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**Issue 9, 2022**

## Welcome!

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

We are very pleased to welcome Charles W. "C. W." Pace, Jr. to the law firm as a partner in our Charleston office.

C. W.'s primary areas of practice are estate planning, probate, commercial transactions, corporate law, and tax. He regularly provides advice and assistance to clients on a wide array of estate planning strategies, including various forms of complex transfer tax planning strategies, business succession, special needs trusts, and charitable trusts. He also advises fiduciaries on trust, probate, and estate matters.

He worked as Vice President & Personal Trust Specialist in BB&T's Wealth Management Department for several years prior to returning to private law practice. You can learn more about C. W. and his role at the firm [here](#).

As always, thank you for reading.

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

and

[Paul G. Papadopoulos](#), Co-Chair, [State & Local Taxation Practice Group](#), and Co-Editor, *Promissory Notes*

"Money is like a sixth sense - and you can't make use of the other five without it." --- William Somerset Maugham

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## **Is SAFE Banking Act Getting Closer to Passage? Senators Agree Public Safety Issues are at Play**

"Sen. Jeff Merkley (D-OR), the sponsor of the SAFE Banking Act, talked about violent crime targeting marijuana businesses and workers, as well as bipartisan support for stand-alone legislation."

**Why this is important:** Notwithstanding the uncertainty of federal regulation and decriminalization efforts, the legal cannabis industry continues to grow and contribute to the overall economy. 37 states have legalized cannabis for medical purposes. 18 states have legalized cannabis for recreational use. According to Cowen and Company, the cannabis market will reach \$100 billion in value by the end of the decade. Since 2014, more than \$10 billion in tax revenue and nearly 500,000 jobs have been created by the legal cannabis industry. Despite all of this growth and general acceptance, legitimate businesses are unable to deposit and safekeep proceeds generated from an otherwise legal business under their respective state laws. The passage of the Secure and Fair Enforcement ("SAFE") Banking Act will provide banking and financial institutions the protection needed to provide financial services—which are offered to all other legitimate businesses—to legal cannabis businesses. --- [Robert J. Dobkin](#)

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## **OCC to Cut Smallest Banks' Assessment Fees by 40%**

*"Hsu also said the OCC is working to revitalize de novo banking activity and keep its regulatory expectations of banks tailored to their size and complexity."*

**Why this is important:** For the fourth year in a row, the OCC will cut assessment fees in an effort to level the playing field on the cost of supervision between state and federal bank charters. In March 2023, banks will see a 40 percent reduction in their assessment fees on the bank's first \$20 million in assets and a reduction of 20 percent on assets between \$200 million and \$20 billion. The OCC suggests that relief from the fees will give banks "extra breathing space and capacity to invest and seize opportunities related to digitalization, compliance, cyber security, and personnel." --- [Brienne T. Marco](#)

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## **ABA, BPI Oppose Proposed Replacement for Troubled Debt Restructuring**

*"In comments filed with the FDIC, the American Bankers Association and Bank Policy Institute came out against an agency proposal to replace troubled debt restructuring in assessments scorecards for large banks with a new term, 'modifications to borrowers experiencing financial difficulty.'"*

**Why this is important:** This summer, the Federal Deposit Insurance Corporation ("FDIC") issued a notice of proposed rulemaking for amendments to the accounting standards for troubled debt in FDIC-insured or supervised banks and financial institutions with assets over \$10 billion. According to the FDIC, the proposed amendments are intended to streamline the transition to the Current Expected Credit Losses ("CECL") methodology outlined in the Accounting Standards Update No. 2022-02, issued by the Financial Accounting Standards Board (ASU 2022-02). By its terms, ASU 2022-02 eliminates certain elements of the recognition and measurement guidance for trouble debt restructurings for institutions adopting the CECL methodology. As a replacement for that guidance, the FDIC proposal, among other things, would define restructured loans using the uniform language "modifications to borrowers experiencing financial difficulty," tracking the language from ASU 2022-02.

During the public comment period, the American Bankers Association and the Bank Policy Institute filed comments opposing the implementation of the proposal. In light of the ongoing rollout and implementation of ASU 2022-02 by banking institutions, the ABA and BPI urge caution in making the changes set forth in the proposal, at a minimum delaying until ASU 2022-02 has been fully implemented so that banks can properly assess the impact of the proposal on their operations. The comment letter outlines how, under certain circumstances, the proposal could result in higher assessments being imposed on banks that have internal policies favoring workouts and loan modifications with customers. In effect, the letter warns that the proposal could disincentivize large banks from working with customers who would otherwise be creditworthy and successful with the modification process.

As the nation emerges from the economic strain of the recent pandemic, lenders of all sizes are turning to their portfolios to re-engage with customers seeking modifications on their accounts. The ABA and BPI represent an important voice in the overall discussion of promoting a strong financial footing going forward in the American economy. Interested parties should review the proposed rule and the comment from these organizations closely. --- [Brian H. Richardson](#)

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## **Foreclosures are Up 187% from a Year Prior. But It doesn't Mean What You Might Think.**

"Foreclosure rates were artificially low during the pandemic due to foreclosure moratoriums and mortgage forbearance options."

**Why this is important:** Foreclosure starts (when the first public foreclosure notice occurs) have reached pre-pandemic levels nationwide, with lenders starting the foreclosure process on 23,952 properties located in the U.S. in August 2022, up 12 percent from the month prior and up 187 percent from a year ago, according to data from ATTOM, a real estate data company. Market watchers state that with moratoriums and forbearance options expiring, the increase in foreclosures looks large only by virtue of the artificially low year-ago levels as the current level of foreclosures has only returned to pre-pandemic levels.

Other factors, like higher inflation levels, have contributed to rising foreclosure rates. According to ATTOM data, foreclosure completion numbers increased as well, with lenders repossessing nearly 4,000 properties in August 2022, up 59 percent from the same time last year. The research shows that over 90 percent of borrowers in foreclosure have positive equity in their homes and would benefit from selling these properties at a profit rather than risk losing everything to a foreclosure auction or lender repossession. Lenders should consider continuing to work with certain borrowers that have positive equity because those lenders would stand a better chance of getting paid in full if those properties sold in the open market. --- [Bryce J. Hunter](#)

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## **Texas Bank Settles with DOJ Over PPP Lending Allegations**

*"The Justice Department has received its first-ever False Claims Act (FCA) settlement from a Paycheck Protection Program lender."*

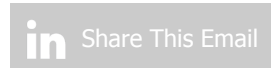
**Why this is important:** The Paycheck Protection Act provided assurances to lenders that they could rely on borrowers' certifications in loan applications without independently verifying them. But, what if a lender had actual knowledge of a disqualifying fact but approved the application anyway? This article recaps a recent settlement between the Department of Justice and a regional Texas bank of allegations along those lines. The DOJ alleged the bank knew the PPP loan applicant was under criminal indictment and the applicant was consequently not eligible for the loan, but the bank approved the loan despite that knowledge. The application stated no criminal charges were pending. The article reports the bank has paid DOJ \$18,673.50 to resolve the matter. This resolution may be the first settlement of an alleged False Claims Act violation with a PPP lender. More may follow. --- [F. B. Webster Day](#)

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## **Summer Ends Amid Rising Bankruptcies**

*"According to Epiq, total filings also show a 15% increase month-over-month compared to the July 2021 total of 30,854 filings."*

**Why this is important:** Ask any bankruptcy practitioner how their second and third quarters of 2022 have been, and they'll all respond the same way: "Slow." Across the country, bankruptcy filings remain at historic lows. Looking toward the fourth quarter, filings are trending upward. Much of the upward trend is being driven by small businesses who are taking advantage of the unique provisions of subchapter V of Chapter 11 to address the challenges of expanding debt loads, rising interest rates, inflation, and supply chain complications that are having an adverse impact on their ability to get ahead as the nation emerges from the effects of the pandemic. This updated data report stems from a joint initiative of Epiq Bankruptcy and the American Bankruptcy Institute with the goal of providing "the most current bankruptcy filing data for analysts, researchers, and members of the news media." When a bankruptcy is filed, certain obligations (and deadlines) are triggered for debtors and creditors. Lenders, creditors, debt collectors, and borrowers should be aware of the impact that a bankruptcy filing can have on their portfolios, and periodically review their accounts for bankruptcy filings to protect their respective interests. --- [Brian H. Richardson](#)



Spilman Thomas & Battle | 300 Kanawha Blvd., E., Charleston, WV 25301

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