a banking regulator, before banks engage in crypto-asset related activities, it is important to ensure that: (a) the specific activity is permissible under applicable law and regulation; (b) the activity can be engaged in a safe and sound manner; (c) the bank has put in place appropriate measures and controls to identify and manage the novel risks associated with those activities; and (d) the bank can ensure compliance with all relevant laws, including those related to anti-money laundering/countering the financing of terrorism, and consumer protection." He noted that ensuring those things is why the FDIC issued its crypto Financial Institutions Letter in April that we discussed at the time.

On stablecoins, and particularly on payment stablecoins, Acting Chair Gruenberg noted that "there may be merit in continuing to examine the potential benefits associated with payment stablecoins." However, he noted there are significant safety and soundness risks. He pointed to three important features that could be implemented to make stablecoins safer:

1. Subject to prudential regulation;
2. Backed dollar-for-dollar by high-quality, short-dated U.S. Treasuries; and
3. Transacted on permissioned ledger systems with robust governance and compliance mechanisms.

In his remarks, he focused extensively on the importance of the disclosure and consumer protection issues that need to be addressed, emphasizing that any payment stablecoin system work in a complementary way with the upcoming FedNow service and any CBDC issued by the Fed if that were to occur.

As noted above, Acting Chair Gruenberg brought a cautious tone to the discussion, but not an outright hostile one. While he didn't necessarily call for legislation in this space, he did pose the question, noting "[w]e must consider the extent to which legislation would be necessary to provide a cohesive framework to prudentially regulate a payment stablecoin system from 'end-to-end' and to ensure that consumers are appropriately protected in the process."

Disclosure: Financial Institution Advertisement Banned by UK Regulator

By **Rachel Rodman**
Partner | Global Litigation

The UK's Advertising Standards Authority (ASA) has ruled that two UK retail banking advertisements, which made claims about the financial institution's green credentials, were "misleading" and "omitted material information." The billboard advertisements, which stated how HSBC was planting trees and transitioning to net zero, were posted on bus stops in Bristol and London in October 2021 just prior to the COP26 climate change summit. The ASA received 45 complaints, including from campaign group Adfree Cities. The ASA determined that the two advertisements should not be used again and that HSBC should ensure that future marketing communications making environmental claims were "adequately qualified and did not omit material information about its contribution to carbon dioxide and greenhouse gas emissions." This is the first example of the ASA taking action against a bank for "greenwashing." Notably, it does not appear that anything depicted in the advertisements was false. Rather, the ASA action appears to have been based on the fact that HSBC finances, among many companies and industries, fossil fuel companies.

HSBC responded to the announcement stating that the "financial sector has a responsibility to communicate its role in the low carbon transition to raise public awareness and engage its customers" and that they "will consider how best to do this as we deliver our ambitious net zero commitments."

Taking the Temperature: The ASA ruling is somewhat surprising. Nothing in the advertisement itself was alleged to be affirmatively false. And the fact that HSBC, like its peers, has not discontinued business with the fossil fuel segment of the energy industry is well known. Many participants on all sides of the green transition discussion acknowledge that transition to a green economy is not possible without energy provided by coal, oil and gas. HSBC also has stated it will "phase down" its financing of the fossil fuel industry, and that it will provide further details on that plan by the end of this year. Nonetheless, the ASA's action is a reminder, if one was needed, for participants in the financial services and other industries, that there is significant regulatory attention being paid to green claims, and any such claims need to have a robust factual basis.

(This article originally appeared in "Cadwalader Climate," a new twice-weekly newsletter on the ESG market.)

Disclosure: 'Green Hushing' Climate Targets

By **Duncan Grieve**
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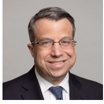
South Pole, a Swiss carbon finance consultancy, has published a report which suggests that one in four companies around the globe have decided not to publicize details of their climate targets. This development has been described as "green hushing" and appears to be a response by some companies to fears of greenwashing allegations and non-compliance with legislation. South Pole surveyed 1,200 companies across 12 countries and found that "nearly a quarter of those surveyed . . . will not be publicizing their achievements and milestones beyond the bare minimum or as required by, for example, the Science Based Targets initiative." Despite the trend for non-disclosure by a minority of the companies surveyed, it is also important to note that 72% of responding companies have set or committed to a science-based target (SBT) to reduce emissions; with a further 18% planning to implement targets in the next 12 months, and 67% having both a net-zero target and an SBT. A common example of an SBT commitment for a financial institution would be the alignment of in-scope assets under management to 2.19°C by 2030 and 1.5°C by 2040.

The CEO of South Pole, Renat Heuberger, in his foreword to the report, stated: "Long gone are the days when announcing a corporate net zero emissions target was exceptional. Today it is expected. Companies need to show, not just tell, how they are delivering on their critically important climate commitments."

Taking the Temperature: South Pole's report reflects concerns that the publication of science-based climate targets or progress meeting such targets may be overly-prescriptive and ambitious. That, in turn, raises concerns that these disclosures open companies up to regulatory enforcement and civil litigation challenges based on allegations of greenwashing. Despite these concerns, non-reporting or under-reporting climate targets is unlikely to be a sustainable long-term strategy. For years institutional investors have been advocating for greater climate-related disclosure, regulators in Europe already have mandated it, and U.S. regulators are not far behind, as evidenced, for example, by the SEC's proposed climate change disclosure rule. And, notwithstanding greenwashing concerns, a majority of the respondents to South Pole's survey committed to SBTs for emissions reductions. Nevertheless, companies need to be extremely thoughtful when defining and publicizing any climate-based targets so as not to over-promise and under-deliver.

(This article originally appeared in "Cadwalader Climate," a new twice-weekly newsletter on the ESG market.)

ESG Ratings: A Call for Greater Transparency and Precision Amid the Chaos of the Current Landscape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Currently, ESG rating providers often greatly differ in both their methodology and approach. A variety of different sources of data, methodologies and formulae are utilized by providers when determining their ratings. This can lead to divergent rankings given to the same company by different ESG rating providers. Regulators in the U.S., UK, and EU recognize the issues caused by the current inconsistencies and are starting to develop rules in this area. Read our most recent Clients & Friends Memo here.