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**Issue 7, 2022**

## Welcome!

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

We are pleased to announce that [Joshua L. Jarrell](#) has joined Spilman as a Member in our Morgantown, West Virginia office. He is the leader of our Public & Project Finance Group. He has extensive experience in corporate law, real estate law, title insurance, and economic development, in addition to public and project finance work. Please join us in welcoming Josh to the firm!

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*

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## **Can an Effort to Revamp Anti-Redlining Lending Law Survive the Swamp?**

*"The first major overhaul of the Community Reinvestment Act since 1995 wins praise, but some advocates say it falls short on closing the racial lending gap."*

**Why this is important:** On May 5, 2022, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (collectively the agencies) issued a joint notice of proposed rulemaking that proposes changes to the way the agencies evaluate a bank's performance under the Community Reinvestment Act ("CRA").

If implemented as written, the proposed rule would update the CRA evaluation framework, with performance standards tailored to a bank's size and business model; create new performance tests to

evaluate large bank CRA performance; establish specific performance tests for small and intermediate-sized banks; update the requirements for the delineation of assessment areas; and create updated record-keeping, data collection, reporting, and disclosure requirements for large banks.

Some critics, however, say the reform falls short on closing the racial lending gap because it lacks more specific language on addressing underserved communities of color. Industry groups, social-equity advocates and other stakeholders have begun offering their support and criticisms as regulators work to revise the measure later this year. The agencies are accepting comments on the proposed rule through August 5, 2022. --- [Bryce J. Hunter](#)

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## **PPP Program was Awash in Fraud. Now, One Lender May Finally Face a Legal Reckoning**

*"Now, thanks to an obscure filing in one of South Florida's many PPP fraud cases, it has been revealed that one of the biggest lenders in the program's first year might soon be facing consequences."*

**Why this is important:** Industry researchers are estimating that as many as 8 to 15 percent of all loans made to small businesses under the Paycheck Protection Program ("PPP") should not have qualified for approval on the front end. Those conservative estimates represent \$64 to \$117 billion of the total \$780 billion in loans that passed through the PPP. Some borrowers on those loans, however, are now finding it more difficult to obtain the PPP loan forgiveness on the back end. All this has led to allegations of fraud on the part of borrowers seeking PPP loans for improper uses, with some also pointing the blame at lenders for their approval practices. So far, prosecutions for fraudulent behavior related to the PPP loans have been focused on borrowers. In a federal criminal case in Florida, a non-party fintech lender has been issued a subpoena to testify. Kabbage is an online lender that managed to process thousands of PPP loans using its proprietary algorithms which gave it a competitive edge for speed. Kabbage, whose PPP arm operates as KServicing, has disclosed in court filings related to the subpoena that it is currently under investigation by U.S. Attorneys in Washington, D.C., Massachusetts, and Texas (and has been for more than a year) in relation to its actions related to the PPP loans. The information in the filing makes it clear that the issue of alleged PPP loan fraud among lenders is not going unnoticed by prosecutors. This could also be an indication that other lenders could be the target of investigations, or may be called upon to provide evidence in other prosecutions. Lenders, servicers, and borrowers of all sizes should take care to maintain accurate records of their PPP-related activities. --- [Brian H. Richardson](#)

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## **Lawmakers Renew Push for Overdraft Legislation**

*"The push comes as the New York Department of Financial Services issued guidance for banks to implement transparent overdraft policies and to eliminate 'onerous fees.'"*

**Why this is important:** At a press conference on July 12, 2022, Rep. Carolyn Maloney, D-NY, and Sens. Cory Booker, D-NJ, and Elizabeth Warren, D-MA, encouraged their fellow lawmakers to support a pair of bills that would place limits on overdraft fees. The Overdraft Protection Act, introduced by Rep. Carolyn Maloney, requires overdraft fees to be reasonable and proportionate, prevents banks from charging a customer more than one overdraft fee per month and six per year, requires that consumers opt-in to overdraft coverage, and adds disclosures to consumers about overdraft coverage programs. The Stop Overdraft Profiteering Act, introduced by Sens. Cory Booker and Elizabeth Warren, limits the number of overdraft fees a consumer may be charged each month and year, provides that such fees must be reasonable, and prohibits an overdraft coverage fee if the overdraft results solely from a debit hold amount that exceeds the actual dollar amount of the transaction. Notwithstanding that these bills have not been enacted into law, some banks are already changing their policies regarding overdraft fees. Last year, PNC, Huntington Bank, and Frost Bank implemented overdraft grace periods, low-cash alerts and access to emergency lines of credit, and Ally and Capital One eliminated overdraft fees altogether. --- [Brienne T. Marco](#)

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## **Ex-CFTC Chairman Discusses Celsius' Bankruptcy and CBDC Adoption**

*"The former Commodity Futures Trading Commission chief joined CoinDesk TV's 'First Mover' to discuss why the bankruptcy of lender Celsius Network could set legal precedent in future crypto hearings, and why the likelihood of CBDC adoption worldwide could be based on Chinese technology."*

**Why this is important:** Celsius Network is a New Jersey-based cryptocurrency lending platform that has recently filed for Chapter 11 bankruptcy protection in the Southern District of New York. Seeking to restructure and hopefully emerge from bankruptcy, the company's bankruptcy case represents a significant development as crypto gains a foothold in United States markets. The bankruptcy proceedings will be important to monitor as they may set a course for future bankruptcy cases where crypto-based assets are a large factor. This could become even more significant as support grows for the development of a central bank digital currency ("CBDC") in the United States. China has already instituted a digital yuan that is available to early adopters. There are currently about 250 million digital wallets holding digital yuan. Implementing a CBDC in the United States would certainly raise privacy concerns. The technology underlying the digital yuan is powerful in that it can be adapted to a wide variety of devices and digital assets, but it also lends itself to increased surveillance and censorship issues. While there is no current decision of the Federal Reserve to create a CBDC in the United States, the idea is being explored and discussed. In a recent paper titled Money and Payments: the U.S. Dollar in the Age of Digital Transformation, the Federal Reserve addresses the need for an open dialogue and comment among consumers, lawmakers, and regulators on the potential benefits and risks of implementing a CBDC in the United States. The initial 120-day comment period on the paper has closed, but questions are still able to be submitted by interested parties. --- [Brian H. Richardson](#)

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## **A Shot Across the Fintech Bow – The FDIC's Reported Investigation of Voyager Digital**

*"The FDIC's reported investigation into Voyager Digital's statements about FDIC insurance coverage means that fintechs with bank partnerships should carefully review any of their statements about such coverage."*

**Why this is important:** Reportedly, the FDIC is investigating statements made by the fintech Voyager Digital that implied that its customers qualified for FDIC insurance in the case of Voyager Digital's bankruptcy. Simply put, Voyager Digital customers are claiming that the company implied that dollar deposits were FDIC insured, when that appears to not be the case. Representing or implying that FDIC insurance covers a liability when it does not is a violation of the Federal Deposit Insurance Act and a new FDIC rule implementing the statute.

Voyager Digital is a fintech specializing as a crypto lending platform and recently filed a Chapter 11 bankruptcy petition in the Southern District of New York. It had partnered with Metropolitan Commercial Bank.

The FDIC's reported investigation into Voyager Digital's statements about FDIC insurance coverage means that fintechs with bank partnerships should carefully review any of their statements about such coverage and how they describe such coverage for customer funds. --- [Bryce J. Hunter](#)

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## **Federal Consumer Finance Watchdog to Tighten Bank Rules Around Money-Transfer Scams, Report Says**

*"Banks generally don't have liability in instances when the transaction is authorized."*

**Why this is important:** Person-to-person digital payments, such as those facilitated by services like Zelle, PayPal, or Venmo, are frequent targets by scammers. Now, the Consumer Financial Protection Bureau is proposing measures to clarify and perhaps raise the financial obligations on banks when their customers fall victim to these digital transfer scams. Historically, banks have been able to rely upon their customers to authorize payments and transfers. There is little recourse available to a customer who has authorized a digital payment to a bad actor as a victim of a scam. Early reports on a forthcoming guidance report from the CFPB indicate that the Bureau is expected to clarify its position as to whether transactions initiated by customers who fall victim to a scam should still be deemed "authorized" by their financial institutions. Banks and consumer advocates agree that person-to-person digital money transfer scams have risen sharply in recent years. It will be important to watch for any additional guidance on

these issues going forward. Banks and fintech service providers looking to stay abreast of these potential changes should proactively take internal stock of their current investigation and error resolution policies and standard operating procedures. --- [Brian H. Richardson](#)

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