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Cabinet **News and Views**

Informed analysis for the financial services industry

In the Mix of May

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To kick off the month of May, there has been no shortage of developments demanding our attention in the financial services and regulatory realms. At the same time, we see certain key themes and topics – such as ESG and crypto – appearing in new places and as part of evolving conversations. Our "Take Five" coverage includes the SEC's recent move to bolster investor protection in crypto markets, the banking agencies coming back together to issue a CRA proposal, and the launch of the UK Transition Plan Taskforce, in support of climate transition plans.

For our "In Depth" article, we provide an update on Russia sanctions-related developments, including proposed legislative changes to streamline the forfeiture of sanctioned assets.

What do you think about this week's topics and *Cabinet News and Views* in general? We'd love to hear from you. Just write to us here.

Daniel Meade & **Michael Sholem**
Co-Editors, *Cabinet News and Views*

More Crypto Sheriffs from the SEC

By Mercedes Kelley Tunstall
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The Securities and Exchange Commission ("SEC") has renamed and expanded a unit within its Division of Enforcement to address protection of investors in crypto markets. The "Crypto Assets and Cyber Unit," which also has responsibility for addressing cyber-related threats to investors, will now have 50 people working on these issues in Washington, D.C., as well as in several regional offices. The SEC intends to step up its monitoring and address several areas in crypto markets, including crypto asset offerings and exchanges; lending and staking products based on crypto assets; decentralized finance ("DeFi") platforms; non-fungible tokens ("NFTs") and stablecoins. Increasing staff dedicated to crypto markets is in line with SEC Chair Gary Gensler's viewpoint on crypto markets, which he says have a value of "roughly $2 trillion." In his recent speech on crypto markets to the Penn Law Capital Markets Association Annual Conference, Gensler opined that crypto trading and lending platforms all need to be registered and regulated like traditional securities exchanges, discussed public policy concerns about stablecoins, and demonstrated that the SEC still views "tokens" as involving only "a group of entrepreneurs raising money from the public in anticipation of profits," despite the plethora of alternative use cases that NFTs have demonstrated in the market today. What is certain is that with these developments, the SEC will definitely be more active in crypto markets than it has been in recent years.

Federal Banking Agencies Issue Interagency Proposal to Update Community Reinvestment Act Rules

By **Daniel Meade**
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On May 5, the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board ("FRB") and the Office of the Comptroller of the Currency ("OCC") (together, the "Agencies") issued a notice of proposed rulemaking to amend and update the rules implementing the Community Reinvestment Act ("CRA"). The comment period on the proposal will be open until August 5, 2022.

The proposal states that it would make substantive changes in five key areas:

1. Delineation of Assessment Areas: The proposal would retain the current "facility-based assessment areas" (focused on where banks have physical facilities, such as branches), but also adds a "retail lending assessment area" for large banks in areas where the bank originates over 100 home mortgage loans or over 250 small business loans in each of the preceding two years.
2. Overall Framework, and Performance Standards and Metrics: The three bank size categories of the current rules would be retained, but all would have higher thresholds, with small banks being defined as having assets up to $600 million, large banks having assets of more than $2 billion, and intermediate banks in between those two levels. Large banks generally would be evaluated under the four proposed tests: (1) Retail Lending, (2) Community Development Financing, (3) Retail Services and Products, and (4) Community Development Services. Intermediate banks would be evaluated under the proposed retail lending test and the current community development test. Small banks would continue to be evaluated under the current small bank standards, but would have the option of opting into the new proposed tests. The proposed tests would also incorporate a broader use of metrics.
3. Community Development Activities: The proposed rule would continue to include activities that currently receive CRA credit as community development activities, but would also create more criteria for the type of activities that qualify for CRA community development credit, with possibly fewer geographic restrictions.
4. Data Collection, Maintenance, and Reporting: The proposal would aim to tailor data requirements based on bank size.
5. Performance Conclusions and Ratings: The proposal would assign ratings in the component tests under the familiar current ratings of Outstanding, High Satisfactory, Low Satisfactory, Needs to Improve and Substantial Noncompliance to result in overall final ratings called for in the statute (*i.e.*, no differentiation between high satisfactory and low satisfactory).

The interagency proposal follows action by the OCC to rescind a June 2020 rulemaking where the OCC issued its own updated rule alone, rather than following the tradition of issuing a joint rulemaking. The FDIC and Federal Reserve did not agree with all aspects of the OCC's 2020 issuance. When rescinding the

2020 rule, the OCC stated it was the agency's intention "to facilitate the ongoing interagency work to modernize the CRA regulatory framework and promote consistency for all insured depository institutions." Thursday's action is a reflection of that intent to modernize the CRA on an interagency basis, and "maintain a unified approach." FDIC Acting Chair Martin Gruenberg noted during the FDIC's open meeting that the FRB's Advanced Notice of Proposed Rulemaking in 2020 served as the blueprint for this proposal and helped to bring the agencies back together.

Launch of UK Transition Plan Taskforce to Support Climate Transition Plans

By **Michael Sholem**
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On April 25, 2022, the UK Transition Plan Taskforce (the "Taskforce") was formally launched by HM Treasury. The goal of the independent Taskforce is to develop a "gold standard" for climate transition plans. With a two-year mandate and active involvement from regulators (to draw on the Taskforce's findings and strengthen disclosure rules), industry leaders and academia, the Taskforce will "help to drive decarbonisation by ensuring that financial institutions and companies prepare rigorous plans to achieve net zero and support efforts to tackle greenwashing."

Under the rules announced by the Chancellor at COP26, the UK Government is requiring large companies and certain financial sector firms to publish a transition plan from 2023. The Taskforce has been mandated by the UK Government to develop transition plan standards.

The Taskforce is working with international frameworks that are preparing guidance on transition plan disclosures, including the Glasgow Financial Alliance for Net Zero ("GFANZ") and the International Sustainability Standards Board ("ISSB"). The Taskforce will build upon the work already carried out to develop detailed transition planning templates suitable for incorporation into UK regulatory frameworks.

The Taskforce will develop:

- A sector-neutral framework for private sector transition plans;
- Sector-specific guidance for finance and real economy sectors; and
- Recommendations for companies and stakeholders on preparing and using transition plans, as well as a sandbox for plans

Details of the Taskforce's steering and delivery groups can be found here. The steering group is co-chaired by Amanda Blanc, the Group CEO of Aviva, and John Glen, the Economic Secretary to the Treasury. The Secretariat for the Taskforce is being provided by the UK Centre for Greening Finance and Investment and by E3G.

The launch follows the UK Government's October 2021 roadmap on green financing and the November 2021 announcement of the introduction of mandatory requirements for certain companies to publish transition plans setting out how they will decarbonise in the period to 2050.

Cutting Corners in a Competitive Auto Market

By Mercedes Kelley Tunstall
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The Consumer Financial Protection Bureau ("CFPB") announced in a press release issued in conjunction with the release of its latest Supervisory Highlights that it is concerned that financial institutions and other companies involved with auto financing might be incented to step up repossession of cars belonging to borrowers in default. While repossession is permissible, it is usually a last-ditch solution to a chronically behind borrower. And, any time physical property is taken from a consumer, additional precautions must be taken. However, the CFPB has observed several situations in its examinations where companies jump to repossess vehicles, without paying close enough attention to their own records. Specifically, the CFPB has identified servicers who repossess cars wrongfully, typically when the borrower is still behind on payments, but has made payments sufficient to stave off repossession. Sometimes that situation occurs because of a lack of communication between the servicer and the third party that actually repossesses the car, and sometimes it occurs because the servicer's systems process the received payments incorrectly or failed to accurately identify the payments needed to avoid repossession. Finally, the CFPB highlighted that servicers who have properly repossessed cars often have personal property belonging to the borrowers, which they sometimes refuse to return without payment of additional fees. Participants in the auto finance industry are well advised to pay heed to the CFPB's recent auto finance compliance bulletin, as well as to carefully scrutinize all aspects of their repossession policies and practices to avoid ending up with an inquiry from the CFPB.

U.S. Court of Appeals for the Third Circuit Agrees to Hear Interlocutory Appeal in CFPB Enforcement Action against Student Loan Trusts


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On April 29, 2022, the U.S. Court of Appeals for the Third Circuit granted a petition for permission to appeal in Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trusts filed by defendants The National Collegiate Student Loan Trusts (the "Trusts") and certain interveners in the action.[1] The Third Circuit agreed to hear two certified questions from the district court in the appeal: (1) whether, under the Consumer Financial Protection Act ("CFPA"), the Trusts are "covered persons" subject to the CFPB enforcement authority; and (2) whether, after Collins v. Yellen, the CFPB was required to ratify the enforcement action before the three-year statute of limitations ran out.[2]

The Third Circuit's grant of permission to appeal allows the Trusts' appeal to be docketed and the issues will be fully briefed over the coming months. The district court has stayed the CFPB's enforcement action pending the Third Circuit's review.[3]

As discussed in previous articles,[4] the CFPB initiated an enforcement action directly against the Trusts in 2017, alleging that the Trusts had violated the CFPA by engaging in unfair and deceptive practices in connection with the servicing and collection of student loans. The Trusts and certain interveners in the action filed a motion to dismiss, arguing that the Trusts are not "covered persons" under the CFPA because they are "passive securitization vehicles that take no action related to the servicing of student loans or collecting debt" and, thus, are not subject to the CFPB's enforcement authority.[5] The Trusts further argued that the action was untimely because the CFPB failed to ratify the suit before the statute of limitations expired, rendering the action time-barred.[6]

Judge Stephanos Bibas, a visiting judge from the Third Circuit sitting by designation in the District of Delaware, rejected both arguments and denied the motion to dismiss. On December 23, 2021, the Trusts and certain interveners filed a motion for interlocutory appeal of the district court's order denying the motion to dismiss. On February 11, 2022, the district court granted the motion, ruling that (1) the questions raised in the Trusts' motion involve "a controlling question of law"; (2) there is "substantial ground" for a difference of opinion in the interpretation of the controlling law; and (3) the interlocutory appeal would "advance the ultimate termination of the litigation."[7]

As we have previously noted,[8] the district court's interpretation of "covered person" under the CFPA is noteworthy and creates a new line of potential exposure for entities, including securitization trusts and other whole loan buyers, that acquire consumer loans on a servicing-retained basis or enter into servicing agreements with third-party services acting as independent contractors. If interlocutory review is granted, the Third Circuit will be the first federal court of appeals to opine on the scope of the CFPA's "covered person" definition as applied to securitization trusts, with important implications for any secondary market purchaser of a loan, including hedge funds and institutional investors (*e.g.*, pension plans), with the possibility that all of them could become subject to the CFPB supervisory and enforcement jurisdiction to the extent such entities purchase consumer loans.

We will continue to monitor this action and others for legal developments under the CFPA affecting the secondary market.

[1] Order at 2, No. 22-8010, ECF No. 19 (3d Cir. Apr. 29, 2022).

[2] Petition for Permission to Appeal at 2, N. 22-8010, ECF No. 1 (3d Cir. Feb. 2, 2022); Order at 1, No. 17-1323, ECF No. 397 (D. Del. Feb. 11, 2022).

[3] Order, *supra* note 2, at 1.

[4] *See*, *e.g.*, Ellen Holloman *et al.*, *District Court Grants Interlocutory Appeal in CFPB Enforcement Action against Student Loan Trusts and Stays Case Pending Appellate Review*, Cadwalader, Wickersham & Taft LLP (Feb. 16, 2022); Ellen Holloman *et al.*, *Federal Court Holds That Student Loan Trusts Are Subject to CFPB Enforcement Authority: What This Means for Consumer Securitizations and Other Whole Loan Buyers*, Cadwalader, Wickersham & Taft LLP (Dec. 15, 2021); Ellen Holloman *et al.*, *CFPB Suit Against Student Loan Trusts Dismissed*, Cadwalader, Wickersham & Taft LLP (Apr. 1, 2021); Ellen Holloman *et al.*, *Forward Movement in the Bureau of Consumer Financial Protection's Student Loan Litigation: What This Means for Securitization*, Cadwalader, Wickersham & Taft LLP (Nov. 2, 2018).

[5] Memorandum Opinion at 8, No. 17-1323, ECF No. 380 (D. Del. Dec. 13, 2022).

[6] *Id.* at 5-6.

[7] *Id.* at 3-4, 6-7. Further supporting this conclusion, Judge Bibas recalled that the previously assigned judge, Judge Maryellen Noreika, "expressed 'some doubt' that the Trusts are covered persons 'under the plain language of the statute.'" *Id.* at 5.

[8] Holloman, *Federal Court Holds That Student Loan Trusts Are Subject to CFPB Enforcement Authority: What This Means for Consumer Securitizations and Other Whole Loan Buyers*, *supra* note 4.

In Depth: President Biden Proposes New Administrative Forfeiture Process and Other Legislative Changes to Address Ukraine Crisis


By **Christian Larson**
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Alongside the slew of new sanctions imposed in response to Russia's invasion of Ukraine, the Biden administration also has been laying the groundwork to maximize the impact of those sanctions. Just days after Russian military action began, President Biden announced in his March 1 State of the Union Address an initiative to increase pressure on Russia's political leadership by "go[ing] after the crimes" of its enablers – the so-called "oligarchs" who have amassed control over much of the country's wealth. The following day, the DOJ announced formation of a multi-agency "KleptoCapture" task force dedicated to enforcing sanctions against Russia, including by using tools to "freeze and seize" the criminal proceeds of Russian oligarchs. Soon thereafter, on March 16, the United States, the United Kingdom and numerous other partners formed the aptly named Russian Elites, Proxies, and Oligarchs ("REPO") task force, which, according to Secretary of the Treasury Janet L. Yellen, is "galvanizing coordinated efforts to freeze and seize assets" of Russian leaders and their enablers.

In his April 28 emergency request to Congress for assistance to Ukraine, President Biden moved beyond these organizational initiatives by submitting proposals to strengthen the legal tools available to punish Russia – and, at the same time, generate funds to aid Ukraine. If enacted, these proposals would enable the U.S. government not merely to block sanctioned property (essentially "freezing" it in place) but to seek its forfeiture – that is, transferring ownership of it and then using those funds "to remediate harms of Russian aggression towards Ukraine."

Among the most significant of the Biden administration's legislative proposals is the establishment of a process, to be defined in a new Chapter 59 of Title 50 of the United States Code, to seize and forfeit property that is blocked under Russia-related sanctions. The new forfeiture authority "would be expressly retroactive" – thus reaching previously blocked property – and would apply to all blocked property that is (i) subject to U.S. jurisdiction, and (ii) derived from or used in specified unlawful or "wrongful" conduct. The scope of relevant conduct that would subject property to forfeiture remains unclear, but it is to include, among other things, a new criminal offense for "possession of proceeds from corrupt dealings with the Russian government."

Importantly, the proposed seizure and forfeiture authorities would establish an entirely new administrative forfeiture process, distinct from existing criminal and civil forfeiture authorities. According to a White House press release, the process is to be "streamlined," suggesting an emphasis on speed. The legislative amendments would authorize the Secretary of the Treasury or a designee, in consultation with the Attorney General and other relevant departments and agencies, to first identify blocked property subject to seizure and/or forfeiture based on the factors described above. Such property would then be subject to seizure by the Attorney General.

Next, the Secretary of the Treasury would be authorized to make an initial determination, again in consultation with the Attorney General, that the property is subject to forfeiture using a preponderance of the evidence standard. This determination would be based on a record "demonstrating that the property in question 1) is owned by a covered person; and 2) has facilitated unlawful or wrongful conduct, is the proceeds of such conduct, or is otherwise traceable to such conduct." Treasury would take steps to give notice of this determination to "any identified party that appears to have a protected legal interest in the property," who would have 60 days to request reconsideration of the determination.

If a request for reconsideration is unsuccessful, the forfeiture decision would become final unless judicial review is sought within 10 days. Jurisdiction would lie solely in the U.S. District Court for the District of Columbia, and "discovery would be available only upon a showing of good cause and that the discovery would be in the interest of justice at the discretion of the court." Any appeal would be on an "expedited" basis, and, if the government prevailed, the Secretary of the Treasury would act promptly to order forfeiture. Liquidation of the property in question would then follow, and the Secretary of State would be authorized to direct any resulting net proceeds "for remediation of harms in Ukraine."

Other aspects of the legislative proposal sent to Congress would create new criminal offenses and amend existing laws, aiding efforts to prosecute those in possession of ill-gotten wealth:

- First, as already noted, President Biden's proposal would create a new criminal offense, to be codified at 18 U.S.C. 228, prohibiting the knowing or intentional possession of "proceeds directly obtained from corrupt dealings with the Russian government."

- Second, criminal violations of the Export Control Reform Act and the International Emergency Economic Powers Act (the authorizing legislation for many sanctions programs, including those directed against Russia) would be added to the definition of "racketeering activity" in the Racketeer Influenced and Corrupt Organizations ("RICO") Act. This would allow charges of export control and sanctions evasion to be brought alongside charges of fraud, money laundering, and other predicate acts in a manner not always possible under current law.

- Lastly, the President's proposal would establish a 10-year statute of limitations for money laundering offenses involving any "specified unlawful activity" that is a violation of foreign law, thereby affording the DOJ additional time to work with international partners to build complex cases and "identify assets for seizure and forfeitures."

Taken together, President Biden's legislative proposals – if enacted – would significantly expand the scope of authorities to seize and seek forfeiture of certain blocked property, while also directing the proceeds of such forfeitures to aid Ukraine and supporting the prosecution of sanctions evasion and other criminal activity. The legislative proposals also signal that the administration is preparing for a potentially high volume of administrative, civil, and criminal action against Russian elites who violate the U.S. law, and those who enable them. Regardless of the course of the conflict in Ukraine, the legal fallout is sure to extend for years to come.