

[Banking and Finance Law Daily Wrap Up, WORTH NOTING—Other regulatory, legislative, litigation, and industry developments, \(Jan. 8, 2021\)](#)

Banking and Finance Law Daily Wrap Up

[Click to open document in a browser](#)

By WK Editorial Staff

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

BANK SECRECY ACT—The Financial Crimes Enforcement Network has issued a [notice](#) alerting financial institutions that it intends to propose to amend the regulations relating to the Report of Foreign Bank and Financial Accounts (FBAR) to include virtual currency as a type of reportable account under 31 CFR 1010.350 Filing Requirement for Virtual Currency.

BANK SECRECY ACT—The Financial Crimes Enforcement Network has issued a [notice](#) alerting financial institutions about the potential for fraud, ransomware attacks, or similar types of criminal activity related to COVID-19 vaccines and their distribution. FinCEN's notice also provided specific instructions for filing Suspicious Activity Reports regarding such suspicious activity related to COVID-19 vaccines and their distribution.

BANKING OPERATIONS—The Office of the Comptroller of the Currency has issued version 2.2 of the "[Foreword](#)" booklet of the Comptroller's Handbook. The booklet describes the overall organization and format of the Comptroller's Handbook and explains the OCC's process for issuing new booklets, updating booklets, and fully revising booklets. The OCC bulletin rescinds version 2.1 of the "Foreword" booklet issued on May 16, 2019 ([OCC Bulletin 2020-109](#)).

BANKING OPERATIONS—The Federal Reserve Board has requested comment on a notice of [proposed rulemaking](#) regarding proposed amendments to Regulation D (Reserve Requirements of Depository Institutions). Under the proposal, references to an "interest on required reserves" rate and to an "interest on excess reserves" rate would be replaced with a single "interest on reserve balances" rate. The proposed amendments would make other conforming changes, such as simplifying the formula used to calculate the amount of interest paid on balances maintained by or on behalf of eligible institutions in master accounts at Federal Reserve Banks. Comments must be received by 60 days after publication in the *Federal Register*. The Fed also adopted as final, without change, an [interim final rule](#) amending Regulation D to lower reserve requirement ratios on transaction accounts maintained at depository institutions to zero percent. The Fed received no comments on the interim final rule.

CAPITAL AND BASEL ACCORDS—The Federal Reserve Board has voted to affirm the [Countercyclical Capital Buffer \(CCyB\)](#) at the current level of 0 percent. In making this determination, the Fed followed the framework detailed in its policy statement for setting the CCyB for private-sector credit exposures located in the United States. The Fed consulted with the FDIC and the OCC in making this determination. Should the Fed decide to modify the CCyB amount in the future, banking organizations would have 12 months before the increase became effective, unless the Fed establishes an earlier effective date.

CONSUMER FINANCIAL PROTECTION BUREAU—To fulfill the annual reporting requirements of the 21st Century Integrated Digital Experience Act or the 21st Century IDEA Act, the Consumer Financial Protection Bureau has submitted a [report](#) to Congress and the Director of the Office of Management and Budget providing a list of the CFPB's publicly available websites and digital services, an indication of which of these services require modernization to meet the requirements of the 21st Century IDEA Act, and an estimation of the cost and schedule for doing this modernization.

CONSUMER FINANCIAL PROTECTION BUREAU—The Consumer Financial Protection Bureau has issued its "[Financial Literacy Annual Report](#)" for fiscal year 2020. The Dodd-Frank Act requires the Bureau to report on

its work to provide consumers with information to make informed decisions about financial products. The report highlighted the initiatives taken by the Bureau in the past year. According to the message from the Director in the report, a large part of the Bureau's financial education efforts in the past year have been the response to the COVID-19 pandemic. The report indicates that 7.3 million web users accessed the Bureau's educational tools in 2020, an increase of 1 million users over 2019, and the Bureau distributed 4.7 million publications to consumers. Another 4 million web users accessed COVID-19 specific resources. The report also notes that the Bureau initiated a fiscal year 2021 strategic planning process for the Consumer Education and External Affairs division.

CREDIT, DEBIT AND GIFT CARDS—Fla. Sup. Ct.: Resolving conflicting decisions at the intermediate appellate court level, the Florida Supreme Court ruled that a unilateral attorney's fee provision in a credit card contract is made reciprocal to a debtor under Florida law when a debtor prevails in an "account stated" action brought to collect unpaid credit card debt and both conditions of the Florida statute (Fla. Stat. § 57.105(7)) are met. If the underlying contract provides for attorney's fees for a party when that party "is required to take any action to enforce the contract," then attorney's fees are authorized for the other party if "that party prevails in any action with respect to the contract" ([Ham III v. Portfolio Recovery Associates, LLC](#), Dec. 31, 2020, Canady, C.).

DEBT COLLECTION—6th Cir.: A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit decided that a consumer sufficiently alleged that a debt collector's letter to her regarding a purported medical debt violated the Fair Debt Collection Practices Act provision limiting the language and symbols that collectors may use or reveal on an *envelope* when communicating with consumers by mail (15 U.S.C. § 1692f(8)). The collector's envelope for the mailed letter featured a glassine window "through which were visible two unmarked checkboxes followed by the text 'Payment in full is enclosed' and 'I need to discuss this further. My phone number is _____'." In reversing the federal trial court's judgment on the pleadings in favor of the debt collector, the appellate panel determined that the consumer adequately alleged a particularized and concrete injury concerning her FDCPA privacy interests to establish Article III standing, and rejected the collector's argument that the glassine envelope and letter fell within a "benign language" exception to the FDCPA provision ([Donovan v. FirstCredit, Inc.](#), Dec. 18, 2020, Moore, K.).

DEBT COLLECTION—7th Cir.: In connection with a consumer's FDCPA lawsuit, claiming that a debt collecting affiliate of a debt purchasing company violated the FDCPA by overstating the remaining balance due on the consumer's monthly repayment plan (stemming from a state-court consent judgment), the Seventh Circuit determined that a "jurisdictional defect" prevented it from addressing whether the FDCPA claim was subject to arbitration. The federal appellate court concluded that the consumer "has not alleged any injury from the alleged statutory violations" and that the court's recent decision ([Larkin v. Finance System of Green Bay, Inc.](#)) required it to "vacate and remand with instructions to dismiss the case for lack of standing" ([Nettles v. Midland Funding, LLC](#), Dec. 21, 2020, Sykes, D.).

DEBT COLLECTION—N.C. App.: The North Carolina Court of Appeals in Charlotte, N.C. was called to examine and interpret North Carolina's law governing unfair practices by collection agencies in the state (N.C. Gen. Stat. § 58-70-115 et seq.) in connection with the state trial court's split decision in a summary judgment order. Addressing the policies and procedures pertaining to pre-collection verifications, debt itemizations, and default judgments in relation to the statutory framework, especially in relation to debt buyers, the appellate court determined that "(1) the pre-collection verification through itemization under N.C. Gen. Stat. § 58-70-115(5), (2) the itemization in the pre-suit letter to the debtor mandated by N.C. Gen. Stat. § 58-70-115(6), and (3) the itemized evidence necessary to procure a default judgment under N.C. Gen. Stat. § 58-70-155(b), when read together in context and in light of the purposes of the Act, all require a debt buyer to itemize the charge-off balance when seeking to avoid committing an unfair practice in collecting that amount" ([Townes v. Portfolio Recovery Associates, LLC](#), Dec. 31, 2020, McGee, L.).

DEPOSIT INSURANCE—The Conference of State Bank Supervisors has filed a new [complaint](#) in the district court of District of Columbia, opposing the Office of the Comptroller of the Currency's creation of a new national bank charter for nonbank companies and its acceptance and impending approval of a charter application from

Figure Technologies Inc. The challenge against Figure Technologies is particularly [concerned](#) with the bank's "illegitimate attempt to evade the controversy surrounding the fintech charter and the federal court decision that invalidated it" and the bank's lack of deposit insurance. The latest complaint is a continuation of a legal action that the association initiated in 2017 which asserts that the creation of a national bank charter for nonbank companies goes beyond the limited authority granted to the OCC by Congress.

DIRECTORS, OFFICERS AND EMPLOYERS—The Federal Deposit Insurance Corporation has [appointed](#) John P. Connelly as Director of the Division of Complex Institution Supervision and Resolution (CISR). Connelly has been with the FDIC for more than 30 years and previously served as CISR Acting Senior Deputy Director. He replaces Ricardo R. Delfin, who has held the position since the creation of CISR in July 2019 and previously served as director of the former Office of Complex Financial Institutions. The change was effective as of Jan. 4, 2021.

DODD-FRANK ACT—The Federal Reserve Board has [released](#) a second round of bank [stress test results](#) for 2020, which showed that large banks had strong capital levels under two separate hypothetical recessions. The stress tests are intended to help ensure that large banks can support the economy during economic downturns by evaluating the resilience of large banks under hypothetical scenarios over nine future quarters. This stress test includes two hypothetical scenarios with severe global recessions. The first scenario featured an unemployment rate that spiked to 12.5 percent and then declined to about 7.5 percent, while the second scenario included a peak unemployment rate of 11 percent followed by a more modest decline to 9 percent. Under both scenarios, large banks would collectively have more than \$600 billion in total losses, considerably higher than the first stress test of 2020.

ENFORCEMENT ACTIONS—The Federal Deposit Insurance Corporation has provided [notice](#) of its maximum civil money penalties (CMPs) as adjusted for inflation. The adjusted maximum amounts of civil money penalties in the notice are applicable to penalties assessed after Jan. 15, 2021, for conduct occurring on or after Nov. 2, 2015. The notice contains charts that provide the inflation-adjusted maximum CMP amounts under 12 CFR Part 308.

ENFORCEMENT ACTIONS—The Federal Reserve Board has [terminated](#) its enforcement action against Mid America Bank & Trust Company, Dixon, Mo., for deceptive marketing of acquired credit card portfolios (see [Banking and Finance Law Daily](#), Oct. 27, 2020). The bank agreed to pay approximately \$5 million in restitution to nearly 21,000 consumers for deceptive practices involving balance transfer credit cards issued to consumers by Mid America through third parties. Under the consent order entered by the Fed, Mid America was required to refund fees paid by cardholders in connection with the deceptive marketing practices and, for certain consumers, refund the total qualifying payments and waive the remaining transferred balance. The termination was effective as of Jan. 4, 2021.

ENFORCEMENT ACTIONS—The Office of the Comptroller of the Currency has adjusted for inflation its maximum civil money penalties, as required to implement the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The [adjusted maximum amounts](#) of civil money penalties are applicable to penalties assessed on or after Jan. 1, 2021, for conduct occurring on or after Nov. 2, 2015.

ENFORCEMENT ACTIONS—The Consumer Financial Protection Bureau has issued a [consent order](#) against Envios de Valores la Nacional Corp., a non-bank remittance provider incorporated in New York and headquartered in Colorado for violations of the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E. La Nacional's primary business is to provide international money transfers, including remittance transfers. The Bureau alleged violations regarding the remittance transfer activities of la Nacional Corp., including its cancellation policies. Under the consent order, la Nacional must pay a civil money penalty of \$750,000 to the Bureau.

ENFORCEMENT ACTIONS—The Consumer Financial Protection Bureau has issued a [consent order](#) against Seterus, Inc. and Kyanite Services, Inc., as Seterus's successor in interest, based on the Bureau's finding that Seterus violated the Consumer Financial Protection Act of 2010 and Regulation X—12 CFR Part 1024. The

Bureau found violations in Seterus' mortgage servicing practices relating to loss mitigation applications. The Bureau [alleged](#) that Seterus committed unfair acts or practices by failing to accurately review, process, track, and communicate to borrowers information regarding their applications for loss mitigation options. Under the consent order, Kyanite was ordered to set aside nearly \$5 million for redress and must pay a civil money penalty of \$500,000 to the Bureau.

ENFORCEMENT ACTIONS—The Consumer Financial Protection Bureau has issued a [consent order](#) against nonprime auto lender and leaser Santander Consumer USA Inc., after finding that Santander violated the Fair Credit Reporting Act (FCRA). The consent order was issued in connection with Santander providing erroneous consumer loan data to consumer reporting agencies (CRAs). The Bureau [found](#) that the consumer loan data Santander furnished to CRAs between January 2016 and August 2019 contained multiple systemic errors that in many instances could have negatively impacted consumers' credit scores and access to credit. The consent order requires Santander to take certain steps to prevent future violations and imposes a \$4,750,000 civil money penalty.

FAIR CREDIT REPORTING—The Consumer Financial Protection Bureau has issued a final rule amending Appendix O for Regulation V, which implements the Fair Credit Report Act (FCRA), to establish the maximum allowable charge for disclosures by a consumer reporting agency to a consumer for 2021. The maximum allowable charge will be \$13.00 for 2021. The CFPB is required to calculate annually the dollar amount of the maximum allowable charge for disclosures by a consumer reporting agency to a consumer pursuant to FCRA Section 609. The [final rule](#) takes effect Jan. 1, 2021.

FINANCIAL STABILITY—The Financial Stability Oversight Council has made available the [minutes](#) of its Dec. 3, 2020, meeting.

FINANCIAL STABILITY—The Federal Reserve Board has issued a [supervision letter](#) to institutions subject to the Large Institution Supervision Coordinating Committee (LISCC) supervisory program. The letter defines the financial institutions subject to LISCC supervisory program as: (i) those firms subject to Category I standards under the Board's tailoring framework, (ii) any non-commercial, noninsurance savings and loan holding company that would be identified for Category I standards if it were a bank holding company, and (iii) a nonbank financial institution designated as systemically important by the Financial Stability Oversight Council.

GOVERNMENT SPONSORED ENTERPRISES—The Federal Housing Finance Agency has requested comments on [a notice of proposed rulemaking](#) that would require Fannie Mae and Freddie Mac (the Enterprises) to develop credible resolution plans, which would facilitate a rapid and orderly resolution should FHFA have to be appointed their receiver under the Housing and Economic Recovery Act of 2008. The proposed rule is similar to those issued by the Fed and the FDIC under the Dodd–Frank Act, which requires many large financial institutions to submit living wills. Comments are due by 60 days after publication in the *Federal Register*.

MORTGAGES—The Consumer Financial Protection Bureau has made its [annual inflation adjustment](#) to asset-size threshold set by Regulation C, the regulation that implements the Home Mortgage Disclosure Act. The changes are applicable on Jan. 1, 2021. The Bureau has amended the official commentary that interprets the requirements of Regulation C to reflect the asset-size exemption threshold for banks, savings associations, and credit unions based on the annual percentage change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). Based on the 1.3 percent increase in the average of the CPI–W for the 12-month period ending in November 2020, the exemption threshold is adjusted to \$48 million from \$47 million. Therefore, banks, savings associations, and credit unions with assets of \$48 million or less as of Dec. 31, 2020, are exempt from collecting data in 2021.

MORTGAGES—The Consumer Financial Protection Bureau has made its [annual inflation adjustment](#) to asset-size threshold set by Regulation Z, the regulation that implements the Truth in Lending Act. Based on the 1.3 percent increase in the average of the CPI–W for the 12-month period ending in November 2020, the exemption threshold is adjusted to \$2.230 billion from \$2.202 billion. Therefore, creditors with assets of less than \$2.230 billion (including assets of certain affiliates) as of Dec. 31, 2020, are exempt, if other requirements of Regulation

Z also are met, from establishing escrow accounts for higher-priced mortgage loans in 2021. The changes are applicable on Jan. 1, 2021.

PREEMPTION—The Office of the Comptroller of the Currency has issued an [interpretive letter](#) on 12 U.S.C. §25b, which codifies preemption standards and establishes procedural requirements for certain preemption actions by the agency. The letter sets out how the OCC interprets these standards and requirements and summarizes the agency's framework for compliance. According to the OCC, the intention is to provide a comprehensive interpretation of these provisions and to set out a consistent framework for compliance.

TRUTH IN LENDING—9th Cir.: In an unpublished opinion analyzing the Consumer Financial Protection Bureau's official commentary to Regulation Z (Truth in Lending), the U.S. Court of Appeals for the Ninth Circuit determined that, because a "delinquency collection proceeding" under Reg. Z encompasses nonjudicial foreclosures, the obligation of a loan servicer under the federal Truth in Lending Act to send periodic statements during the applicable time period was terminated in light of the regulation (12 CFR § 1026.5(b)(2)). As a result, the federal trial court correctly determined that the borrower's TILA claim was time-barred ([Taylor v. Bosco Credit LLC](#), Dec. 24, 2020, *Per Curiam.*).

Attorneys: Geoffrey C. Parker (Hilton Parker LLC) for Lynne Donovan. David Benjamin Shaver (Surdyk, Dowd & Turner Co., L.P.A.) for FirstCredit, Inc. Curtis Warner (Warner Law Firm, LLC) for Ashley Nettles. Heather L. Kramer (Rathje & Woodward, LLC) for Midland Funding, LLC and Midland Credit Management, Inc. J. Jerome Hartzell (Hartzell & Whiteman, LLP) for Morgan McMillan. Jon Berkelhammer (Ellis & Winters LLP) for Portfolio Recovery Associates, LLC. Robert N. Heath, Jr. (Robert N. Heath, P.A.) for Eugene Ham III and Laura Foxhall. Diane G. DeWolf (Akerman LLP) for Portfolio Recovery Associates, LLC. Sarah Shapero (Shapero Law Firm) for Brigitte Taylor. Melissa Robbins Coutts (McCarthy & Holthus LLP) for Bosco Credit LLC and Franklin Credit Management Corp.

Companies: Bosco Credit LLC; Conference of State Bank Supervisors; Envios de Valores la Nacional Corp.; Fannie Mae; Figure Technologies Inc.; FirstCredit, Inc.; Franklin Credit Management Corp.; Freddie Mac; Kyanite Services, Inc.; Mid America Bank & Trust Company; Midland Credit Management, Inc.; Midland Funding, LLC; Portfolio Recovery Associates, LLC; Santander Consumer USA Inc.; Seterus, Inc.

IndustryNews: AlaskaNews ArizonaNews BankingOperations BankSecrecyAct Blockchain CaliforniaNews CapitalBaselAccords CFPB ChecksElectronicTransfers CommunityDevelopment CreditDebitGiftCards CrimesOffenses DebtCollection DepositInsurance DirectorsOfficersEmployers DoddFrankAct EnforcementActions FairCreditReporting FederalReserveSystem FinancialStability FinTech FloridaNews GovernmentSponsoredEnterprises GuamNews HawaiiNews IdahoNews IllinoisNews IndianaNews KentuckyNews Loans MichiganNews MontanaNews Mortgages NevadaNews NorthCarolinaNews OhioNews OregonNews Preemption PrudentialRegulation StateBankingLaws TennesseeNews TruthInLending WashingtonNews WisconsinNews