C A D W A L A D E R

Cabinet **News and Views**

Informed analysis for the financial services industry

Dotting I's and Crossing T's

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In This Issue ...

A relatively quiet week in the financial regulatory world doesn't necessarily translate to a week lacking important developments. Case in point: this past week.

With all the attention paid to the debt ceiling, real work was still getting done in Washington, D.C. – namely, the release of the OCC's Policies and Procedures Manual on Bank Enforcement Actions and Related Matters, which is kind of the all-encompassing day-to-day guide on bank enforcement, and the FDIC's release of the Quarterly Banking Profile, which emphasized the general stability of the banking industry despite the upheavals earlier this year. And what's a week of coverage in *Cabinet News and Views* without at least some examination of crypto.

What's on your mind? I'd love to hear. You can reach out to me here.

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

OCC Issues Updated Enforcement Action Policies and Procedures Manual

By **Daniel Meade**
Partner | Financial Regulation

The Office of the Comptroller of the Currency ("OCC") issued an updated Policies and Procedures Manual (PPM 5310-3) on Bank Enforcement Actions and Related Matters last week. The PPM is updated from the 2018 issuance. The headline change in the PPM is the addition of a new Appendix C titled "Actions Against Banks With Persistent Weaknesses." The Appendix states that it generally would only apply to banks subject to heightened standards under 12 CFR Part 30 (*i.e.*, large banks), but the OCC reserves the right to apply the framework in the new Appendix to any bank or thrift in its jurisdiction.

The framework described in the new Appendix C of the Enforcement PPM describes actions the OCC could take "against banks that exhibit persistent weaknesses." The press release announcing the updated PPM noted that such actions can include "requirements that a bank improve its capital or liquidity position, as well as restrictions on the bank's growth, business activities, or payments of dividends…. [as well as] require a bank to simplify or reduce its operations, including that the bank reduce its assets, divest subsidiaries or business lines, or exit from one or more markets of operation." Acting Comptroller Michael Hsu stated: "[t]his revised policy promotes strong management by making clear that a bank's inability to correct persistent weaknesses will result in proportionate, fair, and appropriate consequences, including growth restrictions and divestitures when warranted."

The press release also linked to Acting Comptroller Hsu's speech in January titled "Detecting, Preventing, and Addressing Too Big To Manage," which we also covered at the time. The OCC's inclusion of the January speech in the press release makes clear that the updated PPM and the guidance that it contains is the next step in the vision Acting Comptroller Hsu laid out in that January speech.

FDIC Issues Q1 Quarterly Banking Profile

By **Daniel Meade**
Partner | Financial Regulation

The Federal Deposit Insurance Corporation ("FDIC") yesterday issued the latest Quarterly Banking Profile ("QBP") for the first quarter of 2023.

The headline results of the QBP were:

- Net Income ($79.8 billion) Increased from the Prior Quarter, Led By Higher Noninterest Income
- The Net Interest Margin Declined Quarter Over Quarter to 3.31 Percent
- Unrealized Losses on Securities Declined for a Second Consecutive Quarter
- Loan Balances Declined Modestly from Last Quarter, But Grew from a Year Ago
- Total Deposits Declined for a Fourth Consecutive Quarter
- Asset Quality Metrics Remained Favorable Despite Modest Deterioration
- Community Banks Reported Lower Net Income from the Prior Quarter
- The Reserve Ratio for the Deposit Insurance Fund Declined to 1.11%

FDIC Chairman Martin Gruenberg, commenting on the QBP, said: "[t]he banking industry has proven to be quite resilient during this period of stress. Net income still remains high in relation to historical measures, asset quality metrics remain favorable, and the industry remains well capitalized. However, the industry continues to face significant downside risks from the effects of inflation, rising market interest rates, slowing economic growth, and geopolitical uncertainty."

International Securities Watchdog IOSCO Proffers Global Crypto Standards

By Mercedes Kelley Tunstall
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Stepping into a breach that finds the United States without a comprehensive cryptocurrency framework while the EU is about to implement its own cryptocurrency framework this July (called Markets in Crypto Assets or MiCA, reported on in *Cabinet News and Views* in October 2022), the International Organization of Securities Commissions (IOSCO) proffered a Consultation Report on "Policy Recommendations for Crypto and Digital Assets Markets" on May 23.

The draft report, which IOSCO will finalize in Q4 2023, includes 18 policy recommendations that "cover the range of activities in crypto-asset markets that involve [crypto-asset service providers or CASPs] from offering, admission to trading, ongoing trading, settlement, market surveillance and custody as well as marketing and distribution (covering advised and non-advised sales) to retail investors" and does not address decentralized finance or "DeFi" activities or markets.

While there are 18 policy recommendations, one recommendation is overarching – specifically, the recommendation that regulatory frameworks should facilitate a level playing field in terms of investor protection and market integrity, with those required in "traditional financial markets," with the goal of avoiding regulatory arbitrage. Inspired by the FTX collapse, several of the policy recommendations are focused on CASPs like FTX that house traditional exchange functions alongside functioning as a trading intermediary and encouraging the adoption of rules that would separate functions, institute clear conflicts of interest protocols and requiring them to "disclose substantive and procedural listing and delisting standards pertaining to crypto-assets." Additional recommendations include requiring CASPs to meet safety and soundness standards, especially whenever they are engaged in the custodying of crypto-assets, and to "diligently assess and onboard retail investors who are aware of, and deemed suitable to take on, the greater speculative risks inherent in this market, and use appropriate measures when promoting crypto-assets."

IOSCO will welcome feedback on the Consultation Report from all stakeholders on or prior to July 31, 2023.

Securities Litigation Alert: Ninth Circuit Clarifies Standards Governing the Statute of Limitations for Private Claims Under Section 10(b) of the Securities Exchange Act of 1934

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In *York County v. HP, Inc.*, the U.S. Court of Appeals for the Ninth Circuit further clarified national standards governing the two-year statute of limitations applicable to private claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Joining the Second Circuit (and others), the Court held that the statute of limitations begins to run when a "reasonably diligent plaintiff" would have discovered the "facts constituting the violation" (including scienter), and that occurs when such a plaintiff can plead those facts "with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *York* contributes to a growing consensus among the circuits on the standards applicable to the two-year Section 10(b) statute of limitations. It also advances the law by articulating a framework for courts to assess when, on the pleadings alone, a Section 10(b) claim may be dismissed as untimely (*i.e.*, when the complaint fails to plead that a "necessary" Section 10(b) "fact" became discoverable within two years of the complaint's filing). While *York* is an important addition to jurisprudence on Section 10(b) limitations periods, questions remain, including the full gamut of "facts constituting the violation" that a reasonably diligent plaintiff must discover for the clock to start ticking.

You can read our Clients & Friends Memo here.