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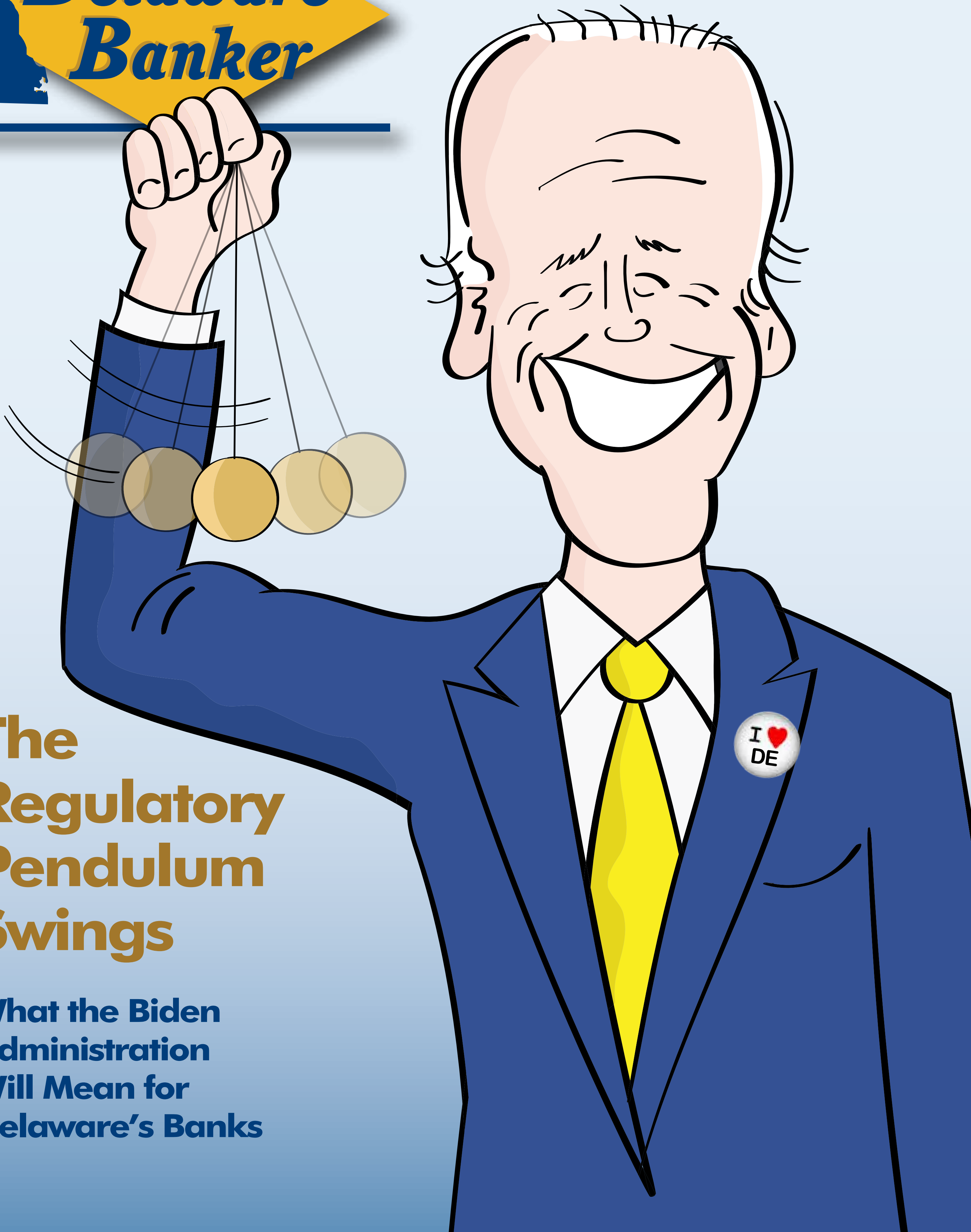

The Regulatory Pendulum Swings

What the Biden Administration Will Mean for Delaware's Banks

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Contents

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View from the Chair

by
Joe Westcott
Market President
Capital One

Chair
Delaware Bankers Association

"Through the peaks and troughs of our history the mission of the Delaware Bankers Association remains constant."

Kurt Vonnegut observed that "history is merely a list of surprises. It can only prepare us to be surprised yet again." Given the events of the past year, it's hard to argue against that.

In 2020 we struggled through a pandemic and its accompanying economic upheaval. This was compounded by nationwide racial and social unrest precipitated by the killing of George Floyd by Minneapolis police. Then we ended the year with a tumultuous and contentious election season that further underscored the challenges we face. Now we turn the page to a new year and a new administration in Washington. Delaware can note the ascendancy of one of its own to the White House, the first time in the history of the First State. As you'll read in our cover story, the Biden Administration has definite plans and proposals that will impact the banking industry, both nationwide and here in the new president's home state. We can be certain, as Mr. Vonnegut says, that there will be surprises along the way as we continue living history.

Weathering surprises are nothing new to the members of the Delaware Bankers Association. Since our founding 126 years ago, the Association and its members have encountered significant changes and challenges. In its history, the DBA has seen no fewer than 25 recessions, panics, or depressions. When the DBA first came into existence, there was one federal regulator: the Office of the Comptroller of the Currency. Since then, we have seen the Federal Reserve, the FDIC, the Office of Thrift Supervision, and the Consumer Financial Protection Bureau. In the past 126 years, the United States has fought in nine major conflicts and numerous smaller military actions. We have seen two major attacks on American soil, Pearl Harbor and the September 11th attacks. There have been 23 presidents and 63 Congresses. All of those have had a mix of liberal and conservative legislation. There have been some policies that favored business and banking, and some that made the lives of bankers more difficult.

Surprises? Absolutely! Changes? Regularly! But through the peaks and troughs of our history, the mission of the Delaware Bankers Association remains constant: to promote the general welfare and usefulness of financial institutions. Banks are a service industry, but we do not exist to serve ourselves. Every bank in Delaware serves its customers, but in a larger sense, we each serve the community.

Delaware's banks provide capital to small businesses just starting up and to established businesses seeking to grow. We provide loans and lending products to families and individuals for homes, education, cars, and other needs. Banks provide revenue to the state and work with our elected officials both in Dover and Washington. In the community, we provide grants to local organizations, promote and participate in volunteer efforts, and conduct financial literacy training.

There are surprises, there are challenges, there are changes in administrations and congresses, but through all of those, Delaware's banks and Delaware's bankers have worked effectively to deliver value to their customers and opportunity to the community.

Joe

President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"Whether expressed as a philosophy or as a noun, we certainly could all benefit from some optimism right now."

Here I sit, staring at my blank computer screen, trying to come up with an inspirational column. The last 12 months have been nerve-wracking with... well, you know, all of it! There must be a way to move forward in a positive way. My mind wanders…

op-ti-mism. Defined by Merriam-Webster as:

> 1. doctrine that this world is the best possible world;
> 2: an inclination to put the most favorable construction upon actions and events or to anticipate the best possible outcome.

Whether expressed as a philosophy or as a noun, we certainly could all benefit from some optimism right now.

If your team is a bit like our DBA team, every week, we spend time connecting during our staff meetings. These real-life conversations have run the gamut from searching for answers on how to best raise teenagers during a pandemic to sharing personal stories about family members struggling with the loneliness and isolation brought on by having to social distance and isolate. Of course, we have also had moments to share more joyous events, like welcoming new additions to our family, developing new connections and relationships, and the limitless possibilities that new career opportunities brought about by COVID create for our children!

One of our most recent discussions revolved around the power of positivity, which is highlighted in *The Secret* by Rhonda Byrne. The basic premise of the book is that the "law of attraction is the law of nature." Summon positive thoughts, and positive outcomes will be the result. The more grateful and thankful you are for what you have and your current circumstances, the more you will attract good things.

A take on this is the ripple theory. You know, one kind act begets another kind act, which begets another kind act, and so on. This "pay it forward" thinking really intrigues me. In other words, when someone does something nice for you, instead of paying that person back directly, you pass on another act of kindness, in most cases, to a perfect stranger. All with the thought that "paying it forward" will make the world a better place. But how do you know your random act of kindness is truly making a difference? You don't. But isn't that part of it? Just keeping the faith that tomorrow will be better?

This may be a bit of a surprise, but I was a bit of a rebel growing up. I did not always see eye to eye with my Mother (I've since apologized for this!). It also didn't help that my older brother was always teasing me about one thing or another, or doing something that would annoy me. Like falling through the floor in the attic into my bedroom, or running into me on his moped. (I now realize that both of these, of course, were accidents and not intended as I thought then!) Many a night ended in tears, but thankfully my Dad was a peacemaker, honing this skill to perfection during those teenage years. Dad would always gently tell me that everything would be better in the morning. Which it usually was.

And so, my hope for you as we enter 2021 is that optimism will guide your path, that the power of positivity will bring you joy, that paying it forward will warm your heart, and that at the end of the day, someone you love tells you that everything will be better in the morning.

With gratitude,

What's New at the DBA

New Associate Members

Cr24

Bryon Burpulis, CEO
Josh Kelso, Chief Sales Officer
1605 E. Ayre Street
Wilmington, DE 19804
Phone: 888.427.9357
website: www.cr24usa.com

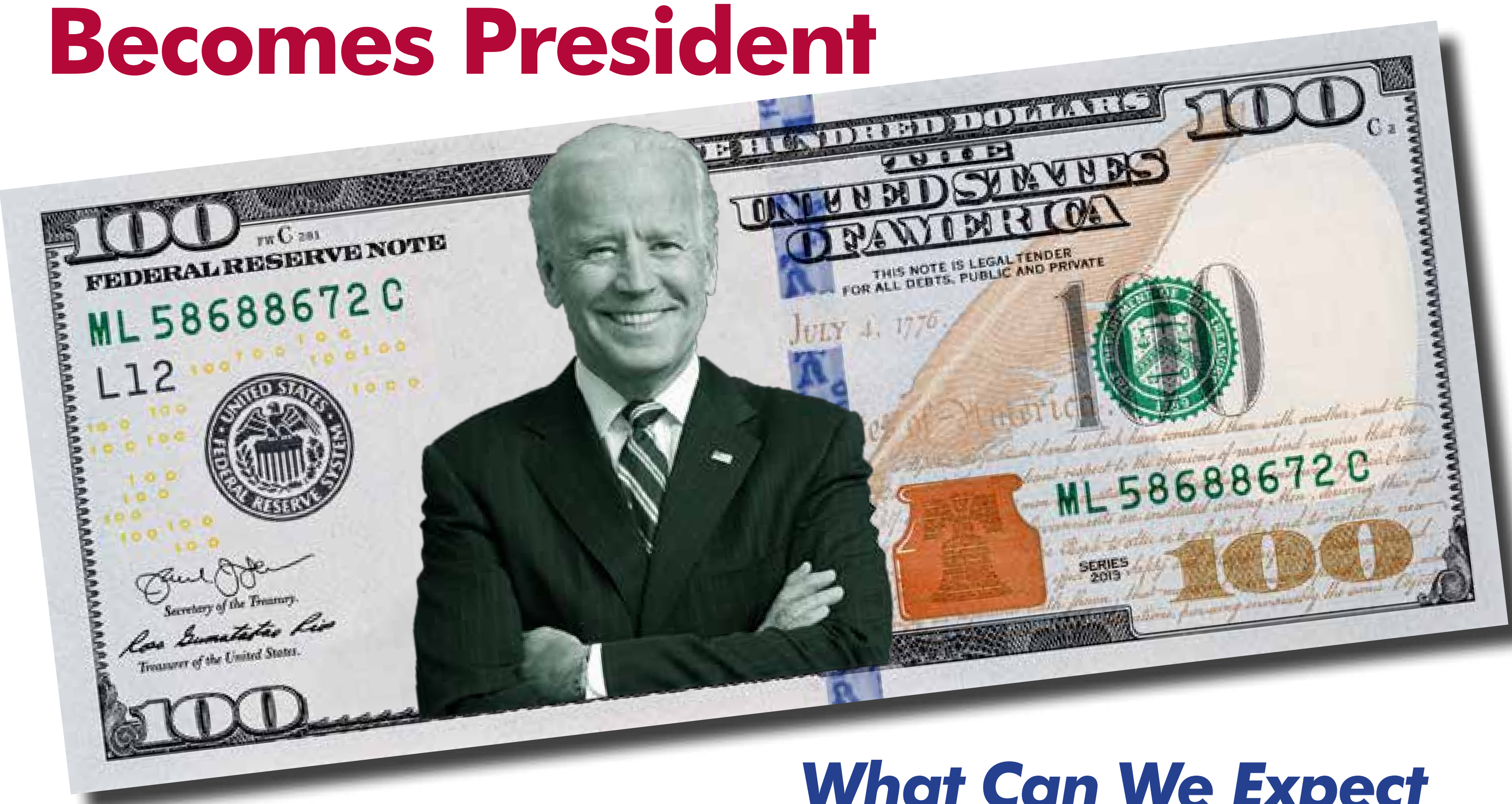
Cr24 is a unique digital and eCommerce software products company located in Delaware. Cr24 creates software products and on-going services to enhance digital eCommerce campaigns with never before experienced precision, speed and comprehensiveness – within digital assets and content development, operations, compliance and testing, and deployment processes. Cr24 products and services connect to enhance digital content, marketing development, operations, testing and compliance, and teams.

Delaware Black Chamber of Commerce

Ayanna Khan, President CEO/Founder
108 Patriot Drive, Suite A
Middletown, DE 19709
Phone: 302.709.1708   Fax: 302.376.3081
email: email@debcc.org
website: www.debcc.org

At the Delaware Black Chamber of Commerce (DEBCC), we are driven to do our part in changing the economic footprint for small businesses in the First State and beyond. The Chamber remains a solid voice for the Black business community while continuously refocusing its efforts to meet the ever-changing needs of its members. It is more than a business-as-usual membership organization. It is the best friend and partner of its members, working exclusively on their behalf and providing the assistance and support they need. We strive to build productive relationships and make a positive impact with all our members.

Joe Biden Becomes President



What Can We Expect in the Banking and Financial Services?

by

Richard P. Eckman
Senior Counsel
Troutman Pepper Hamilton Sanders LLP

Paige S. Fitzgerald
Counsel
Troutman Pepper Hamilton Sanders LLP

Most Delawareans know Joe Biden or have met him over the almost 50 years since he was elected to the U.S. Senate in 1972 in an upset win over the incumbent Senator and former governor Cal Boggs. He has seen Delaware grow from a backwater financial services provider to the home of many of the largest banks and credit card companies in the country as a result of the passage of the Financial Center Development Act in 1981. He has been helpful during his time in the Senate to the financial services industry, a very large and important constituency, and knows of its importance to Delaware. His election to the highest office of the land will test his abilities to navigate the shoals between his natural moderate liberal voting record and the strong progressive forces in the Sanders/Warren wing of the Democratic party, which helped get him elected.

With the recent victories of Raphael Warnock and Jon Ossoff in the Georgia runoff elections, President Biden will be in a strong position of having Democratic control of both the House and Senate, which will be helpful in successfully implementing his legislative agenda. In addition, Biden's recent high-level appointments to the CFPB and OCC provide initial insight into Biden's promise that his presidency will restore stronger regulatory protections to consumers.

Strengthening the CFPB: Nomination of Chopra as Director

On January 18, President Joe Biden announced that he will nominate current Federal Trade Commission (FTC) Commissioner Rohit Chopra to be the next director of the Consumer Financial Protection Bureau (CFPB) to succeed Kathleen Kraninger as director of the financial industry watchdog. Following this announcement, Kraninger tendered her resignation at the behest of the incoming Biden administration. Chopra, a former CFPB official, is well-known as an aggressive consumer advocate. He holds a B.A. from Harvard and an MBA from Wharton. In 2011, Senator Elizabeth Warren, who then served as a special advisor in the Obama administration, tapped Chopra to serve as assistant director of the CFPB, where he led the agency's student lending agenda. In that role, he became known for his hard-charging style and frequent criticisms of private student lenders. As an FTC commissioner since 2018, Chopra supported more aggressive rulemaking and enforcement efforts. Indeed, he openly acknowledged his efforts to encourage "vigorous agency enforcement" and to demand "aggressive remedies against lawbreaking companies."

Consumer advocates have hailed Chopra's nomination, including Ashley Harrington, Center for Responsible Lending Federal advocacy director and senior counsel. She remarked, "Commissioner Chopra has long fought for financial markets that are fair for consumers, including student loan borrowers. We are encouraged that the CFPB will now return to its mission of protecting people's finances, which has heightened significance in this economic downturn, and which includes a strong fair lending program." With Chopra's nomination, Biden has signaled that the CFPB will be taking a more aggressive stance in both its rulemaking and enforcement efforts.

The Biden-run CFPB will be positioned to strengthen oversight of consumer financial services, and will also target predatory lending. Maxine Waters, chairwoman of the House Financial Services Committee, has sharply criticized the Trump administration's actions to limit the CFPB's oversight and enforcement efforts. Chairwoman Waters, along with the new Senate Banking Chairman Sherrod Brown hope to bolster those efforts emphasizing consumer benefits wherever possible. Along these lines, President Biden has expressed his intentions to restore enforcement power to the Office of Fair Lending and Equal Opportunity within the CFPB after a 2018 reorganization stripped the office of its enforcement powers. Fair lending enforcement is likely to feature heavily on Chopra's policy agenda, as part of the agency's overall ongoing response to the COVID-19 pandemic.

In addition, under the Biden Presidency, the CFPB, with Chopra at its helm, is likely to attempt unwinding the CFPB's elimination last summer of ability-to-repay underwriting requirements from the agency's 2017 payday lending regulations and its issuance last year of a policy statement narrowing when and how the agency plans to police prohibited "abusive acts or practices" under the Dodd-Frank Act. There has also been speculation that Chopra may seek to expand the CFPB's supervisory footprint by revisiting the agency's rules that define which larger nonbanks fall under its oversight. This may include consideration of a rule that would cover both traditional installment lenders as well as online lenders, and give the CFPB both supervisory authority and enforcement authority over companies in those markets.

Finally, under the Biden presidency, a reinvigorated CFPB will have a renewed focus on curtailing abusive or deceptive lending practices and increasing lending cost transparency for borrowers. In addition to a more aggressive enforcement role, the CFPB will likely implement policies to strengthen underwriting requirements and borrower protections, to monitor student-loan servicers, and to possibly establish a public credit-reporting agency under the CFPB's control, as an alternative to Equifax, TransUnion and Experian.

Community Reinvestment Act: Combatting Social and Racial Injustice

Biden stressed social and racial justice movements on the campaign trail. The concept of financial inclusion, in particular access to credit and financial services for minorities and low-to-middle income (LMI) neighborhoods, has been a significant issue for Biden. That said, a fractured regulatory framework overseeing the Community Reinvestment Act (CRA) has threatened consistent application of the CRA, in part due to the federal banking agencies proceeding in separate directions. The Federal Reserve, OCC, and FDIC all recently proposed rule changes, but currently the OCC stands alone with a proposed final rule broadening qualifying activity for CRA credit.

President Biden has expressed support for strengthening and expanding the CRA to ensure banks and nonbank financial institutions, particularly mortgage and insurance companies, are providing credit access to all members of the community while closing loopholes that could enable institutions to circumvent investing in community development. To that end, Biden will likely pressure regulators to broaden the CRA in its application, seeking to benefit more communities in need. Such an effort led by Biden and a Democratic Congress will work toward Biden's broader goal of creating greater racial equity and eliminating redlining.

Regulating FinTech: A Careful Balance

Biden's support of ensuring greater access to financial services, creating a public credit-reporting agency alternative, and promoting fair lending practices could create a fertile environment for advancing a new regulatory framework for financial technology. The tension of balancing the massive potential for financial technology innovation with the simultaneous need to develop adequate regulations without stifling innovation has

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long been recognized. A Biden administration and Democratic Congress will want to ensure that FinTech entities offer services that benefit consumers and are safe and sound in their practices. The Biden administration is expected to support and foster innovation while balancing consumer protection efforts.

A friendly regulatory environment for FinTechs will likely create a path for more partnerships between FinTechs and banks that would enable FinTechs to leverage a bank's capital reserves and existing customer base while banks would be positioned to leverage a FinTech's innovative technology infrastructure, which may include artificial intelligence and machine learning, to provide more affordable financial services to a broader segment of the U.S. population. A Biden administration will likely ensure that firms seeking new "FinTech charters" will provide increased access to the "unbanked" and "underbanked." That said, there have been predictions that the OCC may take a slower stance with respect to applications for nondepository trust company charters. The OCC is predicted to be more focused on operational and compliance risks tied to "innovation" proposals and interpretive requests, particularly with respect to payments and custody activities relating to digital assets and currency. In sum, new regulations of FinTechs will be closely examined to ensure consumer protection while also allowing for the fostering of innovation through regulatory sandboxes, allowing FinTech innovators to conduct live experiments in a controlled environment under a financial services regulator's supervision.

Housing Finance: Supporting Affordable Housing

Biden has already provided a detailed plan of the areas he would like his administration to address concerning housing policy and the systemic inequities within the housing market. His plan is focused on undoing what is viewed as modern day redlining. Biden has proposed to invest $640 billion over 10 years to create a more stable and equitable housing market, including a new refundable tax credit for first-time buyers that could be issued in advance. Biden's affordable housing plans also includes establishing a $100 billion affordable housing fund similar to what Chairwoman Waters proposed in 2019. In addition, Democratic majorities in both the House and Senate will ease the passing of Biden's affordable housing, rent, and tenant support initiatives into law.

In addition, Biden is likely to take a drastically different policy approach to Fannie Mae ("Fannie") and Freddie Mac ("Freddie"), in their role as purchasers of residential mortgage loans while under government conservatorship and will revert to the Obama-era approach of empowering Fannie and Freddie to facilitate access to affordable housing. To do so, Biden likely would move to appoint leadership at the Federal Housing Finance Agency who would keep capital requirements for Fannie and Freddie low. In addition, during Biden's presidency, it is likely that he will ensure that both entities remain under conservatorship, rather than being privatized, as was strongly considered during President Trump's administration. Finally, there has been speculation that Biden may treat Fannie and Freddie as public utilities, which could place limits on their profitability and lead to lower borrowing costs for consumers.

OCC: Michael Barr Tapped as Comptroller

Michael S. Barr, a former U.S. Treasury Department official, is likely to become the next Comptroller of the Currency. If confirmed by the U.S. Senate, Barr will succeed Brian Brooks, who stepped down on January 14, 2021, and has served as Acting Comptroller for the last half of 2020. Barr is currently a dean at the University of Michigan Ford School of Public Policy, and was part of the Treasury Department in President Barack Obama's administration, where he worked on bank regulations in the form of the Dodd-Frank Act. New Senate Banking Chairman Sherrod Brown, and other progressive activists, however, are opposing President Biden's choice to lead the OCC, citing nominee Michael Barr's connection to the financial industry. Progressives, such as Brown, favor law professor Mehrsa Baradaran, an advocate for the creation of banking services through the U.S. Postal Service.

If Barr is confirmed, he would become the second individual with a connection to cryptocurrency to lead the OCC. Under Brooks, the OCC published a number of interpretative letters that crypto advocates believe can bring the industry closer to the traditional financial system by making it easier for these startups to tap banking services. Some of these interpretive letters would also let banks participate in the cryptocurrency ecosystem by using stablecoins for payments or acting as node operators on blockchain networks. With Barr at the helm of the OCC, support of the cryptocurrency industry is likely to continue and possibly increase.

A new rule, The Fair Access rule, however, that aims to bar large banks from declining services to unpopular industries is unlikely to survive during the Biden administration. In a final act of Comptroller Brooks' tenure and on the day of his departure, the OCC finalized the rule to ensure "fair access to banking services provided by large national banks, federal savings associations, and federal branches and agencies of foreign bank organizations."

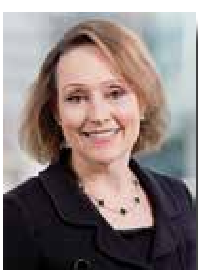
According to Brooks, the rule, promulgated to prevent future Operation Chokepoints from occurring, is aimed at preventing banks with more than $100 billion in assets from denying loan applications and refusing to provide services to certain industries and entire categories of customers without conducting "individual risk assessments." Brooks stated, "it is inconsistent with basic principles of prudent risk management to make decisions based solely on conclusory or categorical assertions of risk without actual analysis."

After considering more than 35,000 stakeholder comments during the public comment period that ended on January 4, the OCC softened the rule somewhat from its initial proposal, but the future of the rule is unclear. The rule was not published in the Federal Register, and thus, it has not yet taken effect. Ronald Klain, Biden's White House Chief of Staff, issued a memo on January 20, 2021, directing agency heads to rescind or freeze any rules not yet published which is typical for new Administrations to do.

Conclusion

President Biden understands the importance of banking to Delaware. His appreciation of banking industry's significant role to the Delaware economy may continue to influence his policy considerations and appointees, as he works to navigate his moderate liberal record against the pressures of the more progressive wing of the Democratic party, headed by Senator Elizabeth Warren. As an example, Biden's nomination of Chopra, an ally of Warren's, may serve to appease progressives and ease the confirmation of Biden's selection of Barr to head the OCC. The next four years under President Biden will most certainly represent a pendulum swing towards stricter banking regulation, but just how far remains to be seen, and will be the result, in part, of President Biden's compromises with progressive Democrats. Regardless of where the pendulum ultimately lands, bankers must be prepared to address the changing regulatory landscape under President Biden.

Richard P. Eckman is a Senior Counsel at Troutman Pepper Hamilton Sanders LLP. He represents financial institutions and non-regulated entities in a range of matters involving investment management, commercial and consumer financial services, public finance and trusts. Drawing upon many years of experience inside the banking industry and involvement in drafting key banking regulations, he is a trusted advisor on operational and regulatory issues.



Paige S. Fitzgerald is a at Troutman Pepper Hamilton Sanders LLP. She regularly advises financial services clients in navigating complex federal and state laws in an array of fields, including mortgage lending and servicing, consumer lending, auto finance and tobacco. As a ten-year veteran of the Virginia Attorney General's office, she also uses her regulatory expertise to counsel clients in the health care industry, with an emphasis on Medicaid reimbursement and compliance.

Driving Economic Inclusion Through Supplier Diversity

by
Joel Acie
Office of Diversity and Inclusion
FHLBank Pittsburgh

The impacts of COVID-19 continue to resonate within our homes, neighborhoods, workplaces and throughout our economy. These events have reminded us that life experiences are dramatically and sometimes tragically different for minority communities. This includes the historic challenges faced by minority businesses that have been magnified by the pandemic, including limited access to capital, constrained supply chains and shifting consumer behavior.

While we have a long way to go to fix racial disparities in the business community, coming together to elevate these businesses will help level the playing field and bring more value and ingenuity to our communities. Whether it's through leadership, resources, mentorship or investment, we can all bring something to the table. Supplier diversity is an important method to help improve economic access and advancement in our region and our country.

Our Approach

As the diversity and inclusion program manager at the Federal Home Loan Bank of Pittsburgh (FHLBank), I am responsible for ensuring that all minority-owned, women-owned and disabled-owned businesses are provided maximum opportunities to bid on Bank business while embedding principles of diversity and inclusion in all our business activities. We believe that an inclusive economy – with equal access to opportunity – is a stronger, more resilient economy.

FHLBank is a government-sponsored enterprise established by Congress and regulated by the Federal Housing Finance Agency. Though our programs are regulated, we approach diversity and inclusion as a strategic imperative that positively impacts our performance and financial results. This approach strengthens our business by empowering us to engage more meaningfully with one another and to strive continually toward new levels of excellence.

Impact and Importance

Minority- and women-owned businesses make up a substantial segment of the small business sector and play a vital role in driving our economy. As of 2018, the U.S. Small Business Administration estimates there are a combined 18 million minority- and women-owned businesses with $2.8 trillion annual receipts.

There are also broader societal benefits of supplier diversity through the generation of economic opportunity for disadvantaged communities. The National Minority Supplier Development Council reports that certified minority business enterprises generate $400 billion in economic output that leads to the creation or preservation of 2.2 million jobs and $49 billion in annual revenue for local, state and federal tax authorities. And those numbers are steadily increasing.

In addition, supplier diversity strengthens our business and reinforces a commitment to excellence. Access to diverse suppliers who are agile, cost-effective and provide innovations to meet our business needs help us better serve our members and communities. Supplier diversity is an integrated marketplace strategy that enables us to grow our business.

The financial sector faces a unique challenge with supplier diversity as financial institutions often seek specialized goods or services. To expand beyond those specialized goods or services purchases, financial institutions must create long-term strategic plans that identify practical opportunities for new suppliers so they can grow to the scale and capacity that is required for success.

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How to Enhance Your Supplier Diversity Program

Although supplier diversity programs are widely embraced among American corporations, many companies are still struggling to develop an effective strategy that earns organizational support. As leaders, we can demand compliance, but we cannot mandate commitment. Supplier diversity won't succeed without the support and engagement of internal and external stakeholders. The responsibility of leaders is to generate shared interest that leads to shared results.

1 – Lead through senior management
Create a vision from the highest levels of the organization to ensure the success of your external partnerships. The leadership team sets the organization's strategic direction and defines corporate expectations. Their focus should be on performance criteria that will achieve the mission and revenue targets and ensure the best value in supplier selection decision-making.

2 – Establish a group of key internal stakeholders
Establish an internal stakeholder group to help advance your supplier diversity program. This can be achieved through a small group of employees who oversee purchasing and contracting, a committee of cross-functional employees who provide various business input, or through dedicated staff members. This person or group should be responsible for ensuring the inclusion and utilization of diverse businesses to advance your supplier diversity program.

3 – Involve employees
Build a base of employee champions to support the supplier diversity program. Provide periodic trainings that educate employees on the process, policies and FAQs to help employees understand their role in supporting supplier diversity when purchasing goods and services. Establish a policy that requires all employees with contracting responsibilities to identify, solicit and consider qualified diverse suppliers in connection with anticipated and/or current contracting needs. Provide these employees with the outreach support to assist with identifying diverse suppliers. This collaboration with internal business partners will help model the various ways to ensure supplier diversity is in all business activities.

4 – Recognize employee champions
Encourage and influence positive behavior by recognizing the intentional efforts of your employees who select a diverse supplier. This can be done through the company's internal website, newsletter or at an all-staff meeting. It is important to acknowledge and celebrate employee collaboration and good faith efforts for making supplier diversity a priority in their decision-making process that helped them ultimately achieve their business needs.

5 – Engage your strategic partners
Partner with a member organization that supports the certification and advocacy of minority- and women-owned suppliers and identify suppliers for purchasing opportunities through their membership databases. You can maximize your membership by attending the organization's opportunities fairs, match-making sessions and networking events to identify certified diverse suppliers. For example, FHLBank supports the Eastern Minority Supplier Development Council, Women's Business Enterprise Council, African American Chamber of Commerce of Western Pennsylvania and Hispanic Chamber of Commerce of Philadelphia.

6 – Align with your company mission and strategic initiatives
Align your supplier diversity program with your company's mission and develop strategic initiatives that will serve as a roadmap to achieve those goals. Your strategic initiative can be to eliminate institutional barriers, foster inclusion into all business and activities, or leverage diversity to advance continuous improvement and innovation.

7 – Measure results and outcomes
Set yearly performance metrics such as increasing the percentage of diverse supplier spend or the number of new diverse suppliers. Measuring these results will help define success so you can grow and streamline your supplier diversity program year-over-year.

Supplier Spotlight:
Minority- and Woman-Owned Supplier Ensures Smooth Transition During COVID-19 Shutdown

We are honored to work with a variety of diverse suppliers that help us achieve our business goals. More than eight years ago, the Bank began a valuable business relationship with SHI International Corp. (SHI), a New Jersey-based certified minority- and woman-owned business that has grown into an $11-billion global IT solutions provider of information technology products and services. SHI is currently the largest minority-owned business in the United States and was recognized as a 2020 New Jersey top 25 minority-owned business. This relationship with SHI brings several benefits to the Bank, including competitive bids and a 30-day billing policy, which most value-added resellers usually do not offer.

With the Bank's long-term remote work during COVID-19, IT needed to outfit home offices for staff with equipment so that they could continue to transact critical Bank business. SHI acted quickly and overnighted critical networking and security hardware that was in short supply. Home offices were up and running shortly thereafter with secure, reliable home routers to meet our customers' needs for Bank products and services.

"SHI came through in a big way by providing excellent customer service during a very stressful time and meeting our immediate needs," said John Cassidy, Chief Technology and Operations Officer at FHLBank. "This is a win-win relationship. The Bank and SHI have established a relationship that we plan to continue in order to meet the Bank's evolving hardware and software needs."

Supplier Spotlight: Woman-Owned Contractor Leads FHLBank's Housing Needs Assessment

FHLBank's strategic focus on supplier diversity has given diverse suppliers the opportunity to provide high-quality services at competitive prices. In early 2020, we began the search for a qualified consultant to conduct a Housing Needs Assessment to determine prevalent housing needs across our three-state district. The project team worked closely with the Bank's Office of Diversity and Inclusion, who then provided a list of diverse businesses from a variety of supplier search databases.

After the Bank ranked the proposals and interviewed the top four businesses, the project team unanimously chose a small, woman-owned business. Atria Planning has over 16 years of experience in the housing industry, 12 years of experience working in housing needs studies and market analysis and has conducted more than 40 projects related to HNAs and plans.

"As evidenced by the communities we serve, diversity, equity and inclusion are integral to the way we do business," said John Bendel, Director of Community Investment at FHLBank. "This is reflected not only through our community products, but also in the way we approach supplier diversity. This commitment makes us a stronger, more responsive organization for our members, employees and communities."

Supplier Diversity – Vital to Future Growth

There is a direct correlation between the impact of a strong supplier-diversity initiative and economically stimulating diverse communities. To have the biggest impact, companies must intentionally grow their diverse suppliers in core areas of spend, and diverse suppliers must develop innovative strategies to grow rapidly. Supplier diversity is an important tool to ensure our communities are sustainable over the long term. If there ever was a time to advance your supplier diversity program, it is now.

FHLBank's diverse suppliers are an extension of our company, and through these strong relationships we can help enhance lives in the diverse communities that we serve to ensure we can all be a part of building a better future.

Joel Acie joined FHLBank Pittsburgh in 2018 and currently serves as the Diversity and Inclusion Program Manager. Joel is responsible for strategizing and operationalizing the Bankwide supplier diversity program and various strategic projects, ensuring that all minority-owned, women-owned and disabled-owned businesses are provided the maximum practicable opportunity to bid on Bank business. Acie has over 15 years of supplier diversity experience within the health care and insurance services industries. He is a committee member of the Commonwealth of Pennsylvania, Governor Wolf Advisory Council on Diversity, Inclusion and Small Business Opportunities.

When a Pandemic Creates Tax Legislation

by
Robert Freed
Tax Principal
Santora CPA Group

Congress passed, and President Trump signed, new legislation to help individuals deal with the current economic situation. Some of the highlights of the Consolidated Appropriations Act, 2021 (the Act) are outlined in the following paragraphs, including a brief overview of the key provisions in the recent COVID-19 relief legislation affecting individuals. The legislation is the COVID-Related Tax Relief Act of 2020 and the Taxpayer Certainty and Disaster Tax Relief Act of 2020, both of which are part of the Act.

The Act provides for a refundable recovery rebate credit for 2020 that will be paid in advance to eligible individuals, often automatically, between now and continuing into early 2021. These payments are in addition to the direct payments provided for in earlier federal legislation, as part of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act).

The amount of the rebate is $600 per eligible family member - $600 per taxpayer ($1,200 for married filing jointly), plus $600 per qualifying child. Thus, a married couple with two qualifying children will receive $2,400, unless a phase-out applies. The credit is phased out at a rate of $5 per $100 of additional income starting at $150,000 of modified adjusted gross income for married filing jointly and surviving spouses, $112,500 for heads of household, and $75,000 for single taxpayers. The Treasury Department will make the advance payments based on the information on 2019 tax returns.

Nonresident aliens, persons who qualify as another person's dependent, and estates or trusts don't qualify for the rebate. Taxpayers without a Social Security number are likewise ineligible, but if only one spouse on a joint return has a Social Security number, that spouse is eligible for a $600 payment. Children must also have a Social Security number to qualify for the $600-per-child payments.

Taxpayers who receive an advance payment that exceeds the amount of their eligible credit (as later calculated on the 2020 return) will not have to repay any of the payment. If the amount of the credit determined on the taxpayer's 2020 return exceeds the amount of the advance payment, taxpayers receive the difference as a refundable tax credit.

Advance payments of the rebates are generally not subject to offset for past due federal or state debts, and they are protected from bank garnishment or levy by private creditors or debt collectors.

In addition to the above stimulus payments, there are some revisions to some popular tax benefits, which also have been extended as part of the Act.

• **The $250 educator expense deduction applies to general supplies, as well as other COVID-related supplies.** The Act provides that eligible educators (i.e., kindergarten-through-grade-12 teachers, instructors, etc.) can claim the existing $250 above-the-line educator expense deduction for personal protective equipment (PPE), disinfectant, and other supplies used for the prevention of the spread of COVID-19 that were bought after March 12, 2020.

• **The 7.5%-of-AGI "floor" on medical expense deductions is made permanent.** The Act makes permanent the 7.5%-of-adjusted-gross-income threshold on medical expense deductions, which was to have increased to 10% of adjusted gross income after 2020. This lower threshold will allow more taxpayers to take the medical expense deduction in 2021 and later years.

• **The mortgage insurance premium deduction is extended by one year.** The Act extends through 2021 the deduction for qualifying mortgage insurance premiums, which was due to expire at the end of 2020. The deduction is subject to a phase-out based on the taxpayer's adjusted gross income.

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Taxes

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• **An above-the-line charitable contribution deduction is extended through 2021.** For 2020, individuals who don't itemize deductions can take up to a $300 above-the-line deduction for cash contributions to "qualified charitable organizations." The Act extends this above-the-line deduction through 2021 and increases the deduction allowed on a joint return to $600 (it remains at $300 for other taxpayers). Taxpayers who overstate their cash contributions when claiming this deduction could be subject to a 50% penalty.

• **An allowance of charitable contributions up to 100% of an individual's adjusted gross income is extended through 2021.** In response to the COVID-19 pandemic, the limit on charitable cash contributions by an individual in 2020 was increased to 100% of the individual's adjusted gross income.

• **An exclusion for benefits provided to volunteer firefighters and emergency medical responders is made permanent.** Emergency workers who are members of a "qualified volunteer emergency response organization" can exclude from gross income certain state or local government payments received and state or local tax relief provided on account of their volunteer services. This exclusion was due to expire at the end of 2020, but the Act made it permanent.

• **The exclusion for the discharge of qualified mortgage debt is extended, but limits on the amount of excludable discharge were lowered.** Usually, if a lender cancels a debt, such as a mortgage, the borrower must include the discharged amount in gross income. But under an exclusion that was due to expire at the end of 2020, a taxpayer can exclude from gross income up to $2 million ($1 million for married individuals filing separately) of discharge-of-debt income if "qualified principal residence debt" is discharged. The Act extends this exclusion through the end of 2025, but lowers the amount of debt that can be discharged tax-free to $750,000 ($375,000 for married individuals filing separately).

• **The exclusion for certain employer payments of student loans is extended.** Qualifying educational assistance provided under an employer's qualified educational assistance program, up to an annual maximum of $5,250, is excluded from the employee's income. The CARES Act added to the types of payments that are eligible for this exclusion, "eligible student loan repayments" made after March 27, 2020, and before January 1, 2021. These payments, which are subject to the overall $5,250 per employee limit for all educational payments, are payments of principal or interest on a qualified student loan by the employer, whether paid to the employee or a lender. The Act extends the exclusion for eligible student loan repayments through the end of 2025.

In addition to deductions which have been made permanent, there were many credits introduced as well.

• **Individuals may elect to base the 2020 refundable child tax credit (CTC) and earned income credit (EIC) on 2019 earned income.** If an individual's CTC exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit equal to 15% percent of so much of the taxpayer's taxable "earned income" for the tax year as exceeds $2,500. And the EIC equals a percentage of the taxpayer's "earned income." For both of these credits, earned income means wages, salaries, tips, and other employee compensation, if includible in gross income for the tax year. But for determining the refundable CTC and the EIC for 2020, the Act allows taxpayers to elect to substitute the earned income for the preceding tax year, if that amount is greater than the taxpayer's earned income for 2020.

• **The health coverage tax credit (HCTC) for health insurance costs of certain eligible individuals is extended by one year.** A refundable credit (known as the HCTC) is allowed for 72.5% of the cost of health insurance premiums paid by certain individuals (i.e., individuals eligible for Trade Adjustment Assistance due to a qualifying job loss, and individuals between 55 and 64 years old whose defined-benefit pension plans were taken over by the Pension Benefit Guaranty Corporation. The HCTC was due to expire at the end of 2020, but the Act extended it through 2021.

• **The New Markets tax credit is extended.** The New Markets tax credit provides a substantial tax credit to either individual or corporate taxpayers that invest in low-income communities. This credit was due to expire at the end of 2020, but the Act extended it through the end of 2025. Carryovers of the credit were extended, as well.

• **The nonbusiness energy property credit is extended by one year.** A credit is available for purchases of "nonbusiness energy property," i.e., qualifying energy improvements to a taxpayer's main home. The Act extends this credit, which was due to expire at the end of 2020, through 2021.

• **The qualified fuel cell motor vehicle credit is extended by one year.** The credit for purchases of new qualified fuel cell motor vehicles, which was due to expire at the end of 2020, was extended by the Act through the end of 2021.

• **The two-wheeled plug-in electric vehicle credit is extended by one year.** The 10% credit for highway-capable, two-wheeled plug-in electric vehicles (capped at $2,500) was extended until the end of 2021 by the Act.

• **The residential energy-efficient property (REEP) credit is extended by two years, bio-mass fuel property expenditures included.** Individual taxpayers are allowed a personal tax credit, known as the REEP credit, equal to the applicable percentages of expenditures for qualified solar electric property, qualified solar water heating property, qualified fuel cell property, qualified small wind energy property, and qualified geothermal heat pump property. The REEP credit was due to expire at the end of 2021, with a phase-down of the credit operating during 2020 and 2021. The Act extends the phase-down period of the credit by two years-through the end of 2023; the REEP credit won't apply after 2023.

In addition, there has been some changes to retirement plan rules as well.

• **The 10% early withdrawal penalty does not apply to qualified disaster distributions from retirement plans.** A 10% early withdrawal penalty generally applies to, among other things, a distribution from employer retirement plan to an employee who is under the age of 59½. The Act provides that the 10% early withdrawal penalty doesn't apply to any "qualified disaster distribution" from an eligible retirement plan. The aggregate amount of distributions received by an individual that may be treated

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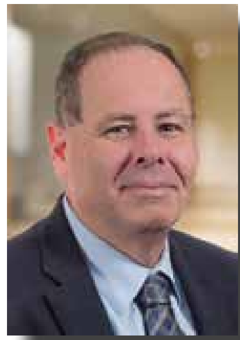
as qualified disaster distributions for any tax year may not exceed the excess (if any) of $100,000, over the aggregate amounts treated as qualified disaster distributions received by that individual for all prior tax years.

- **There is an increased limit for retirement plan loans made because of a qualified disaster.** Generally, a loan from a retirement plan to a retirement plan participant cannot exceed $50,000. Plan loans over this amount are considered taxable distributions to the participant. The Act increases the allowable amount of a loan from a retirement plan to $100,000, if the loan is made because of a qualified disaster and meets various other requirements.

Many of these provisions and extenders are ongoing and more guidance is expected in the coming weeks and months from the Internal Revenue Service, as well as potential additional legislation from the incoming administration. Stay tuned.



Robert Freed is a Principal of Santora CPA Group with over 43 years of public accounting experience. He is a 1981 graduate of Drexel University in Philadelphia.Robert joined Santora CPA Group in September 1999 and became a Principal in July 2005. He chairs the firm's state and local tax group. Robert works with individuals, and existing and newly established businesses, in a wide variety of areas including tax, trust, estate and retirement planning, as well as tax compliance services. He is a member of the National Society of Tax Professionals, the National Society of Accountants, the Tax Division of the American Institute of Certified Public Accountants, and the Delaware Society of Certified Public Accountants.

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For Your Benefit

The Rapidly Changing Benefits Landscape

by
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"The Consolidated Appropriations Act includes benefits and tax provisions affecting employers, group health plan sponsors, health benefits brokers and health insurance issuers."

With the new administration signing executive orders at a pace we've rarely seen it's critical to be aware of the changes that will impact your employees and your clients.

To stay on top of the rapidly changing landscape of regulation and compliance it is important to have a reliable source of information streaming to you or immediately accessible on demand. The following article comes from one of our regular newsletters that our friends and clients receive on a timely basis. Please reach out to us to get access to our portal or to get on our email list so you can always have the latest updates.

This article addresses some of the bullet points in the new Consolidated Appropriations Act: Employee Benefit Provisions enacted on Dec 27, 2020.

The Consolidated Appropriations Act, 2021 (CAA) includes a $900 billion coronavirus relief package that provides funding to individuals and businesses.

The CAA also includes benefits and tax provisions affecting employers, group health plan sponsors, health benefits brokers and health insurance issuers. Some provisions are currently effective, while others begin on future dates.

The CAA provisions impacting employers and group health plan sponsors include the following:

- **Health and dependent care flexible spending accounts (FSAs)**—For plan years ending in 2020 and 2021, the CAA allows employers to extend the grace period to 12 months after the plan year, and permit employees to carry over unused amounts to the next plan year. This provision has generated a lot of questions and concerns from our clients as it requires plan document amendments and other adjustments.

- **Surprise medical billing**—The No Surprises Act will prohibit doctors, hospitals and air ambulances from billing patients who have health coverage for unpaid balances. Rather, providers will have to negotiate with plans or issuers to determine the appropriate payment under the plan. This has always been a huge concern.

- **Health care transparency**—The CAA bans gag clauses in contracts between providers and health plans that prevent cost or quality of care information from being available. The CAA also requires brokers and consultants to disclose any compensation they may receive for referral of services and requires group health plans to report information on plan medical costs and prescription drug spending.

- **Mental health parity**—The CAA includes provisions that strengthen enforcement of existing mental health parity laws and increase transparency regarding how health plans are applying these laws.

- **Retirement plans**—The CAA modifies the current partial plan termination rules to ensure that termination does not occur if the active participant count as of March 31, 2021, is at least 80% of the number of active participants covered by the plan on March 13, 2020. The CAA also provides an exception to the 10% early retirement plan withdrawal penalty for qualified disaster relief distributions.

On a different note, the ACA Reporting Deadlines for 2021 have been extended. Reporting under Section 6055 and Section 6056 for the 2020 calendar year is due in early 2021. Specifically, reporting entities must file returns with the IRS by March 1, 2021, since Feb. 28, 2021, is a Sunday (or March 31, if filing electronically); and furnish statements to individuals by March 2, 2021.

Let us know what questions or concerns you have on this subject or any other subject in regards to you employee benefit plans. Visit: www.weinerbenefitsgroup.com; email: lou@weinerbenefitsgroup.com; or call (302) 658-0218.

Compliance Focus

Emerging Climate Change Risk

Leah Robinson
Senior Consultant
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"Climate change is an issue that promises to shift what is expected of institutions..."

Amid the COVID-19 global pandemic, climate change has come to the forefront of the challenges facing financial institutions as regulators and policymakers grapple with the increasing threat posed to the world's economic and monetary systems. With European regulators remaining steadfast in their path toward stricter climate risk mitigation requirements, U.S. regulators under the Biden Administration are planning to take new steps toward a more hands-on approach. But, just like the pandemic, climate change does not adhere to international boundaries, and it is becoming increasingly clear that U.S. and global regulators need to work together to find solutions.

Global Risk Requires a Global Response

In 2015, a study from the Economist Intelligence Unit valued the risk of a warming climate on global manageable assets between $4.2 and $43 trillion by the year 2100, based on different levels of temperature change. This analysis suggests huge losses in the privately held pool of global assets and that "much of the impact on future assets will come through weaker growth and lower asset returns across the board." Financial institutions, therefore, must begin to consider these implications as the risks related to corporate governance and weak risk management in a changing climate become increasingly more apparent.

At the Paris climate conference (COP21) in December 2015, 195 countries adopted a global climate framework (2015 Paris Agreement), creating the first legally binding global action plan. This plan requires the parties to transition to a low-carbon global economy and to keep global warming below 2 degrees Celsius. The impacts of the physical and transition risks for different industries, including financial services, will continue to reveal themselves as these countries progress toward the Paris Agreement's objectives.

An International Response to Global Risks

In June 2017, the Financial Stability Board (FSB) Task Force on Climate-related Financial Disclosures (TCFD) released recommendations provide financial institutions with high-level guidance for assessing and disclosing climate-related risks and opportunities.

Risks related to the transition to a lower-carbon economy include:

- Policy and legal risk
- Technology risk
- Market risk
- Reputation risk

Risks related to the physical impacts of climate change include:

- Acute risk: There are some physical risks that are event-driven, such as intensified acuteness in weather events like cyclones, hurricanes, wildfires or floods.
- Chronic risk: The longer-term changes in climate patterns (e.g., sustained higher temperatures) pose risks like sea-level rise or chronic heat waves.

Since the report came out, many regulators and working groups have begun to accept a third type of climate change-related risk – "Liability risk," which covers the potential consequences of third-party claims for damages caused by climate change.

US Regulators Take Steps Toward a More Hands-on Approach

As more and more global financial regulators start requiring disclosures in line with TCFD recommendations, and some begin to pilot programs to include climate change risks in modeling scenarios and stress testing, the U.S. lags Europe and Asia in preparing to address climate change in financial services regulation.

Where the US is Headed

Policy makers in Washington and state capitals are focusing on seven key areas to address risk from climate change in and from the banking industry: 1) Required disclosures for climate-related risks; 2) Stress testing for systemically important institutions and key stakeholders; 3) Tailored requirements based on asset size and carbon footprint; 4) More focus in certain states and on particular industries; 5) Sustainable investments; 6) Climate-related legislation that affects operations; and 7)

CRA credit for climate risk mitigation efforts and a focus on environmental racism.

President Biden's "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," sets forth his administration's policy "to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities."

Mitigating Climate Change Risk: Lessons Learned from the COVID-19 Pandemic

Like the rest of the world, financial institutions were unprepared for the shocks of the COVID-19 pandemic. But, in looking at what we have learned about the risks in an unprecedented event, we can see some similarities and glean some lessons learned:

- International events do not care about international borders, even if the effects are differentiated by region.
- Effects fall disproportionately on underserved populations.
- We cannot wait to act because the issue contains certain elements of uncertainty.

Regulators and institutions can support a green economy and mitigate global, local, and institution-specific risks. Climate change is an issue that promises to shift what is expected of institutions, and it is essential to begin planning now for how your institution will actively manage both regulatory and consumer expectations.

Adapted from a Capco RISC Services white paper *Emerging Climate Change Risk: How a Global Pandemic and the Biden Administration Bring Climate Change Risk to the Forefront of the US Financial Regulation Conversation*, February 2021. For more information reach out to leah.robinson@capco.com or peter.dugas@capco.com.

DBA Calendar of Events

2021 Women Connect Speaker Series -

Six Sessions! Live and On-Demand!

February 18th: *Building Your Personal Brand* - Laura Meyer, CEO & Founder, Joy Brand Creative

March 18th: *Business Ready Essentials* - Danielle Turcola, President, Professionalism International, Inc.

April 22nd: *Lessons from Human Resources* - Cathleen Hitchens, SVP of Human Resources, Flagship Credit Acceptance

May 20th: *Exploring Emotional Intelligence* - Linda Comerford, Comerford Consulting

June 17th: *Leveraging your LinkedIn* - Michael Coniglio, AVP, Senior Business Analytics and Reporting Analyst, Wilmington Trust

July 22nd: To Be Announced

Foundations of Delaware Trusts

Coming soon, three new sessions in on-demand video.

2021 Delaware Trust Conference - October 19th & 20th

Chase Center on the Riverfront, Wilmington. Wealth Management Professionals, get the latest strategies at the 16th annual edition of this premiere trust event highlighting the advantages of Delaware's trusts. Sponsorships and Exhibitor space available!

2021 DELAWARE TRUST CONFERENCE

Accounting for Success

Why Should Taking a Hardship Distribution be a Hardship?

by
Maria T. Hurd, CPA, RPA
Belfint Lyons & Shuman, P.A.

"Missing hardship backup is one of the most common operational errors we find during financial statement audits."

Taking a hardship distribution should not be, in itself, a hardship to a participant going through challenging times, nor should it be an administration hardship to the employer trying to help. Although obtaining documentation to substantiate a hardship is not, in itself, difficult, missing hardship backup is one of the most common operational errors we find during financial statement audits. The reason is that every party involved thinks someone else is responsible for obtaining the backup, so nobody does it. To make matters worse, some large recordkeepers had erroneously taken the position that self-certification from participants was permissible, both by stating that there was no other financing available to meet the need and also for the hardship reason and amount.

Do More Options Make It Simpler?

Now, both alternatives are options:

- backup documentation for the hardship reason and amount can still be required, or
- the participant can self-certify the hardship reason, amount, and financial necessity, in writing, including a statement that the information provided is truthful and accurate. If self-certification is used, the employer must provide written notification of the taxability of the distribution, the rules regarding the definition of hardship and limitations, and the requirement that the participant maintain the backup.

Self-certification facilitates automation of the hardship approval by the recordkeeper; however, electronic approval of hardship distribution requests through the plan webstation is not always the default. Thus, we continue to find instances in which neither backup nor compliant self-certifications were obtained for hardship distributions. Unfortunately, self-certification does not mean that an email or a phone call from the participant is sufficient.

Safe Harbor Definition of Hardship

The issuance of ineligible hardship distributions is another common error we find during our audits. Sympathetic employers tend to forget that the plan cannot be changed to reflect their wishes regarding available hardships without a written amendment. In this case, when you wish upon a star, it makes no difference who you are. The employer cannot change the reasons for which hardships are granted without a plan amendment and doing so could affect the qualified status of the plan. Most pre-approved plans default to the Treasury Regulations' safe harbor definition of a hardship. Those regulations provide for a "safe harbor" listing of events, all of which are deemed to meet the Internal Revenue Code's requirements for hardship distributions, which makes the process of determining qualification for a hardship distribution easier for the plan administrator. As a result, most plans limit the qualifying events for a hardship distribution to this list:

- Medical expenses for the participant, spouse, children, dependents, or his or her primary beneficiary, if they would be deductible under Code section 213(d), disregarding the requirement that they exceed 10% of adjusted gross income;
- Costs relating to the purchase of the participant's principal residence (excluding mortgage payments);
- Tuition and related educational fees and room and board expenses for up to the next 12 months of post-secondary education for the participant or his or her spouse, children, dependents, or designated beneficiary;
- Payments necessary to prevent the participant's eviction from, or foreclosure on, his or her principal residence;
- Burial or funeral expenses for the participant's deceased parent, spouse, child, dependent, or primary beneficiary;
- Expenses for the repair of damage to the participant's principal residence that would qualify for the casualty deduction under Internal Revenue Code section 165, disregarding the requirement that the damage was caused by a federally declared disaster; and
- Expenses and losses (including loss of income) incurred by the participant on account of a federally declared (i.e., by the Federal Emergency Management Agency (FEMA)) disaster, if the participant's principal residence or place of employment was in the area designated by FEMA for individual assistance with respect to the disaster.

If the participant's parents have medical expenses, or the participant's mortgage payments are late, but there is no eviction notice, or the participant's niece or nephew needs tuition assistance, or the participant's cat needs surgery, or any other costly and unfortunate situation strikes the participant or someone they care for, but is not a hardship reason permitted in the plan, the employer has to consult the document provider regarding the possibility for an amendment that could make it possible to assist the affected participant. Many employers don't realize that the safe harbor hardship reasons are not the only hardship reasons permitted in a defined contribution plan.

Audit Procedures for Hardship Distributions

In September 2019, Final Regulations were published regarding hardship distributions from 401(k) plans. Although many of the rules regarding hardship distributions were relaxed, the new leniency is often optional, so the auditor will not assume that your plan adopted all the new options, such as available sources for a hardship distribution including the participant's entire 401(k) account, or that maximizing all available participant loans is no longer required. For these previously mandatory requirements to be eliminated, the plan sponsor must actively choose to implement the more lenient provisions. Conversely, 403(b) plans cannot choose to offer hardship distributions from earnings on deferrals, or from employer contributions, including QNECs, QMACs, or safe harbor contributions for custodial account/ mutual fund 403(b) plans, because the Final Treasury Regulations did not change the available sources as it did for 401(k) plans. Lastly, some changes are not optional. Effective 1/1/2020, the suspension of deferrals after a hardship distribution is no longer an option. Our audits will verify that deferrals do not stop automatically after hardship distributions, unless the participant elects to stop deferral withholdings.

Mistakes Happen, but There's a Fix-It Guide for That!

Revenue Procedure 2019-19 – the most current Employee Plans Compliance Resolution System (EPCRS), offers several pre-approved self-correction opportunities for plan operations that go astray, including hardship distribution administration.

EPCRS gives plan sponsors the ability to retroactively amend the plan to match the plan provisions with the plan operations, as long as: (1) the amendment results in an increase of a benefit, right, or feature; (2) the increase applies to all employees eligible to participate in the plan; and (3) providing the increase is permitted under the other requirements of the Code and EPCRS. Nonetheless, ineligible hardship distributions are considered to be overpayments of benefits to participants. Retroactive amendments are not permitted to self-correct overpayments — the plan sponsor must ask the participant to return the money to the plan.

If the participant returns the distribution to the plan, the failure is corrected. However, participants tend to spend dollars connected to ineligible distributions right away, and often cannot return the money. Thankfully, under EPCRS, a plan sponsor does not need to make the plan whole if the failure arose solely because payment of a participant's benefits was made in the absence of a distributable event but was otherwise determined in accordance with the terms of the plan. In this case, requesting the refund seems like it would be a sufficient correction, but we always advise plan sponsors to consult ERISA counsel if they want reassurance that they have properly corrected the operational error. If the participant has terminated employment when the failure is found, the participant would have become eligible for a distribution, and no further correction is needed.

Documentation or Self-Certification Not Obtained — Ideally, the simplest correction possible and available is for the plan sponsor to, *post facto*, get the necessary documentation from the participant, whether it is the hardship reason documentation or the self-certification, as applicable.

More Options, More Opportunity for Error, More Ways to Fix It

Adding self-certification to the hardship distribution substantiation options, made them easier to administer if the employer follows the rules, but also created more ways to get it wrong. Fortunately, the most recent EPCRS offers numerous pre-approved ways to self-correct or to request approval for significant or nonstandard corrections. Whether it comes to preventing, detecting, or correcting operational failures, we can work hand-in-hand with the employer, third-party administrator, recordkeepers, and ERISA attorneys to make everything right. For every mistake, there is always a solution.

Lending Law Update

by
Brent C. Shaffer, Esq.
Young Conaway Stargatt & Taylor, LLP

"An electronic signature can be any electronic symbol or process attached to or associated with a record and adopted by a person with the intent to sign the record."

Are Original Signatures Needed on Commercial Loan Documents in the Post-COVID World?

Despite the fact that Delaware adopted the Uniform Electronic Transactions Act (UETA) over 20 years ago, which provides that a signature may not be denied legal enforceability solely because it is in electronic form and that a contract may not be denied legal effect solely because an electronic record was used in its formation, banks have longstanding policies requiring original hard copy "wet" signatures on all commercial loan documents, eschewing scanned/pdf copies of signatures and digital signatures using platforms such as Docusign. COVID-19's environment of remote signing is causing some banks to change those policies; several things factor into those changes.

It has always been the case that whether a written contract has been signed is a matter of intent and the form of the signature never matters. UETA is consistent with that, and applies if each of the parties has agreed to conduct transactions by electronic means. There are several ways to establish such agreement; many documents are now sprouting clauses that remove all doubt, such as the following: "Counterparts delivered by e-mail (pdf) transmission shall be treated as originals and shall constitute valid and effective delivery for all purposes; and this Agreement may be executed and transmitted using Docusign or other electronic format."

An electronic signature can be any electronic symbol or process attached to or associated with a record and adopted by a person with the intent to sign the record; therefore, it can include scanned pdf signatures and digital signatures. Delaware's Uniform Commercial Code repeats the same concepts, allowing electronic signatures for security agreements.

For mortgage loans, all Delaware Recorder of Deeds offices now permit electronic recording of copies; an original hard copy need not be presented (the party e-recording the loan documents must use a specific software platform to do so; not everyone does this yet). As of now, scanned signatures and notary acknowledgments work; digital signatures do not.

Though digital and scanned signatures can be legally enforceable, it's important to make sure the electronic signature is the act of the person that purports to have signed electronically. Under UETA, "security procedures" such as dual factor authentication and knowledge-based authentication (the signing party must answer fact-based questions only they would be likely to know) are advisable and are built in to most digital signature applications.

Importantly, banks ought to still require wet signature originals of Promissory Notes. UETA applies to non-negotiable Promissory Notes for commercial loans, but the issue is establishing who has control of the electronic Note as payee. For mortgage foreclosures, the bank cannot foreclose unless it is in possession of the Note; an original is the best way to prove it is the holder. Also, under UETA if a wet signature note is signed and then scanned and destroyed, the scanning does not convert the Note to an electronic record; instead the scanned Note is unenforceable.

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Young Conaway's commercial real estate attorneys can handle all aspects of your complex commercial transaction. Whether you need advice regarding the acquisition, development and financing of the project, or the preparation of leases or other agreements, Young Conaway's team will put you at ease.

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