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Research and commentary on regulatory and other financial services topics

Amid Chaos, Regulatory Change Continues Apace

March 6, 2025

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The CFPB Is Dead, Long Live the CFPB

March 6, 2025

By Mercedes Kelley Tunstall
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In the two weeks since our **last update** on what is happening with the Consumer Financial Protection Bureau ("CFPB"), the Trump administration has continued to take actions that make it seem as though they are intending to wind down the agency.

In statements filed in the case brought against the administration by the National Treasury Employees Union ("NTEU") to attempt to stop the shutdown of the agency, one CFPB employee reported that they heard one Senior Executive of the DOGE team working on evaluating the CFPB say that it will become a “room at Treasury, White House, or Federal Reserve with five men and a phone in it.” Accordingly, the CFPB’s headquarters building is in the process of having its lease ended and the name of the agency has been removed. Importantly, the vast majority of CFPB employees have not been working during their administrative leave, because the Chief Legal Officer of the CFPB must approve any and all work being done and has approved very little work. In addition, a “tip line” to report that any CFPB staff are doing work has been established on X, Elon Musk’s social media platform.

Meanwhile, the new appointee to serve as Director of the CFPB, Jonathan McKernan, **testified** in his appointment hearing that he “will fully and faithfully execute the law.” He continued saying, “under my watch, the CFPB will take all steps necessary to implement and enforce the federal consumer financial laws and perform each of its other statutorily assigned functions. But, the CFPB will do this by centering its regulation on real risks to consumers and by focusing its enforcement on bad actors.” And, **the response from the Department of Justice in the NTEU case** claims that even though very little work is being done at the CFPB, the CFPB is fulfilling its statutorily required duties, stating “the building’s closure, which has continued to the present day, has not prevented the CFPB from performing statutorily required functions given CFPB’s capacity to perform its functions remotely.”

With respect to the NTEU case, the judge, Amy Berman Jackson of the U.S. District Court of the District of Columbia, is considering whether to convert the existing temporary restraining order into a preliminary injunction that would prevent the current Acting Director of the CFPB, Russell Vought, from firing any more CFPB employees. As she considers the merits of each side, Berman Jackson has set a hearing for Monday, March 10th tasking Vought with providing specific proof that statutorily required duties are being carried out. **The American Banker reports** that the administration’s answers on this point during the most recent hearing were unclear. For reference, the Consumer Federation of America and the Student Borrower Protection Center **have concluded that there are eighty-seven different statutorily required activities** under the Consumer Financial Protection Act. And, based upon published reports and informal information from CFPB employees, far fewer than even eighty-seven CFPB employees have actually been allowed to do any work since early February.

Whether the agency is allowed to continue its work with more than five people on staff or not, it is certain that the focus for consumer financial protection is shifting away from the Federal sphere, at least for the next four years. States have already begun to revise their priorities accordingly, and all participants in consumer financial services will have to rely upon state regulators such as New York’s **Department of Financial Services** and **California’s Department of Financial Protection & Innovation** for updated guidance and interpretations.

The UK's FCA Reports on Findings From Review of Valuations for Private Market Assets

March 6, 2025

By Alix Prentice
Partner | Financial Regulation

The UK's Financial Conduct Authority ("FCA") has published **findings from its multi-firm review of valuation processes for private market assets**.

Given the UK's status as the largest centre for private market asset management in Europe, and the importance of fair and robust valuation practices in private markets, the FCA has addressed its review to valuation practices in the fund and portfolio management sector, as well as advisory services in the private equity, venture capital, private debt and infrastructure sectors. FCA findings include:

1. Good valuation practices: Against benchmarks of independence, expertise, transparency and consistency, the FCA found that practices were generally robust. Areas for improvement included expanding conflicts identification beyond fees and remuneration to include other conflicts, including marketing, secured borrowing, asset transfers, redemptions and subscriptions, and uplifts and volatility. Other observations include the need for firms to assess whether their valuation functions and committees are sufficiently independent. In addition, firms need to put in place formal and consistent approaches to *ad hoc* valuations that are necessary for revaluation during market or asset-specific events.

2. What actions should firms take? The FCA recommends:

- assessing whether the firm has sufficient independence in their valuation functions and the voting membership of their valuation committees to enable and ensure effective control and expert challenge;
- ensuring the firm has defined processes or a consistent approach for ad hoc valuations to revalue assets during market or asset-specific events. The FCA encourages firms to consider the types of events and quantitative thresholds that could trigger ad hoc valuations and document how they are to be conducted;
- improvements in valuation committees' record keeping;
- expanding the universe of conflicts beyond fees and compensation issues and improving consideration and documentation processes around those issues;
- as part of this exercise in expanding the concept of conflicts, firms should be looking at: conflicts inherent when a manager prices the transfer valuation of an asset; issues that can arise for the pricing of redemptions and subscription when valuations are periodic and judgement-based; potential conflicts when firms include unrealised performance in marketing materials; identifying and documenting potential conflicts when borrowing on a secured basis using the borrower's own valuation of unrealised investments; the need to apply consistent valuation methodologies; and being alive to the conflicts that can arise when employee remuneration is linked to valuations;
- ensuring that valuations are performed by units that are functionally independent from portfolio management and in an impartial manner (note that the FCA "*observed a few firms very clearly demonstrating functional independence*" but that a number could not demonstrate independence or adequate expertise);
- re-examining policies, procedures and documentation of the valuation process to make sure these are robust and consistent. They should include rationales for using particular methodologies and rationales for key assumption changes;
- making sure that valuation cycles are frequent enough to remain current, and if necessary are performed *ad hoc*;
- considering whether reporting to investors could be improved;
- considering whether to apply a secondary methodology to corroborate valuation decisions; and
- exercising appropriate oversight over third-party valuation advisers and dealing with potential commercial conflicts.

3. *Next steps:* The FCA will continue to engage with firms and industry bodies and will follow-up with any firms identified as outliers in its review.

Change Has Arrived

March 6, 2025

By Andrew Karp
Partner | Financial Regulation

By Daniel Meade
Partner | Financial Regulation

We have written in prior *Cabinet News & Views* articles that, since the November elections, the U.S. federal banking regulators have been signaling significant changes in approach. This week, the FDIC kicked off the changes by sweeping away several significant actions taken under prior leadership. It withdrew, or revoked authority for staff to publish for comment, four important proposed rules, rescinded an important policy statement, and deferred certain compliance dates of a different rule. The withdrawn proposals were those addressing (i) brokered deposits, (ii) corporate governance, and (iii) the FDIC's interpretation of the Change in Bank Control Act ("CBCA"). In the same *Federal Register* notice, the FDIC also advised that it has decided not to publish for comment a proposal called for under the 2010 Dodd-Frank Act relating to incentive-based compensation arrangements.

These actions largely represent a return to long-standing FDIC policies, and a turn away from the agency's trend under prior leadership toward stricter regulation. The FDIC's notice in respect of these actions stated the FDIC is withdrawing the proposals because it no longer intends to issue final rules with respect to them. Interestingly, in an oblique recognition of past criticisms of rule-making by informal means, the FDIC stated that, should it decide to pursue regulatory action in any of these areas, it would do so by publishing a new proposed rule or other issuance consistent with the requirements of the Administrative Procedure Act.

Brokered Deposits. The proposal, published in the *Federal Register* on August 23, 2024, was the latest in several adjustments of the brokered deposit rule over the last several years. This proposal would have tightened the conditions for permitting banks to accept brokered deposits. According to the FDIC, the "proposal failed to account for the myriad of ways in which deposit arrangements have evolved over the years." Among other controversial changes, it would have limited the so-called the primary purpose exception in a manner "inconsistent with the plain meaning of the law."

Corporate Governance. This proposal was another controversial measure, published for comment in the *Federal Register* on October 11, 2023. Intended to establish enforceable guidelines on corporate governance as a counterpart to the OCC's Heightened Standards and the Federal Reserve's Enhanced Prudential Standards, it was criticized by the industry on numerous grounds, including being unduly prescriptive, confusing commonly understood roles of boards and management, and establishing unprecedented obligations of the board to consider "the interests of all stakeholders."

Change in Bank Control Act. In yet another controversial action, the FDIC proposed to remove from its regulations an exemption from FDIC review for investments in bank holding companies that are reviewed by the Federal Reserve as holding company regulator. The authority for underlying regulation itself has been questioned as beyond the FDIC's authority. Notably, the FDIC's rescission statement did not address the authority question, focusing instead on the likely consequences that removing the exemption would "have required a wide range of bank investors to file duplicative notices with both the FDIC and the Federal Reserve System and could have discouraged capital investments in FDIC-supervised banks." The proposal was published for comment in the *Federal Register* on August 19, 2024.

Incentive-based Compensation Arrangements. Section 956 of the Dodd-Frank Act requires the FDIC, the OCC, the Federal Housing Finance Agency, the National Credit Union Association, the Federal Reserve and the SEC to *jointly* prescribe regulations or guidelines covering incentive-based compensation at covered financial institutions. The FDIC approved its participation in a joint proposal on May 3, 2024, and the other required agencies, excluding the Federal Reserve and the SEC, on other dates. Although the FDIC's March 3 press release announcing the withdrawal did not expressly state why the proposal was withdrawn, the press release noted that the FDIC board authorized publication of the proposal in the *Federal Register* only if all six agencies statutorily required to issue the rule approved the proposal. It appears that the FDIC considered the failure of the Federal Reserve and the SEC to adopt corresponding proposals as a basis for withdrawal.

Lessons From the FCA's Fine of Infinox Capital

March 6, 2025

By Tom Grodecki
Partner | Global Litigation

The FCA has **fined** Infinox Capital, a London-based broker, for breach of MiFIR transaction reporting requirements. Infinox failed to submit reports for some 46,053 transactions executed by its single-stock CFD (contract for difference) desk. The fine illustrates the risks of business change without adequate governance, and of failing to deal with the FCA in a sufficiently timely and transparent manner.

Assurance failings following business change

Infinox predominantly traded index CFDs until October 2022, when it established a new line of business in single-stock CFDs. This change was implemented without adequate regulatory risk controls. A single individual was responsible for identifying which financial instruments were reportable when new business was commenced, for the purpose of ensuring that relevant data was fed into the firm's transaction reporting systems. Infinox did not put in place any steps to scrutinise this process or any checks to ensure that the correct trades had been identified as reportable, until a third party review was conducted that identified the potential issue.

The FCA has previously put firms on notice that many are not devoting adequate focus and resource to regulatory governance arrangements. Firms may therefore wish to take this opportunity to re-consider such arrangements, especially if there has been recent business change, or if material changes are planned.

Transparency and timeliness of dealings with the FCA

Following the third party review mentioned above, Infinox was advised that it should investigate the duration and volume of its underreported transactions, as a breach notification to the FCA and back-reporting would be required. Seven weeks then passed, at which point Infinox was contacted by the FCA, who had identified the reporting issue. Infinox's failure to self-report in a timely manner is listed as an aggravating factor in the final notice.

In addition to this, the FCA noted significant issues with the speed and nature of Infinox's responses to the FCA. The below paragraph from the final notice is worth reading in full:

The Authority independently identified a potential discrepancy in the transaction data submitted by Infinox and contacted Infinox on 5 May 2023 to clarify the position. On 31 May 2023, Infinox confirmed that it had failed to complete the appropriate MiFIR transaction reporting for its single-stock CFD business executed through the single corporate account. As a result, Infinox initially suspected that it had failed to submit approximately 6,000 transaction reports. On 6 July 2023, Infinox informed the Authority that it may have failed to submit up to 50,000 transaction reports. Infinox engaged with the Authority over the next five months to provide updated figures and finished back-reporting the affected trades on 15 December 2023. However, it took Infinox a year to provide a complete and accurate figure to the Authority as to the total number of transaction reports it had failed to submit in respect of trades executed through the single corporate account.

Firms should expect the FCA to be particularly sensitive at present to delays in the provision of information, especially at the enforcement stage. The latitude that some case officers have previously shown in agreeing that additional time for the provision of information has been diminished by: (i) the FCA's publicly stated **commitment** to increasing the speed of enforcement, and (ii) more centralised control and decision-making in respect of ongoing investigations, aided by the FCA's pruning of cases that do not fit its enforcement priorities.

New CFTC Enforcement Guidance

March 6, 2025

By Peter Y. Malyshev
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By Nikita B. Cotton
Associate | Financial Regulation

On February 25th, 2025, the Commodity Futures Trading Commission's ("CFTC") Division of Enforcement ("Division") issued a long-awaited **advisory** (the "Advisory") regarding its evaluation of how a company's or individual's self-reporting, cooperating and remediation efforts would factor into the Division staff's recommendation of an enforcement action. The Advisory represents the "Division policy on self-reporting, cooperation, and remediation," setting forth the factors and rubric the Division will consider in investigations and enforcement actions.

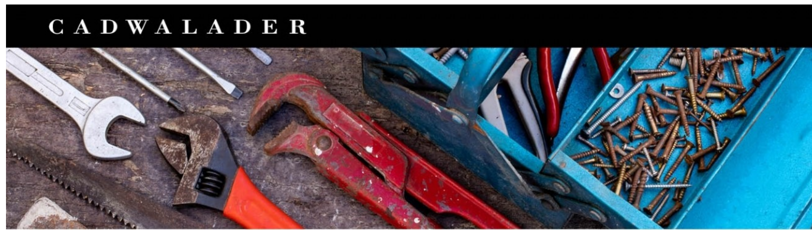
The mitigation credit matrix, the first of its kind to be used by the Division, purports to advance the goal of fostering more transparency in the Division's regulatory proceedings and clarifies the incentives to self-report. The matrix sets forth the presumptive mitigation credits offered based on self-reporting and cooperation levels, which range from 0% to 55% of a discount from the initial civil monetary penalty calculated by the Division (although the Advisory does not clarify how the initial civil penalty will be calculated). Disgorgement and restitution obligations are not eligible for mitigation credit. Some of the factors relevant to the Division's evaluation of a person's self-reporting and cooperation levels are as follows:

- With respect to self-reporting, the relevant factors are whether disclosure was (i) made voluntarily, to the CFTC, in a timely manner (*i.e.*, prompt), and (ii) complete. A self-report that was already publicly known or known to another government actor may not meet the criteria for voluntariness, but a self-report that would have been required to be disclosed in an annual report may still be voluntary if made in a timely manner.
- A self-report can be made to any relevant CFTC operating division ("Operating Division"), not only the Division of Enforcement. A self-report may receive full credit for completeness even if not all the relevant facts are yet known if the disclosing party continues to investigate and supplements its report with additional facts as they are identified. Additionally, self-reports and voluntary disclosures that were made in good faith but are later found to be inaccurate by further investigation of the disclosing party and corrected accordingly will be subject to a safe harbor.
- In order for a person's cooperation to be assessed as "exemplary" on the four-tier scale, significant completion of remediation efforts and accountability measures is required.
- Remediation efforts will be given credit as part of cooperation if the Operating Division has concluded that the reported violation and its root cause have either been remediated or an appropriate remediation plan is in place. The Operating Division will also assess whether the use of a compliance monitor or outside consultant is appropriate to ensure the completion of any remedial undertakings. While invocation of the Fifth Amendment by its employees or agents will not be considered as a factor in a company's cooperation, cooperation credit might be negated by separate bad faith and uncooperative conduct.

Notwithstanding the factors outlined in the Advisory, the Advisory notes that "the Division maintains the discretion to consider the unique facts and circumstances in every case, and may also consider a variety of other factors," which include culpability, recidivism, severity, and other facts and circumstances that do not involve fraud, manipulation or other abusive conduct. CFTC Acting Chair Caroline Pham noted that this Advisory would allow the Division to more efficiently "focus relentlessly on catching fraudsters and scammers, helping victims, and promoting market integrity."

CRT on CRE: Capital Relief Trades on Commercial Real Estate Loans

March 6, 2025



Join **Stuart Goldstein**, co-chair of Cadwalader's Capital Markets Practice as he moderates a panel with **Jed Miller**, Head of the CRT practice and **Kahn Hobbs**, CRE structured finance specialist as they explore the intersection of Capital Relief Trades and Commercial Real Estate.

This CLE webinar will provide decision makers with an understanding of credit risk transfer (CRT) transactions and how they can be used for a portfolio of Commercial Real Estate assets.

Download the CRT Handbook.

Thursday, March 20

12:00 PM – 1:00 PM

Zoom Webinar

Register here.

For more information about this event, please contact **Jeneane Zeleznak**.

Cadwalader Clients & Friends Memo

March 6, 2025

Read our most recent Clients & Friends memos:

The New UK Reserved Investor Fund. RIFs and QAHCs Create an Ambitious UK Structuring Toolkit

Michael Newell, **Adam Blakemore**, **Jack Kelly** and **Catherine Richardson** have authored a Clients & Friends memo, "The New UK Reserved Investor Fund. RIFs and QAHCs Create an Ambitious UK Structuring Toolkit" which discusses the following:

The long-anticipated Reserved Investor Fund ("RIF") will be available from March 19, 2025. Designed to enhance the UK's fund structuring options, the RIF provides a tax-transparent, unlisted vehicle for institutional and sophisticated investors, competing with similar structures in Luxembourg and Ireland. The RIF must have a UK-regulated manager and depositary but is not subject to direct Financial Conduct Authority ("FCA") product regulation. It benefits from stamp duty exemptions, capital gains tax deferrals, and a simplified formation process. When combined with the UK's Qualifying Asset Holding Company ("QAHC") regime, the RIF offers fund managers an attractive onshore alternative for structuring investment funds.

Read the full memo **here**.

FDIC Seeks Comment on Proposal To Rescind Its 2024 Statement of Policy on Bank Merger Transactions

Daniel Mead and **Bilal Sayyed** have authored a Clients & Friends memo, "FDIC Seeks Comment on Proposal To Rescind Its 2024 Statement of Policy on Bank Merger Transactions," which discusses the following:

The Federal Deposit Insurance Corporation ("FDIC") is requesting public comment on its proposal to rescind its 2024 Statement of Policy on Bank Merger Transactions and reinstate its prior Statement of Policy on Bank Merger Transactions. Comments are due no later than 30 days after the request for comment is published in the Federal Register. The FDIC stated in its accompanying Financial Institution Letter that at a later date, the FDIC intends to ask for comment "on all aspects of the regulatory framework governing the FDIC's review of bank merger transactions." The Department of Justice, which, both by statute and custom, consults with the FDIC (and the Federal Reserve and Office of the Comptroller of the Currency, depending on the type of bank charter) on bank merger transactions, has not yet indicated an intention to reconsider its competitive effects analysis of bank mergers. Comments may wish to address not only the adoption of the prior Policy Statement but seek clarity on the continuing relevance of the DOJ's 2024 Banking Addendum to the 2023 Merger Guidelines.

Read the full memo **here**.

U.S. Treasury Department Suspends Enforcement of Corporate Transparency Act Against Domestic Reporting Companies and U.S. Citizens; Foreign Reporting Companies Will Receive Another Reporting Deadline Extension

Dean Berry, **Christian Larson** and **Keyes Gilmer** have authored a Clients & Friends memo, "U.S. Treasury Department Suspends Enforcement of Corporate Transparency Act Against Domestic Reporting Companies and U.S. Citizens; Foreign Reporting Companies Will Receive Another Reporting Deadline Extension," which discusses the following:

On March 2, 2025, the U.S. Treasury Department announced it will not enforce any penalties or fines against U.S. citizens, domestic reporting companies, or beneficial owners of domestic reporting companies under the Corporate Transparency Act ("CTA"). The Treasury Department noted that it plans to issue a proposed rule that will narrow the scope of the CTA's reporting requirements to apply solely to foreign reporting companies. The announcement largely eviscerates the CTA, at least for now.

Read the full memo **here**.