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New Questions in Q2

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In This Issue ...

The first quarter of 2023 was certainly one to remember, especially the final few weeks in the aftermath of Silicon Valley Bank and Signature Bank.

While the unwinding continues, so far in Q2 we've moved into the "what happened" and "what can we do differently going forward" phase, as exemplified by this week's important speech by FDIC Vice Chair Travis Hill. Please take a look at my quick summary, and I encourage you to read the full speech.

We are also including this week a *Bloomberg Law* article by my colleagues Mercedes Kelley Tunstall and Nikita Cotton on crypto regulation in New York and a Clients & Friends Memo by partner Erica Hogan on new SEC filing requirements. And we have some insights into the FCA's 2023/24 priorities from London partner Alix Prentice.

We're always here for comments and questions. Just drop me a note here.

Daniel Meade
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FDIC Vice Chair Hill Speaks on Recent Bank Failures

By **Daniel Meade**
Partner | Financial Regulation

Federal Deposit Insurance Corporation ("FDIC") Vice Chair Travis Hill gave a speech earlier this week, titled "Recent Bank Failures and the Path Ahead," at the Bipartisan Policy Center. The speech appears to be Vice Chair Hill's first public speech since taking office in January. Vice Chair Hill is one of the two Republican members of the FDIC Board that President Biden first announced his intent to nominate in September 2022 and which we reported on at the time.

Vice Chair Hill discussed the recent failures of Silicon Valley Bank ("SVB") and Signature Bank, as well as the self-liquidation of Silvergate Bank. He noted that all three were basically classic bank runs precipitated by rising interest rates and apparent poor interest rate risk management. However, he highlighted that the difference in the most recent bank failures is the speed with which they occurred, noting SVB's $42 billion one-day outflow of deposits compared to $2.8 billion peak outflow from the failing Washington Mutual in 2008.

Vice Chair Hill suggested there is still learning to do on these most recent failures, but mentioned two targeted changes that could help in the future.

First, he noted that there may be reason to pre-populate a data room for some set of insured depository institutions to speed up the process when the FDIC becomes receiver of a failed bank. Such access to information, for both the FDIC and possible bidders, could aid in speeding up a sale of the failed institutions, and preserve more franchise value in the resolution.

Second, he said "the question of whether regional banks should issue long-term debt to absorb losses in resolution ahead of depositors and the Deposit Insurance Fund will warrant careful consideration in the months ahead." This is a question that Acting Comptroller of the Currency Michael Hsu raised in April of last year. Vice Chair Hill also posited that one way to possibly address the interest rate risk encountered by SVB would be to "hold capital against some – or all – unrealized losses on their bond investments." However, he noted that "these types of proposals also have well-known downsides, including, for example, (1) the tendency for market prices to exaggerate fluctuations in value during times of stress, and (2) the incongruence of banks' capital requirements being driven by changes in the market value of securities, while ignoring changes in the value of loans."

Vice Chair Hill also took some time in his speech to defend the statutory changes made in 2018 through the S. 2155 bill sponsored by Senator Michael Crapo (R-ID). He stated: "[t]he reasons for SVB's failure are quite straightforward and easy to explain, and those rule changes had nothing to do with them." In a Q&A that followed his remarks, Vice Chair Hill also spoke of his vote at the FDIC Board to recommend that Treasury Secretary Yellen invoke the systemic risk exception to the Federal Deposit Insurance Act's requirement to follow the least-cost resolution, and while a tough decision and not one he took likely, he believes that it helped to stop the contagion.

In his concluding remarks, Vice Chair Hill said, “[W]e should closely review the lessons to be learned from the recent failures, and be open to targeted changes to our framework, but we should be humble about what our rules and policies can accomplish, and avoid the temptation to overcorrect.”

Bloomberg Law: Current State of Crypto Regulation in New York


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


By **Nikita B. Cotton**
Associate | Financial Regulation

As crypto platforms come under increasing scrutiny, the state of New York in particular has been establishing clear regulatory expectations through enforcement actions involving two crypto exchanges (CoinEx and KuCoin). These enforcement actions are consistent with other recent actions taken against crypto platforms by the NY AG, in addition to other state authorities, the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, and Department of Justice. Of course, the actions also come on the heels of the well-publicized, high-profile bankruptcies of other crypto platforms.

This *Bloomberg Law* article examines these recent developments, providing context and highlighting the legal theories involved.

Read the article here.

Preparing for the New SEC Electronic Filing Requirements for Form 144 – What Public Companies and Their Affiliates Need to Do to Be Prepared

By **Erica Hogan**
Partner | Corporate

The U.S. Securities and Exchange Commission has adopted new rules that will require the affiliates of public companies to electronically submit their Form 144 filings (as opposed to filing those forms manually), effective April 13, 2023. Specifically, whenever an affiliate of a company that files periodic reports with the SEC pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934 effects the sale of securities in reliance upon Rule 144, a Form 144 must be electronically filed with the SEC, providing notice of the proposed sale if the amount to be sold under Rule 144 during any three-month period exceeds (a) 5,000 shares, or (b) has an aggregate sales price greater than $50,000. Pursuant to Rule 144(h)(3), the Form 144 must be transmitted for filing concurrently with either placing the order with a broker or the execution of the sale directly with a market maker. Executive officers, directors and large shareholders are typically affiliates of a Reporting Company because of their relationship of control with the issuer.

This Clients & Friends Memo offers some practical tips on how companies can prepare for the new Rule 144 electronic filing requirements. Read it here.

The UK's Financial Conduct Authority Publishes Its 23/24 Business Plan

By **Alix Prentice**
Partner | Financial Regulation

In the context of a year that has seen record levels of volatility, the FCA has set out in its Business Plan for 2023/24 how it plans to tackle regulating firms with a view to delivering on its objectives of: ensuring markets function well; securing appropriate protection for consumers; protecting and enhancing the integrity of the UK's financial system; and promoting effective competition.

Key challenges are not only the potential for further volatility, but also interest rates and inflation, the risk of rising unemployment and further declines in real household disposable incomes. To meet these challenges, the FCA is expanding in terms of headcount and locations and continuing to make progress in its data and digital programmes to improve intelligence and analytical capabilities. Specific initiatives include extending the scope of cryptoasset regulation, extending the regulatory perimeter to include "buy-now-pay-later" credit as well as ongoing work to ensure good outcomes for consumers and market resilience. The Edinburgh Reforms are referenced, along with work to implement the new Future Regulatory Framework, which gives the FCA direct firm-facing, rule-making powers. Alongside bringing forward proposals for changes to the regimes for the public offer of securities, securitisation and short selling (among others), work with the Bank of England to support the government's objective of having the Financial Market Infrastructure Sandbox to test the use of Distributed Ledger Technology for settlement and trading running by the end of this year is another feature of implementing these more structural changes.

The Business Plan contains no surprises but has been reoriented from previous years to address 13 commitments across three focus areas of: reducing and preventing serious harm; setting and testing higher standards; and promoting competition and positive change. The 13 commitments are also unsurprising but are outward facing in the emphasis that is given to strengthening the FCA's vision of the UK's position in global wholesale markets and as a market that sees itself as a leader in adopting new technologies.