CADWALADER

Spring Fever

April 20, 2023

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In This Issue ...

Maybe it's a bit of spring fever or maybe (fingers crossed) we're starting to see a return to normal after a challenging start to the year, but there were no screaming headlines this week.

Congress is back this week and having hearings, but after a two-week holiday recess, there wasn't an overabundance of news coming out of Washington. Chances are, that is likely to change in the weeks to come.

For now, please reach out here if there’s anything you'd like to talk about.

Daniel Meade
Partner and Editor, *Cabinet News and Views*

FDIC Releases Semiannual Update on the Deposit Insurance Fund Restoration Plan

By **Daniel Meade**
Partner | Financial Regulation

The Federal Deposit Insurance Corporation ("FDIC") Board held an open meeting on Tuesday to receive the semiannual update on the Deposit Insurance Fund ("DIF") Restoration Plan. As we previously wrote last year, the FDIC amended the DIF restoration plan with an increase in the base assessment rate charged to insured depository institutions.

At Tuesday's meeting, the FDIC staff reported that it projects that the reserve ratio should reach the statutory minimum designated reserve ratio of 1.35% by the statutory deadline of September 2028, and may reach it well before that, "though the precise timing is uncertain and depends on a number of factors." The FDIC Board accepted the staff's recommendation that no changes be made to the plan.

FDIC staff reported that as of year-end 2022, the reserve ratio increased one basis point from the previous quarter to 1.27%. Staff also noted that the Silicon Valley Bank and Signature Bank failures should not have a material impact on the restoration plan. The semiannual update stated that "[t]he FDIC estimated the cost to the DIF for these failures to be $20 billion and $2.5 billion, respectively. Of that estimated total cost of $22.5 billion, the FDIC estimated that approximately $19.2 billion was attributable to the cost of covering uninsured deposits pursuant to systemic risk determinations made on March 12, 2023." Because the $19.2 billion is required to be recovered by special assessment (for which a notice of proposed rulemaking is expected next month), staff reported that the impact of the March bank failures will be approximately $3.2 billion.

While industry will be happy to hear that this update on the DIF restoration plan will not result in increased deposit insurance assessments, all eyes will be on the forthcoming proposed rule to recoup the costs of the systemic risk exception coverage of uninsured deposits in March.

Bank of England and CFTC Announce Agreement on CCP Supervision

By **Alix Prentice**
Partner | Financial Regulation

Post-Brexit, the Bank of England (the "Bank") assumed responsibility for recognising and supervising incoming, non-UK central counterparties ("CCPs"), and on 14 April, the Bank and the Commodity Futures Trading Commission announced that the relationship between the two authorities meets the expectations of the Bank's Level 1 Informed Reliance Assessment. This means that the Bank has made an assessment of the level of risk to UK financial stability that incoming CCPs supervised by the CFTC pose and has determined that it can defer to the CFTC as the home supervisory authority.

In June 2022 the Bank published The Bank of England's approach to tiering incoming central counterparties under EMIR Article 25 - Statement of Policy, which sets out the approach to tiering incoming CCPs, with Tier 2 CCPs (those that are assessed as systemically important or likely to become systemically important for the financial stability of the UK) becoming subject to direct UK supervision and regulation. An important aspect of the tiering process is the "informed reliance assessment" under which the Bank determines the extent to which it is able to rely on the incoming CCP's home authority for supervision and regulation. The Memorandum of Understanding entered into by the Bank and CFTC in 2020 included within its scope the common understanding of mutual practices in connection with U.S. and UK cross-border CCPs, clearly facilitating this tiering decision.

Financial Conduct Authority Calls for Improvements in ESG Benchmarks

By **Sara Bussiere**
Special Counsel | Global Litigation

Last month, the Financial Conduct Authority (FCA) announced that, after conducting a "preliminary review" of ESG benchmarks, "the overall quality of ESG-related disclosures made by benchmark administrators was poor" and improvements were necessary to ensure that the benchmarks were based on quality, consistent, and reliable data. On March 23, 2023, the FCA sent a letter to benchmark administrators explaining that it expected the administrators to develop, and be prepared to explain upon request, their strategies to address a number of issues raised in the letter, which address deficiencies concerning benchmark statements, benchmark methodologies, low carbon benchmarks regulations, and the robustness and reliability of ESG benchmarks. The key deficiencies identified include:

- Not enough detail on the ESG factors considered in benchmark methodologies;
- Not ensuring that the underlying methodologies for ESG data and ratings products used in benchmarks are accessible, clearly presented and explained to users;
- Not fully implementing ESG disclosure requirements; and
- Benchmark administrators failing to implement their ESG benchmarks' methodologies correctly – for example, using outdated data and ratings or failing to apply ESG exclusion criteria.

For any administrators who fail to develop strategies to address these deficiencies, the FCA intends to "deploy [its] formal supervisory tools and, where appropriate, consider enforcement action[.]"

Taking the Temperature: The FCA has made it clear that it is and will remain focused on ensuring accurate and reliable disclosures, particularly with respect to ESG-related data. As the FCA has recognized, benchmark administrators, as users of ESG data, bear responsibility for ensuring that the data and methodologies used to formulate their benchmarks are accurate and reliable. In September 2022, the FCA sent a letter to benchmark administrators detailing its "supervisory priorities" in, among other areas, disclosure and quality of data and data controls. In that letter, the FCA detailed the risks associated with each area and the expectations for administrators in addressing those risks. For example, with respect to disclosure, the FCA highlighted the growth of the ESG sector, and how "the subjective nature of ESG factors, and how ESG data and ratings are incorporated into benchmark methodologies, give rise to an increased risk of poor disclosures in ESG benchmark statements," which could result in a misalignment between the quality of the benchmark and investor expectations. In a related development, the FCA

recently extended the publication date for its sustainability disclosure requirements in order to review and consider the approximately 240 responses it received during the consultation period on its proposals. In its announcement, the FCA reiterated that “[t]o create a UK market that functions competitively and effectively for the benefit of consumers, those consumers must be able to trust sustainable investment products” and that their proposals aim to “build confidence and to help consumers navigate the market and make better informed decisions.” As we have observed, however, including with respect to ESG ratings, the potential for inconsistencies and inaccuracies in the source data, methodologies and weightings of the various aspects of ESG-related benchmarks continues to be an issue.

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

Cadwalader Adds Leading Specialty Finance and Securitization Partner Ryan McNaughton

Structured finance partner Ryan McNaughton has joined Cadwalader's market-leading securitization and structured finance practice in New York. Ryan joins Cadwalader from King & Spalding.

Ryan represents banks, broker-dealers and other financial institutions and private equity and asset management firms as issuers, underwriters, lenders and investors in structured and corporate finance transactions, securities offerings (public and private) and credit facilities. Ryan has a particular focus on esoteric asset-backed securities (ABS), including asset classes and transactions such as whole business and other operating asset securitizations, music and media royalty transactions, oil and gas interests, franchise concepts, digital infrastructure, cell towers, data center and distributed antenna operators, solar and renewable energy assets, transportation assets, outdoor advertising receivables, ground leases, and specialty real estate lending transactions.

Ryan's addition expands Cadwalader's leveraged and acquisition finance capabilities, as he regularly advises private equity and asset management firms and investors in the structuring, diligence and execution of asset-based acquisition financings and related warehousing and securitizations. Ryan will be reunited with his former colleagues Ronald Lovelace, Patrick Yingling, Jared Zajac and Joseph Polonsky, a market-leading leveraged finance team from King & Spalding that also recently joined Cadwalader, and who had all worked closely with Ryan in executing some of the largest whole business securitizations and novel structured leveraged finance transactions in the market. Over the last decade, Ryan has been opposite Cadwalader partners Stuart Goldstein and Ira Schacter on several novel securitization transactions, and was well aware of Cadwalader's place as one of the pioneers in the development of using structured finance and securitization as a corporate financing tool.

"We are very excited to have Ryan join our firm," said Cadwalader managing partner Pat Quinn. "We are already considered the dominant transatlantic firm in structured finance. Ryan's arrival will significantly enhance our existing capabilities and strengthen our first-rate ABS practice."

Added Capital Markets co-chair Stuart Goldstein: "Ryan will be instrumental in expanding our capital markets and corporate finance capabilities – particularly important in today's environment, as clients continue to seek innovative ways to

finance M&A and other transactions. We are excited to grow our team with Ryan and his market-leading practice."