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Issue 5, 2022

Welcome!

Welcome to our fifth *Promissory Notes* issue of 2022.

Please welcome a new co-editor to *Promissory Notes*. [Paul G. Papadopoulos](#) is a Member of the firm and Co-Chair of the State & Local Taxation Practice Group.

His experience is wide-ranging and includes representing clients from many industries, such as multi-national corporations to smaller entrepreneurial businesses. Paul represents clients in West Virginia state and local tax matters, including property tax appeals, assessments and claims for refund both in court and at the administrative level. He assists clients in the formation of businesses, the buying and selling of businesses, financing, contracts, and general business and commercial law matters.

He is AV® Preeminent™ Peer-Review Rated by Martindale-Hubbell and was nominated by his peers for inclusion in *The Best Lawyers in America* in the areas of Closely Held Companies and Family Businesses Law, Corporate Law and Tax Law.

Paul also serves as Chair of the West Virginia State Bar Committee on State and Federal Taxation and as a member of the Board of Directors of the West Virginia Tax Institute.

He received his B.A. in Economics from Davidson College and his J.D. from University of North Carolina at Chapel Hill.

He is admitted to the West Virginia and North Carolina State Bars, the United States Supreme Court, and the United States District Court for the Southern District of West Virginia.

Paul is a great addition to this publication and we welcome his unique insight.

As always, thank you for reading.

[F. B. Webster Day](#), Chair, [Banking & Finance Practice Group](#), and Co-Editor, *Promissory Notes*

"Bills travel through the mail at twice the speed of checks." — Steven Wright

Banking Law Rooted in Civil Rights Era Gets a 21st Century Update

"The Community Reinvestment Act basically mandates that if you open a bank in a low-income neighborhood, you can't just take that neighborhood's deposits and lend them only to borrowers in richer, usually whiter, neighborhoods."

Why this is important: Banks are examined and scored based on the Community Reinvestment Act ("CRA"). CRA requires, among other things, a bank that opens a branch in a community to "invest" in that community. There are a number of ways for a bank to meet this goal, including lending in the community, sponsoring redevelopment and community improvements, and other actions. The equitable argument is that banks should not accept deposits from places where they are not otherwise willing to do business. The article explains that CRA does not apply to fintech businesses, which are not banks and operate largely on the internet. It also is difficult to determine easily where a fintech's customers really are. Fintech players, because they are not "banks" and operate largely by internet, have escaped most bank-like regulation. This article discusses recent efforts to apply CRA standards and other applicable banking regulations to the fintech industry, such as focusing on areas where significant business is conducted and not just branch locations. --- Hugh B. Wellons

CFPB Takes Action to Protect Depositors from False Claims About FDIC Insurance

"Specifically, firms cannot misuse the name or logo of the FDIC or make deceptive representations about deposit insurance."

Why this is important: The Federal Deposit Insurance Act ("FDIA") prohibits any person from engaging in false advertising by misusing the name or logo of the Federal Deposit Insurance Corporation ("FDIC") or from making knowing misrepresentations about the existence of deposit insurance. The statute also grants the FDIC authority to investigate and take administrative enforcement actions against any person who violates the prohibition. While the FDIC has enforced this prohibition, it had not issued specific rules until recently. On May 17, 2022, the FDIC approved a final rule implementing its statutory authority to prohibit any person from making misrepresentations about FDIC deposit insurance or misusing the FDIC's name or logo. The rule clarifies the FDIC's procedures for identifying, investigating and taking formal and informal enforcement actions against people to address violations. The rule will become effective 30 days after publication in the Federal Register. In connection with the FDIC's adoption of this regulation, the Consumer Financial Protection Bureau issued a Consumer Financial Protection Circular addressing deceptive representations involving the FDIC's name or logo or deposit insurance. Under the Consumer Financial Protection Act ("CFPA"), covered persons and service providers are prohibited from committing or engaging in an unfair, deceptive or abusive act or practice in connection with the offering or provision of a consumer financial product or service. Unlike the FDIA, which prohibits knowing misrepresentations regarding the extent or manner that deposits are insured, the CFPA's prohibition on deception applies even if the misrepresentation was made unknowingly. --- Brienne T. Marco

Forbearance Rate Drops Below 1%, Lowest Level Since June 2020

"The total number of loans in forbearance decreased by 11 basis points to 0.94% in April."

Why this is important: Mortgage servicers' forbearance portfolio volume dropped in April 2022 to a level below 1 percent, with fewer than half a million borrowers remaining with an active plan, according to the monthly Loan Monitoring Survey conducted by the Mortgage Bankers Association ("MBA"). In total, the share of loans in forbearance decreased by 11 basis points, to 0.94 percent in April from 1.05 percent in March. At the end of April, 470,000 homeowners were in forbearance plans. Total forbearance requests were 0.10 percent of servicing portfolio volume in April, while exits represented 0.21 percent. The survey also shows 28.9 percent of total loans were in the initial stage last month and 58.1 percent were in a forbearance extension. The remaining 13 percent were re-entries. The survey also shows loans serviced, not delinquent or in foreclosure, were 95.64 percent in April, up from 95.47 percent in March, an improvement despite potential headwinds such as high inflation and stock market volatility.

The MBA cites the improvements in the U.S. unemployment rate remaining below 4 percent, which leaves borrowers in a good position to make their mortgage payments. --- Bryce J. Hunter

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Barr Quizzed on Fair Lending, Climate Change During Fed Confirmation Hearing

"Barr is Biden's second pick for Federal Reserve vice chairman for bank supervision."

Why this is important: The article highlights Michael Barr's testimony on the Federal Reserve and climate change. The statements came in a recent hearing before the Senate Banking Committee on his nomination to serve as the Fed's vice president for bank supervision. Barr is President Biden's second pick for that position. Sarah Bloom Raskin, his first pick, withdrew from the process in March in the face of strong Republican and some Democratic opposition due to her past statements that fossil fuel companies should not be eligible for governmental pandemic relief. In contrast, Barr's testimony indicates he has a more neutral stance. The article quotes him as saying, "The Federal Reserve is not able to allocate credit and should not be in the business of telling financial institutions to lend to a particular sector or not to lend to a particular sector." --- F.B. Webster Day

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Bipartisan Senators Push to Finally Enact Marijuana Banking Legislation

"The 24 senators—including 19 Democrats and five Republicans—wrote in a letter that the Secure and Fair Enforcement Banking Act would 'help cannabis-related businesses, support innovation, create jobs, and strengthen public safety in our communities.'"

Why this is important: Most states permit the sale of medical marijuana for prescribed medical uses. 21 states (including D.C.) permit sale of small amounts of marijuana for "recreation." Yet banks cannot lend to these sort-of-legal businesses. There now is an effort in Congress (the "SAFE Act") to permit banks specifically to lend to and service companies in this industry. Bankers need to tread carefully, if this is passed, which likely will happen. We do not have the language yet, so we don't know, for example, whether a new federal law might prevent a claim for "aiding and abetting." Also, cannabis businesses still are "businesses." Many will fail; a few will succeed. "Be careful out there." --- Hugh B. Wellons

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Foreclosure Filings are Up 132% from a Year Prior. Here's What that Means for the Housing Market (and It's Not What You Might Think).

"Though active foreclosures are up on a year-over-year basis, the number of loans in active foreclosure is still way below historic norms."

Why this is important: Statistically, the number of active foreclosures (when the foreclosure process has begun on a seriously delinquent loan, but it has yet to be completed and liquidated) increased in March 2022 - the first year-over-year increase in almost 10 years. Secondly, more than 78,000 U.S. properties had a foreclosure filing during the first quarter of 2022, a 39 percent increase from the previous quarter and up 132 percent from a year ago. And third, serious mortgage delinquencies — those 90 or more days past due — are 70 percent higher than they were pre-pandemic, according to Black Knight, a mortgage technology, data and analytics provider. While foreclosure filings increased significantly in the first quarter of 2022, a sudden weakness in the housing market, or the U.S. economy, isn't inevitable. Mortgage experts say that even with the dramatic increase in first quarter foreclosure activity, mortgage servicers are still running at about 50 percent of the normal level. Regarding serious mortgage delinquencies, though they are up since the pandemic, in March 2022 they fell 12 percent for the strongest single-month improvement in 20 years, and there are actually more than 1.2 million fewer serious delinquencies than there were last March, Black Knight reports. Those experts cite a combination of rising employment, student loan deferrals, strong post-forbearance performance and millions of refinances have helped put downward pressure on delinquency rates, as reasons for the lower delinquent numbers.

Ultimately, the low level of foreclosures and serious delinquencies are having little impact on the housing market. --- Bryce J. Hunter

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Bankruptcy Filings Continue Steady Drop

"Filings fell 16.5 percent for the 12-month period ending March 31, 2022."

Why this is important: Individuals and small businesses were impacted much harder than large businesses by the economic impacts of the COVID-19 pandemic. Bankruptcy filings are a consistent indicator of economic trends and financial health across industries. The 2022 statistics recently released by the Administrative Office of the U.S. Courts shine a harsh light on the disparate impact on non-business debtors (i.e., individuals) compared to business debtors. Overall, bankruptcy filings continue a general downward trend (down 16.5 percent year over year). Digging further, however, the data show that business debtor filings are down a whopping 33.9 percent, compared to non-business debtors, which are down only 15.7 percent for the same period. These are the nationwide numbers.

In our analysis, the regional data appear to tell a more complete story. In the Fourth Circuit (the region spanning the Virginia, Carolinas, and Maryland), for example, business debtor filings were down 18.5 percent, compared to 16.8 percent for non-business debtors. This would seem to indicate a generally even impact on regional businesses and individuals. By contrast, large-business debtors tend to file with bankruptcy courts in the Third Circuit (Delaware) and Second Circuit (New York). The regional data for the Third Circuit (including Delaware courts) show that while non-business debtors kept pace with the rest of the country at a 16.1 percent decline, business debtor filings there plummeted by 62.1 percent! Similarly, in the Second Circuit, non-business debtor filings declined by 18.1 percent, but business debtor filings were down 39.2 percent. Western Louisiana is the outlier with an increase of 4.6 percent in overall filings reported.

As businesses and individuals develop their strategic plans and business projections for the coming year, they should consider these regional economic indicators of the overall impact of the COVID-19 pandemic. The wide differences in the indicators reflecting the impact on large businesses compared with small businesses and individuals are worthy of further analysis. As the Administrative Office releases the updated data in future quarters, keep an eye on these trends! --- Brian H. Richardson

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OCC's Comptroller Orders Staff to Review Bank Merger Framework

"'Without enhancements, there is an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risk,' Hsu said in prepared remarks."

Why this is important: This is just an FYI, and we don't know yet where this will lead, but it bears watching. Michael Hsu, the acting Comptroller has asked the Federal Reserve to review the basis for approving bank mergers. The Department of Justice also is looking at this with a view to reduce anti-competitive transactions. There also is a push to include "non-banks" (particularly fintech) in these assessments for competitive analysis. All of this points to major changes in bank and holding company merger rules and enforcement. This merits tracking. **---** Hugh B. Wellons

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