The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

JUNE 2022

EDITOR'S NOTE: CLIMATE RISKS
Victoria Prussen Spears

BANKS, CLIMATE RISKS, AND THE EMERGING REGULATORY FRAMEWORK
Lanier Saperstein and Marc Kushner

LSTA ISSUES ADDITIONAL GUIDANCE FOR SOCIAL LOANS AND EXTERNAL REVIEWS
Deborah Low

THE CRYPTOCURRENCY INDUSTRY BREATHES A SIGH OF RELIEF FOLLOWING PRESIDENT BIDEN'S EXECUTIVE ORDER Alexandra C. Scheibe, Joseph B. Evans and Rachel Rosen

U.S. GAO URGES NEW VIRTUAL CURRENCY REGULATIONS TO COUNTER HUMAN TRAFFICKING AND DRUG CARTELS
Sean P. McDonnell and Gina M. Parlovecchio

U.S. FEDERAL BANKING AGENCIES ISSUE RULE REQUIRING BANKS TO NOTIFY REGULATORS OF CYBER INCIDENTS WITHIN 36 HOURS
Daniel Silver, Megan Gordon, Celeste Koeleveld, Philip Angeloff, Brian Yin and Shannon O'Brien

COMPANIES PERFORMING FINANCIAL TRANSACTIONS STUCK IN GUI DESIGN PATENT INFRINGEMENT CASES Michael T. Piery and Michael W. Carwin

IBOR REPLACEMENT: WHAT'S NEXT?
Aymen Mahmoud, Stephanie S. McCann, Nicholas Jupp and Nicole Briody

IFC RELEASES GUIDELINES FOR BLUE FINANCE
Kevin L. Turner and Lara M. Rios

PROMOTION OF CRYPTOASSETS TO UK CONSUMERS WILL BE REGULATED BY UK FINANCIAL CONDUCT AUTHORITY
Jeremy C. Jennings-Mares, Gareth Rees QC, Chloe Kearns and Struan Clark

FROM THE COURTS
Michael R. O'Donnell, Michael Crowley, Desiree McDonald and Kevin Hakansson

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 139 **NUMBER 6** **June 2022**

Editor's Note: Climate Risks
Victoria Prussen Spears 301

Banks, Climate Risks, and the Emerging Regulatory Framework
Lanier Saperstein and Marc Kushner 304

LSTA Issues Additional Guidance for Social Loans and External Reviews
Deborah Low 315

The Cryptocurrency Industry Breathes a Sigh of Relief Following President Biden's Executive Order
Alexandra C. Scheibe, Joseph B. Evans and Rachel Rosen 323

U.S. GAO Urges New Virtual Currency Regulations to Counter Human Trafficking and Drug Cartels
Sean P. McDonnell and Gina M. Parlovecchio 327

U.S. Federal Banking Agencies Issue Rule Requiring Banks to Notify Regulators of Cyber Incidents Within 36 Hours
Daniel Silver, Megan Gordon, Celeste Koeleveld, Philip Angeloff, Brian Yin and Shannon O'Brien 331

Companies Performing Financial Transactions Stuck in GUI Design Patent Infringement Cases
Michael T. Piery and Michael W. Carwin 335

IBOR Replacement: What's Next?
Aymen Mahmoud, Stephanie S. McCann, Nicholas Jupp and Nicole Briody 340

IFC Releases Guidelines for Blue Finance
Kevin L. Turner and Lara M. Rios 346

Promotion of Cryptoassets to UK Consumers Will Be Regulated by UK Financial Conduct Authority
Jeremy C. Jennings-Mares, Gareth Rees QC, Chloe Kearns and Struan Clark 351

From the Courts
Michael R. O'Donnell, Michael Crowley, Desiree McDonald and Kevin Hakansson 356

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at .... (800) 252-9257

Email: .... matthew.t.burke@lexisnexis.com

Outside the United States and Canada, please call .... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at .... (800) 833-9844

Outside the United States and Canada, please call .... (518) 487-3385

Fax Number .... (800) 828-8341

Customer Service Website .... http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or .... (800) 223-1940

Outside the United States and Canada, please call .... (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2022–Pub.4815)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF
Steven A. Meyerowitz
President, Meyerowitz Communications Inc.

EDITOR
Victoria Prussen Spears
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS
Barkley Clark
Partner, Stinson Leonard Street LLP

Carleton Goss
Counsel, Hunton Andrews Kurth LLP

Michael J. Heller
Partner, Rivkin Radler LLP

Satish M. Kini
Partner, Debevoise & Plimpton LLP

Douglas Landy
White & Case LLP

Paul L. Lee
Of Counsel, Debevoise & Plimpton LLP

Timothy D. Naegele
Partner, Timothy D. Naegele & Associates

Stephen J. Newman
Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2022 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

Banks, Climate Risks, and the Emerging Regulatory Framework

By Lanier Saperstein and Marc Kushner*

This article discusses the increasing focus within the industry and by regulators on the financial impact of climate change, especially regarding the safety and soundness of financial institutions.

Nellie Liang, a senior U.S. Treasury official, recently told a large group of assembled bankers that climate change is "an existential threat to our environment and ecosystems" and that it "is creating increasing and significant economic costs."[1] Michael Hsu, the Acting Comptroller of the Currency, amplified the point, noting its impact on the financial system: "Climate change is generating risk exposures for banks."[2] This article discusses the increasing focus within the industry and by regulators on the financial impact of climate change, especially regarding the safety and soundness of financial institutions.

THE FINANCIAL RISKS

Climate change is creating new financial risks for banks. New York's banking regulator, for example, issued an open letter in late 2020, observing the "aggregate cost of billion-dollar natural disasters in the United States more than quadrupled from the 1980s to the 2010s."[3] The financial risks to New York's residential housing stock, alone, is staggering. New York's bank regulator estimates that "single- and multi-family residential homes in New York City

---

* Lanier Saperstein and Marc Kushner are partners at Dorsey & Whitney LLP. Mr. Saperstein advises banks on cross-border litigation and regulatory matters, including those relating to environmental, social, and governance ("ESG"). Mr. Kushner is the head of the firm's U.S. M&A practice and focuses on complex U.S. and cross-border transactions, which increasingly touch upon ESG considerations. The authors received invaluable input on this article from their colleagues, including Martha Coultrap, Andrew G. Herr, Cam Hoang, Megan Houdeshel, Helen Jiang, Josh Kornfield, Joseph Lynyak and Peter Nelson.

[1] Remarks by Under Secretary for Domestic Finance Nellie Liang at the Institute of International Bankers' Annual Washington Conference, March 7, 2022, https://home.treasury.gov/news/press-releases/jy0635.

[2] Remarks by Acting Comptroller of the Currency Michael J. Hsu, Institute of International Bankers, Annual Washington Conference, March 7, 2022, https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-22.pdf.

[3] New York State Department of Financial Services, Climate Change and Financial Risks, October 29, 2020, https://www.dfs.ny.gov/industry_guidance/industry_letters/il20201029_climate_change_financial_risks.

with $334 billion of reconstruction value are at high risk of storm surges." That means banks providing mortgages to those homeowners run the risk of having their collateral significantly impaired, quite literally overnight.

Bank regulators in the United States, however, do not have the power to set or impose carbon targets or other environmental requirements. Instead, the mandate of banking regulators, whether at the federal or state level, is to ensure the "safety and soundness" of their regulated entities. Bank regulators in the United States therefore view climate change through that lens. Acting Comptroller Hsu emphasized that the OCC is now "laser-focused" on the safety and soundness aspects of climate change risks, and in particular whether banks are "identifying, measuring, monitoring, and mitigating climate-related exposures and risk."

We are in the early days of climate risk quantification, so the full panoply of potential costs remains unknown. But bank regulators are starting to expect their regulated entities to identify their climate-related exposure and the potential impact of that exposure on their balance sheets. On a recent panel, for example, the OCC's Climate Change Risk Officer said the OCC will start asking its regulated banks, "What is your exposure? What are your risks?" Even if banks believe they have imperfect data, they ought to start collecting and analyzing it in order to answer these questions.

It might be tempting to some to view the current regulatory focus on climate change-related financial risk as a political trend, driven by a Democratic president and a Democratically controlled Congress. The issue, however, is not going away. The financial risks are real. Investors care. The media remains interested and is keen to report on alleged "greenwashing." Even if the federal banking regulators shift their focus under a Republican administration, the state regulators will remain focused on climate risk and marshal the enforcement mechanisms available to them. Indeed, New York's influential banking regulator, which oversees approximately 1,500 banking and other financial institutions with assets totaling more than $2.6 trillion, took an active role on climate change starting in 2019 because it felt the "Trump administration has actively undermined progress on climate change. . . ."[4]

There are geopolitical considerations at play too. Russia's invasion of Ukraine has sparked a renewed urgency to diversify energy sources, including transiting to sustainable and renewable options. The invasion has highlighted Europe's

[4] DFS Press Release (Jan. 15, 2021), Superintendent Linda A. Lacewell's op-ed in Law360: 6 ways financial regulators should prioritize climate risk. https://dfs.ny.gov/reports_and_publications/press_releases/pr2021152.

heavy reliance on Russian fuel, impacting Europe's energy security and constraining its response to the crisis. The transition to sustainable and renewable energy sources, however, will impose physical and transition costs. For banks operating in the United States with customers concentrated in carbon-heavy sectors, the regulators will expect those banks to safely and soundly manage the resulting financial risks with a laser-like focus.

MAJOR ESG REGULATION AND INITIATIVES

Legislators and financial regulators—both at the federal and state levels—have advanced multiple legislative or regulatory proposals regarding climate change and financial risk. While the details still are being debated or finalized, the regulatory direction and the growing appetite for action is clear.

Executive Orders

On January 27, 2021, President Biden issued an executive order[5] requiring the federal government to "drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy."

Later, on May 20, 2021, President Biden signed the Executive Order on Climate-Related Financial Risk[6] (the "May 2021 Executive Order") to:

> advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk . . . including both physical and transition risks; act to mitigate that risk and its drivers, while accounting for and addressing disparate impacts on disadvantaged communities and communities of color . . . and spurring the creation of well-paying jobs; and achieve our target of a net-zero emissions economy by no later than 2050.

The May 2021 Executive Order sets in motion the first steps toward the development of a government-wide strategy regarding climate-related financial risk, and deputizes federal agencies and financial regulators to embed climate risk considerations into virtually all aspects of government spending and oversight. Specifically, the May 2021 Executive Order requires various steps be taken to achieve the Administration's policy objectives, including information gathering and assessment, reviews of existing rules, and the issuance of reports regarding the impact of climate change on different aspects of U.S. financial stability.

---

[5] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

[6] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate- related-financial-risk/.

While the May 2021 Executive Order does not require financial services providers to change anything about how they conduct business, Section 3 of the Order, "Assessment of Climate-Related Financial Risk by Financial Regulators," may result in future changes in how financial services providers are regulated with respect to climate-related financial risks. Section 3 requires the secretary of the treasury to engage with members of the Financial Stability Oversight Council ("FSOC") to consider a number of actions by the FSOC, including comprehensively assessing the climate-related risk to the financial stability of the federal government and stability of the U.S. financial system, facilitating sharing of climate-related financial risk data and information with FSOC members and other departments/agencies as appropriate, and issuing a report to the president within 180 days on efforts by FSOC members to integrate consideration of climate-related financial risk into their policies and programs.

On October 21, 2021, in response to the directive in the May 2021 Executive Order, the FSOC issued a report,[7] running 129-pages, on climate-related financial risk. The report, among other things, calls for new disclosures, endorses building on the core concepts of the Task Force on Climate-Related Financial Disclosures ("TCFD") and recommends a variety of actions regarding climate risk across the federal financial regulatory agencies.

Proposed Federal Legislation

On June 16, 2021, the House, in a close vote (215-214), passed the Environmental, Social and Governance Disclosure Simplification Act of 2021 (H. R. 1187). The legislation would build on the Biden Administration's push for major corporations to be more transparent in disclosing economic and social risks to investors, including climate-related risks. Perhaps not surprisingly, the bill passed largely along party lines—not a single Republican voted in favor of H. R. 1187 and four Democratic members voted against it. Facing a Senate split along similar lines, the prospect of the bill becoming law remains unclear.

If signed into law, H. R. 1187 would require the SEC for the first time to define "ESG metrics," for the purpose of guiding required corporate disclosures under the Securities Act of 1933 and the Securities Exchange Act of 1934, each as amended. Specifically, based upon the defined metrics, the bill would require the following:

- In consent solicitation or proxy statements, issuers would be required to include "(a) a clear description of the views of the issuer about the link between ESG metrics and the long-term business strategy of the issuer; and (b) a description of any process the issuer uses to determine the

[7] https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

impact of ESG metrics on the long-term business strategy of the issuer."[8]

- In audited financial statements, issuers would be required to disclose ESG metrics.[9]

The bill also calls for the Securities and Exchange Commission ("SEC") to establish a Sustainable Finance Advisory Committee, which would be required to submit to the SEC, within 180 days after its first meeting, a report with recommendations on what ESG metrics issuers should be required to disclose. The report should "(i) identif[y] the challenges and opportunities for investors associated with sustainable finance; and (ii) recommend[] policy changes to facilitate the flow of capital towards sustainable investments, in particular environmentally sustainable investments."

The Office of Comptroller of the Currency

On December 16, 2021, the OCC released Principles for Climate-Related Financial Risk Management for Large Banks[10] (the "OCC Draft Principles") designed to provide large OCC-regulated institutions with a high-level framework for the safe and sound management of exposures to climate-related financial risks consistent with existing OCC rules and guidance.

In particular, the OCC identified the physical effects of climate change and the transition to a low-carbon economy as emerging risks to banks' safety and soundness, as well as that of the overall financial system, with potentially disproportionate impacts on the financially vulnerable, such as low and moderate-income and otherwise disadvantaged communities and individuals.

The OCC Draft Principles outline six key aspects of climate-related financial risk management: governance; policies, procedures and limits; strategic planning; risk management; data, risk measurement and reporting; and scenario analysis. In addition, the OCC Draft Principles offer risk assessment principles for incorporating climate-related financial risks in various traditional risk categories. The OCC sought public feedback on the Principles to inform its anticipated additional guidance on climate-related financial risks.

The Federal Deposit Insurance Corporation

On March 30, 2022, the FDIC issued its Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions

---

[8] Section 103(a)(1).

[9] Section 103(b)(1).

[10] https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf.

(the "FDIC's Statement"), which are substantially similar to the OCC's Principles. The public comment period on the FDIC's Statement closes on June 3, 2022.[11]

The Federal Reserve

The Federal Reserve is active too. It recently joined the Network of Central Banks and Supervisors for Greening the Financial System in December 2020 and created the Financial Stability Climate Committee in March 2021. The Financial Stability Climate Committee will consider the potential for complex interactions across the financial system at a "macroprudential" level. It complements the work of the Federal Reserve's Supervision Climate Committee, which is tasked with ensuring the resilience of the Federal Reserve's supervised firms to climate risks. The Fed has started privately pressing[12] big banks to detail the measures they are taking to mitigate climate change-related risks to their balance sheets, including testing the geographical exposure of bank assets to physical risks as well as testing exposures to different sectors.

The Securities and Exchange Commission

On March 21, 2022, the SEC released its long-awaited proposed rules[13] on climate-related disclosure, its most extensive rulemaking in recent history. Under the SEC's proposed rules, companies publicly listed in the United States would have to include certain climate-related information in their registration statements and periodic reports, including:

- Climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook;
- Their governance of climate-related risks and relevant risk management processes;
- Their greenhouse gas emissions;
- Certain climate-related financial statement metrics and related disclosures; and
- Climate-related targets and goals, and any transition plan(s).

While banks have relatively small carbon footprints, the physical and macroeconomic risks posed by climate change may profoundly impact the businesses they finance and do business with. As noted above, the OCC has

---

[11] https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf.

[12] https://www.reuters.com/article/us-usa-fed-climate-exclusive/exclusive-fed-privately-presses-big-banks-on-risks-from-climate-change-idUSKBN2CT2R7.

[13] https://www.sec.gov/news/press-release/2022-46.

identified the effects of climate change and the transition to a low carbon economy as presenting risks to banks and the financial system more broadly. As part of sound risk management, banks therefore should develop processes to measure and monitor material climate-related financial risks and to inform management about the materiality of those risks.

The New York Department of Financial Services

The focus on the financial risks of climate change is not just the province of the federal government. New York's banking regulator—New York's Department of Financial Services ("DFS")—has taken a leading role in providing guidance on climate change and financial risks. DFS was the first financial regulator in the United States to join the Network of Central Banks and Supervisors for Greening the Financial System.

On October 29, 2020, the DFS issued an Industry Letter outlining its expectations related to addressing the financial risks from climate change to all New York-regulated banking organizations, branches and agencies of foreign banking organizations, mortgage bankers and servicers, and limited purpose trust companies, as well as New York-regulated non-depositories, including New York regulated money transmitters, licensed lenders, sales finance companies, premium finance agencies, and virtual currency companies.

On February 9, 2021, DFS issued an industry letter alerting banking institutions subject to the New York Community Reinvestment Act that they may receive credit for financing activities that support the climate resiliency of low- and moderate-income, and underserved communities.

Most recently, on November 3, 2021, Acting Superintendent Adrienne Harris announced the establishment of a new Climate Division at the DFS, as well as the appointment of the new division's leader. Dr. Nina Chen, who is DFS's inaugural Director of Sustainability and Climate Initiatives, will lead the new division as Executive Deputy Superintendent.

COUNTER-ESG LEGISLATION

In contrast to the various regulations focused on enhanced ESG disclosures and carbon reduction metrics, legislators from energy-producing states such as Texas, North Dakota, Oklahoma, and Alaska understandably have adopted or proposed counter-ESG legislation. Specifically, laws or policies limiting transactions with companies that have called for divestment from the fossil fuel industry.

Texas Governor Abbott signed into law Senate Bill 13,[14] which, effective in September 2021, prohibits the state from contracting with or investing in companies that divest from oil, natural gas and coal companies. Specifically, it requires Texas' public pension funds to "sell, redeem, divest, or withdraw all publicly traded securities of [any] financial company . . ." that "boycott[s] energy companies." The law defines "boycott energy companies" as "refusing to deal with, terminating business activities with, or otherwise taking any action that is, solely or primarily, intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company: engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or does business with a company described [above]."

North Dakota Governor Burgum signed into law S.B. 2291[15] in March 2021. The law prohibits the consideration of ESG when making investments in North Dakota's state pension and legacy fund investments. It requires the state's department of commerce to undertake a study of ESG's impact on government and private industry in North Dakota and must include an evaluation of investment policy as it relates to ESG and the level of involvement the state has with companies that use ESG when making business decisions or investments. The study will also include the implications to the state as it relates to the boycott of energy or production agriculture commodities, with a report to legislative management by June of 2022.

In Oklahoma, H.B. 2034[16] was sent to committee in March 2021. While the legislation remains pending, if ever enacted, it would prohibit state contracts with a company unless the company submits a written certification that the company is not currently engaged in a boycott of the oil and gas industry.

INDUSTRY DEVELOPMENTS

Reaction of Financial Institutions

The growing focus on climate risk has spurred banks to more closely examine their environmental exposures, for example how rising sea levels and changing weather patterns might impact their existing business lines.

Some banks are reconsidering their support of companies and projects that generate substantial carbon emissions, while others have made disclosures about

[14] https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00013F.pdf#navpanes=0.

[15] https://www.ndlegis.gov/assembly/67-2021/documents/21-0717-02000.pdf.

[16] http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENGR/hB/HB2034%20ENGR.PDF.

prioritizing energy transition, exiting from thermal coal industry investments within a certain timeframe, among others. However, banks ought to be careful about their disclosures, as they do not want to turn aspirational statements into alleged actionable misstatements garnering the interest of the plaintiffs' bar.

ESG-related provisions are also being incorporated in loan documentation, such as interest rate adjustments based on borrowers' performance against certain ESG targets. For example, Blackrock's amendment of its loan revolver[17] added a Section 4.17 "Sustainability Adjustments," whereby Blackrock's interest rate can go up/down by .05 percent and its commitment fee can go up/down by .01 percent if it attains certain sustainability and diversity metrics.

The Institute of International Bankers

In response to the request for public feedback on the OCC Draft Principles noted above, the Institute of International Bankers ("IIB") submitted a letter,[18] offering additional considerations and requesting some clarifications in relation to the issuance of any Final Guidance. In particular, the IIB urged:

- Recognition that methodologies, models, and data for analyzing climate-related financial risk remain a work in progress;
- Coordination of efforts among U.S. and international regulators, as well as its dialog with industry participants, to foster clarity and efficiency and ensure that the OCC's final guidance reflects the aggregate views of the U.S. prudential regulators and consistency with state-level regulators; and
- Consideration of the unique structure and governance of internationally headquartered financial institutions.

The American Bar Association

The American Bar Association (the "ABA") also submitted a letter[19] in response to the request for public feedback on the OCC Draft Principles. The ABA urges the OCC to continue to take a principles-based approach that is flexible and iterative—and that allows banks to assess the risks they identify as the most material to their unique circumstances.

Moreover, it urges the OCC not to expand the scope of the guidance to mid-size and community banks until more robust data is available, and the climate-related financial risks and opportunities are better understood.

---

[17] https://www.wsj.com/articles/blackrock-must-hit-esg-targets-or-pay-more-to-borrow-money-11617769833.

[18] https://cdn.ymaws.com/www.iib.org/resource/resmgr/iib_comment_letters/20220214IIB.Comm.Ltr.pdf.

[19] https://www.aba.com/advocacy/policy-analysis/clclimateocc20220214.

LTSA, ACC & PRI Harmonized ESG Reporting Project

On March 30, 2022, the Loan Syndications and Trading Association ("LSTA"),[20] the leading trade group for the U.S. loan market, announced a joint project with Alternative Credit Council ("ACC")[21] and Principles for Responsible Investment ("PRI"),[22] to harmonize ESG reporting for borrowers across credit markets. As the LSTA has noted,[23] "[t]his project builds on the success of the LSTA's ESG Diligence Questionnaire (DDQ) for Borrowers which has been broadly adopted in loan transactions," and is reflective of the fact that "asset owners and asset managers are becoming more sophisticated and more insistent when it comes to ESG demands."

Loan Principles

Last month, the Asia Pacific Loan Market Association ("APLMA"), Loan Market Association ("LMA") and LSTA jointly published their Sustainability-Linked Loan Principles[24] and related Guidance.[25]

The APLMA, LMA and LSTA have also jointly published Green Loan Principles (February 2021)[26] and related Guidance (February 2021);[27] and Social Loan Principles (April 2021)[28] and related Guidance (March 2022).[29]

Together, these joint APLMA, LMA and LSTA publications represent significant moves forward toward high-level frameworks for ESG market standards and guidelines in loan markets across the E.U., United States and Asia-Pacific region, and are a testament to the increasing importance stakeholders attach to ESG in the loan space.

CONCLUSION

The issue of climate-related financial risks and their impact on the safety and soundness of banks is not going away. While we are in the early stages of

---

[20] https://www.lsta.org/.

[21] https://acc.aima.org/.

[22] https://www.unpri.org/.

[23] https://www.lsta.org/news-resources/lsta-announces-esg-harmonization-project/.

[24] https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/.

[25] https://www.lsta.org/content/guidance-on-sustainability-linked-loan-principles-sllp/.

[26] https://www.lsta.org/content/green-loan-principles/.

[27] https://www.lsta.org/content/guidance-on-green-loan-principles-glp/.

[28] https://www.lsta.org/content/social-loan-principles-slp/.

[29] https://www.lsta.org/content/guidance-on-social-loan-principles-slp/.

understanding and measuring the risks to the financial system and banks, to quote Acting Comptroller Hsu, the time to work on "identifying, measuring, monitoring, and mitigating climate related exposures and risk," in response to market and regulatory pressure is quickly diminishing. While there is time, banks that are too slow to adapt will bear reputational and perhaps other costs as consumers and the "laser focused" regulators continue to pivot toward sustainability. Moreover, banks have a growing financial imperative to assess the climate-related risks faced by their customers and counterparties. It is likely the market will drive the need for banks to more closely evaluate ESG, including climate-related risks, even in the absence of further regulatory requirements.