Banking and Finance Law Daily Wrap Up, WORTH NOTING—Other regulatory, legislative, litigation, and industry developments, (Jan. 4, 2019)

Banking and Finance Law Daily Wrap Up

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

BANK HOLDING COMPANIES—The Federal Reserve Board sent an FRB Interpretive letter to John Eggemeyer granting a request by Castle Creek Capital, Rancho Santa Fe, Calif., and certain of its subsidiaries and affiliates for relief from commitments made to the Fed in connection with their investment in shares of Trinity Capital Corporation, Los Alamos, N.M.

BANK SECRECY ACT—The Financial Crimes Enforcement Network is inviting the public to nominate financial institutions, trade groups, and non-federal regulators or law enforcement agencies for membership in the Bank Secrecy Act Advisory Group, which provides advice to the Treasury Department on the operations of the Bank Secrecy Act.

BANKING OPERATIONS—The Federal Reserve Board sent a General Counsel letter granting a request under Section 19 of the Federal Deposit Insurance Act to permit an individual to continue as an institution-affiliated party of State Farm Mutual Automobile Insurance Company, Bloomington, Ill.

BANKING OPERATIONS—A Comptroller Letter concludes that an Interactive Teller Machine placed in a commercial location open to the public is not a branch office under 12 CFR 5.31 and therefore it does not require a filing by a federal savings association.

BANKING OPERATIONS—The Office of the Comptroller of the Currency has issued updates to the "Bank Premises and Equipment," "Consigned Items and Other Customer Services," and "Litigation and Other Legal Matters" booklets of the *Comptroller's Handbook*. The revised "Bank Premises and Equipment" and "Litigation and Other Legal Matters" booklets apply to the OCC's supervision of all national banks, federal savings associations, and federal branches and agencies. The "Consigned Items and Other Customer Services" booklet applies to all banks that offer consigned items and other customer services. The updates to the booklets are summarized in the "Table of Updates Since Publication" in the back of each booklet (OCC Bulletin 2018-49).

CONSUMER FINANCIAL PROTECTION BUREAU—The Consumer Financial Protection Bureau has issued final policy guidance describing the loan-level Home Mortgage Disclosure Act data the Bureau expects to make available to the public beginning in 2019, including modifications intended to protect consumers' privacy. Prior to issuing the final guidance, the Bureau reviewed public comments received on the proposed policy guidance released in September 2017. The CFPB said it will exclude certain data from the public HMDA data, including the property address and applicant's credit score, and disclose certain information with reduced precision, such as by disclosing ranges rather than specific values for an applicant's age, the amount of the loan, and the number of units in the dwelling.

CONSUMER FINANCIAL PROTECTION BUREAU—The Consumer Financial Protection Bureau has released the results of its annual employee survey for 2018. More than 72 percent of CFPB employees responded to the survey conducted between Aug. 6 and Aug. 31, 2018.

CONSUMER FINANCIAL PROTECTION BUREAU—The Government Accountability Office has published the findings of a study it conducted on the Consumer Financial Protection Bureau's policies and procedures intended to reduce risks to consumers. The Dodd-Frank Act mandates that the GAO study financial services regulations annually, including CFPB's related activities. This is the eighth annual report. The GAO determined that the CFPB needs a systematic process to prioritize consumer risks. In 2015, the Bureau initiated an agency-wide process for using market data and other information to set policy priorities related to addressing risks to

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consumers. However, according to the GAO, the Bureau has not yet decided whether it will continue to use this process to set priorities. Therefore, the CFPB currently lacks a systematic, bureau-wide process for prioritizing financial risks to consumers and considering how it will use its tools—such as rulemaking, supervision, and consumer education—to address risks. The GAO noted in the report that federal internal control standards state that management should use quality information to achieve agency objectives and that it also should identify, analyze, and respond to risks related to achieving those objectives. Implementing a bureau-wide prioritization process could help to ensure that the CFPB focuses its resources on the most significant financial risks to consumers and heightens its ability to meet its statutory consumer protection objectives.

CONSUMER FINANCIAL PROTECTION BUREAU—The Consumer Financial Protection Bureau has published its latest list of institutions subject to Bureau supervision. The list is based institutions' total assets as of Sept. 30, 2018.

DEBT COLLECTION—Md. Spec. App.: Maryland's intermediate appellate court was called to review an action brought by a pair of homeowners against their homeowners association (HOA) and the association's law firm, alleging violations of the Maryland Consumer Protection Act (MCPA) and the Maryland Consumer Debt Collection Act (MCDCA) in connection with the association's and law firm's efforts to collect unpaid HOA assessments, fines, and related costs and fees. First, while the Maryland appellate court recognized that the law firm may have been exempt under the MCPA, the court parted ways with the lower court and held that the HOA was *not* also shielded from MCPA liability simply because the firm was. Next, in vacating the state trial court's judgment in favor of the HOA on the homeowners' MCDCA claims and remanding the matter, the appellate court determined that the homeowners were not directly challenging the validity of the underlying debt of unpaid assessments. Rather, in keeping with MCDCA section 14-202(8), the MCDCA claims were viable because the homeowners were challenging the HOA's methods and right to file liens when the applicable statute of limitations under the Maryland Contract Lien Act had passed (*Mills v. Galyn Manor Homeowner's Association, Inc.*, Dec. 21, 2018, Berger, S.).

DEBT COLLECTION—The Consumer Financial Protection Bureau is proposing to renew, without change, the Office of Management and Budget approval for an existing information collection entitled "Regulation F: Fair Debt Collection Practices Act—State Application for Exemption (12 CFR 1006.2).'' According to the CFPB's notice, Reg. F contains procedures and criteria whereby states may apply to the Bureau for an exemption from the provisions of the FDCPA of a class of debt collection practices within the applying state. On Oct. 1, 2018, the Bureau issued a 60-day notice at 83 *Federal Register* 49369 requesting comments on the proposed renewal. Written comments on the current notice must be received by Jan. 28, 2019.

DIRECTORS, OFFICERS AND EMPLOYERS—The White House has formally sent to the Senate the nomination of Dr. Mark A. Calabria to be the next director of the Federal Housing Finance Agency for a term of five years. President Donald J. Trump announced his intention to nominate Calabria, Vice President Mike Pence's Chief Economist, to replace Mel Watt in December 2018 (see *Banking and Finance Law Daily*, Dec. 12, 2018).

ENFORCEMENT ACTIONS—The Office of the Comptroller of the Currency has issued a notification of its maximum civil money penalties as adjusted for inflation for 2019. The adjusted penalty amounts apply to penalties assessed on or after Jan. 1, 2019, for conduct occurring on or after Nov. 2, 2015.

FINANCIAL STABILITY—The Office of the Comptroller of the Currency has amended its enforceable guidelines relating to recovery planning standards for insured national banks, federal savings associations, and federal branches by increasing the average total consolidated assets threshold for applying the guidelines from $50 billion to $250 billion. The OCC also decreased from 18 months to 12 months the time within which a bank should comply with the guidelines after the bank becomes subject to them.

FINANCIAL STABILITY—The Secretary of the Treasury, as chairperson of the Financial Stability Oversight Council, after consultation with the Federal Deposit Insurance Corporation, issued an exemption to Morgan Stanley Smith Barney LLC from certain requirements of the rule implementing the qualified financial contract recordkeeping requirements of Title II of the Dodd-Frank Act. The exemption took effect Dec. 27, 2018.

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FLOOD INSURANCE AND DISASTER RELIEF—The Federal Emergency Management Agency has resumed the sale of new flood insurance policies and the renewal of expiring policies, reversing an initial halt in sales operations during the lapse in annual appropriations. Previously, federal regulators reminded banks, savings associations, and Farm Credit System institutions that they can continue to make loans during periods when the National Flood Insurance Program is unavailable (see *Banking and Finance Law Daily*, Jan. 2, 2019).

INTEREST–USURY—Bankr. D.C.: In a federal bankruptcy proceeding, a creditor who held a monetary judgment against a debtor failed to establish that he was entitled to 6-percent compounded interest under the District of Columbia statutory provision governing interest on judgments (§28-3302), either before or after the filing of the debtor's bankruptcy petition. The court determined that the creditor's $305,117 claim, based on an alleged loan made to the debtor, was unsecured because, although the creditor provided adequate notice, he had not followed the necessary procedures to obtain a judgment lien against the debtor's property; moreover, he did not produce any agreement providing for judgment interest at any specified or statutory rate. Consequently, the court determined that the applicable judgment rate was the "variable rate that changes quarterly" under section 28-3302(c), not the 6-percent fixed rate argued by the judgment creditor under section 28-3302(a). Further, the creditor was not entitled to any compounded interest because, under District of Columbia law, prejudgment and judgment interest are not ordinarily compounded in the absence of an underlying contract providing for it (*In re Akers*, Dec. 18, 2018, Teel, S.M.).

LOANS—The Office of the Comptroller of the Currency updated the "Student Lending" booklet of the Comptroller's Handbook to provide guidance on the OCC's process for approving rehabilitation programs under Section 602 of the Economic Growth, Regulatory Relief, and Consumer Protection Act. Section 602 amends the Fair Credit Reporting Act to give borrowers the opportunity to rehabilitate private education loans under certain conditions. Banks offering Section 602 programs must receive OCC approval. The booklet also contains other updates to clarify supervisory guidance, sound risk management, and regulatory requirements, as well as to update references due to new and rescinded OCC issuances (OCC Bulletin 2018-48).

SECURED TRANSACTIONS—2nd Cir.: The U.S. Court of Appeals for the Second Circuit has held that a marine fuel supplier/subcontractor—U.S. Oil Trading LLC (USOT)—may be entitled to pursue a maritime lien against four vessels owned or chartered by Hapag-Lloyd Aktiengesellschaftto (Hapag), despite the general rule that disallows maritime liens by subcontractors. The court concluded that purchase orders and admissions by Hapag permitted a finding that Hapag directed that USOT be the subcontractor to supply the fuel, bringing USOT within an established exception to the rule. As a result, the Second Circuit vacated an order by the U.S. District Court for the Southern District of New York dismissing USOT's claims and remanded the matter for trial on the issue of whether Hapag directed that USOT be the physical supplier (*U.S. Oil Trading LLC v. M/V Vienna Express*, Dec. 19, 2018, Kearse, A.).

SECURED TRANSACTIONS—2nd Cir.: A fuel supplier/subcontractor, NuStar Energy Services, Inc. (NuStar), was not entitled to pursue a maritime lien against two vessels for which NuStar supplied fuel bunkers and was not paid, the U.S. Court of Appeals for the Second Circuit has held, because there was no evidence to establish that NuStar was entitled to assert the exception to the general rule that disallows maritime liens by subcontractors. Unlike the subcontractor in *U.S. Oil Trading LLC v. M/V Vienna Express* (2d Cir.), NuStar was unable to point to any evidence that the vessels' owner or charterer or their agent directed that NuStar be the physical supplier. As a result, the court affirmed the district court's dismissal of NuStar's claims (*Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc.*, Dec. 19, 2018, Kearse, A.).

SECURITIES AND DERIVATIVES—According to a periodic survey on dealer financing terms conducted by the Federal Reserve Board, one-third of dealers indicated an increase in the amount of resources and attention devoted to the management of concentrated credit exposure to central counterparties and other financial utilities during the September 2018 through November 2018 period. The December 2018 Senior Credit Officer Opinion Survey on Dealer Financing Terms collected qualitative information from 23 institutions on changes over the three month-period in credit terms and conditions in securities financing and over-the-counter derivatives. In addition to the core questions, the survey included a set of special questions about clients' exposures and

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positioning with respect to emerging markets and the effects of the turmoil in emerging markets earlier this year on the quantity and terms of financing offered to clients.

SECURITIES AND DERIVAVTIVES—The Treasury Department has issued a final rule revising its recordkeeping and reporting requirements for registered government securities brokers and dealers. The changes conform to recent amendments made by the Securities and Exchange Commission to its disclosure requirements that may have become redundant, duplicative, overlapping, outdated, or superseded because of changes to U.S. Generally Accepted Accounting Principles. The final rule took effect Jan. 1, 2019.

Companies: Castle Creek Capital; Galyn Manor Homeowner's Association, Inc.; Hapag-Lloyd Aktiengesellschaftto; NuStar Energy Services, Inc.; State Farm Mutual Automobile Insurance Company; Trinity Capital Corporation; U.S. Oil Trading LLC

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