In This Issue ...

This is a busy time of year for a lot of reasons.

There are the holidays, of course, but this is also a great time to take stock of the year that was and to do some crystal ball-gazing into the future. So this week's issue does a bit of "looking back" at 2022 and "looking ahead" to 2023, including a look at the FTX situation that will likely feature prominently in the weeks and months to come.

Mentioned several times as we're looking back and looking ahead is sustainability, and along those lines, we're excited to welcome ESG finance and investment partner Sukhvir Basran to Cadwalader. Sukhvir is based in London and has established a global profile as a market-leading ESG attorney.

But even with the anticipation of the new year, there are still very important developments in the news every day – none more prominent than continued and intensified discussion around crypto asset regulation. My colleagues Philip Khinda and Kendra Wharton take a look at important new SEC guidance following recent developments.

This will be our final issue of 2022. Thank you for your loyal readership over the past year, and we hope we were able to provide some helpful insights and analysis. We'll aim to do more of the same in 2023.

Happy holidays, all.

Daniel Meade
Editor, *Cabinet News and Views*

DOJ, SEC and CFTC Announce Parallel Criminal and Civil Charges Against Sam Bankman-Fried, FTX Trading and Alameda Research

By **Jodi L. Avergun**
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On December 13, the U.S. Attorney's Office for the Southern District of New York (the "U.S. Attorney's Office"), the U.S. Securities and Exchange Commission (the "SEC"), and the U.S. Commodity Futures Trading Commission (the "CFTC") announced parallel criminal and civil actions (here, here and here) against FTX co-founder and former CEO Sam Bankman-Fried. The charges were made public the morning after the U.S. Attorney tweeted that Bankman-Fried had been arrested by Bahamian authorities at the request of the U.S. government.

Criminal Charges

A federal grand jury indicted Bankman-Fried on December 8, charging him in eight separate counts. The charges include conspiracies to commit wire fraud, commodities fraud, securities fraud, money laundering and federal campaign finance violations.

According to the indictment, Bankman-Fried perpetrated a multi-year scheme to defraud FTX customers by diverting billions of dollars of their crypto assets to his crypto trading firm, Alameda Research. Bankman-Fried is also alleged to have defrauded Alameda's lenders and equity investors in FTX by concealing his misuse of customer crypto, some of which are alleged to be the true source of millions of dollars in political contributions.

Bankman-Fried is being held without bail in the Bahamas pending the filing of a formal extradition request. An extradition process is usually lengthy, and it might be many months before Bankman-Fried can be prosecuted in a U.S. court. At a hearing on December 13, Bankman-Fried indicated that he plans to fight extradition at this time, but he may ultimately waive that right and agree to be transferred to the U.S. to begin judicial proceedings. Bankman-Fried's appearance in the U.S. may also be delayed if Bahamian authorities pursue charges under Bahamian law.

In addition to the possibility of a lengthy prison sentence, Bankman-Fried faces potential asset forfeiture of any property derived from the proceeds of his alleged crimes.

SEC Allegations

The SEC's complaint, filed in the U.S. District Court for the Southern District of New York, alleges that Bankman-Fried defrauded equity investors in FTX by misrepresenting that FTX was a safe, responsible crypto asset trading platform. For example, the SEC alleges that Bankman-Fried repeatedly told prospective investors that FTX had sophisticated risk management controls in place to protect customer assets, and that those assets were safe and secure, but his statements were false and misleading because he had exempted Alameda from the risk management measures and was diverting billions in crypto assets to prop up Alameda's operations. The SEC alleges that these and other actions amounted to securities fraud in violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.

The SEC is seeking a permanent injunction against Bankman-Fried, disgorgement of ill-gotten gains, civil money penalties, an officer and director bar, and an order prohibiting Bankman-Fried from participating in any future offer or sale of securities (including crypto asset securities).

CFTC Allegations

Unlike the criminal and SEC actions, the CFTC's complaint alleges multiple federal violations by Bankman-Fried, as well as FTX Trading and Alameda Research. The CFTC's complaint is very similar to those filed by the DOJ and the SEC; however, the scope of the complaint and the legal authorities relied by the CFTC are materially different.

- First, the CFTC asserted that virtual currencies, such as Bitcoin, Ether and Tether, are recognized as "commodities" as defined in Section 1a(9) of the Commodity Exchange Act of 1936 (the "CEA") and CFTC regulations thereunder.
- Second, the CFTC charged that FTX's actions materially impacted the trading of crypto assets, as well as certain futures contracts on these assets that are traded on registered derivative commodity exchanges.
- Third, the CFTC alleged that FTX's asset transfers to Alameda constituted fraud and that FTX engaged in fraudulent misstatements of material fact and material omissions "in connection with contracts of sale of commodities in interstate commerce" in violation of Section 6c(1), and CFTC regulations Section 180.1(a)(1), (2) and (3), thus triggering CFTC's general antifraud enforcement jurisdiction in connection with commodities generally.

Notably, the CFTC made clear that FTX's U.S. CFTC-registered platforms ("FTX US Derivatives") (formerly known as "LedgerX") were registered with and fully regulated by the CFTC as a designated contract market, a derivatives clearing organization and swap execution facility, that "maintained separate bank accounts which segregated and accounted for customer funds at all relevant times." Accordingly, the U.S. platforms are not within the scope of this complaint.

Final Thoughts

Despite recent focus on whether many crypto assets can be regulated under the federal securities laws or the CEA, the criminal and civil actions announced on December 13 do not require any finding that crypto assets listed by FTX were securities or commodity derivatives (such as futures, options or swaps). Rather,

they focus on time-tested legal theories of fraud. However, the U.S. Attorney's Office, the SEC and the CFTC have indicated that investigations into other possible misconduct are still ongoing.

SEC's Division of Corporation Finance Heightens Expectations for Crypto Disclosures

By **Philip Khinda**
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Associate | White Collar Defense and Investigations

In the wake of mounting crypto bankruptcies and federal investigations into the alleged misappropriation of crypto assets, among other possible wrongdoing by market participants, the U.S. Securities and Exchange Commission's Division of Corporation Finance announced new guidance on December 8 for public company disclosures about the impact of these and other developments.

While the news cycle is currently focused on the arrest of FTX co-founder and former CEO Sam Bankman-Fried, public companies, funds and other institutions with federal disclosure obligations must be mindful of the heightened scrutiny they will receive in the coming months. Many public companies, in particular, may be obligated under the federal securities laws to provide disclosures in their upcoming annual or quarterly filings relating to the impacts of widespread financial distress across the crypto asset markets. Even those facing indirect counterparty risks may be required to make meaningful disclosures.

In its December 8 guidance, the Division of Corporation Finance released a sample letter describing several considerations that public companies should keep in mind as they prepare their disclosures. The Division advised companies to evaluate their disclosures, including Risk Factors and Management's Discussion & Analysis of Financial Condition and Results of Operations, with a view toward providing specific, tailored disclosures about the material impacts of crypto asset market developments.

Among other considerations, the sample letter indicates issuers should carefully evaluate their disclosures of:

- impacts from the price volatility of crypto assets;
- impacts from the bankruptcies of FTX, Voyager, Celsius Network, BlockFi, and other market participants, including whether the business has any material assets that may not be recovered or may otherwise be lost or misappropriated;
- direct or indirect exposure to other counterparties, customers, custodians, or other participants in crypto asset markets known to have experienced insolvency or excessive redemptions, have crypto assets that are unaccounted for, or have experienced material corporate compliance failures;
- if the company holds crypto assets, whether the crypto assets serve as collateral for any loan, margin, rehypothecation, or other similar activities;

- changes to company processes in light of crypto market developments, including steps taken to safeguard crypto assets, and implementation of policies and procedures designed to prevent commingling of assets, self-dealing and other potential conflicts of interest;
- risk management gaps identified by the company's board or management in light of crypto market conditions, as well as changes made to address those gaps;
- reputational harm the company may face in light of recent disruption in the crypto asset markets; and
- potential impacts of regulatory developments, including pending crypto legislation or regulation.

The sample letter follows an announcement by the Division of Corporation Finance in September that it was adding a dedicated Office of Crypto Assets to its Disclosure Review Program. The new office focuses resources and expertise to address the unique and evolving disclosure issues relating to crypto assets. The Office of Crypto Assets will be ready and willing to refer matters to the Division of Enforcement when it finds that companies failed to provide investors meaningful disclosures about the material impacts of crypto asset market conditions.

Looking Back on 2022 and Looking Ahead to 2023 – U.S. Prudential Bank Regulation

By **Daniel Meade**
Partner | Financial Regulation

As we are coming to a close on 2022, we're taking a look back at some of the important developments of 2022 and what lies ahead for 2023.

Looking Back at 2022

As past readers may have seen me say before, there's a saying in Washington that personnel is policy. In 2022, we at least have more certainty on who the personnel is, and therefore some better educated guesses about what policy may be in 2023. On the personnel front, in 2022, we saw Michael Barr confirmed as Vice Chair of Supervision at the Federal Reserve Board ("FRB"), and Martin Gruenberg nominated to be permanent Chair of the Federal Deposit Insurance Corporation ("FDIC"). We also saw nominations of Travis Hill and Jonathan McKernan as the Republicans on the FDIC Board. If confirmed, the FDIC would have all five seats filled for the first time in a long while. The Federal Reserve Board also has its full contingent of seven members for the first time in recent memory as well, with Jerome Powell and Lael Brainard being confirmed as Chair and Vice Chair, respectively, this year as well. Presuming Acting Chair Gruenberg is confirmed as FDIC Chair, the only acting principal at the federal prudential banking agencies is Acting Comptroller of the Currency Michael Hsu. While President Biden may very well nominate someone (possibly including Mr. Hsu) to be confirmed as Comptroller, the National Bank Act permits an acting Comptroller to stay at the pleasure of the Secretary of the Treasury.

In terms of the policy we have seen in 2022, all three agencies have issued proposed guidance on the management of financial risks related to climate and crypto. The FDIC finalized its 2-basis point increase in base deposit insurance rates. This year showed a return to a preference for interagency agreement. The climate and crypto guidance noted above demonstrate an intent to provide consistent, if not uniform guidance on those topics, and the most notable interagency action may be the interagency release of a Community Reinvestment Act proposed rule in May.

Looking Ahead to 2023

Looking ahead to 2023, many of the topics of proposals in 2022 likely will become the final rules of 2023. Just last week, we noted Vice Chair Barr's speech at the American Enterprise Institute on Bank Capital. As 2022 turns to 2023, we will likely see the results of Vice Chair Barr's holistic review of the capital rules, and likely (hopefully?) see an interagency proposal on the U.S. version of the Basel III endgame (aka Basel IV) rules. Reading the tea leaves laid out in Mr. Barr's speech, it's likely that capital levels will be going up.

Given the continuing turmoil in the cryptocurrency market (see this week's article by my colleagues on SEC and CFTC actions with regard to FTX), it's become more likely that Congress will do something to at least clarify jurisdiction among the market regulators and possibly legislate on stable coin rules.

As noted above, we will likely see final rules or guidance from the banking agencies on rules they proposed in 2022. Look for a final rule (or possibly a re-proposal) from the three agencies on the Community Reinvestment Act. There will likely be further guidance on climate and crypto activities. If the FRB doesn't finish before the end of 2022 (which is still a possibility), we will likely see a final rule from the FRB on rules to implement the LIBOR Act. Although the FRB finalized its Guidelines on access to Federal Reserve master accounts in 2022, the issue will likely continue to see developments in 2023, as litigation on the matter continues. Finally, speaking of litigation, since the Consumer Financial Protection Board ("CFPB") is a bureau of the FRB, I'll squeeze a big CFPB matter into our 2023 future gazing. It seems likely that the Supreme Court will hear an appeal of the Fifth Circuit Decision finding the way the CFPB is funded through the FRB to be unconstitutional. Any decision on the constitutionality of the CFPB could very well be the biggest banking law story of 2023.

New Bipartisan Bill Takes Aim at Digital Asset Money Laundering and Terrorism Finance

By **Peter Y. Malyshev**
Partner | Financial Regulation

On December 14, Senators Elizabeth Warren (D-Mass.) and Roger Marshall (R-Kan.) introduced in the U.S. Senate a new bipartisan bill, titled "Digital Asset Anti-Money Laundering Act of 2022" (the "Bill"), intended to curb the use of digital assets for money laundering and to counter the financing of terrorism. This is a very narrow bill and is not intended to supplant previously proposed legislation on digital assets by Senators Stabenow/Boozman or Lummis/Gillibrand, and does not address the Commodity Futures Trading Commission ("CFTC")/Securities and Exchange Commission ("SEC") jurisdictional reach over digital assets.

The Bill defines the terms: digital assets, digital asset kiosk, digital asset mixer and privacy coin, and directs the Financial Crimes Enforcement Network ("FinCEN") to promulgate rules "classifying custodial and unhosted wallet providers, cryptocurrency miners, validators, or other nodes who may act to validate or secure third-party transactions, independent network participants, including MEV searchers, and other validators with control over network protocols as money service businesses."

Further, FinCEN is directed to implement rules requiring reporting of all transactions by U.S. persons in digital assets in value over $10,000 through accounts outside the United States. The Bill also requires the U.S. Treasury to promulgate rules prohibiting financial institutions from "handling, using, or transacting business with digital assets" entities using anonymity-enhancing technologies.

The Bill directs the Treasury, SEC and CFTC to establish a "risk-focused examination and review process" to assess the adequacy of anti-money laundering and anti-terrorist prevention programs, including suspicious activity reporting.

Finally, the Bill requires operators of digital assets kiosks and the ATMs to ascertain the identity of all their customers and users.

The reach of this Bill is very broad, requiring, first, existing financial institutions and, second, digital assets infrastructure providers to play a critical role in preventing domestic and international money laundering and financing of the terrorist activities through the use of digital assets, such as crypto currencies like Bitcoin, Ether, or Tether.

Many of the digital assets infrastructure providers, such as FTX, are based outside of the U.S. but offer their services to U.S. persons. If this Bill had been enacted before the collapse of FTX, most if not all of FTX's non-U.S. transactions with U.S. participants would have been reportable to and transparent for the FinCEN, Treasury, SEC, and CFTC.

This Bill is likely the first of many to be introduced (or re-introduced) in the aftermath of the FTX's collapse in November 2022.

A Closer Look at the UK Chancellor's 'Collection of Announcements'

By **Michael Newell**
Partner | Financial Services

By **Alix Prentice**
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By **Nick Shiren**
Partner | Capital Markets

On the 9th of December, the UK's Chancellor, Jeremy Hunt, set out a "collection of announcements" aimed at reforming the UK's financial services ecosystem to maximise its position outside the EU while aligning still with those European regulatory requirements and processes that make sense given the UK's status as a third country that needs to do business in the EU. At the heart of the exercise is the repeal of EU law that was retained on the statute books post-Brexit and its replacement and modification with purely domestic law and regulation. While the Government and Parliament will set the framework and parameters, for financial services the idea is to leverage the so-called "FSMA Model" to empower the Financial Conduct Authority ("FCA") and Prudential Regulatory Authority ("PRA") to set direct regulatory requirements in their rulebooks (rather than embedding them in less flexible primary and secondary legislation), many of which will be a transposition of existing EU law and regulation but some of which will reflect targeted policy change. The architecture for these changes is already in motion under the Financial Services and Markets Bill ("FSM Bill"), which significantly introduces a secondary objective for each of the FCA and PRA to facilitate the international competitiveness of the UK economy and its growth in the medium to long term, subject to aligning with international standards. Going forward, the hope is that the changes should introduce significantly more flexibility for proportionate and timely changes to UK regulatory rules.

This is a significant project both in terms of resources and time, and the proposed approach is a phased one, dealing with work in three tranches. Tranche one involves work already underway to review, repeal, reform and replace based on the outcomes of the Wholesale Markets Review (MiFID), the Listing Review (Prospectus Regulation), the Securitisation Review (Securitisation Regulation) and the Solvency II Directive. Phase two will be run on a twin track, and includes work on the Taxonomy Regulation, the Long-Term Investment Funds Regulation, the PRIIPS Regulation, the Short Selling Regulation, the Capital Requirements Regulation and Directive and the Short Selling Regulation, among others. The Government expects "significant progress" on Tranches 1 and 2 by the end of 2023. Other legislation is still being assessed in terms of whether (where considered necessary and if at all) to bring it forwards into phase 2 or prioritise for phase 3.

Alongside the announcements, the Treasury has published three "illustrative" Statutory Instruments to show how legislation under the FSMA Model could look.

While these are so speculative at this stage that it would not be prudent to characterise them as drafts, the following are noteworthy.

Securitisation Regulation

While this illustrative version is largely a restatement of existing regulations, because of the FSMA model's focus on requiring regulators to directly regulate firm-facing issues there are a number of restatements that bring in elements that are not in the current version of the Securitisation Regulation, including a definition of STS securitisation which, while not new, is helpful clarity (which, of course, might change). It is interesting to note in passing that current proposals preserve the temporary recognition of EU STS securitisations issued before 31 December 2024, while the Financial Services and Markets Bill (see below) introduces an equivalence regime for recognising non-UK securitisations as STS securitisations in the UK. In addition, the policy note accompanying the illustrative Statutory Instrument provides that HM Treasury is committed to working with the FCA and the PRA to bring forward the proposed reforms to the securitisation framework identified in HM Treasury's December 2021 review, including in respect of risk retention in securitisations of non-performing exposures, the definitions of public and private securitisation and due diligence requirements for institutional investors when investing in non-UK securitisations.

Prospectus Regulation

The proposed new Statutory Instrument will replace the existing text of the adopted Prospectus Regulation with what is intended to be a more simple, agile and effective regime: a new "Public Offers and Admissions to Trading" regime. Importantly, the draft regulations create a number of new "designated activities" for the purposes of the FSM Bill, in relation to which the FCA is empowered to make "designated activity rules." These designated activities include:

- offering relevant securities to the public in the United Kingdom;
- requesting or obtaining the admission of transferable securities to trading on a regulated market or market-trading facility ("MTF");
- admitting transferable securities to trading on a regulated market or MTF;
- communicating an advertisement relating to an offer of relevant securities to the public or admission to trading in the United Kingdom; and
- disclosing, otherwise than in an advertisement, information relating to such an offer or admission to trading or proposed admission to trading.

The Statutory Instrument sets out the exemptions to the prohibition on making public offers of securities in the UK, which largely align with the existing regime.

What's Next for the UK and the EU?

By **Michael Newell**
Partner | Financial Services

By **Alix Prentice**
Partner | Financial Regulation

As we make the transition from 2022 to 2023, this is a good time to look ahead to developments in the UK and the EU that will likely impact the financial services industry. Here are some observations.

What Is Next in the UK in 2023?

Financial Services and Markets Bill

Chancellor Hunt's proposed reforms, discussed separately here, derive from the FSM Bill, introduced to Parliament on 20 July 2022 and currently in its second reading in the House of Lords. The Bill is cast as a revised blueprint for regulation that takes the existing Financial Services and Markets Act 2000 and sets up new regulatory architecture. We covered the Bill here.

SDR

A key regulatory focus for 2023 will be the progression of the UK's Sustainability Disclosure Requirements ("SDR") and investment labels regime, which is designed to tackle greenwashing and retain trust in sustainable products. The regime proposes to introduce 3 product labels (Sustainable Focus, Sustainable Improver and Sustainable Impact), which will be compulsory for retail products advertising sustainable features and optional for other products. The labels come with detailed disclosure obligations. The regime will also introduce product-naming conventions and a general "anti-greenwashing" rule. The Government is consulting on, and has yet to clarify, how the regime is expected to impact non-UK firms and products.

Professional Investor Fund

The latest reading of the FSM Bill has introduced a new clause to allow the UK to legislate for a new type of "professional investor fund," which would take the form of an unauthorised co-ownership alternative investment fund ("AIF"). The new clause inserts a new section into the Financial Services and Markets Act 2000 ("FSMA") giving HM Treasury the power to make regulations concerning the rights and liabilities of participants in unauthorised co-ownership AIFs. The intention is to create a UK fund product which would not require FCA authorisation but which would qualify for similar "regulated" and tax-exempted status as the Luxembourg RAIF.

Alternative Asset Managers

On 9 August 2022 the Financing Conduct Authority ("FCA") published an open letter to CEOs on alternatives supervisory strategy, which outlines the FCA's

supervisory strategy and priorities for alternative asset managers and which will become an increasing focus in 2023. Focus areas include:

- investor risk: Ensuring any investments offered are appropriate where offered to retail clients, with emphasis on robust governance, due diligence and investor categorisation;
- conflict of interests: Having appropriate policies in place and ensuring these are adhered to;
- market integrity: Expectation for firms to ensure that their risk management systems are fit for purpose;
- market abuse: Expectation for firms to have effective systems and controls tailored to potential risks in their business model;
- culture: Expectation for firms to have a healthy culture, particularly with regard to renumeration as well as D&I, noting that this will be looked at during the forthcoming supervisory cycle; and
- ESG: This remains a priority for the FCA, particularly with respect to marketing and disclosure.

Retail Clients

The FCA has 3 key focuses as regards authorised firms as it moves into 2023 – in particular, those providing services and products to retail clients. These are: reducing and preventing serious harm; setting and testing higher standards; and promoting competition and positive change.

The key components to achieving the first focus will include dealing with problem firms, including removing authorisation from sub-standard firms, improving the redress framework for consumers, increasing the focus on the standards and conduct of regulatory "hosting" providers, and being more assertive and decisive on market abuse.

The FCA's new Consumer Duty will form the core of the second focus, making strides to ensure firms are embedding this at the heart of their firm culture, which requires firms to set a higher standard of care for consumers and provide more protection across financial services. Requirements will include fairer charges and fees, easier switching, better support, clearer and more timely information and better tailored products. The FCA will also continue their scrutiny of firms' financial promotions and target action to make sure promotions are clear, fair and not misleading. Finally, the FCA will look to ensure firms seeking authorisation have appropriate ESG policies, systems and controls embedded into their operations.

In terms of the third focus, the intention will be to work in conjunction with the new Financial Services and Markets Bill proposals to tailor rules to better suit UK markets in a global context and to strengthen the UK's position in global wholesale markets, with the intention that the UK is one of the leading markets of choice for issuers, intermediaries and investors alike. This will include shaping digital markets to achieve good outcomes.

What Is Next in the EU in 2023?

EU regulatory authorities have three themes at the top of the agenda for next year.

- Sustainable finance. The reporting regime under the Sustainable Finance Disclosure Regulation ((EU) 2019/2088) ("SFDR") is fully in force from 1 January 2023. Notwithstanding there is still much uncertainty as to the specifics and amendments expected to the secondary legislation in the Commission Delegated Regulation (C(2022) 1931)(the "SFDR Delegated Regulation") as well as further Q&As from the various European Supervisory Authorities ("ESAs") (being the EBA, EIOPA and ESMA). In particular, these amendments will be to the Regulatory Technical Standards ("RTS") laid down in the SFDR Delegated Regulation relating to sustainability indicators in relation to adverse impacts (whether streamlining, extending, refining and considering improvements definitions, applicable methodologies, metrics and presentation). The ESAs may also put forward amendments relating to information provided in relation to financial products in pre-contractual documents, on websites, and in periodic reports on decarbonisation targets, including intermediary targets and milestones, where relevant, and actions pursued. The revised RTS are expected to be delivered by 28 April 2023. In addition, the ESAs will monitor the application of the SFDR to determine (i) whether optional implementing technical standards ("ITS") on marketing communications are needed; and (ii) whether to issue additional Q&As or other level 3 tools to promote supervisory convergence on the practical application of the SFDR. The ESAs, together with the ECB, also intend to conduct a coordinated EU-level climate change stress test across the financial sector during 2023 to assess the resilience of the financial sector in line with the Fit-for-55 package.

- Digital assets. The final texts of the proposed Regulation on markets in cryptoassets ("MiCA") (2020/0265(COD)) and the proposed Regulation on information accompanying transfers of funds and certain cryptoassets (recast revised WTR) (2021/0241(COD)) are expected to be published in the EU Official Journal in early 2023. 2023 will then see advancement of secondary legislation and guidance on both regimes. In particular, the ESAs have already announced that they intend to develop technical standards on information and communications technology ("ICT") risk management frameworks and guidelines on the methodology for calculating costs, as well as quantifying losses for response and recovery, as mandated under the proposed Regulation on digital operational resilience for the financial sector (DORA) (2020/0266(COD)). They also intend to produce standards and reports on reporting of ICT-related incidents.

- Securitisation. The ESAs intend to develop further Q&As and other level 3 tools to promote a common understanding and supervisory convergence for a consistent approach to the Securitisation Regulation, including giving national regulators and stakeholders' further guidance on the implementation of cross-sectoral areas of the Securitisation Regulation.

European Supervisory Authorities Publish Joint Advice on the Review of the Securitisation Prudential Framework

By **Nick Shiren**
Partner | Capital Markets

On 12 December 2022, the three European Supervisory Authorities ("EBA," "EIOPA" and "ESMA") published a joint advice on the review of the securitisation prudential framework.

The advice consists of two parts:

Review of the Securitisation Prudential Framework for Banks

The ESAs make the following recommendations in respect of the securitisation prudential framework for banks:

1. some technical quick fixes aimed at improving consistency and clarity in the framework (including carving out the tranches risk weighted 12.5% from the calculation of the overall cap for securitisation; and the treatment of specific credit risk adjustments for the purpose of calculating the exposure value of securitisation positions retained by originators);
2. a targeted recommendation recognising the reduced model and agency risk associated with originators through a reduction in the risk weight floor applicable to senior tranches retained by originators in certain "resilient" securitisation transactions which satisfy a set of eligibility criteria; and
3. general issues on the securitisation risk weight formulas that underpin the framework but noting that further work is required to be done by the EBA in this regard.

As regards the liquidity framework for banks, the ESAs consider that the current framework should be kept as it currently stands. The advice concludes that re-calibrating the securitisation capital framework for banks would not be a solution that would ensure the revival of the securitisation market and that any changes to the capital framework may have a limited impact because investor demand may remain subdued in the foreseeable future.

Review of the Securitisation Framework in Solvency II Applicable to (Re)Insurers

The advice notes that relatively few EU insurers/reinsurers invest in securitisations and that the change in capital weightings for STS securitisations effected in 2019 has only marginally increased investment by EU insurers/reinsurers in securitisations. The advice concludes that there is insufficient evidence to conclude that the current Solvency II capital framework is not fit for purpose and, as such, no changes are proposed.

Welcoming Our New ESG Finance and Investment Partner Sukhvir Basran

We are delighted to announce the addition of ESG finance and investment partner Sukhvir Basran in the firm's London office.

Sukhvir joins Cadwalader from Hogan Lovells, where she co-established and co-led the firm's Global Sustainable Finance and Investment Group. Combining her substantial experience as a banking and finance lawyer and in sustainable finance and investment, Sukhvir advises a range of clients on ESG strategies, policies, frameworks, disclosure and reporting, ESG-related transactions and products, and the integration and alignment of ESG across investment processes.

In addition to her client work, Sukhvir works closely with trade associations and industry bodies, standard setters, and data providers to deliver an end-to-end service for clients. She is involved with several organizations and financial institutions in the Gender Lens and diversity investing space to develop products and deepen engagement to promote gender equality outcomes. She is a member of the Loan Market Association's ESG committee, is Independent Chair of the 2X Global's inaugural board, is on the Steering Committee of GenderSmart JEDI, is a member of the Global Alliance of Impact Lawyers' Board and is working on a UN-led Taskforce on the creation of an ESG Board Certification. Sukhvir also launched "Aurora: The Gender Lens Project" with the 2X Collaborative and GenderSmart.

You can read the full press release here.