BankBCLP

BANKING BITES – OCTOBER 21 2022

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SUMMARY

Welcome to Banking Bites! This is our short summary flagging some key developments in your sector that we hope will inform your activities in your market.

This edition covers:

1. US FDIC Chair focuses on risk based mitigation to climate risks
2. UK financial services regulator updates its rulebook
3. Will UK mandate reimbursements for APP scams?
4. Amended guidance to reflect UK's 2022 Money Laundering Regulations
5. UK's Economic Crime Bill 2.0 enters legislative process
6. The EU releases its eighth package of sanctions against Russia
7. UK plans further response to Russian activities
8. Bank of England to change stress testing to the UK banking system
9. FCA outlines observations regarding transaction reporting and instrument reference data regimes
10. New York Supreme Court issues decision that newly enacted provision of CPLR 5004 does not apply to foreclosure judgments

1. US FDIC CHAIR FOCUSES ON RISK BASED MITIGATION TO CLIMATE RISKS

The Acting Chair of Federal Deposit Insurance Corporation ("FDIC") spoke to the American Bankers Association on October 3, 2022. He emphasized two key overarching issues:

- the FDIC's "role with respect to climate change is centered on the financial risks that climate change may pose to the banking system" and
- the FDIC wants "financial institutions to fully consider climate-related financial risks—as they do all other risks—and continue to take a risk-based approach in assessing individual credit and investment decisions."

Key takeaways from the session:

- Safety & Soundness: Trends including "rising sea levels, increases in the frequency and severity of extreme weather events, and other natural disasters" all "challenge the future resiliency of the financial system, and in some circumstances pose safety and soundness risks to individual banks."
- Physical & Transition Risks: Both physical risks and transaction risks present potential impact on financial institutions
- Market Demand Changes: "Increasing marketplace demand of the evaluation and disclosure of climate-related financial risks may influence investment decisions made by broader market participants, or result in a shift in market, consumer, or investor preferences that may trigger material decreased in the value of certain assets or groups of assets on [financial institutions'] balance sheet and contribute to broader volatility of portfolio performance."
- Effective Risk Management. FDIC is focused on "effective risk management practices, which should be appropriate to the size of the institution and the nature, scope, and risks of its activities."
- Concentration of Potential Exposure and Asset Size: Both are key considerations to assess, especially for mid-sized and community banks.
- Sound Governance & Scenario Analysis: Banks should "consider developing appropriate sound governance frameworks and processes that have the capability of incorporating the assessment and management of climate-related financial risks as appropriate to their size, complexity and risk profile."

The FDIC continues to work through comments to the proposed Statement of Principles for Climate-related Financial Risk Management and continues to collaborate with the FSOC committee and others, via a "cross-disciplinary, interagency approach with international engagement." The Acting Chair emphasized the need for continuing dialogue with industry and attention to planning for longer-term risk impacts.

2. UK FINANCIAL SERVICES REGULATOR UPDATES ITS RULEBOOK

The Financial Conduct Authority's latest changes to its Handbook reflect the following instruments coming into force:

- the Consumer Duty Instrument 2022 (comes into force 31/07/2023. The FCA has produced a timeline). For more information, see our insight on this topic.
- the Appointed Representatives Instrument 2022 (comes into force in three stages 29/07/2022, 04/08/2022, and 08/12/2022); and
- the Financial Promotions and High-Risk Investments Instrument 2022 (comes into force in two stages 01/12/2022 and 01/02/2023)

It is also making amendments to DEPP 2.5 (giving the decision making authority to FCA staff in cases relating to the discontinuance of listing of securities on the FCA's own initiative) and other minor changes.

In a recent public statement, the Executive Director for Consumers and Competition at the FCA set out some of the regulator's expectations for those who will be subject to the incoming Consumer Duty. The clear message was that the regulator expects the changes implementing the new Duty to be led from the top; just in time for board meetings to take place before the first implementation milestone by the end of October 2022. The speech also attempts to address questions around how the supervision landscape around the Duty is set to change, with the regulator transitioning to collecting more consumer outcomes based data and taking account of whole of product life cycles. An important hint is that the regulator will require evidence about what consumer outcomes are being achieved, and how firms are assuring themselves that they are meeting these outcomes. It is vital for UK firms or overseas firms with UK based branches or subsidiaries to put structures in place now to enable them to meet the requirements under the Duty when it comes fully into force next year.

For further information, please contact Polly James, Matthew Baker, Rhys Corbett or Joanna Munro.

3. WILL UK MANDATE REIMBURSEMENTS FOR APP SCAMS?

On 29 September 2022, the UK's Payment Systems Regulator (PSR) published a consultation paper (CP22/4) proposing mandatory reimbursements for authorised push payments (APP) scams on all payments over £100 (in all but exceptional cases), subject to an excess of no more than £35 irrespective of which bank account the person holds. The consultation is open until 25 November 2022. The move follows the publication of the Financial Services and Markets Bill earlier this year, which contains clauses that would amend the Payment Services Regulations 2017 to provide the mandate for the PSR to regulate for mandatory repayments in all cases.

For further information, please contact Andrew Tuson or Joseph Ninan.

4. AMENDED GUIDANCE TO REFLECT UK'S 2022 MONEY LAUNDERING REGULATIONS

A group of leading UK Trade Associations in the financial services industry has published amendments to its anti-money laundering ("AML") guidance to reflect changes which have been brought into the UK's AML regime under The Money Laundering and Terrorist Financing (Amendment) (High-risk Countries) Regulations 2022 and provisions of The Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022, which came into force in September. The amendments reflect the requirement to obtain proof of registration of a trust from the Trust Registration Service or trust itself and for reporting discrepancies in this respect to the keeper of the trust register, His Majesty's Revenue and Customs (as opposed to Companies House, where discrepancies in the People with Significant Control information must be reported), and new requirements to conduct risk assessments and mitigate the risk of proliferation financing, which are now part of the regime.

For further information, please contact Andrew Tuson or Rebecca Norris.

5. UK'S ECONOMIC CRIME BILL 2.0 ENTERS LEGISLATIVE PROCESS

A second Economic Crime and Corporate Transparency Bill has been tabled in the UK's Parliament (the second of 2022), designed to improve corporate transparency, provide the legislative framework for Companies House reform and strengthen the powers to tackle economic crime. The Bill prefaces the introduction of identity verification for all new and existing registered company directors, People with Significant Control, and those delivering documents to the Registrar as well as powers enabling Companies House to challenge entries on its register and proactively share information with law enforcement bodies. The Bill also includes provisions to tailor existing asset recovery powers to cover the unique characteristics of cryptoassets, facilitate better information sharing in the AML regulated sector and expand the remit of the Serious Fraud Office to use its pre-investigation powers in relation to offences other than bribery. While only at the early stages of the Parliamentary process, there is significant weight behind the push to get this Bill onto the statute books, particularly in view of the Companies House reforms it provides for.

6. THE EU RELEASES ITS EIGHTH PACKAGE OF SANCTIONS AGAINST RUSSIA

The EU has adopted its eighth package of sanctions against Russia, including further import bans on strategic goods, export bans, bans on EU nationals holding posts on the governing bodies of Russian state-owned entities, and a ban on the provision of architectural and engineering services, IT consultancy and legal advisory services. The package also bans the provision of crypto-asset wallets, accounts or custody services to Russian persons and residents, regardless of value. The final portion of the sanctions package is focused on targeting Russian oil and includes a price cap related to maritime transport of crude oil or petroleum products from December.

For more information, please contact Chris Bryant or Constantin Achillas.

7. UK PLANS FURTHER RESPONSE TO RUSSIAN ACTIVITIES

On 30 September 2022, the UK's Foreign, Commonwealth & Development Office announced it intends to coordinate with the EU and implement further restrictions on the provision of IT consultancy, architectural, engineering and transactional legal advisory services as well as imposing export controls on 700 further goods. This was in response to annexation of the Ukrainian regions of Donetsk, Luhansk, Kherson and Zaporizhzhia. This news was followed, on 11 October 2022, by the publication of a research briefing by the House of Commons library on sanctions against Russia. This detailed that, as at 4 October 2022, 1418 individuals and 160 entities are currently subject to sanctions under the UK's autonomous regime in respect of Russia. This sheds some light on the frozen asset reporting exercise which is currently underway in the UK's regulated financial services sector, with firms due to report on the funds and economic resources belonging to, owned, held, or controlled by designated persons by 11 November 2022.

For more information, please contact Chris Bryant or Sonja Hainsworth.

8. BANK OF ENGLAND TO CHANGE STRESS TESTING TO THE UK BANKING SYSTEM

The BOE will be returning to their annual cyclical scenario (ACS) stress-test framework in 2022 (a change from the past two years under COVID). In terms of preparing for testing, banks should note that the ACS will cover a five-year horizon with the start point being end-June 2022 and testing will continue to be assessed on the International Financial Reporting Standard 9 (IFRS 9). Once complete, the results of the test will be published in Summer 2023 along with other information that will help banks better understand capital buffers.

For further information, please contact Oran Gelb.

9. FCA OUTLINES OBSERVATIONS REGARDING TRANSACTION REPORTING AND INSTRUMENT REFERENCE DATA REGIMES

The FCA has published its latest Market Watch newsletter in which it has reminded UK-regulated firms of their reporting obligations under the EU's Markets in Financial Instruments Directive and new Markets in Financial Instruments Regulation (MiFID II and MiFIR), which continue to apply despite the UK's exit from the EU.

The FCA has identified issues with transaction reporting including insufficient verification of information via the Market Data Processor (MDP) Entity Portal. Areas of concern included firms not actively checking their transaction reports to identify failures to use national identifiers when natural persons are referenced; incorrectly using appointed representatives and agents instead of the principal firm within a report and only taking into account the physical location of a trader in relation to branch reporting instead of other issues like branches who received the order or oversaw the transaction.

Further, the FCA has reported shortcomings in relation to trading venues and Systematic Internalisers (SIs) who are required to submit instrument reference data pursuant to UK MiFIR including having inadequate procedures in place to identify incomplete or inaccurate instrument reference data and submitting data in respect of instruments that are not reportable.

For further information, please contact Matthew Baker.

10. NEW YORK SUPREME COURT ISSUES DECISION THAT NEWLY ENACTED PROVISION OF CPLR 5004 DOES NOT APPLY TO FORECLOSURE JUDGMENTS

On October 4, 2022, a New York Supreme Court (Westchester County) held that a legislative enactment amending CPLR 5004 did not change the foreclosure judgment interest rate. The New York legislature recently amended the judgment interest rate from 9% to 2% in cases arising out of "consumer debt." Citing legislative history, the Court held: “foreclosures are not debt collection actions but are instead actions to enforce mortgage liens” and noted the support of Second Department precedent holding that a “foreclosure action is properly characterized as an action to enforce a security interest in property, rather than to collect money directly from a debtor.”

While this case is a positive development with regard to clarifying foreclosure judgment interest rates, there is, at this time, no definitive appellate authority regarding the meaning of “consumer debt” in the newly enacted provision of CPLR 5004. We will continue to monitor this topic for further updates.

For more information, contact Catherine Welker.

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