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REGULATORY REPORT – FASB's New Current Expected Credit Loss Model

Sharpen your pencils and put on your green eyeshades—the Financial Accounting Standards Board is making major changes to the credit loss accounting model. The current "incurred loss" accounting model will be replaced by a current expected credit loss model (CECL), which will require institutions to estimate expected losses over the life of most credit exposures that are not subject to fair value accounting. Specifically, this change will affect the recognition and measurement of credit losses for loans, loan commitments, and held-to-maturity debt securities.

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TREND WATCH – What's Old Is New Again: Syndication and Participations

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READ ARTICLE

SECURITIZATION SIDE NOTES – Alston & Bird Leads Developments in the RMBS Reps and Warranties Framework

Time flies when you're having fun: litigation over "put back" or repurchase claims from RMBS 1.0 stemming from pre-credit crisis deals is now in its second decade. This has been a cash cow for lawyers: as billions of dollars' worth of mortgage loans have been the subject of repurchase litigation, many millions, if not billions, in legal expenses have been incurred.

READ ARTICLE

ASSET CLASS SPOTLIGHT – New Regulations in Maryland Impact Student Loan Market

Participants in the student loan servicing industry need to be aware of important new amendments to Maryland's Financial Institutions Article, which were proposed under SB 1068 and approved by the governor on May 31, 2018, and will be effective October 1, 2018.

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BANKRUPTCY BEAT – Safe Harbor Update

Although commercial Chapter 11 filings decreased 49% year-over-year from June 2017 to June 2018, some are beginning to wonder whether this is 2007 all over again, given that we're experiencing the second-longest expansion in U.S. history without a recession.

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- Finance Forum Debrief
- New Additions

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FASB's New Current Expected Credit Loss Model

Sharpen your pencils and put on your green eyeshades—the Financial Accounting Standards Board is making major changes to the credit loss accounting model. The current "incurred loss" accounting model will be replaced by a current expected credit loss model (CECL), which will require institutions to estimate expected losses over the life of most credit exposures that are not subject to fair value accounting. Specifically, this change will affect the recognition and measurement of credit losses for loans, loan commitments, and held-to-maturity debt securities. The impact of CECL may be greatest for banks, but other financial institutions will also be affected.

CECL is significant because:

- It requires a forward-looking approach (as opposed to a historically backward-looking approach) in establishing allowances for credit losses.
- The likely effect for most institutions will be to increase allowances and reduce capital.
- Institutions will need to significantly adjust loss forecasting models, infrastructure, and systems.

CECL will become effective (1) December 15, 2019, for SEC registrants; (2) December 15, 2020, for non-SEC public business entities; and (3) for all other organizations, fiscal years beginning after December 15, 2020, and for interim periods within fiscal years beginning after December 15, 2021. Early adoption is permitted beginning in 2019.

Interestingly, the International Accounting Standards Board implemented a similar shift in model under IFRS 9, which was finalized in 2014 and effective January 1, 2018. U.S. institutions for once may have some precedent to draw from in terms of assessing how best to comply. It should be noted that institutions with both a U.S. and foreign presence may be required to maintain parallel approaches.

The current accounting methodology allows a loss to be recognized when an event occurs that actually impairs

the loan or upon specific events that foreshadow a loss, like a credit downgrade. Impairment is normally measured in pools and is heavily based on historic annualized charge-off rates. Conversely, CECL requires a credit loss to be recognized if a loss is expected at any time in the future over the lifetime of the loan or portfolio. Essentially, while incurred loss accounting reflects the current losses in a portfolio, CECL reflects the current risk in the portfolio, which includes both current and future credit losses.

This shift in loss reserve approach is hugely significant because it forces banks to set aside capital for loss events that could occur even if they have not yet occurred, which will have the effect of reducing the retained earnings component of equity. Any amount an institution does not expect to collect will be recorded in the allowance for loan and lease losses (ALLL). Additions to ALLL are recorded as expenses, which reduces bank capital. Initial estimates forecast a 30–50% increase in ALLL as a result of CECL implementation; however, those estimates have been significantly lowered. While it is assumed that ALLL balances will increase, the extent of the change is unknown.

(continued on next page)

Under CECL, the measurement of expected credit losses will be based on relevant information about past events, including historical experience, current conditions, and reasonable and supportable forecasts that affect the collectability of the reported amount. Many of the loss estimation techniques utilized today will still be permitted, although the inputs to those techniques will change to reflect the full amount of expected credit losses. The standard does not require a specific credit loss method; rather, institutions will continue to use their own judgment in determining the relevant information and loss estimation method that are appropriate for the circumstances.

In order to effect the changes required to become CECL compliant, a bank will need to involve its accounting policy, finance, credit risk, operations, information technology, and internal and external auditors to determine the modeling approach and to define the new allowance process. ■

FinCEN Customer Due Diligence Requirements for Financial Institutions

If you are a criminal, a kleptocrat, or someone otherwise looking to anonymously access the financial system to hide illegally obtained proceeds, you might want to rethink your plan. Until recently, U.S. financial institutions were not required to know the identity of the individuals who own or control their legal entity customers (also known as beneficial owners). Effective this past May, financial institutions are now subject to enhanced customer due diligence requirements under the new Customer Due Diligence Requirements for Financial Institutions rule promulgated by the Financial Crimes Enforcement Network (FinCEN), an arm of the U.S. Treasury. The rule amends the Bank Secrecy Act regulations, applies to institutions such as banks, broker–dealers, and mutual funds, and is aimed at improving financial transparency and enabling banks and law enforcement agencies to better identify illicit money flows.

Among the new requirements that apply to covered institutions is the obligation to establish and maintain written internal policies that satisfy the following four requirements:

- Identify and verify the identity of its customers at the time a new account is opened.

- Identify and verify the identity of the beneficial owners of companies opening accounts with the financial institution. This is essentially a look-through to a natural person who ultimately owns, controls, and/or profits from an institution's customer. Persons who qualify as a beneficial owner own 25% or more of the customer's equity interests or exercise significant control, management, or direction over the customer.
- Understand the nature and purpose of customer relationships in order to develop a risk profile for each customer. If a potentially suspicious transaction is identified, this risk profile will be a tool the institution can use to determine whether the subject activity is legitimate.
- Monitor customer transactions on an ongoing basis and identify and report suspicious transactions. When an institution uncovers information (including a change in beneficial ownership information) about a customer in the course of its normal monitoring relevant to the customer's risk profile, it must update the customer information. Absent the occurrence of such a risk-related trigger, a change in address to another state or country, or the opening of a new account, institutions do not have an ongoing duty to update.

Of course, much of this is not as straightforward as it sounds. One such example is the "new accounts" requirement. The rule applies only to accounts opened after May 11, 2018; however, the actual nature of client relationships, where one large corporate client may open hundreds of accounts in a short period of time, may make drawing the distinction between new and old accounts difficult. If the beneficial owners of a customer were previously known and confirmed to the institution at the time a new account was opened as a result of the opening of another account, the rule's requirements would be satisfied so long as the customer certifies or confirms (verbally or in writing) that the previously provided information is current and accurate and the financial institution has no knowledge of facts that would reasonably call into question the reliability of such information. This can be difficult to cross-check internally, however, and in certain circumstances it might be easier to collect beneficial ownership information with each new account opening.

Another such example is the recertification requirement. Each time a loan is renewed or a certificate of deposit is rolled over, the customer is required to recertify that the beneficial ownership information previously provided to the bank remains accurate as of the renewal date. Certain types of loan renewals (e.g., certificate of deposit renewals) may be automatic and therefore do not allow for the collection of information unless special processes are set up within the institution. Further, when certifying an existing beneficial ownership form, a financial institution must ensure that the form has already been approved and documented in its systems. If the form was never formally approved and entered into the institution's data system, this recertification fails the rule's requirements. Here, as with many aspects of this rule, financial institutions will benefit from maintaining careful recordkeeping of beneficial ownership information that is readily accessible to ensure smooth workflow and internal processes.

In addition to these nuanced issues, the way in which the rule is intended to intersect with the USA PATRIOT Act of 2001 could be further clarified. Most financial institutions use a data search system that compares all customer records to the list of subjects provided by FinCEN in a Section 314(a) request under the Patriot Act and reports any matches uncovered by their searches. However, since there is no beneficial ownership reporting requirement under the Patriot Act, an institution must search its database for any accounts maintained by a "named subject" (i.e., an individual) of the Section 314(a) request and report any matches. Since beneficial ownership alone is not sufficient to report a match under Section 314(a), there might be positive matches of customers' beneficial ownership that would not necessarily be required to be reported under the Patriot Act. It seems somewhat incongruous to require reporting of individuals matching a Section 314(a) request but not of the legal entity customers in which those named individuals have a beneficial ownership interest.

FinCEN has published several FAQs to assist with interpretive issues:

July 19, 2016

April 3, 2018 ■

Volcker Rule Rollback

The dismantling of the landmark Volcker Rule has begun. The broad objective of the Volcker Rule, when enacted in December 2013, was to discourage banks and insured depository institutions from engaging in risky behavior with depositors' funds. The rule, however, was widely disparaged by industry insiders as being overly cumbersome because it lacked clarity on which trades were prohibited and which were allowed. In addition, the International Monetary Fund and other financial organizations and industry groups criticized the Volcker Rule as being difficult to enforce and verify in real time.

This federal regulation operates to prohibit banks and insured depository institutions from using their own accounts to engage in proprietary trading. The rule also prohibits banks, except in limited circumstances, from acquiring and/or maintaining ownership interests in hedge and private equity funds (often referred to as "covered funds").

On May 24, 2018, the Trump Administration enacted amendments to the Volcker Rule ("Volcker 2.0") designed to streamline compliance requirements. While proprietary trading remains banned under Volcker 2.0, positions held for 60 days or less will no longer be deemed to be proprietary. This allows institutions to engage in short-term trades for hedging purposes without having to demonstrate to regulators the need for such trades, and shifts oversight away from the regulators to the institutions. Regulators, however, maintain the right to review internal controls, compliance programs, and short-term trades.

Although the amendments do not modify the definition of "covered funds" under the Volcker Rule, each of the federal agencies charged with implementing the amendments is seeking comment on whether the definition should be amended to exclude funds that do not meet the requirements of a hedge and private equity fund under the SEC PF Form requirements. These agencies are also seeking comment on provisions of the Volcker Rule prohibiting banks and insured depository institutions from owning interests in covered funds.

The five federal agencies charged with implementing Volcker 2.0 (the Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of the Comptroller of the Currency, and Securities and Exchange Commission) have published the amendments and are currently seeking public comment. The final amendments to the Volcker Rule are expected to go into effect as early as the end of this year. ■

What's Old Is New Again: Syndication and Participations

In recent months, the structured finance market seems to be more frequently deploying some of the more traditional secured lending techniques in its arsenal in an effort to find new ways of doing things. Specifically, we have noted that the use of syndication and participation in structured warehouse deals, repurchase arrangements, term loans, and other facilities is on the rise. Though we are not quite at the originate-to-distribute model in this space, at least not just yet.

Why are we seeing this now? It could be that the unwieldy burdens of capital requirements, coupled with the natural tension (which was amplified post-crisis) between bankers and their risk groups, have required some creative problem solving to reduce credit risk exposure while maintaining and even growing customer relationships. For the arranging lender, loan syndications and participations can do just that. To the extent the arranging lender retains a large chunk of the loan, or the entire loan in the case of participation, the arranging lender may also continue to retain control over the administration of the facility. For a syndicate member or participant, these arrangements can allow the engagement in transactions that might otherwise be prohibited by its internal policies, and also enables involvement in a multitude of deals and exposure to new counterparties without taking on the full credit exposure of the counterparty, expending the costs of structuring the arrangement, or assuming any of the operational or administrative obligations. On the other hand, in many cases the price for such involvement is relinquishing ordinary course decision-making authority to the agent or lead lender, as well as the ability to act unilaterally in administering a facility.

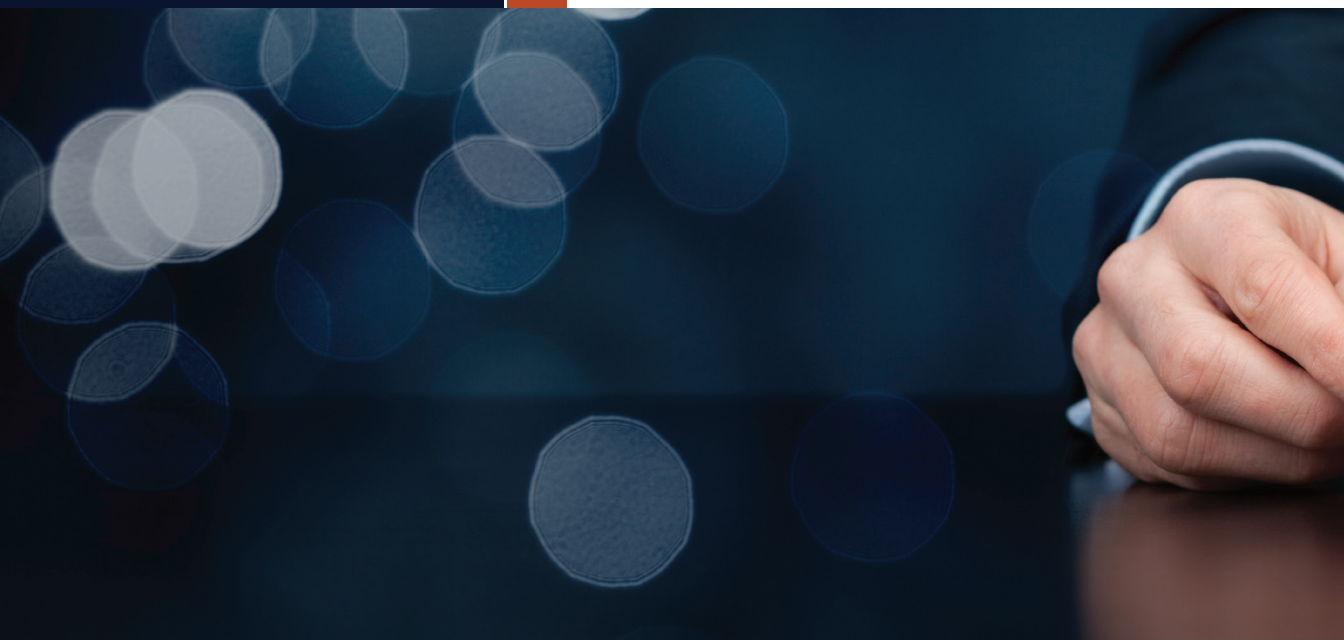
While the objectives of syndication and participation are similar, the relationship among the lender, syndicate/participating lenders, and borrower in each structure is wholly different. In a syndicated facility, the lenders are in direct contractual privity (i.e., a legal relationship) with the borrower and directly take on borrower credit risk. Further, the lenders in a syndication all participate together in the loan origination and funding process. Whether the lender is regularly included in decisions, however, will depend on the size of that lender's loan commitment relative to the facility size. In a participation, unless the credit facility requires otherwise, a lender can sell a participation in the credit facility without the borrower's consent or knowledge, the participant is often unknown to the borrower, and the contractual

relationship is only between the lender and the participant. If the participation is structured as a pari passu pass-through of the economics of the credit facility, the participant may nevertheless take on borrower credit risk and not lender credit risk. If it is structured in some other manner, the participant may be exposed only to the credit risk of the lender.

Voting rights tend to be hotly debated points of negotiation in both types of arrangements, although the voting rights available to syndicate members are more robust than those typically offered to participants. Provisions commonly known as "sacred rights" cannot be modified without the specific consent of each lender in a syndicate. These generally include, at a minimum, increasing the principal amount of the facility, reducing the interest rate, and extending the maturity date. Beyond these rights, voting gets a little more democratic in a syndication where most decisions are typically made by the lenders holding the majority of the debt. Participants under a participation can usually expect to weigh in on modifications to sacred rights provisions, but not much more than that.

Other key discussion points include enforcement actions, information and notice rights, liability and standard of care, default and payment priorities, and participant buy-out rights, all of which can have a significant impact on the agent, arranging lender, and participants.

This is just a high-level overview of these arrangements. Even though there is a well-established market for syndications and participations through the Loan Syndications and Trading Association and, across the pond, the Loan Market Association, grafting these constructs onto structured finance deals can often yield significant complexity and legal and commercial nuance, and result in a fully bespoke arrangement. Well-structured syndications and participations should result in a win-win-win for the borrowers, the lender/arranger, and the syndicate lender or participant, and you should consult with your favorite Alston & Bird attorney to help you achieve this result. ■



Alston & Bird Leads Developments in the RMBS Reps and Warranties Framework

Time flies when you're having fun: litigation over "put back" or repurchase claims from RMBS 1.0 stemming from pre-credit crisis deals is now in its second decade. This has been a cash cow for lawyers: as billions of dollars' worth of mortgage loans have been the subject of repurchase litigation, many millions, if not billions, in legal expenses have been incurred. We've all learned the hard way that the repurchase protocols and other provisions in these deals were not drafted with large-scale litigation in mind, and the interpretive issues with those provisions have significantly contributed to the costs of litigation.

The industry sought to address some of the representations and warranties framework issues through the introduction of the so-called "RMBS 2.0" model. This model included provisions that provided for an independent loan review process, required the automatic review of every representation and warranty on every delinquent loan (which has proven difficult to implement in practice), and required binding arbitration upon dispute with the parties largely bearing their own costs. Although steps were taken, many issues remained.

More recently, Alston & Bird has taken the lead in developing new reps and warranties constructs ("RMBS 3.0") in response to the issues raised by both RMBS 2.0 and 1.0 deals. Here are some of the highlights of the RMBS 3.0 "Alston & Bird" framework – for the granular details, call us:

- Clarification of the roles of parties in the investigation and enforcement of reps and warranties breaches, including provisions specifying how and when a party is deemed to have notice of a breach as well as to whom notices are to be given. These provisions attempt to address when deal parties are required to act on the uncertainty that has plagued pre-crisis deals in particular.
- Creation of two independent but complementary breach review frameworks. Loan reviews may be initiated upon discovery of potential breaches by transaction parties such as the sponsor or servicers in the ordinary course of business or the triggering of specified "review events" such as loans that become significantly delinquent or suffer realized losses. In

either circumstance, the protocols specify the parties responsible for investigation and enforcement of such potential breaches, and also clarify which parties are responsible for the related costs and expenses in various circumstances. Importantly, any party that wishes to investigate a potential breach is required to do so through an independent reviewer, rather than through formal litigation.

- Protocols that outline the scope of review that may be requested and provide investors with the ability to specify the representations to be reviewed, although certain fundamental breaches are always reviewed. The new construct also seeks to provide investors with more fulsome information in connection with their decision whether or not to call for a review by an independent reviewer, such as the current loan-to-value (LTV) of the loan. Together, these provisions create a more economically sensible approach to breach investigations for all parties.
- Clarification of the standard for materiality of breaches of reps and warranties. While repurchase obligations have been predicated on "material and adverse" breaches, that requirement has led to significant litigation because materiality had been left undefined. Under the new construct, materiality parameters are also more well-defined. For example, certain reps and warranties are deemed intrinsic, while breaches are always deemed material. Certain other reps and warranties that may be calculable as a dollar amount are deemed immaterial if the dollar amount is less than a certain percentage of the principal balance of the mortgage loan.

In addition, under the new framework, if an independent reviewer identifies a breach, and the breach is disputed, then the determination of materiality and adversity is subject to binding arbitration with no appeals, and the losing party pays for the costs of the arbitration. This construct helps align the costs and incentives of litigating reps and warranties breaches because investors are less likely to pursue speculative breach claims in the hopes of generating a recovery and sponsors are motivated to avoid being liable for arbitration fees. This arbitration construct is also intended to promote settlement among parties.

Although the development of RMBS reps and warranties frameworks is ongoing, our approach has been employed in a number of securitizations to date. This new framework seems to be working well and is rapidly being adopted by the industry as the market's standard. ■

Kavanaugh Nomination: What Can We Expect?

On July 9, President Trump nominated D.C. Circuit Judge Brett Kavanaugh to the U.S. Supreme Court. If confirmed, Judge Kavanaugh will fill the vacancy left by retiring Justice Anthony Kennedy.

Much has been and will be written about Judge Kavanaugh's nomination, but comparatively little of that coverage has focused on what Judge Kavanaugh's nomination might mean for financial industries. As the press, Congress, and public pore over Judge Kavanaugh's judicial opinions and government writings, we see a picture emerging of a judge who would likely take a more questioning view of federal regulation than Justice Kennedy did.

On the D.C. Circuit, Judge Kavanaugh has not shied away from saying when he thinks that a federal agency has exceeded its regulatory power. In that respect, Judge Kavanaugh likely shares Justice Gorsuch's skepticism of *Chevron* deference. On the whole, that skepticism would likely prove a welcome outcome for financial institutions: If Judge Kavanaugh is confirmed, the Supreme Court will likely scrutinize federal regulations more than it has in the past. By the same token, Judge Kavanaugh's commitment to separation of powers might also force Congress to take more responsibility for its policy goals (as opposed to delegating to federal agencies what in some cases looks like legislative power). ■

SAFE HARBOR UPDATE

Although commercial Chapter 11 filings decreased 49% year-over-year from June 2017 to June 2018, some are beginning to wonder whether this is 2007 all over again, given that we're experiencing the second-longest expansion in U.S. history without a recession. The yield curve has flattened and is projected by some to invert by mid-2019, if not sooner, and the insolvency world is licking their chops. Economics aside, the beloved Bankruptcy Code safe harbors are the topic du jour. Since the American Bankruptcy Institute issued its 2014 Commission to Study the Reform of Chapter 11, which called for a narrowing of the safe harbors based on findings that the "safe harbor protections have been extended to contracts and situations beyond the original intent of the legislation," courts have continued to grapple with the parameters of broadly worded statutory language.

Such was the case in the February 2018 U.S. Supreme Court decision *Merit Management Group LP v. FTI Consulting Inc.*, in which the Court denied "securities contract" safe harbor protection for certain transferees when a settlement payment merely passes through a financial institution as a conduit or an intermediary. Before *Merit*, there had been a split between the circuit courts on this issue that specifically relates to the exception under Section 546(e) to a bankruptcy trustee's ability to avoid or claw back certain transfers of a debtor's property for "settlement payments," "margin payments," and other transfers "made by or to (or for the benefit of) a … financial institution … in connection with a securities contract." The Supreme Court's decision in this case resolved this split and effectively narrowed the scope of Section 546(e) to exclude protection for transferees who are not otherwise financial institutions or other protected entities when a settlement payment or transfer passes through a financial institution as a conduit or an intermediary but the transferee itself is not a financial institution.

FTI Consulting was acting as trustee of a liquidation trust in connection with a Chapter 11 case and sought to avoid a constructively fraudulent transfer and recover a portion of money paid by the debtor, Valley View, to purchase a Pennsylvania racetrack and casino operator. The challenged transfer passed through financial institution intermediaries acting as escrow agents before ultimately winding up in the hands of the racetrack seller. The Court rejected the argument that the safe harbor protection of Section 546(e) applies to transfers where financial institutions serve only as intermediaries and not when the institution directly benefits from the transfer and employed a close read of the statute in observing that Section 546(e) protects from avoidance those transfers that are "either a 'settlement payment' or made 'in connection with a securities contract,'" but "[n]ot a transfer that involves" or "comprises" such a settlement payment. In other words, such a transfer needs to be assessed in its totality in determining whether the safe harbor is available.

A predecessor to the *Merit* case was the 2016 Second Circuit decision *Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation* in which creditors of the Tribune Company sought to claw back the proceeds of the sale of the company's stock from the former shareholders who sold the Tribune. The court sustained the dismissal of the creditors' suit on the basis that the purchase money passed through a securities clearing agency as an intermediary, and therefore the Section 546(e) safe harbor protected the transfer.

Following *Merit*, in considering whether to grant certiorari over the *Tribune* opinion, Justices Anthony Kennedy and Clarence Thomas stated that the Supreme Court could lack sufficient quorum to hear the case and suggested instead that the Second Circuit might want to revisit its March 2016 decision in light of the Court's ruling in *Merit*.

The *Merit* decision and any future progeny of this decision have significant implications for market participants that are not otherwise financial participants or protected financial institutions and who seek to protect transactions from a trustee's avoidance powers in certain securities transactions. In particular, selling stockholders in leveraged buyouts must be wary of a potential clawback of sale proceeds by a bankruptcy trustee or debtor-in-possession, who now may exercise a broader right to unwind transfers that were previously protected under Section 546(e). ■

New Regulations in Maryland Impact Student Loan Market

Participants in the student loan servicing industry need to be aware of important new amendments to Maryland's Financial Institutions Article, which were proposed under SB 1068 and approved by the governor on May 31, 2018, and will be effective October 1, 2018. These amendments, among other things:

- Create the position of "student loan ombudsman" for the state, who will have the power to "[a]nalyze [and] monitor the development and implementation of federal, State, and local laws, regulations, and policies on student loan borrowers … [and make] recommendations regarding … [n]ecessary changes to State law to ensure that the student loan servicing industry is fair, transparent, and equitable, including whether the State should require licensing or registration of student loan servicers."
- Define "student loan servicer" to include "a trust entity … receiving the benefit of student loan servicing."
- Require each student loan servicer to designate an individual to represent it in communications with the student loan ombudsman.

When considered in the context of the Maryland Court of Special Appeals' June 2017 opinion addressing the consolidated cases *Blackstone v. Sharma* and *Shanahan v. Marvastian*, we observe that this new legislation seems to codify Maryland's apparent distrust of passive, secondary market investors in consumer debt. Although neither the statute itself nor the legislative history explains what it means for a trust entity to "[receive] the benefit of student loan servicing," the effect of expanding the definition of "student loan servicer" to include a trust entity clarifies, as least for us, that a trust entity that passively invests in student loan debt on the secondary market would be within this law's purview, thereby avoiding similar, future litigation for Maryland's student loan servicing industry.

Additionally, these amendments raise the all-important question of whether passive, secondary market investors will eventually need to be licensed or registered as a servicer to invest in student loan debt. Although as currently enacted, SB 1068 does not include a licensing or registration requirement for student loan servicers, the legislative history suggests that such a requirement is likely on the horizon, which could obligate those passive, secondary market investors to be licensed or registered with the commissioner of financial regulation to engage in business, irrespective of how they are organized. Indeed, a prior version of SB 1068 included an affirmative licensing requirement for student loan servicers that are (1) trust entities receiving the benefit of student loan servicing; or (2) engaging in debt collection activities in Maryland for student loan debt, and specified that a person may not engage in student education loan servicing unless the person is either licensed by the commissioner or otherwise exempt from licensing.

It remains to be seen whether the Maryland legislature will cast a licensing dragnet around passive, secondary market investors in student loan debt. Given the expansive authority granted to the student loan ombudsman, we fully expect to see more regulation forthcoming. ■

Private Label RMBS Backed by Agency-Eligible Loans

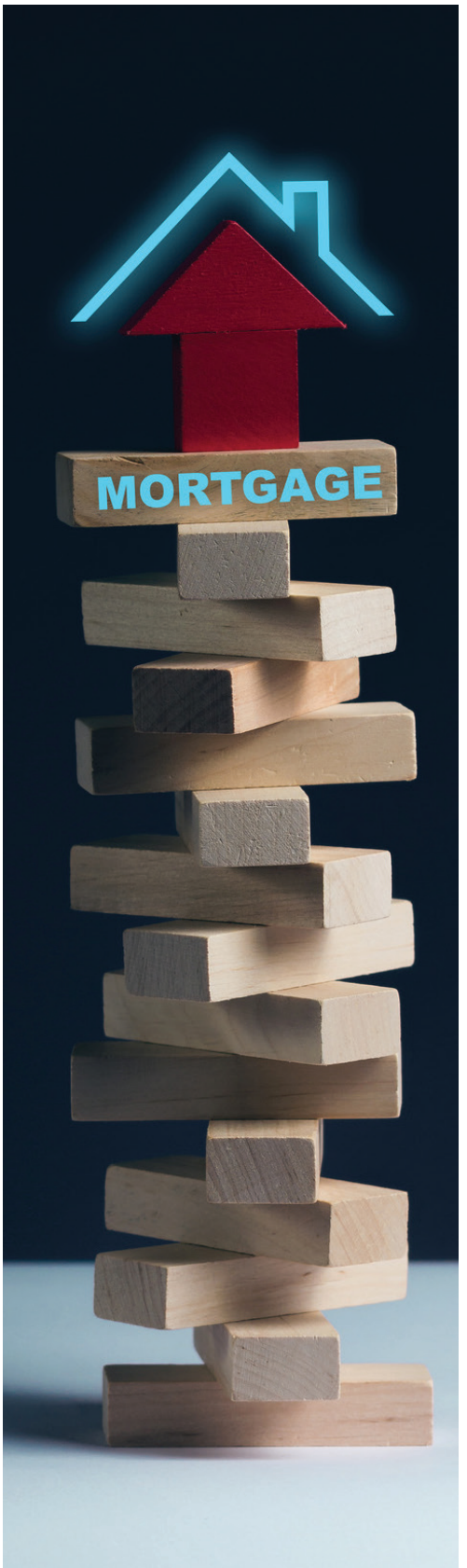
The RMBS private label securitization (PLS) market continues to see growth in the inclusion of mortgage loans that would otherwise be eligible for Fannie/Freddie securitizations. These mortgage loans fall into two categories—those that are qualified residential mortgages (QRM) for purposes of risk retention, and those that are not.

The QRM requirements can be satisfied by agency-eligible loans originated pursuant to either agency's automated underwriting systems.

These systems do not have the same requirements, such as for debt-to-income ratios, required for non-agency qualified mortgages. As a result, it is unclear whether these loans will perform differently from the mortgage loans currently included in these securitizations. Regardless, including a meaningful concentration of agency-eligible QRMs in PLS containing QRM jumbo non-agency loans has not been a problem thus far for PLS issuers in the currently robust securitization market.

Agency-eligible residential mortgage loans that are not QRM (e.g., those that are secured by investor properties), have also started to make their way into high-quality non-QRM PLS, either as a material percentage of or all of the mortgage loans included. These securitizations are subject to the risk retention requirement to hold securities. Notably, these mortgage loans differ from those generally included in other investor programs because the loans are generally made to individuals rather than through a single borrower. The performance of these mortgage loans has yet to be determined.

The agencies have not yet responded to losing these mortgage loans to the PLS market; however, for the time being, many market participants believe that the amount of loans moving to the PLS market has not yet been significant enough to impact the agencies. In addition, the comparative execution of agency versus PLS may fluctuate over time. Regardless, the last time the PLS execution was better for agency loans was back in 2006; it remains to be seen whether this will be a lasting change to the PLS market. ■



Finance Forum Debrief

Great to see so many of you at our 4th annual Finance Forum this past May in New York City.

Panels covered the current regulatory landscape, the continuing evolution of the single-family rental market, developments and trends in consumer loan ABS, prime jumbo RMBS, CRE CLOs, and distressed lending and DIP finance opportunities. Our panelists included thought leaders from SFIG, rating agencies, large financial institutions, and nonbank lenders.

Our panels were laser-focused on how banks and investors are maneuvering through the current market and the roadblocks that lie ahead. Here are some of the takeaways:

- **Regulatory**: While the CFPB has been undergoing massive changes and easing its "rulemaking by enforcement" approach, it is the state attorneys general who are getting more aggressive and where regulated entities are finding most of their current regulatory burden.
- **Mortgage Loans**: Most think non-QM loans are here to stay, but the paradigm of jumbo prime loans, non-QM prime loans, and non-QM non-prime loans that has developed in the context of new originations is causing a lot of confusion. This paradigm is necessary, however, because it is difficult to market a deal with borrowers that are low LTV, high FICO but with nontraditional income types.
- **Single-Family Rental Properties**: Also an asset class that is here to stay. Banks have become more comfortable with the asset and have developed substantial bank loan products around it, and the thought is that more types of financing will continue to emerge over time. There is greater access to equity capital in this space today than historically. Finally, technology has been a big driver of revenue and margins due to the automation of rent, the accessibility of inventory through FinTech-style platforms, and the ability of borrowers to now marshal and monitor Big Data.
- **Consumer Loans**: "Point-of-sale" loans is a burgeoning asset class with significant growth potential. Lenders offer a customer, through a merchant such as a home improvement chain, financing for a large-ticket item at point of need for the customer, which is the sale or shortly before sale, which results in the merchant getting the sale they might not have gotten, the customer getting the product they might not otherwise be able to afford, and the lender/originator getting fees and a coupon.

Alston & Bird's New York Office Adds Distressed Debt Team

This spring, Alston & Bird welcomed a five-attorney Distressed Debt & Claims Trading Team. David Hoyt, Ken Rothenberg, Russ Chiappetta, Mathew Gray, and Jason Cygielman represent some of the market's largest and most active market makers, sellers, and buyers investing in distressed and bankruptcy companies.

David Hoyt
Partner

Ken Rothenberg
Partner

Russ Chiappetta
Partner

Mathew Gray
Counsel

Jason Cygielman
Counsel

CONTRIBUTING AUTHORS

Aimee Cummo
Partner, Finance

John Doherty
Partner, Litigation & Trial Practice

Jonathan Edwards
Partner, Bankruptcy

J. Nicole Knox
Associate, Finance

Lisa Lanham
Senior Associate, Financial Services

Robert O'Connor
Associate, Finance

Emily Redmerski
Associate, Finance

Richard Simonds
Partner, Finance

Will Sugden
Partner, Bankruptcy

Kyle Wallace
Partner, Litigation & Trial Practice

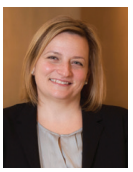
Nanci Weissgold
Partner, Financial Services

STRUCTURED & WAREHOUSE FINANCE TEAM

Finance

Michael Calandra
Partner, Finance
michael.calandra@alston.com
212-210-9426

Tara Castillo
Partner, Finance
tara.castillo@alston.com
202-239-3351



Shanell Cramer
Partner, Finance
shanell.cramer@alston.com
212-210-9580

Aimee Cummo
Partner, Finance
aimee.cummo@alston.com
212-210-9428

Karen Gelernt
Partner, Finance
karen.gelernt@alston.com
212-210-9535

Mark Harris
Partner, Finance
mark.harris@alston.com
214-922-3504

Mike Jewesson
Partner, Finance
mike.jewesson@alston.com
214-922-3511

Peter McKee
Partner, Finance
peter.mckee@alston.com
214-922-3501

Pat Sargent
Partner, Finance
patrick.sargent@alston.com
214-922-3502

Richard Simonds
Partner, Finance
richard.simonds@alston.com
212-210-9431

Michael Thimmig
Partner, Finance
michael.thimmig@alston.com
214-922-3421

Karen Wade
Partner, Finance
karen.wade@alston.com
214-922-3510

Charlie Marshall
Senior Counsel, Finance
charlie.marshall@alston.com
214.922.3503

Robin Boucard
Counsel, Finance
robin.boucard@alston.com
212-210-9454

John Caverlee
Counsel, Finance
john.caverlee@alston.com
214-922-3455

Ron Klein
Counsel, Finance
ronald.klein@alston.com
212-210-9588

Celine Barakat
Senior Associate, Finance
celine.barakat@alston.com
212-210-9437

Antone Little
Senior Associate, Finance
antone.little@alston.com
704-444-1152

STRUCTURED & WAREHOUSE FINANCE TEAM

Jon Ruiss
Senior Associate, Finance
jon.ruiss@alston.com
202-210-9508

Kristin Burnett
Associate, Finance
kristin.burnett@alston.com
214-922-3457

J. Nicole Knox
Associate, Finance
nicole.knox@alston.com
212-210-9448

Andrea Nixon
Associate, Finance
andrea.nixon@alston.com
212-210-9442

Robert O'Connor
Associate, Finance
robert.oconnor@alston.com
212-210-9555

Bradford Patterson
Associate, Finance
bradford.patterson@alston.com
214-922-3513

Emily Redmerski
Associate, Finance
emily.redmerski@alston.com
212-210-9589

Bankruptcy

Gerard Catalanello
Partner, Bankruptcy
gerard.catalanello@alston.com
212-210-9509

Jonathan Edwards
Partner, Bankruptcy
jonathan.edwards@alston.com
404-881-4985

Will Sugden
Partner, Bankruptcy
will.sugden@alston.com
404-881-4778

James Vincequerra
Partner, Bankruptcy
james.vincequerra@alston.com
212-210-9503

Tax

Clay Littlefield
Partner, Tax
clay.littlefield@alston.com
704-444-1440

Diligence

Jeff O'Neale
Partner, Finance
jeffrey.oneale@alston.com
704-444-1044

Elizabeth Osborne
Associate, Finance
elizabeth.osborne@alston.com
212-210-9504

ERISA

Blake MacKay
Partner, Employee Benefits
blake.mackay@alston.com
404-881-4982

STRUCTURED & WAREHOUSE FINANCE TEAM

'40 Act

David Baum
Partner, Financial Services
david.baum@alston.com
202-239-3346

UCC

Noël Para
Partner, Financial Services
noel.para@alston.com
212-210-9556

Servicing

Jamie Daniel
Partner, Finance
jamie.daniel@alston.com
704-444-1436

Bob Sullivan
Partner, Finance
robert.sullivan@alston.com
704-444-1293

Regulatory

Steve Ornstein
Partner, Financial Services
stephen.ornstein@alston.com
202-239-3844

Laura Pruitt
Partner, Financial Services
laura.pruitt@alston.com
202-239-3618

Cliff Stanford
Partner, Financial Services
cliff.stanford@alston.com
404-881-7833

Nanci Weissgold
Partner, Financial Services
nanci.weissgold@alston.com
202-239-3189

Eli Corbett
Counsel, Financial Services
elizabeth.corbett@alston.com
919-862-2257

Real Estate

Meryl Diamond
Partner, Real Estate Finance
meryl.diamond@alston.com
212-210-9579

Ellen Goodwin
Partner, Real Estate Finance
ellen.goodwin@alston.com
212-210-9447

Gerard Keegan
Partner, Real Estate Finance
gerard.keegan@alston.com
212-210-9558

Steve Collier
Counsel, Real Estate Finance
steve.collier@alston.com
404-881-7638

Litigation

John Doherty
Partner, Litigation
john.doherty@alston.com
212-210-1282

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