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Cabinet News and Views

Informed analysis for the financial services industry

Being Thankful

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In This Issue ...

It's hard to stay focused with the start of the World Cup and the abundance of Thanksgiving Day dinner goodie staples — green bean casseroles and sweet potatoes with marshmallows, anyone? — showing up in kitchens this week. But there's never a holiday from the regulators, and there's much to report in Washington and in Europe.

We take a look this week at developments at the FTC, CFPB and FDIC, as well as more developments in the climate space that are impacting the financial services industry. And, after the holiday break in the U.S., we'll be back in your email inboxes next Thursday.

One final thought: I'll be taking time this Thanksgiving to think about all the things I'm thankful for and will also do some introspection to see if I'm doing enough to help others who could use some support this holiday season. I hope you will do the same. Have a wonderful Thanksgiving (and enjoy those World Cup games)!

Daniel Meade
Editor, *Cabinet News and Views*

President Biden Nominates Martin Gruenberg as Chair of FDIC (Again)

By **Daniel Meade**
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On November 14, the White House announced that President Biden is nominating Martin Gruenberg for a five-year term as Chair, and six-year term on the Board, of the Federal Deposit Insurance Corporation ("FDIC"). Mr. Gruenberg is currently the Acting Chair of the FDIC, and remains a member of the FDIC Board on an expired term. The nomination will allow Mr. Gruenberg to remain as the FDIC Chair if confirmed by the Senate.

As we reported in September, the President had announced his intent to nominate two Republicans, Travis Hill and Jonathan McKernan, to the FDIC Board. The actual nominations of Messrs. Hill and McKernan have not been moved yet, in light of the President deciding on whom to nominate as a non-acting Chair. Acting Chair Gruenberg's term as an FDIC Board member is expired, but he has been able to continue serving until a successor is confirmed. If confirmed, he will succeed himself on the Board. If Mr. Hill's nomination had been moved forward and he was confirmed as Vice Chair prior to Mr. Gruenberg being confirmed for another term as Chair, Mr. Hill would have become Acting Chair of the FDIC Board per the Federal Deposit Insurance Act ("FDI Act").

The FDIC's Board of Directors comprises five members. Under the FDI Act, no more than three members of the Board can be in the same political party. The FDI Act also calls for the Director of the CFPB and the Comptroller of the Currency to be members of the FDIC Board. Thus, generally, the Chair of the FDIC, the Comptroller and the CFPB Director are members of the President's party, and the Vice Chair and one other member are members of the other party.

Mr. Gruenberg's nomination to another term as FDIC Chair will need to be confirmed by the Senate. We learned after Election Day, earlier this month, that a confirmation of Mr. Gruenberg at least appears politically feasible, either in the lame-duck session or in the next Congress, given that Democrats will maintain their majority in the Senate.

FTC Delays Safeguards Rule Implementation for Certain Financial Institutions

By **Mercedes Kelley Tunstall**
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The Federal Trade Commission ("FTC") announced last week that it is delaying the date by which certain financial institutions must comply with certain provisions of its updated Safeguards Rule by six months, with the compliance date now being June 9, 2023. Applicable to non-banking institutions such as mortgage brokers, motor vehicle dealers, and licensed lenders, the FTC's iteration of the Safeguards Rule (16 C.F.R. 34) — which implements data security requirements from the Gramm-Leach-Bliley Act ("GLBA") — was updated in December 2021.

The FTC's new requirements are not without controversy. The Safeguards Rule has been hailed as uniquely effective over the two decades it has been in place because it is technology-agnostic and instead requires all financial institutions to maintain data security programs that are commercially reasonable, compared to their cohorts. Indeed, in a dissenting opinion from Commissioners Noah Joshua Phillips and Christine S. Wilson, they note that "the new prescriptive requirements could weaken data security by diverting finite resources towards a check-the-box compliance exercise and away from risk management tailored to address the unique security needs of individual financial institutions."

To that end, the following provisions have been delayed:

- Designating a qualified individual to oversee the information security program;
- Developing a written security risk assessment;
- Limiting and monitoring who in their organization, and among their service providers and other third parties, can access sensitive customer information;
- Encryption of all sensitive information;
- Training of security personnel;
- Development of an incident response plan;
- Periodic assessment of the security practices of service providers; and
- Implementation of multi-factor authentication, or another method of equivalent protection.

While most of these provisions are part of a robust information security program, the FTC cited the need for the delay as stemming from the multitude of small businesses affected by the Safeguards Rule that are still struggling with resuming business as usual after the pandemic.

CFPB Seeks Supreme Court Appeal of Funding Ruling

By **Rachel Rodman**
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On November 14, the Consumer Financial Protection Bureau ("CFPB") filed a Petition for a Writ of Certiorari with the Supreme Court for *Community Financial Protection Bureau et al. v. Community Financial Services Association of America, Ltd. et al*. The Petition asks the Supreme Court to promptly hear the CFPB's appeal of the Fifth Circuit Court of Appeals' decision in *Community Financial Services Association of America, Ltd. v. CFPB* ("CFSAA") that the CFPB's funding structure violates the Constitution's Appropriations Clause and, as a result, that the CFPB's "Payday Lending Rule" is invalid. Citing the case's "enormous legal and practical consequences," the Petition requests a hearing during the Court's April 2023 sitting.

The Petition challenges both parts of the Fifth Circuit's CFSAA decision. It contends that Congress "appropriated" funds to the CFPB as the Appropriations Clause requires when it authorized the CFPB to receive a capped amount of funds each year from the Federal Reserve Bank. The Petition also argues that the Fifth Circuit's remedy — invalidating the Payday Lending Rule — was an error. The CFPB contends that the Fifth Circuit failed to ask whether the funding provision could be severed from the Consumer Financial Protection Act and misapplied precedent when assessing the causal connection between the CFPB's purported constitutional defect and the Payday Lending Rule.

To spur the Court to action, the CFPB emphasizes that CFSAA has created significant uncertainty for CFPB enforcement and regulated entity compliance, particularly in the mortgage industry. The CFPB claims that defendants in the Fifth Circuit and beyond are asking to have CFPB rules invalidated and to have their cases dismissed. With the legitimacy of CFPB rules in question, mortgage industry participants face "disruptive uncertainty around millions of past home mortgage transactions," and "the mortgage markets would very likely all but grind to a halt."

The Petition constitutes the CFPB's most robust treatment of these issues to date as both parties treated them as ancillary in their prior briefing.

Regulation: IOSCO Begins Consultation on Carbon Markets

By Peter Y. Malyshev
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The International Organization of Securities Commissions ("IOSCO"), an international policy forum for securities regulators, has announced the publication of a consultation report and discussion paper. The 90-day public consultation covers "recommendations for establishing sound Compliance Carbon Markets" and "key considerations for enhancing the resilience and integrity of Voluntary Carbon Markets. . . ." The Compliance Carbon Markets ("CCM"s) Consultation Report and the Voluntary Carbon Markets ("VCM"s) Discussion Paper are open to public comment until February 10, 2023. IOSCO is asking for market participants to give feedback on "how to foster fair and functional markets and increase structural resilience to ensure these markets achieve their stated purpose, *i.e.*, the environmental objectives upon which their existence is based." The report on CCMs (which are created and regulated by mandatory governmental carbon-reduction regimes) offers various recommendations for jurisdictions that are looking to establish compliant carbon markets as a way to achieve their obligations under Article 6 of the Paris Agreement. The report on VCMs (which operate outside of compliance markets) details characteristics that can "foster sound carbon credit markets," together with weaknesses that currently limit the growth of the carbon credit markets. The report requests that respondents consider the role that financial regulators should play in overseeing these markets.

Announcing the publication of the reports at COP27, Jean Paul Servais, IOSCO Chairmain, IFRS Foundation Monitoring Board Chair and Chairman of the Belgium Financial Services and Markets Authority, said: "In recent years, carbon markets have gained significant importance as a mechanism for corporates, and society in general, to facilitate their transition towards net zero. However, they have so far fallen short of their objectives. No market can function without appropriate levels of integrity and, transparency, and liquidity so IOSCO today hopes to lend its international, market expertise to help develop appropriate frameworks for sound and well-functioning carbon markets, focusing on promoting integrity and liquidity and increasing transparency to facilitate price discovery."

Taking the Temperature: IOSCO is a significant force in the regulatory landscape with its membership regulating over 95% of the world's securities markets in 130 jurisdictions. Its proposals will likely carry great weight with their member regulators. The carbon offset market has come under significant scrutiny recently due to concerns that product inconsistencies and lack of scrutiny may be leading to greenwashing. There are also concerns that carbon offset markets can disincentivize or distract corporate actors from the primary objective of reducing emissions. The IOSCO consultation was launched in large part in response to these concerns. Of course, the effectiveness of regulatory activity in promoting well-functioning and high-volume carbon markets remains to be seen, and the future verdict on that issue will have to await the further evolution of any such regulation.

Notably, the U.S. Commodity Futures Trade Commission's ("CFTC") Chair, Rostin Behnam, was recently appointed as the vice chair of IOSCO. Behnam is an avid advocate for the development of carbon markets in the U.S., and the CFTC has been active in finding market solutions to climate change. The CFTC has also published several reports on VCMs and in June 2022 hosted a VCM convening. The CFTC is currently working on a report regarding the impact of climate change on the U.S. financial market.

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

European Regulators Launch Joint Consultation on Greenwashing

By Simon Walsh
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On November 15, three European supervisory authorities ("ESA"s) — the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA") — announced a Call for Evidence on greenwashing. The ESAs are seeking feedback on “potential greenwashing practices in the whole EU financial sector, including banking, insurance and financial markets, and which may be relevant to various segments of the sustainable investment value chain and of the financial product lifecycle.” The Call for Evidence defines greenwashing “broadly” to include “sustainability-related claims relating to all aspects of the ESG spectrum.”

In the consultation, the ESAs are requesting:

- views on how to understand greenwashing and the main drivers behind it;
- examples of potential greenwashing across the EU financial sector; and
- data to assist the ESAs in gaining a “concrete sense of the scale of greenwashing and identify areas of high greenwashing risks.”

The ESAs requested that all interested parties, “including financial institutions under the remit of the three ESAs and other stakeholders ranging from retail investors and consumers’ associations to NGOs and academia,” submit their responses by Tuesday, January 10, 2023. The ESAs anticipate issuing a progress report in May 2023 and a final report in May 2024.

Taking the Temperature: Regulators and companies continue to struggle to define what constitutes greenwashing. Just this week, as we reported, the UN High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities published a report that, in our view, proposed an aggressively broad greenwashing definition that would sweep up conduct that ordinarily would not be considered in the greenwashing calculus. As another example, in May 2022, ESMA issued a supervisory briefing addressing sustainability disclosures in the investment management industry. By issuing a Call for Evidence, these regulators appear to recognize the need for input from industry in light of the significant impact regulatory articulations of greenwashing will have on market participants.

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