

[Banking and Finance Law Daily Wrap Up, WORTH NOTING—Other regulatory, legislative, litigation, and industry developments, \(Apr. 2, 2021\)](#)

Banking and Finance Law Daily Wrap Up

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By WK Editorial Staff

A weekly roundup of other items of interest to the banking and finance law community.

BANKING OPERATIONS—6th Cir.: Facing financial challenges, the State Bank in Fenton, Michigan hired Daniel Wollschlager, a banking executive and lending officer, to "steady the ship." As an enticement, "the bank's holding company offered to pay Wollschlager roughly two years' salary if the bank fired him prematurely—a golden parachute arrangement that Congress requires the Federal Deposit Insurance Corporation to approve when it comes to troubled banks. That risk materialized in 2011, when Wollschlager and the bank parted ways. The bank sought permission from the FDIC to pay Wollschlager the first installment of this money, roughly a year's salary. The FDIC approved the request. When the bank later asked permission to pay the last installment, however, the FDIC declined on the ground that golden parachute arrangements should not exceed one year's salary, particularly for someone who had worked at the bank for just three years. Wollschlager sued the agency, alleging that it violated the Administrative Procedure Act by refusing to permit the second payment. The district court granted the FDIC's motion for judgment on the administrative record. Because the FDIC's decision was neither arbitrary nor capricious, the Sixth Circuit affirmed ([Wollschlager v. Federal Deposit Insurance Corporation](#), March 31, 2021, Sutton).

BANK SECRECY ACT—The Financial Crimes Enforcement Network has released a [report](#) on its innovation hours program, which was instituted in May 2019 to better understand financial services sector innovation related to anti-money laundering (AML) and countering the financing of terrorism (CFT) compliance, and to learn of new financial services offerings and related technologies. The innovation hours program provides a monthly forum for users and providers of regulatory and financial technology to share information about, and discuss potential opportunities and challenges of, their innovative products and services, to the benefit of both the private sector and government. Since the program began, FinCEN has met with 65 U.S. and foreign firms and held 19 monthly sessions, including one event in New York City jointly hosted by the Office of the Comptroller of the Currency's Office of Innovation.

COMMUNITY DEVELOPMENT—The Consumer Financial Protection Bureau, Federal Housing Finance Agency, and Federal Reserve Board have submitted their 2020 Office of Minority and Women Inclusion (OMWI) annual reports to Congress. The CFPB [notes](#) that its report describes the Bureau's diversity and inclusion work over the past fiscal year and aligns closely with the Biden-Harris Administration's "Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." The FHFA [report](#) provides an overview of the FHFA's Diversity and Inclusion (D&I) program, including its workforce demographics, contracting data, and D&I strategies and activities. The Fed said its [report](#) outlines the OMWI's "activities, successes, and challenges."

COMMUNITY DEVELOPMENT—6th Cir.: The U.S. Court of Appeals for the Sixth Circuit was called to address an emergency motion by the U.S. Government pertaining to the authority of the Center for Disease Control and Prevention, under a provision of the Public Health Service Act (42 U.S.C. § 264(a)), to "extend" an expired congressional moratorium on "eviction filings based on nonpayment of rent for tenants residing in certain federally financed rental properties." The Sixth Circuit denied the Government's emergency motion to stay the federal trial court's order denying injunctive relief pending appeal of the CDC's eviction moratorium extension. The appellate court concluded that because the U.S. Government "is unlikely to succeed on the merits," the

court "need not consider the remaining stay factors" ([Tiger Lily, LLC v. U.S. Dept. of Housing and Urban Development](#), March 29, 2021, *per curiam*).

CONSUMER FINANCIAL PROTECTION BUREAU—The Consumer Financial Protection Bureau has published its [Semiannual Regulatory Agenda](#), as part of the Fall 2020 Unified Agenda of Federal Regulatory and Deregulatory Actions. The Bureau reasonably anticipates having the regulatory matters identified under consideration during the period from November 2020, to November 2021. The next agenda will be published in Spring 2020 and will update this agenda through Spring 2022.

CONSUMER FINANCIAL PROTECTION BUREAU—The current [list](#) of CFPB-supervised depository institutions and depository affiliates has been released, based on Dec. 31, 2020, Call Report data.

DEBT COLLECTION—5th Cir.: In upholding a summary judgment in favor of a defendant bank's foreclosure sale of the home of a pair of borrowers, the majority of a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit also affirmed the dismissal of the borrowers' claims for violating the Texas Debt Collection Act (TDCA) prohibition against "threatening to take an action prohibited by law" (Texas Financial Code § 392.301(a)(8)) as well as the prohibition against "misrepresenting the character, extent, or amount of a consumer debt, or misrepresenting the consumer debt's status in a judicial or governmental proceeding" (Texas Financial Code § 392.304(a)(8)). However, one of the appellate panelists dissented from the ruling concerning TDCA § 392.304(a)(8), maintaining that the bank violated the provision by "misrepresenting, in a March 2017 phone call, that \$14,000 would be automatically deducted from the Douglas's [borrowers'] account to pay off the bulk of their past-due mortgage payments" ([Douglas v. Wells Fargo Bank, N.A.](#), March 26, 2021, Owen, P.).

DIRECTORS, OFFICERS AND EMPLOYERS—Todd M. Harper, National Credit Union Administration Chairman, has been [named](#) Chairman of the Federal Financial Institutions Examination Council (FFIEC) for a two-year term running from April 1, 2021, through March 31, 2023. The Council also named Blake Paulson, Acting Comptroller of the Currency, as its new vice chairman for the same two-year term. FFIEC also [announced](#) appointments to the FFIEC's State Liaison Committee (SLC). Susannah Marshall was designated by the Conference of State Bank Supervisors to serve on the SLC for a two-year term that begins immediately and continues through March 31, 2023. The American Council of State Savings Supervisors has reappointed Superintendent Kevin Allard, Ohio Division of Financial Institutions, to the SLC for a first full two-year term; and the National Association of State Credit Union Supervisors has reappointed Senior Deputy Commissioner Stephen Pleger, Georgia Department of Banking and Finance, for a second two-year term to the SLC. Allard and Pleger's two-year terms will expire on March 31, 2023.

DODD-FRANK ACT—The Office of the Comptroller of the Currency has issued a [request and notice for comment](#) on the revision of a continuing information collection, "Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of \$250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act." Under section 165(i)(2) of the Dodd-Frank Act, a covered institution is required to submit to the Federal Reserve Board and to its primary financial regulatory agency a report containing information such as the primary financial regulatory agency may require. The OCC uses the data collected to assess the reasonableness of the stress test results of covered institutions and to provide forward-looking information to the OCC regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. Comments are due by May 3, 2021.

ENFORCEMENT ACTIONS—S.D.N.Y.: In connection with an enforcement action brought by the New York Attorney General, the federal district court in New York City has entered a default judgment and issued an order imposing \$53 million in civil money penalties against defendant Hutton Ventures, LLC and requiring the company to comply with various monitoring and reporting requirements. Previously, in June 2020, a \$5.5 million stipulated final judgment and order was agreed to by other defendants in the New York AG's civil enforcement action (see [Banking and Finance Law Daily](#), June 26, 2020). Among other things, the New York AG has claimed that various combinations of these defendants engaged in an overall deceptive scheme to sell debt-relief services to student-

loan borrowers in violation of New York state laws, including those governing credit repair and usury, as well as federal laws, including the federal Credit Repair Organizations Act and the Truth in Lending Act ([People of the State of New York v. Debt Resolve, Inc.](#), March 30, 2021, Nathan, A.).

FEDERAL RESERVE SYSTEM—The Federal Reserve Board has [issued](#) its Semiannual Report on Banking Applications Activity for the period of July 1 through Dec. 31, 2020. The report provides information regarding the applications filed by banking organizations and reviewed by the Fed as of the most recent reporting period ending on June 30 and December 31 of each calendar year.

FEDERAL RESERVE SYSTEM—The Federal Reserve Board has published its [Semiannual Regulatory Agenda](#), issued under the Regulatory Flexibility Act and the Board's Statement of Policy Regarding Expanded Rulemaking Procedures. The Fed anticipates having under consideration regulatory matters as indicated below during the period Nov. 1, 2020, through April 30, 2021. The next agenda will be published in Spring 2021.

FINANCIAL STABILITY—The Office of the Comptroller of the Currency has released documents pertaining to a [second-tier appeal](#), filed by a participant bank to the OCC's Ombudsman, of the decision rendered by the interagency Shared National Credit (SNC) appeals panel during the third quarter interagency SNC review. The bank not only contested the "special mention" rating assigned to a credit facility, but also argued that the obligor's credit profile "meets the definition of a substandard credit, with well-defined weaknesses in its current operating performance, as evidenced by negative earnings before interest, tax, depreciation and amortization and cash flow, and uncertainty in future projections given the coronavirus disease." The Ombudsman agreed with the SNC appeals panel that the credit facility meets the supervisory standards of a "special mention" rating.

FINANCIAL TECHNOLOGY—The Federal Deposit Insurance Corporation has issued a [financial institution letter](#) providing information and clarification for FDIC-supervised financial institutions on the FDIC's Rapid Phased Prototyping (RPP) initiative. The RPP initiative is a competition designed to accelerate the adoption of modern technological solutions to help the FDIC fulfill its mission. The solutions are intended explore new ways to receive, manage, and analyze data from individual institutions, particularly community banks, without increasing compliance burdens. The FDIC noted that any solutions or reporting systems produced by the RPP initiative are voluntary and banks will not be required to adopt them. RPP competitors were selected through an FDIC-approved and-controlled competitive procurement process. According to the letter, some FDIC-supervised financial institutions have inquired about the expectations for them to partner with RPP contestants. The FDIC stated that RPP competitors will independently determine whether they will seek to collaborate with FDIC-supervised financial institutions to receive feedback and input on proposed prototype designs. Financial institutions are not obligated to collaborate with any RPP competitors. The FDIC noted that if financial institutions collaborate with any RPP competitor, they will be responsible for complying with the appropriate consumer protection laws, privacy laws, and other legal requirements.

GOVERNMENT SPONSORED ENTERPRISES—The Federal Housing Finance Agency Office of Inspector General has issued an audit report to determine what examination activities its Division of Enterprise Regulation (DER) completed, during the period 2014 through Dec. 31, 2020, in response to identified risks in Fannie Mae's management of third-party provider relationships with vendors that provide operational support and information technology services. OIG found that DER's last completed targeted examination of Fannie Mae's third-party risk management (TPRM) program was during the 2013 examination cycle, and DER did not complete any targeted examinations of Fannie Mae's TPRM program, an area of acknowledged risk, from 2014 through 2020. OIG also assessed whether FHFA followed its standards when performing the ongoing monitoring activity, which were completed during 2019 and 2020, finding that the ongoing monitoring activities that DER completed during this period complied with applicable examination guidance ([AUD-2021-007](#)).

INTEREST-USURY—The Federal Deposit Insurance Corporation has notified banks under its supervision ([FIL-23-2021](#)) that the agency has updated its Banker Resource Center to provide information regarding revisions to the agency's brokered deposits regulation. The FDIC has also updated its webpage for revised interest rate restrictions applicable to less than well-capitalized institutions ([FIL-24-2021](#)).

MORTGAGES—The Consumer Financial Protection Bureau has [advised](#) that the Home Mortgage Disclosure Act Modified Loan Application Register ([LAR](#)) data for 2020 has been published on the Federal Financial Institutions Examination Council's HMDA Platform. The published data contain loan-level information filed by financial institutions, modified to protect privacy. Annual loan-level LAR data for each HMDA filer are made available online by March 31. Later this year, the 2020 HMDA data will be available in other forms to provide users insights into the data, including a nationwide loan-level dataset that will provide all publicly available data from all HMDA reporters, aggregate and disclosure reports with summary information by geography and lender, and the HMDA Data Browser. The Bureau said it will also publish a Data Point article highlighting key trends in the annual data.

MORTGAGES—Representative Nydia M. Velázquez (D-NY) has reintroduced the [Home Loan Quality Transparency Act of 2021](#) in the Houses of Representatives. The proposed legislation would require lending institutions and credit unions to provide public disclosures regarding their mortgages and home equity lines of credit. A companion bill was also introduced in the Senate, led by Sen. Catherine Cortez Masto (D-Nev). "Today's housing market is built on a bedrock of discriminatory practices, with systemic issues dictating who can and cannot have fair access to a home," [stated](#) Velázquez. The new requirement for reporting is intended to increase transparency among these institutions and help to find and eliminate discriminatory lending practices.

MORTGAGES—The Federal Financial Institutions Examination Council has issued a guide to reporting under the Home Mortgage Disclosure Act (HMDA). The [guide](#) is intended to be a resource for assisting institutions in their HMDA reporting. It includes a summary of responsibilities and requirements, directions for assembling the necessary tools, and instructions for reporting HMDA data. The 2021 edition reflects updates to incorporate content from the HMDA rule issued by the Consumer Financial Protection Bureau in April 2020 ([FIL-21-2021](#)).

RECEIVERSHIPS—The Federal Deposit Insurance Corporation's Office of Inspector General has issued a [Failed Bank Review](#) for Almena State Bank, which was closed on Oct. 23, 2020, to examine whether the bank failure warranted an in-depth review. According to the FDIC's Division of Finance, the estimated loss to the Deposit Insurance Fund was \$18 million or 27 percent of the bank's \$69 million in total assets. The OIG said that based on its review of key FDIC documents, the bank's failure was due to longstanding capital and asset quality issues resulting from the aggressive growth strategy that management implemented in 2014. According to the review, the bank launched its growth strategy without sufficient experience, and coupled with hazardous lending practices and inadequate Board oversight, this strategy resulted in the bank's deterioration. The bank's Board and management failed to comply with the Consent Order and were unable to improve the bank's safety and soundness. OIG concluded that no unusual circumstances exist that warrant an In-Depth Review of the loss.

SECURITIES AND DERIVATIVES—The Federal Reserve Board has released its March 2021 [Senior Credit Officer Opinion Survey](#) on Dealer Financing Terms, which provides qualitative information on changes over the previous three months in credit terms and conditions in securities financing and over-the-counter (OTC) derivatives markets. In addition to the core set of questions, focused on changes between December 2020 and February 2021, this survey included set of special questions about the transition away from the London interbank offered rate (LIBOR) for U.S. dollar-denominated OTC derivatives. The 23 institutions participating in the survey account for almost all dealer financing of dollar-denominated securities to non-dealers and are the most active intermediaries in OTC derivatives markets.

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Companies: Almena State Bank; American Council of State Savings Supervisors; Conference of State Bank Supervisors; Debt Resolve, Inc.; Fannie Mae; Hutton Ventures, LLC; National Association of State Credit Union Supervisors; Progress Advocates, LLC; Progress Advocates Group, LLC; State Bank in Fenton, Mich.; Student Advocates Team, LLC; Student Advocates, LLC; Tiger Lily, LLC; Wells Fargo, N.A.; Wells Fargo Student Advocates Group, LLC

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