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As always, your comments and questions are valued. Feel free to reach out to us anytime by dropping a note here.

Mercedes Tunstall and Alix Prentice
Partners and Co-Editors, *Cabinet News and Views*

Third Circuit Finds Statutory Trusts Are Subject to CFPB Jurisdiction

By **Mercedes Kelley Tunstall**
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By **Andrew Karp**
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On Tuesday, the Third Circuit, handed down a decision in a case involving the Consumer Financial Protection Bureau ("CFPB") and the National Collegiate Master Student Loan Trust ("NCMSL") that finds that statutory trusts used to handle securitizations are considered "covered persons" for purposes of the Consumer Financial Protection Act ("CFPA") and thus, are subject to CFPB jurisdiction.

NCMSL has been fighting the CFPB on jurisdictional grounds for several years and the parties got close to settling in 2017, however, the United States District Court for the District of Delaware refused to accept the proposed consent judgment due to pending concerns regarding the constitutionality of the CFPB. However, due to two Supreme Court decisions involving the constitutional issues that have plagued the CFPB (including Seila Law and Collins), in this decision, the Third Circuit found that even if the CFPB Director's position was unconstitutional because the Director could not be removed at will by the President, etc., that unconstitutionality did not cause actions taken by the CFPB Director to be void, because the CFPB Director's appointment had proceeded constitutionally.

The other jurisdictional ground that NCMSL challenged the CFPB on was whether the statutory trusts were "engaged" in consumer financial services under the CFPA. The purpose of these statutory trusts is to facilitate the transfer of ownership of the loans into securitization pools. Accordingly, these trusts have no employees and are necessarily engaged in an extremely limited set of activities, all of which occur as a result of automatic processes established by the agreements used to set up a securitization of loans, and which activities are overseen by a party that does have employees, often called the "Administrator." The Third Circuit ignored this automatic process aspect of the statutory trusts, commenting in a footnote that "[w]hile the Trusts purport that the Administrator is separate from the Trusts" and is "not subject to the supervision of the [Trusts] or the Owner Trustee" the Court does not need to ". . . address th[e Administrator's role]. It is a bridge too far. All we need to determine is whether the Trusts engaged in such agreements."

With that viewpoint in mind, the Court found that based upon legislative history, plain language and the language of the administration agreements used in the transactions, the statutory trusts are considered "covered persons" under the CFPA. Covered persons under the CFPA are not only subject to CFPB jurisdiction, but also have primary responsibility for full compliance with consumer financial services laws and regulations.

Due to the proposed consent order between the parties that was made publicly available in 2017, we have a good idea as to what the CFPB will do with this new-

found jurisdiction. Practically speaking, this means, at a minimum, that going forward statutory trusts used in consumer asset securitizations should themselves have proper policies and procedures in place [for] interpreting consumer financial services laws relating to servicing loans and collecting debts. In addition, to the extent existing securitization trusts have significant collection lawsuits being filed on their behalf by their servicers, such trusts would be well-advised to direct their servicers to cease filing new collections lawsuits and begin a "look-back" review over those collection lawsuits to ensure that none of the flaws the CFPB noted in the NCMSL case exist, starting with the cases that are pending and then proceeding into lawsuits that have already been concluded.

In other words, this decision:

1. Could effectively completely undermine the non-operating nature of the trusts used in consumer asset securitizations; and
2. Means that the trusts would be treated like any other lender or servicer, accountable to the CFPB (and also, possibly have liability to private litigants, as well as the states).

Taken to its logical end, this means that trusts could need direct management, operations (perhaps including risk and compliance), and capital to manage the assets and business.

We have full capabilities to support clients in assessing the risks relating to this decision, as well as to help clients draft policies and procedures, conduct appropriate look-backs and otherwise be prepared for CFPB oversight.

We will be shortly sending out a more fulsome Client & Friends memo. If you would like to make sure you receive this memo, please contact us here.

Liquidity Management, Loan Origination and Credit Funds Under AIFMD II

By **Michael Newell**
Partner | Financial Services

By **Alix Prentice**
Partner | Financial Regulation

On February 7 2024, the European Union adopted a final text amending the AIFMD and UCITS directives (AIFMD II). In a recent Client & Friends Memo authored by Michael Newell and Alix Prentice, we focus on loan origination funds and the novel rules applying to them in terms of scope, leverage requirements and liquidity management requirements, as well as important considerations for the grandfathering period as these entirely new rules come into force locally across Europe.

Read more here.

Court Finds Corporate Transparency Act Unconstitutional and Unenforceable as to NSBA Members

By **Christian Larson**
Special Counsel | White Collar Defense and Investigations

On March 1, 2024, the U.S. District Court for the Northern District of Alabama ruled that the Corporate Transparency Act ("CTA") is unconstitutional.[1] The CTA requires many U.S. entities to disclose their individual beneficial owners in a report filed with the U.S. Treasury. The CTA statute was enacted in 2021.[2] Its implementing regulations require many entities formed in 2024 to report beneficial ownership information within 90 days of formation.[3] The CTA requires many entities formed prior to 2024 to report beneficial ownership information by January 1, 2025.[4]

The federal court's ruling arose in the context of a constitutional challenge by plaintiffs the National Small Business Association ("NSBA") and one of its individual members, Isaac Winkles. In granting summary judgment for the plaintiffs, the court held that:

- the Commerce Clause, the Necessary and Proper clause, the taxing power, and the U.S. government's authority over foreign affairs and national security do not provide sufficient authority for the Corporate Transparency Act ("CTA"), and the CTA is unconstitutional as a result; and
- the U.S. government is enjoined from enforcing the CTA as to the NSBA and Isaac Winkles.

The court did not issue a nationwide injunction barring the U.S. government from enforcing the law against other entities within the scope of the CTA's reporting requirements.

On March 11, 2024, the U.S. Government filed a notice of appeal of the court's ruling.[5] The same day, the Financial Crimes Enforcement Network ("FinCEN"), which is the U.S. Treasury bureau that administers the CTA, stated that it will continue to implement the CTA while complying with the court's order.[6]

FinCEN clarified that it is not currently enforcing the CTA against two categories of persons:

- individual plaintiff Isaac Winkles and reporting companies for which he is a beneficial owner; and
- the NSBA and its members as of March 1, 2024.

FinCEN stated, "[o]ther than the particular individuals and entities subject to the court's injunction [. . .] reporting companies are still required to comply with the law and file beneficial ownership reports as provided in FinCEN's regulations."[7]

[1] https://www.govinfo.gov/content/pkg/USCOURTS-alnd-5_22-cv-01448/pdf/USCOURTS-alnd-5_22-cv-01448-0.pdf.

[2] National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, div. F, title LXIV, § 6403 (adding 31 § U.S.C. 5336), available at: https://www.govinfo.gov/content/pkg/PLAW-116publ283/pdf/PLAW-116publ283.pdf.

[3] 31 C.F.R. § 1010.380.

[4] *Id*.

[5] https://fincen.gov/sites/default/files/shared/54_Notice_of_Appeal.pdf

[6] https://fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448

[7] *Id*.

CFTC's MRAC Tackles AI and Climate Change

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

On Friday, March 15, 2024, Commodity Futures Trading Commission ("CFTC") Market Risk Advisory Committee ("MRAC") convened two roundtables in Washington DC.

The first roundtable was organized by MRAC's Future of Finance Subcommittee and focused on the use of artificial intelligence ("AI") in financial markets today, what risks the use of AI poses, what aspects of financial regulation are implicated AI and what the markets and regulators can anticipate in the future. Participants in the roundtable agreed that the AI has already been a presence in financial markets for several years and is clearly here to stay. While the focus of regulation should not be on the rapidly evolving technology itself, regulators should focus on the use of such technology and the accountability for such use by market participants. The Subcommittee also addressed some of the issues raised in CFTC's January 25, 2024 request for comments on the use of AI in CFTC-regulated markets as well as CFTC's advisory on the use of AI in financial scams.

During its second roundtable discussion organized by MRAC's Climate-Related Market Risk Subcommittee, participants mostly addressed issues relating to the use and trading of environmental commodities, such as carbon credits, as well as market reaction to CFTC's December 4, 2023 proposed guidance on listing on CFTC-regulated trading platforms of voluntary carbon credit contracts. Cadwalader's own Peter Malyshev addressed the issues of carbon trading and environmental derivatives at the Market Risk Advisory Committee's roundtable and you can watch the replay here.

Participants in this roundtable addressed market design, disclosures as well as intermediation in voluntary carbon credit markets. The roundtable addressed legal nature of carbon credits as a "commodity" and the likely future regulatory regime may evolve to ensure reliability, transparency and to prevent greenwashing. The issues identified during this roundtable will be further explored during the subcommittee meetings.

UK’s Financial Conduct Authority Publishes Business Plan

By Alix Prentice
Partner | Financial Regulation

The UK’s Financial Conduct Authority ("FCA") has published its 2024/25 business plan, setting out its priorities for the next 12 months. Against a backdrop of 13 public commitments focusing on: reducing and preventing financial crime; putting consumers’ needs first; and strengthening the UK’s position in global wholesale markets, the FCA is, among other promises, committing to:

1. use and expand intelligence systems and data collection systems to target higher risk firms and activities, slow the growth in fraud tackle financial crime;
2. put consumers’ needs first, including in relation to unit-linked pensions and long-term savings products to test how value is being disclosed and delivered. Ongoing supervisory work testing the implementation of the Consumer Duty will clearly play a big part in delivering this commitment.
3. strengthen the UK’s position in global wholesale markets by encouraging innovation and evolving markets through supporting work on bringing in T+1 settlement and delivering on the FCA’s Primary Market policy reforms. Continuing work on reforming the regime governing payment for research, reviewing and reforming the Listing Regime and ensuring markets are ready to implement new derivative reporting rules under UK EMIR is also key.

The business plan also sets out a broad budget, and among the headline items in “Exceptional Projects” is £11.3 million for implementation of the Smarter Regulatory Framework as the FCA continues work on repealing EU law and replacing it with firm-facing FCA rules.