CADWALADER

Cabinet **News and Views**

Informed analysis for the financial services industry

Risky Business

March 24, 2022 | Issue No. 3

Table of Contents:

In This Issue ...

Ongoing developments in Ukraine aside, the big business news headline this week was the SEC's anticipated announcement of new climate-related risk disclosure rules. As expected, the SEC got everyone's attention, which was probably one of the chief motivators in the first place. The proposals are significant and represent a genuine departure from current disclosure standards. We take a look at those proposals in our "In Depth" article this week.

Our "Take Five" commentaries this week are quite eclectic, with coverage of news out of the CFPB, the Federal Reserve Board and elsewhere. There's also another insightful look at the new federal LIBOR legislation. We think these items are worth your review.

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

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

CFPB Will Begin Using UDAAP Authority to Address Discrimination in Wide Array of Consumer Financial Products

By **Rachel Rodman**
Partner | Global Litigation

On March 16, the Consumer Financial Protection Bureau (CFPB) announced that it would begin examining financial institutions for discriminatory practices under its authority to prohibit unfair, deceptive, or abusive acts or practices (UDAAP). Specifically, the CFPB issued changes to its examination manual on UDAAPs that require examiners to scrutinize discriminatory conduct that may be unfair – including in situations where fair lending laws may not apply.

The CFPB has broad authority to examine bank and non-bank financial institutions for compliance with federal consumer financial law. As part of that mandate, the CFPB and other bank regulators have traditionally relied on the Equal Credit Opportunity Act (ECOA) to address discriminatory practices. ECOA, however, is limited to extensions of credit. In contrast, the CFPB's unfairness authority applies to all consumer financial products or services, such as collections, payments, remittances, and deposits.

The CFPB announced that its examiners would assess whether a financial institution's conduct is discriminatory under an unfairness standard. Under the Consumer Financial Protection Act, an act or practice is "unfair" if it (1) causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by countervailing benefits to consumers or competition.

In a blog post accompanying the announcement, the CFPB highlighted as unfair discriminatory practices "not allowing people of color to open deposit accounts" and "complex algorithms that can target highly specific demographics of consumers to exploit perceived vulnerabilities and strengthen structural inequities." The CFPB stated that it would be "closely examining" automated decision-making models, along with how companies generally test and monitor for discrimination.

The CFPB's announcement is a significant but not unexpected change in the agency's approach. Director Chopra has made clear that he would take an expansive view of the CFPB's authorities and that addressing structural inequities would be a top priority. Financial institutions should prepare accordingly.

Puerto Rico's Plan of Adjustment 'Goes Effective'

By **Casey Servais**
Partner | Financial Restructuring

On March 15, 2022, the Financial Oversight and Management Board for Puerto Rico announced that the Plan of Adjustment for the Commonwealth of Puerto Rico became effective, more than four years after Puerto Rico commenced restructuring proceedings under Title III of the Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA"). PROMESA is a bespoke piece of federal legislation enacted in 2016 to address Puerto Rico's debt crisis, and incorporates most of chapter 9 of the Bankruptcy Code. The Commonwealth's Title III case is the largest municipal restructuring proceeding in U.S. history.

Under the Plan, the Commonwealth:

- reduced more than $33 billion of its pre-petition bond debt and other claims. Commonwealth creditors will receive $7.4 billion in new bond debt and over $8 billion in cash on the Effective Date, as well as securities designated as "contingent value instruments" that pay out based on the outperformance of actual revenues over projected revenues;
- eliminated all debt of the Employees Retirement System of the Government of Puerto Rico ("ERS") and the Puerto Rico Public Buildings Authority ("PBA"); and
- reduced annual debt service from a maximum of $3.9 billion before the debt restructuring to $1.15 billion each year.

Puerto Rico's use of PROMESA to significantly lower its debt burden could encourage other distressed government debt issuers to consider bankruptcy as a viable option. In the case of issuers already eligible to be debtors under chapter 9, Puerto Rico's example could spur an increased number of chapter 9 filings in coming years. To the extent PROMESA is perceived as a success, it could also inspire Congress to contemplate legislation extending bankruptcy access to financially burdened U.S. states, such as Illinois or New Jersey, which are not currently eligible to be debtors under chapter 9.

Federal LIBOR Legislation: Five Things Financial Market Participants Need to Know


By **Jason M. Halper**
Partner | Global Litigation


By **Rachel Rodman**
Partner | Global Litigation


By **Lary Stromfeld**
Partner | Financial Regulation

Cadwalader partners Jason Halper, Rachel Rodman and Lary Stromfeld, members of the firm's LIBOR Preparedness Team, authored a Reuters article this week. You can read it here.

Federal Banking Agencies to Issue Notice of Proposed Rulemaking to Amend Uniform Rules of Practice and Procedure

By **Daniel Meade**
Partner | Financial Regulation

On March 22, the Federal Reserve Board issued a Notice of Proposed Rulemaking ("NPR") that will be joined by the Federal Deposit Insurance Corporation, National Credit Union Administration and the Office of the Comptroller of the Currency. The Interagency NPR proposes to amend the Uniform Rules of Practice and Procedure ("Uniform Rules"). The Uniform Rules are used by the banking agencies to govern the conduct of their administrative proceedings.

The agencies are amending the Uniform Rules (and their own local rules) to help modernize the rules to acknowledge that electronic filings, rather than paper filings, can be accepted. The agencies have been accepting electronic filings, but they have tended to be ad hoc arrangements determined by the relevant administrative law judges ("ALJs"). Through this rulemaking, the agencies intend to update and modernize the Uniform Rules to in fact have a uniform approach rather than the ad hoc arrangement that exists today.

While the agencies are performing this needed "housecleaning" of the rules, they also propose to amend the rules in other ways. The NPR proposes removing references to the Office of Thrift Supervision, which was eliminated by the Dodd-Frank Act in 2010. Other updates to the rules would include replacing gender-specific references with gender-neutral references, replacing the word "shall" with "must" or "will" to conform with current *Federal Register* drafting style, and allowing for the use of ALJ instead of administrative law judge.

Comments on the proposal are due within 60 days after publication in the *Federal Register*.

The European Supervisory Authorities' Warning on the Risks of Cryptoassets

By **Michael Sholem**
Partner | Financial Regulation

On March 17, 2022, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (together, the European Supervisory Authorities or "ESAs") published a warning to EU retail investors on the risks of cryptoassets. The ESAs' view is that cryptoassets are not suited for most retail consumers as an investment or as a means of payment or exchange.

In their warning, the ESAs provide an explanation of the key risks in cryptoassets that they consider face retail investors, including:

- Extreme price movements;
- Misleading information provided in marketing;
- Absence of regulatory protections (as most cryptoassets are outside of the EU regulatory perimeter);
- Product complexity;
- Fraud and malicious activities;
- Market manipulation, lack of price transparency and low liquidity; and
- Hacks, operational risks and security issues.

The ESAs note that while most cryptoassets are currently unregulated in the EU, this situation will change once the European Union implements the proposed Regulation on markets in cryptoassets (known as "MiCA").

Both the FCA and the ESAs have expressed concern for a number of years regarding the suitability of cryptoassets for the retail market. This most recent warning might well be regarded as a timely reminder to EU legislators to progress the MiCA proposal as soon as possible, noting that "[EU] consumers will not currently benefit from any of the safeguards foreseen in that proposal until it is adopted and applies."

In an interesting addition to the warning, the ESAs state that EU retail investors should be aware of the environmental impact of some cryptoassets, such as the high energy consumption of some cryptoassets which involve mining and validation processes.

In Depth: SEC Proposes Climate-Related Changes to Regulation S-K and Regulation S-X


By **Jason M. Halper**
Partner | Global Litigation


By **Erica Hogan**
Partner | Corporate


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

On March 21, 2022, the U.S. Securities and Exchange Commission proposed amendments to Regulation S-K and Regulation S-X that would mandate significant additional climate-related disclosures. This memorandum provides an overview of the new proposed disclosures, as well as the proposed phase-in periods, safe harbors and other accommodations provided under the proposed rules.

Read our Clients & Friends Memo here.

Cadwalader Adds Leading Litigator Helen Maher

Cadwalader, Wickersham & Taft LLP has expanded its Global Litigation Group with the addition of partner Helen M. Maher in New York. Helen joins Cadwalader from Boies Schiller.

Helen's practice focuses on complex commercial and antitrust matters for both plaintiffs and defendants. For over two decades, she has litigated cases in federal and state courts and arbitral tribunals throughout the country, including taking the lead in trying a number of these actions. The former head of Boies Schiller's Sports and Gaming practice, with clients including NASCAR, the Dallas Cowboys and the Ladies Professional Golf Association (LPGA), Helen will be one of the leaders of Cadwalader's Sports Industry practice.

"Helen is a first-rate litigator and another great addition to our Global Litigation Group," said Cadwalader managing partner Pat Quinn. "She brings considerable commercial litigation experience and will also expand our Sports Law capabilities. We're delighted to welcome her to the firm."

Added Global Litigation Group co-chair Nicholas Gravante: "I have known Helen for quite some time and have worked closely with her on a number of complex, high-profile matters. She is nothing short of exceptional."

Added Global Litigation Group co-chair Jason Halper: "We are all in on continuing to grow our litigation capabilities, and Helen is another well-known and highly respected addition to our team."

Helen has represented the co-founder of AriZona Iced Tea in complex commercial litigation that led to a recovery of nearly $1 billion for the client. Other clients, in addition to her sports law clients, include HSBC, Breakthru Beverage Group, Barclays and the State of Kentucky, among others.

Her abilities have been recognized by *Benchmark Litigation*, which has recognized her among the top 250 female litigators in the United States and as a litigation star.

"I am very excited about joining Cadwalader and its growing Global Litigation Group and to reunite with a number of former colleagues – in particular, Nick Gravante, Phil Iovieno, Karen Dyer, Larry Brandman and Sean O'Shea," Maher said. "Cadwalader has made such a strong commitment to growing its litigation offering, and the expanded team is truly world class."