

# The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

NOVEMBER/DECEMBER 2021

**EDITOR'S NOTE: CLIMATE CHANGE**

Victoria Prussen Spears

**ESG AND BANKING: THE DISCLOSURE DEBATE**

Robert C. Azarow, Erik Walsh, Sarah Grey, and Paul Nabhan

**FEDERAL RESERVE VICE CHAIR ADDRESSES CLIMATE-RELATED FINANCIAL RISKS**

Travis P. Nelson and Lara M. Rios

**NEW PRIVATE FLOOD INSURANCE GUIDANCE ON HORIZON FOR BANKS**

Michael J. Heller

**LEGAL IMPACT OF FFIEC UPDATE TO AUTHENTICATION GUIDANCE FOR INTERNET-BASED FINANCIAL SERVICES**

Scott R. Fryzel, Lindsay S. Henry, and Lauren E. Quigley

**SBA GUARANTY PURCHASES AND LENDER SERVICING RESPONSIBILITIES FOR PPP LOANS**

Martin Teckler and Grant E. Buerstetta

**CFPB FINALIZES COVID-19 MORTGAGE SERVICING RULES**

Abigail M. Lyle and Taylor Williams

**MOST DE NOVO BANKS WILL BE FORMED BY PAYMENTS AND FINTECH COMPANIES**

James W. Stevens, David S. Idokogi, and Brenna She field

**TEMPORARY RELIEF FOR DEBT COLLECTORS: ELEVENTH CIRCUIT WITHHOLDS *HUNSTEIN* MANDATE**

Daniel F. Gottlieb, Sam Siegfried, and Mark E. Schreiber

**NEW CENTRAL BANK GUIDANCE FOR UAE FINANCIAL INSTITUTIONS ON SUSPICIOUS ACTIVITY/ TRANSACTION REPORTING**

Benjamin D. Wood, Kevin P. McCart, Claiborne W. Porter, and Richard J. Gibbon



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VOLUME 138

NUMBER 10

November/December 2021

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**Editor's Note: Climate Change**

Victoria Prussen Spears 551

**ESG and Banking: The Disclosure Debate**

Robert C. Azarow, Erik Walsh, Sarah Grey, and Paul Nabhan 554

**Federal Reserve Vice Chair Addresses Climate-Related Financial Risks**

Travis P. Nelson and Lara M. Rios 562

**New Private Flood Insurance Guidance on Horizon for Banks**

Michael J. Heller 565

**Legal Impact of FFIEC Update to Authentication Guidance for Internet-Based Financial Services**

Scott R. Fryzel, Lindsay S. Henry, and Lauren E. Quigley 576

**SBA Guaranty Purchases and Lender Servicing Responsibilities for PPP Loans**

Martin Teckler and Grant E. Buerstetta 582

**CFPB Finalizes COVID-19 Mortgage Servicing Rules**

Abigail M. Lyle and Taylor Williams 586

**Most De Novo Banks Will Be Formed by Payments and Fintech Companies**

James W. Stevens, David S. Idokogi, and Brenna Sheffield 591

**Temporary Relief for Debt Collectors: Eleventh Circuit Withholds *Hunstein* Mandate**

Daniel F. Gottlieb, Sam Siegfried, and Mark E. Schreiber 595

**New Central Bank Guidance for UAE Financial Institutions on Suspicious Activity/Transaction Reporting**

Benjamin D. Wood, Kevin P. McCart, Claiborne W. Porter, and Richard J. Gibbon 600

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ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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# SBA Guaranty Purchases and Lender Servicing Responsibilities for PPP Loans

*Martin Teckler and Grant E. Buerstetta\**

*A recent Small Business Administration Servicing Guidance provides helpful new information that should assist lenders in determining further servicing actions under the Paycheck Protection Program loans, including how to proceed in the context of borrower bankruptcy filings. The authors of this article discuss the guidance.*

The U.S. Small Business Administration (the “SBA”) recently issued important new guidance (SBA Procedural Notice 5000-812316, SBA Guaranty Purchases and Lender Servicing Responsibilities, effective July 15, 2021 (the “SBA Servicing Guidance”))<sup>1</sup> regarding the servicing of loans extended under the Paycheck Protection Program,<sup>2</sup> which was initially established pursuant to the Coronavirus Aid, Relief, and Economic Security Act<sup>3</sup> (the “PPP loans”). The purpose of the SBA Servicing Guidance is to reinforce certain servicing responsibilities that lenders have regarding PPP loans under the SBA’s existing rules and regulations (collectively, the “Program Requirements”),<sup>4</sup> and to advise

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<sup>1</sup> The SBA Servicing Guidance: PPP Guaranty Purchases, Charge-Offs, and Lender Servicing Responsibilities, *available at* [https://www.sba.gov/document/procedural-notice-5000-812316-ppp-guaranty-purchases-charge-offs-lender-servicing-responsibilities?utm\\_medium=email&utm\\_source=govdelivery](https://www.sba.gov/document/procedural-notice-5000-812316-ppp-guaranty-purchases-charge-offs-lender-servicing-responsibilities?utm_medium=email&utm_source=govdelivery).

<sup>2</sup> The Paycheck Protection Program (as amended, the “PPP”) was established under Division A, Title I, of the CARES Act and has been subsequently modified pursuant to the Paycheck Protection Program and Healthcare Enhancement Act, Pub. L. 116-139, Apr. 24, 2020, the Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, Jun. 5, 2020, the Consolidated Appropriations Act, 2021, Pub. L. 116-260, Jan. 27, 2021, the American Rescue Plan Act of 2021, Pub. L. 117-2, Mar. 11, 2021 and the PPP Extension Act of 2021, Pub. L. 117-6, Mar. 30, 2021.

<sup>3</sup> The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (as amended, the “CARES Act”), was initially enacted on March 27, 2020.

<sup>4</sup> “Program Requirements” means all regulations and SBA Guidelines under the CARES Act, the Paycheck Protection Program Flexibility Act, the Economic Aid Act, Section 7(a)(36) and (37) of the Small Business Act, any of the rules or guidance that has been issued by the SBA implementing the PPP, including any rule, frequently asked question, or any other applicable

lenders of the guaranty purchase process required for the SBA to honor its 100 percent guaranty on each PPP loan.

## **THE SBA SERVICING GUIDANCE**

The SBA Servicing Guidance provides amplification and further advice on a number of scenarios that commonly arise in the context of servicing and liquidating PPP loans. In this regard, the SBA Servicing Guidance provides that a lender's primary servicing responsibility is to work with the borrower under each PPP loan to seek full loan forgiveness under applicable Program Requirements within 10 months of the end of the applicable PPP loan forgiveness covered period; or, in the event of default or other qualifying event, request that the SBA honor its guaranty of 100 percent repayment of the PPP loan and charge off any remaining balance of the PPP loan under the procedures set forth in the SBA Servicing Guidance.

## **LENDER RESPONSIBILITIES**

The SBA Servicing Guidance enumerates the servicing responsibilities that the SBA expects each PPP lender to observe. It is important to note that the SBA Servicing Guidance (i) makes clear that the lender must service each PPP loan until it is fully forgiven, paid in full, or charged off, and (ii) provides that if a borrower becomes more than 60 days past due in repayment of a PPP loan that has not been wholly forgiven, the lender should make a request for the SBA to make a guaranty purchase of the guaranteed balance of the PPP loan and charge off of the uncollected balance through the use of the SBA's PPP platform.

## **BORROWER BANKRUPTCY**

The SBA Servicing Guidance also provides that if a borrower under a PPP loan has filed for bankruptcy protection after disbursement of a PPP loan, unless the loan has been fully forgiven and the bankruptcy proceeding is a no asset proceeding, the lender must provide the SBA with a notice of the bankruptcy filing; file a proof of claim; and continue to monitor the proceeding.

However, the SBA has now indicated that it does not generally expect lenders to take actions in bankruptcy proceedings in excess of the above minimal actions, and will only approve legal expenses related to the bankruptcy if the

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SBA loan requirements, as defined in 13 C.F.R. § 120.10, *et seq.*

SBA determines, upon review of a litigation plan submitted by the lender, that the legal expenses which would be incurred are cost effective in context of any expected recovery. These clarifications included in the SBA Servicing Guidance provide a different approach to addressing borrowers in bankruptcy than has been the approach required in addressing bankruptcy filings by borrowers more broadly in the 7(a) loan program (of which PPP loans are a part).

Nonetheless, the SBA Servicing Guidance suggests that there may be circumstances in which lenders should be prepared to take further action, in coordination and with the approval of the SBA. Lenders will need to assess different situations to make judgments on whether to seek approval for additional action and what is reasonably required in order to continue monitoring of bankruptcy proceedings, but it is helpful that the SBA has clarified that, in many circumstances, no action beyond the steps outlined will be necessary or appropriate.

The SBA Servicing Guidance enumerates the circumstances under which the lender may ask the SBA to honor its guaranty and obtain a charge-off of a PPP loan. Notably, these circumstances include most bankruptcy proceedings where the court enters an order confirming a reorganization plan that does not provide for repayment of 100 percent of the debt under the PPP loan. The SBA Servicing Guidance also provides the circumstances in which the lender may request the SBA to honor its guaranty without charge-off of the balance. This would most commonly occur when the borrower has appealed a forgiveness decision and that appeal is pending before the SBA's Office of Hearings and Appeals.

The SBA Servicing Guidance also describes what a lender must do if the borrower of a PPP loan submits a forgiveness request after the lender has submitted a request for the SBA to honor its guaranty, and describes how lenders are to submit requests for the SBA to honor its guaranty and charge-off of a PPP Loan using the SBA platform. Notably, complete instructions for usage of the SBA platform in this context are not included in the Notice and will be posted at a later date.

Finally, the SBA Servicing Guidance makes clear that the SBA will honor its guaranty and purchase 100 percent of the outstanding balance of a PPP loan only if the lender has complied with Program Requirements, including applicable underwriting requirements and document collection and record retention requirements. Although the burdens placed on lenders at the outset of the PPP loan program were minimal, the SBA Servicing Guidance makes clear that lenders should maintain careful compliance with the requirements for continuing to service PPP loans.



## **CONCLUSION**

The SBA Servicing Guidance provides helpful new information that should assist lenders in determining further servicing actions under the PPP loans, including, how to proceed in the context of borrower bankruptcy filings.