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Issue 6, 2021

Welcome!

Welcome to our sixth issue of *Promissory Notes* -- our e-newsletter focused on banking and finance insights.

Are we covering the topics you find interesting? Do you have questions about specific issues? Let us know and we will make sure we pay close attention to those areas of interest.

Thank you for reading.

F. B. Webster Day, Chair, Banking and Finance Practice Group, and Co-Editor, *Promissory Notes*

and

Elizabeth A. Benedetto, Chair, Public & Project Finance Practice Group, and Co-Editor, *Promissory Notes*

"You should always live within your income, even if you have to borrow to do so." --- Josh Billings

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SBA to Drop Its Review of PPP Loans of $2 Million and Above

"The effort marks an about-face for the agency that landed in hot water after allowing publicly traded companies to access the program intended for small businesses."

Why this is important: The U.S. Small Business Administration (SBA) announced on July 9th that it has discontinued use of its necessity questionnaires (Form 3509 for for-profit businesses and Form 3510 for non-profit businesses) for Paycheck Protection Program (PPP) loans of $2 million or more. In October 2020, the agency began asking PPP lenders to provide the forms to its for-profit and non-profit PPP borrowers that had PPP loans in excess of $2 million, to be completed as part of the loan forgiveness process. The SBA developed the questionnaire as a means of discouraging companies that did not need emergency PPP funds, such as publicly traded companies that had access to other forms of capital, from using the forgivable loan program. The questionnaire sought information about revenues, effects of shutdown and other pandemic-related orders, disruptions in operations and supply chains, capital improvement projects, liquidity, dividends, market capitalization, debt, owner compensation and parent companies, and was described by many as being time-consuming and burdensome, as well as problematic because the information sought was based on the current period and not as of the time when the PPP loan was sought. At least one lawsuit was filed challenging the questionnaire. Recognizing that the necessity reviews were causing delays in approving forgiveness applications and acknowledging that the questionnaire was no longer serving its intended purpose -- to deter companies that had access to alternate forms of capital from applying for PPP loans (the application period ended on May 31, 2021) -- the SBA agreed to withdraw use of the questionnaires to reduce the burden on PPP borrowers with loans of $2 million and greater. --- Elizabeth A. Benedetto

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PPP Loan Investigations: What's on the Horizon for Banks?

"This will take the form of government and whistleblower investigations, including False Claims Act claims related to loans that went to companies (and fraudsters) that should not have received these loans."

Why this is important: The industry has been expecting the second shoe to fall since last year. Banks were heavily encouraged by the federal government to be active and even proactive in making PPP loans during the pandemic. Now, the regulatory focus seems to be turning to finding and prosecuting fraudulent and improper PPP loans. Allegations may arise through government and whistleblower investigations generated in response to False Claims Act claims and through class actions from companies denied such loans. Creative plaintiffs' attorneys will develop new theories for litigation. Financial institutions already are receiving subpoenas for this information. The fear is that financial institutions, who responded to government and local need, now find themselves in a tactical box. Either: (i) They expanded their borrower base without usual confirmation/investigation, in response to the "need for speed." And, that now leaves them open to regulatory reprimand. OR (ii) They limited their borrowers to current customers, trying to continue to "know the customer," as regulations generally require. In hindsight, that now may appear discriminatory. This article proposes actions that financial institutions can take now, in anticipation of this regulatory push. --- Hugh B. Wellons

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The $30 Trillion Trust-Fall: Reaching Millennials Amid the Great Wealth Transfer

"The generation born between 1981 and 1996 will soon be on the receiving end of a $30 trillion windfall as Baby Boomers begin to retire."

Why this is important: Over the next two decades, the Baby Boomer generation (born between 1944 and 1964) is expected to transfer approximately $30 trillion in wealth to Millennials (the generation born between 1981 and 1996). The transfer of wealth from one generation to the next will create business opportunities for banks and financial institutions as Millennials begin looking for financial partners for investments, retirement accounts, mortgages and other financial products. Although the so-called "Great Wealth Transfer" and resulting business opportunities won't happen overnight, banks and financial institutions interested in securing a slice of this business may need to rethink their marketing strategies to target the tech-savvy Millennial benefactors. The article suggests leveraging consumer behavioral data to create a personalized experience for Millennial customers and utilizing automated e-mails and text messaging to communicate with the younger generation. --- Brienne T. Marco

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ABA Calls for 'Consistent Taxonomy' for Digital Assets

"Association responds to FDIC call for comments on the future regulation of crypto assets."

Why this is important: The ongoing push for regulation of digital assets has a new supporter. In a letter to the Federal Deposit Insurance Corporation ("FDIC"), the American Banking Association ("ABA") recently said, "[d]igital assets will require a 'consistent taxonomy.'" In order to obtain that "consistent taxonomy," the ABA pointed out that clarification is necessary on the types of digital asset activity that is allowed for banks. Further, the ABA highlighted the difficulty in regulating an asset that is "constantly evolving" and as such may "leave significant gaps in regulation and oversight." Finally, the ABA pointed out that the lack of regulation posed a heightened risk to consumers. While these issues are concerning, the ABA is not the first to point them out. Hopefully, this new voice expressing concern over the lack of regulation of digital assets will force the interagency task force, composed of members of the OCC, Federal Reserve, and FDIC, to come up with an answer. --- Kellen M. Shearin

Virginia Foreclosures of Owner Occupied Real Estate Get More Complicated

"The Virginia General Assembly in 2021 passed (and the Governor signed) a new law affecting foreclosures of real property and manufactured homes that are owner-occupied."

Why this is important: The new Act provides for various protections for homeowners and tenants of manufactured home parks (i.e., owner-occupied residential real estate) by increasing the notice period for a foreclosure sale from 14 days to 60 days, requiring an affidavit from the party sending the notice and including in such notice information regarding housing counseling. The 60-day notice requirement, the disclosure of payment status (in more detail below), and affidavit requirement took effect July 1, 2021. The provisions related to the specifics of the notice that is required before a trustee can sell a property in a foreclosure sale have a delayed effective date of October 1, 2021. The notice period of at least 14 days remains in effect for real property that is not owner-occupied residential real property.

In addition to the change from 14-days notice to 60-days notice related to owner-occupied residential real estate, also effective July 1, 2021, the notice to the owner/borrower will need to include:

1. The date of the last payment received and the amount received;
2. The total amount of principal, interest, costs, and fees due in arrears; and
3. The remaining total principal balance due on the instrument (i.e., note).

Lenders, trustees, and other firms foreclosing on owner-occupied residential real property must be aware of and comply with these changes. Failure to do so will result in the foreclosure sale being set aside and increase potential liability for wrongful foreclosure. --- Bryce J. Hunter

The SBA's PPP Loan Forgiveness Portal is Coming

"The platform is expected to simplify the process for small-business owners and lenders alike."

Why this is important: Last week, the U.S. Small Business Administration (SBA) announced small businesses that borrowed no more than $150,000 through the Paycheck Protection Program (PPP) soon will be able to seek forgiveness through an online portal. The new online portal should simplify forgiveness for millions of small businesses that used funds from the PPP to survive the COVID-19 pandemic by allowing them to apply for forgiveness directly from the SBA – with one caveat -- small businesses will be able to utilize the online portal only if their PPP lender has opted into the online portal. The SBA has acknowledged that 93 percent of the outstanding PPP loans are for less than $150,000, and that the owners of small businesses, many of whom are sole proprietors, have been challenged by an overly complicated forgiveness process that needs to be streamlined to allow business owners to get back to running their businesses. According to the SBA, the portal will work as follows: First, a borrower will apply for forgiveness through the portal by using the electronic equivalent of SBA Form 3508S. Then, upon receipt of notice that its borrower has applied for forgiveness on the portal, a PPP lender will be able to review the loan forgiveness application in the portal and issue a forgiveness decision to SBA. The use of the portal is expected to reduce the wait time and uncertainty associated with submission of a forgiveness application with the PPP lender. The new portal is expected to launch on August 4, 2021, under an invitation only pilot period, with a full launch to occur in the near future. --- Elizabeth A. Benedetto

FDIC Opens 'Tech Sprint' to Serve Unbanked Population

"First-of-its-kind competition challenges organisations to identify resources and tools for unbanked people across the US."

Why this is important: The FDIC estimates that 5.4 percent of U.S. households have no banking account. This percentage is higher for Black, Hispanic and Native American households. The FDIC refers to these households as "unbanked." The FDIC, through a new "tech sprint" competition, is asking for help from banks, nonprofits, universities and the private sector to imagine new ways to reach the unbanked. Banking organizations also encourage this effort. Like the FDIC, banking organizations believe that community banks, in particular, are best suited to discover ways to bridge this gap. **---** Hugh B. Wellons

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