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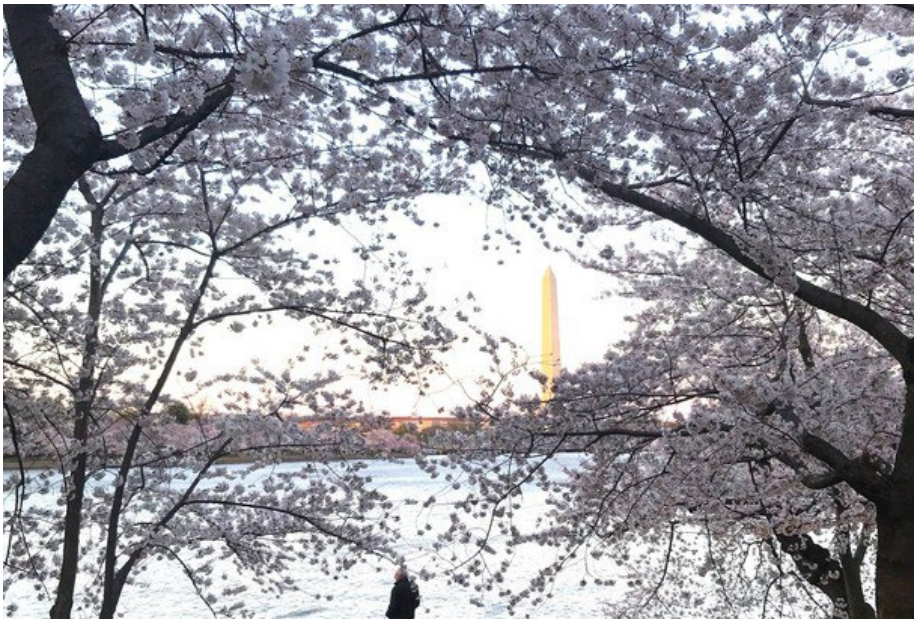
LXR Group

Policy Bulletin

Bringing clients and stakeholders policy updates and analysis from the world of capital markets, fintech, investor protection and more.

In This Volume:



Top Developments:

House Financial Services Committee Advances Regulatory Sandbox legislation, 12 Other Bills, Joint Resolutions

On April 17, the House Financial Service Committee held a markup of thirteen legislative proposals. The mix of legislation considered included a number of bills that were holdovers from a February 29 markup that was unexpectedly cut short due to a change in the House Floor schedule, including legislation to establish a federal "regulatory sandbox," and separate legislation to exempt so called "earned wage access" products from the Truth in Lending Act. The markup also included several Congressional Review Act proposals that seek to undo recent Biden Administration agency rulemakings, none of which are expected to become law. Interestingly, close observers of the Committee may remember the markup due to use of electronic voting for the first time; voting at the end of the day went lightening fast.

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HFSC Markup (Cont.)

First up was HR 5535, the "Insurance Data Protection Act," (Fitzgerald), which would prohibit the Federal Office of Insurance from collecting data directly from an insurance company, largely in response to the Biden Administration's recent effort to gather data from insurance companies. The debate and final vote was entirely along party lines. The tone of the markup quickly turned combative after discussion of a Republican housing bill that would have rolled back COVID-era protections for tenants, HR 802, the "Respect State Housing Laws Act," (Loudermilk).

A largely bipartisan bill requiring federal supervisory agencies to assess their technological vulnerabilities, H.R. 7437 the "Fostering the Use of Technology to Uphold Regulatory Effectiveness (FUTURE) in Supervision Act," (Houchin) was debated next. The debate on HR 7437 (no recorded vote was requested) was more significant during the amendment discussion, after Rep. Waters (D-CA) offered an amendment to the bill on diversity and inclusion that the Republicans on Committee did not accept (the amendment failed on party lines).

The debate on H.R. 7440 ,the "Financial Services Innovation Act of 2024," (McHenry), which would create a "sand box" from any kind of enforcement for fin tech companies through an agency petition process, was significantly heated. Ranking Member Waters (D-CA), Rep. Lynch (D-MA), Rep. Velazquez (D-NY), Rep. Sherman (D-CA) speaking strongly against the bill. Rep. Lynch was particularly breathing fire during the debate. Chair McHenry (R-NC), Rep. Hill (R-AK), spoke in support of the bill. Rep. Lynch (D-MA), Rep. Beatty (D-OH) offered Democratic amendments, which were rejected by Committee Republicans. Rep. Lynch's first amendment to strike the enforcement limitations failed on party lines, as did his amendment on AI. Rep. Beatty's amendment to strike bill text and add a study also failed on party lines. Only Chair McHenry (R-NC) spoke against the amendments. Rep. Casten (D-IL) offered a minor clarifying amendment, that was accepted by Chair McHenry (R-NC). The vote on final passage of the bill was entirely along party lines.

The debate on H.R. 7428, the "Earned Wage Access Consumer Protection Act," (Steil); kept the tone going, albeit slightly muted from the outright hostility of the previous bill. Rep. Green (D-TX) lead the Democratic opposition, with Rep. Velazquez (D-NY), Rep. Sherman (D-CA), Rep. Lynch (D-MA) also speaking against the bill. The bill sponsor, Rep. Steil (R-WI) and Rep. Sessions (R-TX), Rep. Hill (R-AR), Rep. Barr (R-KY) spoke in favor of the bill. Rep. Green (D-TX) offered an amendment that was rejected by the Committee Republicans. The vote on final passage of the bill was also entirely along party lines.

Right before the series of partisan CRA bills, the committee moved to quickly debate two Democratic lead, but bipartisan bills. Both

DEBATE ON H.R. 7440

"If we want better consumer protection of technology and better understanding of the risk associated with the benefits to consumers at this kind of standing up innovation inside the supervisory agencies and encouraging work with market participants is absolutely the way to achieve that it's not a way to skirt anything it's a way to enhance supervision. We've seen states that we've seen foreign jurisdictions do it and we've seen benefits from that...we see that in this administration not providing clarity actually this incentivizing the use of innovating products and services." - **Rep. French Hill (R-Ark)**

"I've seen some bad bills over 20 years - some real doozies, some real stinkers - and this isn't the worst bill that has come before me, but I would say it's in the top ten. I say it's in the pantheon bad ideas that come out of the Republican side. What you're suggesting here is your elevating innovation - this word 'innovation' - you're saying if someone can put a petition that proposes to create innovation then once that petition is granted that effort is immune from the enforcement of all other federal statutes and other agencies other than the one that signs the compliance agreement - all those protections for all those consumers all those investors they are held in abeyance, so the other regulators can't take action once that petition is granted, and that is unconstitutional. I'm not worried about this bill because it's got so many constitutional problems...so many explosive devices in the legal context in this bill it's going nowhere." **Rep. Stephen Lynch (D-MA)**

bills were responsive to the recent bank failures in March 2023. There was minimal debate and no amendments were offered on H.R. 4206, the "Bank Safety Act of 2023," (Sherman) and H.R. 4116, the "Systemic Risk Authority Transparency Act," (Green). The final vote on HR 4116 was unanimous, HR 4206 was voice voted.

The Committee then moved to consideration of the various CRAs on recent Biden Administration rules. The debate on all of the CRA resolutions was entirely partisan and at times heated with many members of the committee participating. The CRA on the recent SEC Climate Rule, HJ Res 127, was hotly debated on partisan lines, with the final vote entirely on party lines. The CRA on the CFPB Credit Card Late Fee Rule, HJ Res 122 was also the subject of significant debate, that ended with a entirely partisan vote. The last CRA that had a separate debate was the CRA on the recent FSOC rule on Guidance on Non-bank Financial Company Determinations, HJ Res 120, which was also a party line vote. The final three CRAs concerning climate-related issues for financial agencies (HJ Res 125; HJ Res 126; HJ Res 124) were considered en bloc and debated together, with just the sponsors speaking in support. These CRAs were part of the larger Republican message that financial regulators should not be climate regulators. The final vote on the en bloc was also on party lines.

House Financial Services Committee Holds Hearing on SEC Climate Rule

On April 10, the Full Committee held a hearing entitled: "Beyond Scope: How the SEC's Climate Rule Threatens American Markets." The hearing predictably continued the Republican campaign against the scope and volume of SEC rulemakings, casting the SEC as acting like a climate regulator. Chair McHenry focused on the lack of explicit authority the SEC has for the rulemaking, arguing the scope of the rule fell far outside the jurisdiction of the agency. He went on say that the SEC under chair Gensler acts outside the law and several others such as federal judges have suggested as much through recent court decisions. Ranking Member Waters, by contrast, focused on the financial impacts that climate change has had thus far, and "Maga Republicans" attempt to make sure investors and others are not aware of the climate risks to companies. She ended by expressing some disappointment for the rule not being broader.

The witnesses at the hearing were (1) Mr. Elad Roisman, Partner, Cravath, Swaine & Moore LLP and former Commissioner and Acting Chairman of the U.S. Securities and Exchange Commission; (2) Mr. Robert Stebbins, Partner, Willkie Farr & Gallagher LLP and former General Counsel of the U.S. Securities and Exchange Commission; (3) Mr. Chris Wright, Chief Executive Officer of Liberty Energy; (4) Mr. Joshua T. White, Assistant Professor of Finance, Owen Graduate School of Management, Vanderbilt University; and (5) Professor Jill E. Fisch, Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School.

Senators Introduce "The Lummis-Gillibrand Payment Stablecoin Act of 2024"

On April 17, Sens. Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced new legislation that would create a regulatory framework for so-called stablecoins. The bill, S. 4155, would set up a new structure for regulating stablecoins — or cryptocurrencies that are pegged to other assets like the U.S. dollar. Specifically, the legislation proposes to authorize state non-depository trust companies to issue payment stablecoins up to $10 billion, with limited-purpose state/OCC depository institutions authorized to issue any amount and require issuers to maintain one-to-one reserves. A payment stablecoin, as defined by the bill, would be any dollar-pegged digital asset "that is, or is designed to be, used as a means of payment or settlement." The bill would also ban algorithmic stablecoins, which are typically undercollateralized tokens designed to maintain their value through algorithmic mechanisms, and establish a receivership regime under the FDIC for all payment stablecoin issuers including order of priority, validity of claims and classification of payment stablecoins as customer assets (not belonging to the issuer). The bill would explicitly carve out stablecoins from the securities laws. In addition to the bill text, the Senator's released a section-by-section overview and a one-pager.

The release of the Lummis-Gillibrand bill has been highly anticipated by crypto stakeholders of all stripes. While the Senators have jointly introduced a number of bills addressing the digital assets market that have failed to advance, including a bill last summer that would create legal definitions for decentralized finance, S. 4155 is considered far more viable than any of their previous proposals on the basis of reports that it reflects extensive consultation with key governmental stakeholders, including the White House, federal banking regulators, top members of the House Financial Services Committee, and Senate Majority Leader Chuck Schumer (D-NY). Senate Banking Chair Sherrod Brown (D-Ohio) also said last week that he is open to advancing stablecoin legislation as part of a package with other financial services measures, signaling that there may be life for digital asset legislation this year. Brown signaled he would want stablecoin legislation to move alongside other banking provisions that passed his committee last year, including a bank executive compensation claw back bill, RECOUP Act; and legislation to allow the cannabis sector access to financial services, the SAFER Banking Act.

U.S. Department of Labor (DOL) Releases Final Retirement Security Rule

On April 23, the DOL's Employee Benefits Security Administration issued a final rule to protect workers' retirement savings by updating the regulation defining a fiduciary under the Employee Retirement Income Security Act (ERISA). a federal law governing workplace employee benefit plans, such as pension plans and 401(k) plans, along with other types of retirement savings plans, such as individual retirement accounts (IRAs). ERISA imposes requirements on "fiduciaries" of these plans, including those who are fiduciaries because they provide investment advice for a fee.

The final rule and related amendments to prohibited transaction exemptions (PTEs) detail when advice providers are acting in a fiduciary role under federal pension laws and explain the conditions they must follow to protect retirement investors. According to EBSA, the amendments are necessary because the "previous definition was from 1975 and didn't work in today's marketplace. Investors who are making decisions for their retirement accounts expect advice to be in their best interest — so, it should be." The rule and amendments to the PTEs generally take effect on September 23, 2024, although there is a one-year transition period after the effective date for certain conditions in the PTEs.

As LXR Group addressed in a blog post earlier this year, the release of the DOL's final rule marks the latest chapter in an almost 15-year effort by the DOL to amend the five-part test in its 1975 regulation for determining whether a person is an ERISA "fiduciary" by reason of providing "investment advice" for a fee. The determination of who is a fiduciary is significant because many of the protections, duties, and liabilities of ERISA hinge on fiduciary status. Among the many Biden Administration rulemakings that policymakers are attempting to finalize before the election, the DOL's renewed push to expand ERISA protections is viewed as far from a sure bet, partly due to the collapse of previous rulemaking attempts in the face of fierce political opposition and legal challenges.

Under the rule released on April 23, Under the final rulemaking, trusted advisers will have to: (1) meet a professional standard of care when making recommendations (give prudent advice); (2) Never put their financial interests ahead of the retirement investor's when making recommendations (give loyal advice); (3) Avoid misleading statements about conflicts of interest, fees, and investments; (4) Charge no more than what is reasonable for their services; and (5) Give the retirement investor basic information about the adviser's conflicts of interest.

- **REGULATORY DEVELOPMENTS**

Comment deadline closes on FinCEN proposal to apply BSA/AML to federally registered RIAs

On April 15, 2024, the comment period closed on the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) notice of proposed rulemaking to expressly include certain registered investment advisers (RIAs) in the definition of a "financial institution" under the Bank Secrecy Act (BSA) and its implementing regulations, which collectively establish the US anti-money laundering (AML) and counter-terrorism financing (CFT) regime. The proposed rule would subject covered RIAs to AML/CFT requirements – including implementing and maintaining a risk-based AML/CFT program, reporting suspicious activity to FinCEN, and meeting recordkeeping requirements. FinCEN would have the authority to seek civil penalties for noncompliance. As proposed, the rule would apply to two types of investment advisers: (1) RIAs registered with the SEC; and (2) investment advisers that report to the SEC

as exempt reporting advisers (ERAs). The proposal would not apply to state registered RIAs.

In some respects, the application of the BSA/AML framework to RIAs has been a long time coming. Attempts to mandate AML requirements were first proposed by FinCEN in 2002 and 2003 for unregistered investment companies, commodities traders, and investment advisors. However, both proposed rules were withdrawn by FinCEN in 2008. The Obama administration revisited the issue and published the 2015 Proposed Rule for Registered Investment Advisers to expand the definition of "financial institution" to cover RIAs, but the proposal was not adopted.

In a comment letter filed with FinCEN, the Investment Advisers Association urged the agency to "reconsider the scope of its proposal," arguing that "the BSA does not need to be extended to *all* investment advisers with respect to *all* of their activities." Other commenters urged FinCEN to broaden the scope of the proposal. For example, in its comment letter, Americans for Financial Reform (AFR) expressed the view that: "Basic, sensible anti-money laundering standards are long overdue for investors in private funds (hedge funds, private equity, and venture capital) and FinCEN's proposals are the first critical step in ensuring that those funds are required to know their investors and their sources of funding."

- **CONGRESSIONAL DEVELOPMENTS:**

Senate Banking Democrats Push for Accountability in Student Loan Servicers.

On April 10, the Senate Banking Subcommittee on Economic Policy held a hearing entitled: "MOHELA's Performance as a Student Loan Servicer." Subcommittee Chair Warren focused her remarks on concerns about student loan servicers not providing adequate services, mentioning her new report about servicers charging excessive and inaccurate fees, and excessive wait times. Ranking Member John Kennedy (R-LA) did not attend, nor did any other Republican on the subcommittee. Other Democrats on Committee attended, pushing for more accountability in the services provided to student loan borrowers. The witnesses at the hearing were (1) Ms. Persis Yu, Deputy Executive Director, Student Borrower Protection Center; (2) Kansas City Mayor Quinton Lucas; (3) Jason Delisle, Nonresident Senior Fellow, Center on Education Data and Policy Urban Institute; (4) Scott Buchanan, Executive Director, Student Loan Servicing Alliance; and (5) Kathleen White, Former Faculty Member City College of San Francisco.

Subsequently, on April 18, Sen. Warren and eight of her colleagues sent a letter to David L. Yowan, President and Chief Executive Officer of student loan servicer Navient, urging the servicer to "cancel decades-old private student loans pushed onto borrowers attending fraudulent, for-profit colleges." The letter comes as Navient plans to transfer its 2.7 million student borrower loan portfolio to the Higher Education Loan Authority of the State of Missouri (MOHELA) by the end of the year. The letter was joined by Senators Richard Blumenthal (D-Conn.); Dick Durbin (D-Ill.); Ed Markey (D-Mass.); Jeff Merkley (D-Ore.); Bernie Sanders (I-Vt.), Chair of the Senate Health, Education, Labor and Pensions Committee; Tina Smith (D-Minn.); Peter Welch (D-Vt.); and Ron Wyden (D-Ore.), Chair of the Senate Finance Committee.

House Financial Services Subcommittee Holds Hearing on Ransomware

On April 16, the HFSC Subcommittee on National Security, Illicit Finance, and International Financial Institutions held a hearing entitled, "Held for Ransom: How Ransomware Endangers Our Financial System." Subcommittee Chair Kim (R-CA) focused on how large the ransomware attacks threat is across industries. She was particularly interested to learn how to increase good cyber hygiene for companies, and what Congress can do to close gaps in coverage for cyber protection. She ended by applauding the bipartisan efforts that the committee has already made on the issue. Subcommittee ranking member Beatty (D-OH), also focused on the significant extent of the problem of ransomware attacks, and specifically the threats to small and medium size businesses, and the larger threat to national security. She noted the steady increase in the number of ransomware attacks and the amount demanded. She concluded by highlighting what the Biden Administration's agencies are already doing to address these issues, and focused on what Congress can do to help protect businesses and consumers.

House Financial Services Subcommittee Holds Hearing on CFPB Transparency

On April 16, the Subcommittee on Financial Institutions and Monetary Policy held a hearing entitled, "Agency Audit: Reviewing CFPB Financial Reporting & Transparency." This was another attempt by Committee Republicans to attack the CFPB this time questioning their funding (up for a Supreme Court decision), financial audits, and general transparency of the agency that allows them to "go rogue" and make rules and press statements outside the scope of their jurisdiction. The CFPB has recently drawn the attention and ire of Republicans with the recent rulemakings on credit card late fees and overdraft fees. Subcommittee Chair Barr (R-KY) focused his opening statement on the CFPB's unaccountability to Congress, failure to provide a witness for the hearing, and lack of independent oversight. He also reiterated a familiar point that the CFPB is acting arbitrarily and outside of its statutory authority, specifically highlighting court rulings against the CFPB's rulemaking and other actions.

Subcommittee Ranking Member Foster (D-IL) focused on the important work the CFPB has done as the "cop on the beat" and supported overwhelmingly in a bipartisan fashion. He also talked about the GAO and independent reviews of the agency and its funding that are already occurring, and the significance of the mission of CFPB in the wake of the 2008 crisis. Ranking Member Waters used her one minute to emphasis the crusade of Republicans against the CFPB, and the strong bipartisan support of the agency.

The witnesses at the hearing were: (1) Mr. Brian Johnson, Managing Director, Patomak Global Partners, LLC; (2) Mr. Adam J. White, Senior Fellow, AEI and Co-Executive Director, Antonin Scalia Law School's C. Boyden Gray Center for the Study of the Administrative State; (3) Prof. Christopher L. Peterson, Professor of Law, University of Utah, S.J. Quinney College of Law.

Senate Banking Holds Hearing on Illicit Finance, Terrorism and Sanctions Evasion

On April 9, the Full Committee held a hearing entitled: "An Update from the Treasury Department: Countering Illicit Finance, Terrorism and Sanctions Evasion." The sole witness was **t**he Honorable Adewale O. Adeyemo**,** Deputy Secretary, Department of the Treasury. Chair Brown (D-OH) focused his opening remarks on the significant threats to the American economy and values from terrorism, drug trafficking, and military threats like Russa and China, as well as the need to use all economic tools available to combat these threats. He concluded by pushing Congress to act on the Fend off Fentanyl Act that had passed the Committee already and action on stopping illicit finance activity through cryptocurrency. Ranking Member Scott (R-SC) used his opening statement to focus on legislation: FEND Off Fentanyl legislation and Revoke Iranian Funding Act. Scott continued to push for more sanctions on Iran, a focus on fentanyl trafficking, and an end to Biden Administration's focus on climate agenda. For his part, Deputy Secretary Adeyemo reiterated his previous calls for Congress to grant the Treasury Department additional authority with respect to digital assets. "While we have had some success in rooting out illicit finance in the digital asset ecosystem, we need to build an enforcement regime that is capable of preventing this activity as more terrorists, transnational criminals, and rogue states turn to digital assets. That's why we sent the Committee proposals to strengthen counter-terrorist financing authorities, and we look forward to working with the Committee on your ideas and proposals."

- **OTHER DEVELOPMENTS**

Consumer Organizations Hold Consumer Advocacy Week

During the week of April 15-19, the Consumer Federation of America(CFA) and a number of other organizations conducted their annual Consumer Advocacy Week. This year's advocacy week focused on supporting the CFPB's rule to reduce credit card late fees, supporting the CFPB's proposed overdraft rule, supporting the FTC's CARS rule, and opposing the FTC REDO Act. According to the FTC, the primary purpose of the CARS Rule is to add truth and transparency to the car buying and leasing process by making it clear that certain deceptive or unfair practices are illegal. Specifically, the rule: (1) Prohibits misrepresentations about material information; (2) Requires dealers to clearly disclose the offering price – the actual price anyone can pay to get the car, excluding only required government charges; (3) Makes it illegal for dealers to charge consumers for add-ons that don't provide a benefit; and (4) Requires dealers to get consumers' express, informed consent before charging them for anything.

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