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A MESSAGE FROM **THE CHIEF EXECUTIVE:**

By Sally Cline

The Power of Advocacy

One thing that has not changed at WVBankers since it was founded 130 years ago is its dedication to lobbying and advocating on behalf of the banking industry. With heightened legislative and regulatory uncertainty, it is more important than ever that we, collectively, take the time to reach out to our legislators and regulators at both the federal and state levels to show them the vital role that banks play within their communities. We take it for granted that every member of the West Virginia Legislature and the U.S. Congress understands the business of banks and the impact banks have on the local economy. Unfortunately, this is not always the case, and it is our role to share our story.

We have a compelling story to tell. Banks make a meaningful difference in the lives of their customers, from home purchases to local sponsorships and small business loans to financial education. Decision-makers should be reminded. Only then can they understand the need for commonsense policies that solve marketplace and regulatory issues while supporting the health and viability of the banking system.

These relationships then build a foundation for lobbying and advocacy, better served through a single voice. Whether you are a small bank, regional bank, a large bank, or thrift, we all come together as one. Most agree that a common vision and message carries more influence and clout. On any big advocacy campaign, we are stronger and more effective when the banking community is united.

Our primary state-level advocacy event is held during the legislative session. Representatives from 19 member banks attended the 2022 Legislative Day and Legislative Reception on January 25. The group was bused to the State Capitol, where we witnessed advocacy at its finest. Meetings were held with legislative leadership and Treasurer Riley Moore, who shared their perspectives about legislative priorities and answered questions. Later that evening, members from the West Virginia State Senate and House of Delegates joined our bankers for the Annual Legislative Reception, where relationships were forged and deepened.

On a federal level, WVBankers partners with the American Bankers Association (ABA) at the annual Washington Summit, an important event in the nation's capital. Here you have an opportunity to hear from high-level speakers, engage with our Congressional delegation, and network with bankers across the country.

These events help bankers maintain and strengthen relationships with members of the West Virginia Legislature and the U.S. Congress, which helps to enable WVBankers to work swiftly and directly with decision-makers when proposals that would be bad for banking are introduced and when we have legislation to push forward that promotes our interests.

When dealing with really important legislative issues, lobbying and advocacy are sometimes not enough. Some issues require grassroots efforts, in which we provide our members with legislative contact information so that they can communicate directly. On federal issues, the association will often partner with ABA. On state issues, we launch a call to action through VoterVoice. VoterVoice is our legislative action center that provides members the opportunity to conveniently contact their elected officials through emails, letters, and phone calls. Two critical grassroots efforts occurred last year:

- We successfully partnered with ABA to oppose a controversial proposal by which Congress would have created a new bank account-based IRS information reporting regime. Sixty-five West Virginia bankers

Continued on page 6

Continued from page 5

participated in the campaign and sent 195 emails to our West Virginia delegation.

- During the 2021 WV Legislative session, we successfully shut down a provision that would have imposed a new 8.5% tax on computer hardware and software, digital goods, advertising, and electronic data processing, and a 3% tax on legal, accounting, and other professional services. West Virginia bankers sent 514 messages of opposition to West Virginia legislators.

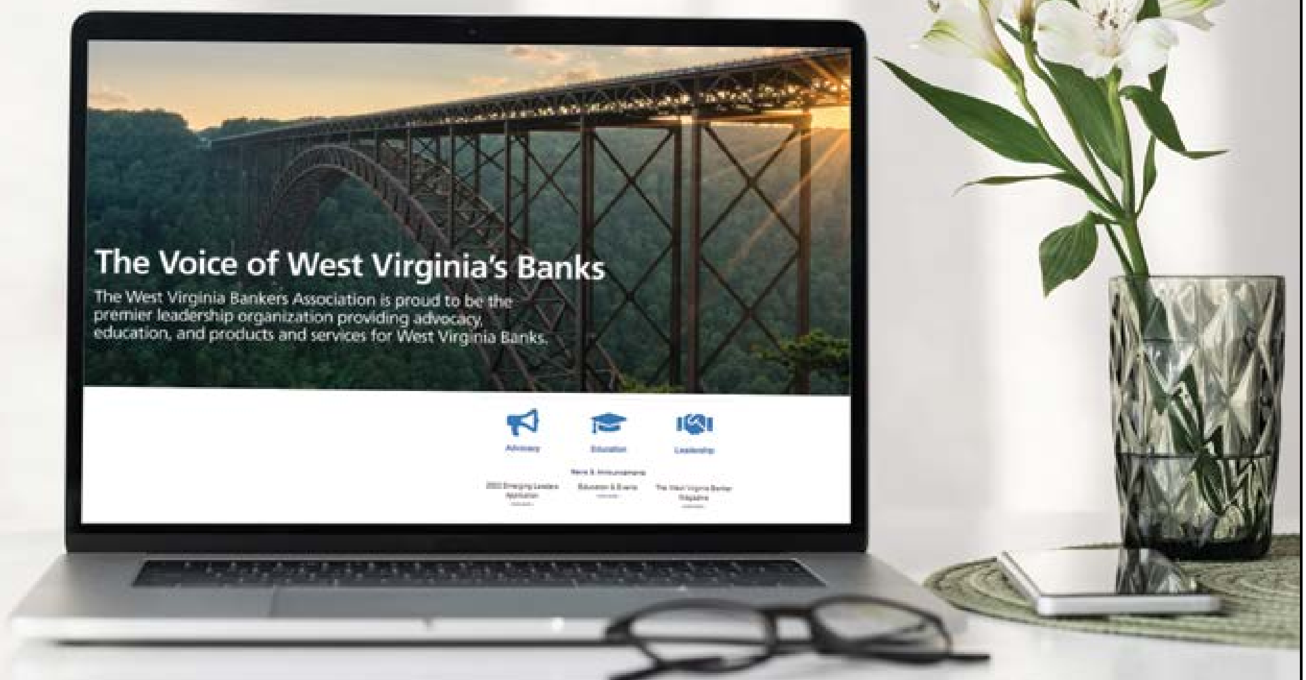
When it comes to laws and regulations, banks are in it together. A law that is bad for one bank is bad for all.

I am an ardent advocate of uniting the voices of banks of all sizes to move the industry forward while protecting and serving local communities and businesses.

I am an ardent advocate of uniting the voices of banks of all sizes to move the industry forward while protecting and serving local communities and businesses. No industry can do what we do in economic growth and job creation. Effective advocacy requires everyone's involvement. To that end, we are working to provide meaningful opportunities for our members to engage in that process.

Finally, I cannot talk about advocacy without mentioning the continuing importance of your WVBankPAC contributions. Like it or not, raising money is crucial to getting the attention and support of legislators and getting in front of them when we call. We are more focused than ever on supporting candidates who support banking, and we have seen real, very tangible, and positive results. More than ever, we need your personal support, and especially the support of your directors, senior officers, and your entire team.

Every year will bring new legislative and regulatory challenges. WVBankers will continue to actively advocate on whatever issue comes our way. None of this would be possible without a strong membership and a unified voice. We encourage you to stay informed and engaged. ■



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Community Corner

Peoples Bank

Peoples Bank will be delivering 120 Acts of Kindness across its footprint in 2022, celebrating its 120th anniversary. Peoples Bank started in Marietta February 6, 1902, and has since expanded into seven states and Washington, D.C.

The pictures showcase the first Acts of Kindness of Peoples Bank's delivered, which included pet food and monetary donations to Kanawha-Charleston Humane Association in West Virginia and purchasing unsuspecting patrons' coffee at Mea Cuppa Coffee Lounge in Charleston, West Virginia.

You can follow along with Peoples Bank's 120 Acts of Kindness by visiting their website at pebo.com or following them on their Facebook Page, facebook.com/PeoplesBank.

Bank of Romney

Warm the Children — The Bank of Romney presents $1,900 in employee donations to Patty Anderson of Warm the Children. This local organization does a tremendous amount of good in Hampshire County and concentrates its efforts on providing a complete set of new, warm outerwear to area children.

(left to right) – Shawna Haines, BOR Credit Analyst/Secondary Market Coordinator; Patty Anderson, the owner of Anderson's Fine Jewelry and a representative of Warm the Children; Lisa Carl, BOR SVP/COO; and Beverly Berg, BOR Accounting/Auditing Manager.

Souper Bowl, Augusta Branch of The Bank of Romney: In photo (left to right) Patricia Garland, BOR Teller, Judy Miller, BOR Customer Service Representative, Brittney Baker, BOR Assistant Branch Manager and Loan Officer, Myra Kesner, BOR Branch Manager and Loan Officer, Aren Fincham, BOR Teller.

Souper Bowl, Capon Bridge Branch of The Bank of Romney: In photo (left to right) Tori Davis, BOR Teller; Karen Fadeley, BOR Customer Service Representative; Julie Bergdoll, BOR Customer Service Representative; Barbara Shingleton, BOR Teller; Tracy Orndorff, BOR Capon Bridge Branch Manager and Loan Officer, Adam Hodges, BOR Loan Officer.

Calhoun Banks

Arnoldsburg Office Assistant Retail Manager Andrew Wilson, Operations Specialist Kyerstan Perkins, and Vice President Rick Fitzwater presented "lunch on us" gift certificates to every employee at Roane General Memorial Hospital. They also received a tour of their new facility!

Glenville Office Retail Manager Royce Steele and Vice President Bruce Fitzwater presenting "lunch on us" gift cards to the EMTs at the Braxton County Emergency Services in Sutton, WV

Glenville Office Retail Manager Royce Steele and Vice President Bruce Fitzwater presenting "lunch on us" gift cards to the dedicated women at Hometown Health Care in Sutton, WV.

Glenville Office Retail Manager Royce Steele and Vice President Bruce Fitzwater presenting "lunch on us" gift cards to all employees at Braxton County Memorial Hospital in Gassaway, WV.

Nonsufficient Funds and Overdrafts:

"Junk Fees" in an Ever-Evolving Regulatory Landscape

By Sandra M. Murphy and Floyd Boone, Bowles Rice LLP

Over the last 20 years, nonsufficient funds ("NSF") fees and overdraft ("OD") fees have generated a significant amount of non-interest income at many financial institutions – both large and small. Indeed, the Consumer Financial Protection Bureau ("CFPB") recently noted that, in 2019, financial institutions realized more than $15.4 billion in revenue from NSF and OD fees, while account maintenance fees only contributed approximately $1 billion.

Although NSF/OD fees have generated substantial revenue, they have come at a cost. With various deposit account services (e.g., overdraft payment programs) and internal banking practices (e.g., debit card approval policies, transaction posting orders, etc.), these fees have attracted attention from banking regulators, public interest groups, and lawyers representing consumers. Predictably, these groups have been critical of these fees in general and of bank services and internal banking practices that enhance OD fee income in particular.

Class action litigation against financial institutions has resulted in the payment of settlements that collectively exceed $1 billion. Whereas the targets of this costly litigation were once mainly institutions holding billions of dollars in assets, in recent times, institutions of every size have been targeted. In fact, many of the readers of this article will have either personally dealt with such litigation (or threats of such litigation) or will know someone who has. Unfortunately, these cases (or threats to sue unless settlements are paid) are unlikely to stop.

At the same time, financial institutions have had to deal with ever-evolving regulatory requirements. Historically, although various regulatory reforms have impacted NSF/OD fee income, they have been manageable and have not been existential threats. More recently, however, there have been signs that profound reforms are on the horizon.

Notably, Dec. 1, 2021, the CFPB released two research reports analyzing the revenue generated by OD fees. On that same day, the CFPB's director, Rohit Chopra, issued prepared remarks commenting on the research reports and announcing three steps being taken by the CFPB:

1. Director Chopra announced that CFPB will take action against any "large financial institutions" violating the law in relation to OD fees. Moreover, Director Chopra noted that the CFPB will also work to reveal the identities of any individuals who directed any illegal activity. Relatedly, Director Chopra stated that the CFPB is considering additional policy guidance outlining unlawful practices.

2. CFPB's examiners are being directed to prioritize examinations of banks that are "heavily reliant on overdraft." Director Chopra noted that such institutions can expect "close supervisory attention."

3. "CFPB will be looking to harness technology in ways that give American families the power to more easily fire poor-performing banks." This step will be intended to make it

Class action litigation against financial institutions has resulted in the payment of settlements that collectively exceed $1 billion. Whereas the targets of this costly litigation were once mainly institutions holding billions of dollars in assets, in recent times, institutions of every size have been targeted. In fact, many of the readers of this article will have either personally dealt with such litigation (or threats of such litigation) or will know someone who has.

easier for consumers to move their deposit accounts from one bank to another, including mitigating much of the hassle associated with opening new bank accounts (e.g., obtaining new debit cards, updating direct deposits, etc.).

More recently, Jan. 26, 2022, CFPB published a notice requesting public comments with respect to consumer "fees that are not subject to competitive processes that ensure fair pricing." CFPB characterized such fees as "junk fees." Examples of these junk fees included NSF fees, OD fees, credit card late fees, "convenience fees" for making payments by telephone or online, and various fees related to residential mortgage loans, among others. The deadline to submit comments is March 31, 2022. Comments "will serve to assist the CFPB and policymakers in exercising its enforcement, supervision, regulatory, and other authorities to create fairer, more transparent, and competitive consumer financial markets."

Although most West Virginia banks are not regulated by the CFPB, they have the power to amend a host of federal regulations that are binding on every West Virginia bank. And changes to CFPB's supervisory and examination practices could influence the CFPB's fellow federal banking regulators to make similar changes to their practices.

Unsurprisingly, before and after Director Chopra's Dec. 1, 2021, public statement, many banks announced dramatic changes regarding their NSF/OD policies and practices. Although changes made by the largest banks (e.g., Bank of America, Chase, Wells Fargo, Truist) have received the most attention, many regional and smaller banks have also announced dramatic changes in their NSF/OD policies and practices. These changes range from eliminating NSF and/or OD fees altogether to providing consumers with grace periods to eliminate any overdraft before charging an OD fee.

Financial institutions should carefully review their NSF/OD policies and practices, including whether they are overly dependent on income from NSF and OD fees. Likewise, institutions should carefully consider changes to their NSF/OD policies and practices, including the possibility of eliminating NSF fees, reducing the amounts of OD fees, and providing customers with grace periods to eliminate any overdrafts before any OD fee is assessed.

At a minimum, every financial institution should carefully review its standard account disclosures and consider whether the disclosures accurately reflect their policies and procedures concerning the NSF/OD fees and any internal institutional processes that impact ODs.

Profound changes are coming in terms of regulatory expectations vis-à-vis NSF/OD fees. Banks cannot prevent these changes, but they can plan for the inevitable and potentially mitigate the impact of change. ■

Sandra M. Murphy is a partner with Bowles Rice LLP and serves as leader of the firm's Banking and Financial Services practice group. She focuses her practice on acquisition, regulatory, enforcement, corporate governance and securities law matters for banks and other financial institutions

Floyd Boone, also a partner with Bowles Rice, focuses his practice on advising financial institutions in regulatory compliance and litigation. He is a member of the firm's Banking and Financial Services practice group and leads the firm's Financial Services Litigation group.

Both Ms. Murphy and Mr. Boone have extensive experience defending and advising financial institutions against regulatory and litigation threats relating to NSF/OD policies and procedures. Mr. Boone has been defending and advising financial institutions in these areas since 2006. Please feel free to contact Ms. Murphy at (304) 347-1131 or Mr. Boone at (304) 347-1733 for more information.

The Fed's Balancing Act for 2022

By Jeffrey F. Caughron, The Baker Group

Short-term yields have risen commensurate with the expectation of multiple rate hikes. All members of the Federal Open Market Committee (FOMC) now see at least one, and some see as many as four hikes in 2022.

On the first trading day of 2022, the U.S. 10-year Treasury Note yield jumped above 1.60%, then traded up another 10bps in the two subsequent sessions. That was a 35bps increase in two weeks and aligned with a similar move higher for market measures of inflation expectations. The bond market hadn't seen a worse start to a year since 2009. It seems the market is entering the new year with the same concerns and uncertainty that plagued it for most of 2021, but with greater urgency. We've seen this movie before, though, and it's clear that policymakers and investors alike need to carefully assess the strength and staying power of an inflation environment that's unusual but not so transitory.

Typically, an inflationary impulse arises late in an economic cycle and is driven by an overheated economy where everything is maxed out and hitting on all cylinders, and strong demand is pulling up the general price level. That is not really what is happening now. Instead, we're dealing with "supply shock" inflation, where COVID-induced shutdowns produce bottlenecks and sclerotic trade flows. Dockworkers, truck drivers, processing personnel and other key points in the supply chain are working with reduced staffing and capacity, causing ripple effects throughout the system. So, are rate hikes and a tighter monetary policy the right medicine for "supply shock" inflation as is normally the case with "demand-pull" inflation? Or might a higher cost of borrowing just exacerbate the supply chain disruptions?

Former Treasury Secretary Lawrence Summers recently warned of a trying period for the U.S. economy in coming years with a risk of recession followed by "stagnation." He fears that "we are already reaching a point where it will be challenging to reduce inflation without giving rise to recession." Fed decision-makers are all too aware that if they move too aggressively and inflation really is just a matter of temporary supply chain problems, they run the risk of creating recession to little purpose. The Fed needs to go slow if the inflation trend is truly benign. But if it has deeper, more fundamental roots, too gradual a policy would

allow inflationary psychology to become embedded in the economy, risking a wage-price spiral, pushing households and firms to get ahead of assumed cost increases and resort to stockpiling. That's the Summers worst-case scenario: a return to 1979.

There can be no question that the Fed is right to accelerate the "tapering" and stop pumping liquidity into an over-liquified banking system. In their zest to prop up the economy to when COVID was new, they characteristically overdid the job, creating way too much cheap money, distorting financial markets, and fueling asset price bubbles in speculative assets that pose serious risks going forward. The quantitative ease needs to stop. That's the easy part of the Fed's task. The hard part is subsequently determining when and how fast to raise rates.

The flattening yield curve reflects the dangerous waters the Fed must navigate. Short-term yields have risen commensurate with the expectation of multiple rate hikes. All members of the Federal Open Market Committee (FOMC) now see at least one, and some see as many as four hikes in 2022. Longer-term yields, though, have behaved differently. Despite the new year's jump, the 10-year yield remains below its March 2021 high of 1.75%. That may change, of course, but the fact that yields in the long end have moved so slowly up to this point has allowed the yield curve to flatten and belies genuine concern about growth going forward. The Fed is indeed walking a tightrope. Let's hope they're able to keep their balance. ■

Jeffrey F. Caughron is Chairman of the Board with The Baker Group. He has worked in financial markets and the securities industry since 1985, always with an emphasis on banking, investments and interest rate risk management. You can contact him at 800-937-2257 or jcaughron@GoBaker.com.

WEST VIRGINIA SMALL ESTATE ACT:

Simplifying The Administration Process For Heirs While Providing Potential Mistakes For Unprepared Banks

By Richard Marsh, Flaherty Sensabaugh Bonasso PLLC

The West Virginia West Virginia Small Estate Act (the Act) provides an alternative to traditional probate and became effective July 1, 2021. Although from the heirs' perspective, the Act simplifies the process for transferring the deceased's assets, it will provide complications and liabilities for financial institutions if these institutions do not update their probate policies.

The Act can be used to administer "small" estates. Small estates are those in which the deceased had probate personal property assets collectively valued at no more than $50,000 and West Virginia real property assets collectively valued at no more than $100,000. It is designed to be less expensive as there is no bond required. It is also designed to be faster, not subject to a claims period and has less paperwork.

When reviewing the Act, a reader will note that although it has some similarities to traditional probate, the process and the language used is different. For example, instead of heirs or beneficiaries, the persons to receive the deceased's assets are the "successors." The definition of successors also includes persons named as personal representative or beneficiary under the deceased's will.

In the small estate process, there is no personal representative of the estate. Rather, the equivalent of the personal

representative is the "authorized successor." The authorized successor has many of the same powers as a personal representative, such as filing tax returns and pursuing litigation. Regarding who acts as the authorized successor, they are simply the successor who has qualified with the clerk for the position. Notably, the authorized successor's term and authority are limited to six months unless otherwise extended.

The authorized successor's primary obligation is to collect the small assets, pay creditors, and then distribute those small assets to the successors. A "small asset" is any probate personal property owned by the decedent that has a value of less than $50,000. Specifically included in the definition of small assets are several assets controlled by financial institutions, including cash, bank accounts, savings accounts, credit union accounts, certificates of deposit, brokerage accounts, stocks, mutual funds, securities, bonds, notes, proceeds of life insurance payable to the estate, deposits, and overpayments.

The Act does not change the probate and non-probate distinctions. Therefore, to the extent of a payable on death or other beneficiary designation, such asset remains a non-probate asset. As a nonprobate outside, the asset will fall outside of the scope of the Act.

Financial institutions have an obligation to pay over the small asset to the authorized successor. The Act is clear that any entity having possession of a small asset shall deliver the same to the authorized successor. To trigger that duty, the authorized successor need only present the authorized successor's certificate and authorization issued by the county clerk. An authorized successor may institute a civil action against the holder of a small asset if the holder refuses to pay the same over. Based on such power and authority, a financial institution refusing to pay over the asset creates its own liability.

The change in the administrative process may create a problem for some financial institutions. Normally, one expects to receive letters of administration. After receiving the same, the financial institution will normally want to pay the funds to the estate of the deceased and may require the creation of an estate checking account. Neither of those actions is necessarily possible under the Act. The authorized successor does not have a letter of administration but instead has the certificate and authorization. In terms of payment, the financial institution should not simply pay or transfer the funds to the estate. Rather, to fully comply with the Act, the financial institution should pay or transfer the asset directly to the authorized successor in the authorized successor's name.

The financial institution does have liability protection for paying the asset over to the authorized successor to the same extent as if the person was the personal representative. The financial institution also has no obligation to see the application of the small asset or inquire into the truth of any statement in the certificate and authorization.

A financial institution could likely comply with its obligation by paying the money to the "Estate of the Deceased," but

The financial institution does have liability protection for paying the asset over to the authorized successor to the same extent as if the person was the personal representative. The financial institution also has no obligation to see the application of the small asset or inquire into the truth of any statement in the certificate and authorization.

this could ultimately create liability. Such payment would work because the authorized successor has the authority to endorse any check that is payable to the decedent or the decedent's estate. Because of the power to endorse, other financial institutions have to honor that check and endorsement under the Act. The concern is if that second financial institution will not honor the check, then is it creating liability for both financial institutions? Put another way, consider what happens if ABC Bank issues a check to "Estate of John Doe" and then the authorized successor tries to deposit it in his own bank account at XYZ Bank, which is allowable under the Act. However, if XYZ Bank ignores the Act and refuses to deposit an estate check in a personal account, would the authorized successor have a claim against both banks for refusing to pay over the small asset and accept the endorsement? XYZ Bank would clearly be in violation of the Act, and, arguably, ABC Bank is as well because it had not paid the money over to the authorized successor instead of the estate.

The Act provides a simpler and faster way to administer the estate of a deceased. By simplifying the process, the Act changes some aspects of the traditional method of probate. Those changes, such as the ability of the authorized successor to forego an estate bank account, can create confusion and ultimately liability for financial institutions. However, by following the Act, a financial institution will have the same protections as if it was dealing with a personal representative and will further assist in simplifying the administrative process. ■

Richard Marsh is an attorney with Flaherty Sensabaugh Bonasso PLLC in Clarksburg, West Virginia. His practice focuses on estate planning and administration and corporate representation. He can be reached at rmarsh@flahertylegal.com.

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Benefits That Attract and Retain Employees As We Emerge From The Pandemic

By Mark Hogan, Pentegra

Although the worst of the pandemic is hopefully behind us, the lifestyle disruption it caused has created a monumental shift in how people work. This disruption has affected nearly every industry and has caused many individuals to take a step back and reevaluate what their career means to them. According to the Bureau of Labor Statistics, a record 4.4 million people quit their jobs in September of 2021 alone.

Due to the pandemic, it is no surprise then that many employers face the challenge of attracting and retaining talent. This issue is likely to continue through 2022 and beyond. Talented employees enhance productivity and provide leadership and are often a company's greatest asset. In a recent study of 205 retirement plan sponsors, 81% said they are concerned about the increased competition for talent, and 73% are struggling to find qualified employees to fill positions.[1] With job candidates scarce, companies will be vying for the same top-tier employees.

As a result, many companies are utilizing their retirement and benefit packages and placing emphasis on improving their employees' financial wellness and well-being to help differentiate themselves as the employer of choice.

Below are a few ways employers are now positioning themselves for success:

Offer Employer Retirement Plan Matching Contributions

An employer retirement plan match is an attractive employee benefit that can help an employer set itself apart. A recent study showed that more than 45% of respondents considered an employer 401(k) match a major factor when deciding to accept a job.[2] Many employers are now considering increasing their matches and shortening their vesting schedules. Even if employers had to suspend their matches due to the pandemic, reinstating a match is a positive message to communicate to employees. Offering a match also boosts employee enrollment into the plan.

Add A Profit-sharing Arrangement

Some employers are adding a profit-sharing arrangement to their 401(k) plans, providing employees with a personal interest in a company's success. This can potentially limit employee turnover through rewarding ongoing service. For employers, a primary benefit is a flexibility whereby no contributions are required if there are no profits in a particular year.

Offer Additional Benefits

Some plan sponsors add other nonretirement plan-related benefits such as emergency savings accounts (ESAs) and/or health savings accounts (HSAs). An ESA can be funded through automatic deposits set up through payroll deductions, similar to how employees fund their 401(k) plans. The money deducted into an ESA is taxed as income and is available to employees who have immediate financial needs.

HSAs allow employees to set aside money on a pretax basis to pay for qualified medical expenses. If your company offers an HSA program, now may be a good time to remind employees of this benefit and how to enroll in the account. HSAs can be an effective and tax-efficient way to save for health care costs in retirement.

Offer Greater Flexibility

Many employees settled into working from home and all the flexibility that went along with that. Some were able to achieve a healthy work/life balance without having to contend with a long commute or set office hours. But workplace flexibility goes beyond just working from home. Other benefits include providing caregiver leave and rethinking paid time off (PTO) policies. ■

[1] Principal Financial Group, https://www.pionline.com/retirement-plans/firms-beef-retirement-benefits-attract-and-retain-employees

[2] https://www.betterment.com/401k/resources/employer-match

We Can Help
These are just some ways employers can help recruit and retain the high-quality employees their companies depend on. Pentegra is here to help. Contact Mark Hogan at 513.259.9222 or mark.hogan@pentegra.com to learn more about plan redesign and benefit enhancement options.

Five Ways Banks Can Compete with Fintech Startups

By Nicholas P. Mooney II, Spilman Thomas & Battle PLLC

Readers of West Virginia Banker magazine likely are familiar with the term "fintech," but for the uninitiated, "fintech" is the combination of the words "financial" and "technology." It generally refers to a piece of technology that automates or improves the delivery of financial products by traditional financial institutions or their use by customers. An example of this is the implementation of digital lending into a bank's services. The term also is used to refer to a specific type of entity that integrates technology as a core feature of its delivery of financial products. Examples of this are PayPal, Stripe, and Robinhood.

Investments in fintech have been on the rise in recent years. In 2018, $128 billion was invested globally into fintech, which is predicted to be $310 billion in 2022. In addition to investments, customers are not shy about using a fintech company for their banking services. One recent study reported that 30% of respondents had used a digital-only bank in the past or expected to use one in the future. Further, 9% said that they planned to open a bank account with a fintech company in the near future.

In addition, the COVID-19 pandemic increased consumers' desire to conduct their daily lives without the necessity of physical contact. This preference forced small businesses to adopt digital payment options. VISA's 2022 Back to Business Survey reports that 41% of consumers already operate without cash or will make that change within the next two years.

Similar things are being said about the change fintech is bringing to traditional banking. Consumers value the convenience of being able to conduct banking 24/7 and to open an account remotely. They argue that fintechs offer less expensive services and more user-friendly experiences.

Does this mean fintechs will replace banks? No. Banks have many benefits over fintechs. Although fintechs are seen as more nimble, they also are considered riskier than banks. Furthermore, fintechs sometimes lack the long-term relationship banks already enjoy with their customers. Those relationships can reduce the likelihood that a customer will leave for a fintech and also give the bank a trove of information to help customize their user experiences.

Below are five ways banks can compete with fintechs.

1. **Modernize and digitize core products and functions.**
   A bank can work to modernize and digitize its core products and functions in many ways, such as focusing on its mobile app. Most banks have some internet

presence, but that presence needs to be optimized for mobile devices. Customers want the ability to access a bank's different products and services with one all-encompassing mobile app.

If it has not already, a bank needs to consider distributed ledger applications and how they might be implemented to speed up processes and lower transaction costs. Several projects are underway in the U.S. and abroad to develop and implement these applications for the financial industry.

Banks also should investigate how they can implement automation into some functions, including adopting artificial intelligence. This approach can save time and money onboarding new customers, mortgage lending, and loan processing. These technologies can also reduce compliance costs in areas like anti-money laundering compliance. In fact, an entire industry (called Regtech) has sprouted to offer these types of services to banks and others.

2. **Incentivize a change in culture.** Critics say banks are the oldest of the old school businesses. Legacy operating systems sometimes silo different departments and contain many levels of hierarchy. Fintechs claim they can offer faster services for often less cost because of their flat organizational structure.

   Banks should consider where the adoption of cross-functional teams can speed up the delivery of products while reducing costs. They also need to prepare to adopt the post-COVID-pandemic new normal of a remote and decentralized workforce.

3. **Focus on the customer experience.** Banks should capitalize on their existing customer relationships, which can be done in a number of ways. Increased transparency in the lending process, where potential borrowers are given visual representations of what is needed to obtain a better rate, would give customers more of a sense of being in control of the lending process. Gamification of the user experience, especially in savings and checking accounts, would appeal to younger customers. PNC Bank's "Punch the Pig" is a popular example. In it, a virtual piggy bank appears on the app screen and allows users to transfer funds from a spending account to a savings account simply by "punching" it.

   In addition to those options, banks have an opportunity that fintechs currently lack. With customer relationships spanning years or decades, banks hold a trove of personal information about their customers that could be used to develop a more personalized set of products and services.

4. **Focus on underserved communities, Millennials, and Gen Z.** People who traditional banks have underserved are more likely to gravitate to fintechs. One rallying cry of cryptocurrencies is the ability to bring financial inclusion to the unbanked and underbanked. Banks should consider how they can bring traditionally underserved communities under the tent with online banking and easier ways to use savings accounts.

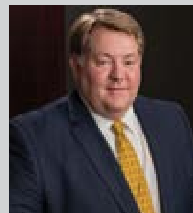
   The population segments most likely to use a digital-only bank or fintech are Millennials and Gen Z. These groups have grown up in a digital-first world, and to capture their business, banks will need to have a robust digital experience.

Although fintechs are seen as more nimble, they also are considered riskier than banks. Furthermore, fintechs sometimes lack the long-term relationship banks already enjoy with their customers. Those relationships can reduce the likelihood that a customer will leave for a fintech and also give the bank a trove of information to help customize their user experiences.

5. **Collaborate with fintechs.** Another way banks can compete with fintechs is to collaborate with them. This can take many forms, with varying degrees of investment and integration costs. An inexpensive option is to purchase loans originated by fintechs or enter into agreements to refer customers. Outsourcing some functions to a fintech is another option (bearing in mind the bank's obligation to supervise compliance of vendors). More expensive options include acquiring an ongoing and profitable fintech and making equity investments in fintechs.

Conclusion

Fintechs are not likely to disappear from the financial services landscape. However, the belief that these "disruptors" will put banks out of business is misplaced. Banks have many tools available to them to compete with these companies. The previous are five avenues banks should consider and discuss internally as they plot their course to coexist with fintechs. ■



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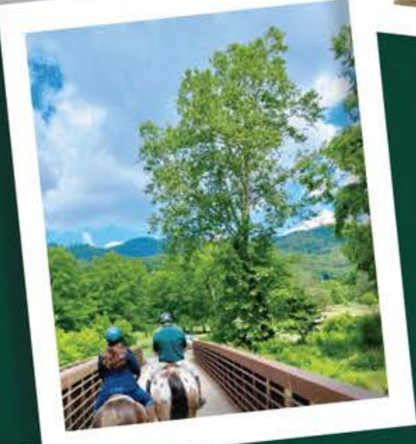

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Bankruptcy and Judgment Liens: Traps for the Unwary

By Steve Brown, Investors Title Insurance Company

When searching a title or reviewing the results of a title search, the title examiner may discover that the current property owner, or a previous owner, has been involved in a bankruptcy proceeding while owner of the property. Often, the property owner's bankruptcy was preceded by the entry of a number of judgments in favor of the owner's creditors, which served as precipitating factors for the bankruptcy proceeding. In determining whether the pre-bankruptcy judgments remain attached as liens against the subject property, the title examiner's limited knowledge of the effect of bankruptcy proceedings on judgment liens against the debtor's property may create traps for the title examiner in rendering the title opinion. Those traps may be avoided by a better understanding of the effect of bankruptcy proceedings on judgment liens that attach before the bankruptcy filing and by disclosing the bankruptcy issues and seeking the advice of a knowledgeable bankruptcy attorney or the title insurer.

The property owner facing a significant judgment or numerous judgments or demands by creditors will seek the protection of the bankruptcy courts by filing a voluntary petition or may have an involuntary petition filed by his or her creditors. When the petition is filed, all debts owed by the debtor are called "pre-petition" debts. The principal goal of the debtor, once in bankruptcy, is to obtain relief from as many pre-bankruptcy obligations as possible. The principal and most commonly known way the debtor accomplishes this goal in bankruptcy proceedings is by obtaining a discharge.

Under each of the bankruptcy chapters, a debtor may obtain a discharge of some of all of the debtor's indebtedness if the debtor meets the statutory requirements for the discharge, pursuant to 11 U.S.C. Section 727, 944, 1141, 1228 or 1328. The effect of a discharge is described in 11 U.S.C. Section 524 provides:

(a) A discharge in a case under this title:

1. voids any judgment to the extent that such judgment is a determination of the personal liability of the debtor with respect to any [pre-petition] debt discharged under … this title …
2. operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor …

Instead, to avoid the bankruptcy trap, a knowledgeable title examiner must investigate further to determine if other action has been taken during the debtor's bankruptcy proceedings to expunge the judgment lien from the debtor's property.

The effect of Section 524(a) of the Bankruptcy Code is to provide the debtor with a discharge from personal liability for most pre-petition debts under the applicable provisions of the bankruptcy code, including debts evidenced by a pre-bankruptcy judgment. It further protects the debtor from any court action to collect, recover, or offset any discharged debt as a personal liability of the debtor. Because of the language in Section 524(a)(1) stating that the discharge "voids any judgment," a title examiner with limited knowledge of the Bankruptcy Code may assume that the effect of a discharge is also to void the judgment lien against the real property of the debtor when the judgment was obtained prior to the debtor's bankruptcy case. Accordingly, the title examiner may fail to report the existence of a pre-bankruptcy judgment lien on the title report or opinion, which would be a serious error.

The United States Supreme Court has held that a creditor's right to foreclose on a lien survives the bankruptcy proceedings notwithstanding the discharge of personal liability of the debtor pursuant to 11 U.S.C. Section 524(a). (See Johnson v. Homestate Bank, 501 U.S. 78, 82-83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66, 73-74 (1991).) Thus, the mere fact that a property owner has obtained a discharge of a prepetition indebtedness, which was reduced to judgment prior to bankruptcy, does not mean that the bankruptcy has wiped out the pre-bankruptcy judgment lien against the owner's property. Instead, to avoid the bankruptcy trap, a knowledgeable title examiner must investigate further to determine if other action has been taken during the debtor's bankruptcy proceedings to expunge the judgment lien from the debtor's property.

Other actions that may occur during a bankruptcy proceeding that would have the effect of removing the lien as a lien against the real property owned by the debtor include a sale of the debtor's real property during the pendency of the bankruptcy proceeding "free and clear of liens" pursuant to an applicable court order under 11 U.S.C. Section 363(f); avoidance of the judgment lien pursuant to the avoidance powers of the trustee; "stripping" of the lien pursuant to a confirmed bankruptcy plan; and avoidance of the judgment lien by the debtor pursuant to 11 U.S.C. Section 522(f). However, even if the diligent title examiner discovers any of these events in the course of the debtor's bankruptcy proceedings, further questions must be asked, or the unwary title examiner may fall into another bankruptcy trap.

It would seem logical to assume that the entry by a bankruptcy court of an order allowing a piece of real property to be sold free and clear of liens pursuant to 11 U.S.C. Section 363(f), and a subsequent sale of that property by the trustee or the debtor, would be sufficient to remove a pre-bankruptcy judgment as a lien on the real property conveyed; however, the order has that effect only if the sale, which occurred, was conducted in accordance with the specific terms regarding the manner of sale, sale price, and identity of purchasers in the court order authorizing the sale. For example, if the order authorizes a sale of the property free and clear of liens to John Smith for $250,000.00, and the property is sold to John Smith or another for a lesser price, the sale may be ineffective to remove the judgment liens and voidable. In addition, if the order authorizes a sale by auction, further bankruptcy orders may be required to confirm the sale after auction.

Accordingly, once a title examiner discovers a sale of a property during bankruptcy "free and clear of liens," an effort should be made to obtain as much information as possible regarding the terms of the order authorizing the sale and the circumstances of the actual sale, and that information should be forwarded to a knowledgeable bankruptcy attorney or the title insurer for a determination of whether the sale was sufficiently in compliance with the terms of the court's order to remove the pre-bankruptcy judgment liens.

If the title examiner discovers that the property was conveyed by the debtor or trustee during the pendency of the bankruptcy and the property examiner cannot obtain any evidence of a court order allowing the sale "free and clear of liens," the conveyance will be invalid to convey the property free and clear of judgment liens, unless the sale was made by the trustee or the bankruptcy debtor in the ordinary course of the business of the bankruptcy debtor and the requirements of Section 363(f) of the Bankruptcy Code are met. The title examiner should not rely upon statements of the debtor or the trustee to determine whether or not a sale of real property allegedly "in the ordinary course of business" of the debtor is sufficient to remove the attached judgment liens from the property. Instead, the title examiner should convey all information known to a knowledgeable bankruptcy attorney or the title insurer to make such a determination. In any event, the matter should be reported to the title insurer, who will often require a court order clarifying that the sale

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was authorized and sufficient pursuant to Section 363 to remove the liens or may require a legal opinion that the sale had the intended effect.

The trustee may avoid certain liens by using the trustee's avoidance powers under the Bankruptcy Code, thereby removing the attachment of the liens to the property. Any avoidance by the trustee of the lien pursuant to the Bankruptcy Code requires entry by the court of an order avoiding the liens.

In addition, the debtor may "strip" the liens from the property in a confirmed bankruptcy plan or may have judgment liens avoided under the circumstances described in 11 U.S.C. 522(f). Both events require an order of the Bankruptcy Court confirming the bankruptcy plan or avoiding the lien. However, the mere existence of an order confirming a bankruptcy plan with "lien stripping" provisions, or an order avoiding a lien pursuant to Section 522(f) as to a particular piece of property, may not be sufficient to avoid the lien. In Chapter 12 and Chapter 13 bankruptcy cases, neither the avoidance of judgment liens by the debtor pursuant to Section 522(f)(1)(A) nor the stripping of liens pursuant to a confirmed plan is final unless and until the debtor completes the Chapter 12 or Chapter 13 bankruptcy plan, and obtains a discharge pursuant to Sections 1228 or 1328 of the Bankruptcy Code. Accordingly, any order confirming a plan with "stripping" provisions or avoiding a lien against real property pursuant to Section 522(f)(1)(A) should be reviewed by a knowledgeable bankruptcy attorney or by the title insurer to determine whether the bankruptcy order has the effect of actually avoiding judgment liens and removing them as liens against the property of the bankruptcy debtor.

It should be noted that if a debtor has obtained a discharge in bankruptcy, and a pre-judgment lien attached to the debtor's real property prior to bankruptcy has not been avoided or otherwise removed from the property during the pendency of the bankruptcy, the debtor may, under certain circumstances, be able to have the bankruptcy attorney reopen the case to remove the lien pursuant to Section 522(f) of the Bankruptcy Code if the property is of the type that could be exempted pursuant to applicable state or bankruptcy law. For that reason, the property owner should be allowed to determine whether removing the lien is feasible prior to being required to pay the lien at or before closing the transaction.

Finally, it should also be noted that a bankruptcy proceeding by a property owner may have the effect of extending the duration of a judgment lien on the real property if the judgment lien survives the bankruptcy proceeding. 11 U.S.C Section 108(a) may have the effect of extending the duration of a judgment lien at least 30 days after the expiration of the bankruptcy case if the lien otherwise would have expired during the bankruptcy proceeding. In addition, some states have laws that toll the statute of limitation for a judgment lien during the period in which a creditor is enjoined from enforcing

The title examiner should not rely upon statements of the debtor or the trustee to determine whether or not a sale of real property allegedly "in the ordinary course of business" of the debtor is sufficient to remove the attached judgment liens from the property.

his lien during the pendency of a bankruptcy proceeding. Failure by the title examiner to consider any such tolling in determining whether a judgment lien has expired would be a serious mistake.

In short, the determination of whether pre-bankruptcy judgment liens remain attached to property of a judgment debtor who has been through a bankruptcy proceeding is a process fraught with traps for the title examiner. A consultation with a knowledgeable bankruptcy attorney and a call to the title insurer with full disclosure of the bankruptcy information is essential to protect the interests of the title examiner, the person rendering the title opinion, the title insurer, the lender, the buyer, and the seller of the real property. ■

Stephen B. Brown Sr. serves as Vice President Communications & Market Development/Title Attorney for Investors Title Insurance Company.

He assists in underwriting, identifies and resolves major claims, formulates risk management solutions, and develops and implements legislative and regulatory policies on behalf of the company. He is a premiere speaker in paralegal and attorney education regarding legislative and regulatory issues, claims prevention, and risk management.

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Implementing Computer-Security Incident Notice Requirement a Good Reason to Revisit Your Response Plan

By Mark Mangano, Jackson Kelly PLLC

The three primary banking regulators have issued a new rule effective April 1, 2022, "Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers"("Notice Requirement").[1] Complying with the new rule should be relatively easy, but a deeper consideration of the associated obligations should prompt a bank to review its computer-security incident response plan, policies, procedures, and cyber-risk insurance coverage.

Notice Requirement

The Notice Requirement is intended to promote a bank providing timely notice to its primary regulator when the bank experiences a computer-security incident that materially and adversely affects the bank or bank holding company supervised by the Federal Reserve, OCC, or FDIC. The rule generally applies to banks and entities subject to the Bank Service Company Act ("Banking Service Provider").

Bank Service Provider Obligation

A Bank Service Provider is required to notify at least one bank-designated point of contact at each affected banking organization customer as soon as possible when the Bank Service Provider determines that it has experienced a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, covered services provided to such banking organization for four

Banks bear ultimate responsibility for responding to incidents that impact their customers and safe and sound banking operations.

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The bank is obligated to evaluate the impact of computer-security incidents occurring within its own systems or the systems of a Bank Service Provider and determine whether the incident constitutes a "Notification Incident."

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or more hours. The reporting requirement does not apply to any scheduled maintenance, testing, or software update previously communicated to the bank. A computer-security incident is an occurrence that results in actual harm to the confidentiality, integrity, or availability of an information system or the information that the system processes, stores, or transmits.

Bank Obligations

The bank is obligated to evaluate the impact of computer-security incidents occurring within its own systems or the systems of a Bank Service Provider and determine whether the incident constitutes a "Notification Incident." A Notification Incident is a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade a banking organization's:

1. Ability to carry out banking operations, activities, or processes, or deliver banking products and services to a material portion of its customer base, in the ordinary course of business;

2. Business line(s), including associated operations, services, functions, and support, that upon failure would result in a material loss of revenue, profit, or franchise value; or

3. Operations, including associated services, functions and support, as applicable, the failure or discontinuance of which would threaten the financial stability of the United States.

The bank is obligated to notify its primary regulator as soon as possible but no later than 36 hours after it determines that the computer-security incident constitutes a notification incident. The preferred method of contact will be provided to the bank by its regulator.

Updating Your Computer-Security Incidence Response Plan

Based on 2019 and 2020 data, the agencies have estimated that at least 3% of banks will need to report a computer-security incident each year but acknowledge the number could grow. Given the potential disruption and expense related to computer-security incidents, this is a significant risk for a community bank.

The 36-hour notice requirement highlights the bank's responsibilities to move quickly after discovering a computer-security incident and assess the incident's likely impact even if the incident flows from a third-party vendor. Banks should not generally assume that third-party vendors such as core processors will take the lead on computer-security incidents.

Banks bear ultimate responsibility for responding to incidents that impact their customers and safe and sound banking operations. Incidents require rapid coordination of internal and external resources to address some or all the following actions:

- Detect a computer-security incident;
- Analyze and document the incident;

- Prioritize the incident for further action;
- Notify appropriate parties;
- Choose a containment strategy;
- Gather and preserve evidence;
- Eradicate the threat;
- Recover systems, and;
- Conduct a post-activity assessment.

Without advanced planning, the computer-security incident response process can be far too complex to accomplish. In addition, there are potentially significant costs associated with incident response, including third-party vendor costs, lost productivity, ransomware demands, and business interruption.

Cyber-insurance is an increasingly necessary risk mitigation tool that should be integrated into the computer-security incident response plan. Cyber-insurance policies are complex contracts that do not generally follow a standardized form. The terms should be negotiated in the context of the bank's overall incident response plan.

The computer-security risk environment suggests that even with robust prevention measures in place, banks are exposed to the potential for computer-security incidents requiring rapid, costly, and coordinated action. With proper planning, clearly understood and documented roles and responsibilities among vendors, and appropriate insurance, banks can substantially mitigate the potential disruption stemming from computer-security incidents.

[1] "Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers", 86 FR 66424, (November 23, 2021).

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2022 Calendar of Events

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February

23 & 24 IRA (Basic/Advanced) | Patrice Konarik (Stonewall Resort)

March

2 & 3 Branch Management School | Christie Drexler (Four Points by Sheraton Charleston)

10 Emerging Leaders | Chuck Stump (Sam Bowling Conference Center)

15 & 16 Compliance School | Compliance Alliance – Julie Gutierrez (Four Points by Sheraton Charleston)

April

19 A/L Investments | The Baker Group (Sam Bowling Conference Center)

21 Key Ratio Analysis | David Osburn (Four Points by Sheraton Charleston)

22 Basic Personal & Business Tax Return Analysis | David Osburn (Four Points by Sheraton Charleston)

May

3 & 4 Credit Management Conference | KPN Consulting (Stonewall Resort)

5 & 6 Bank Security School | Jim Rechel (Stonewall Resort)

19 F&E Planning Conference | Edgewood Country Club - Charleston

22 – 27 WV School of Banking (University of Charleston)

June

6 & 7 Commercial Lending Development Program (CLDP) Sessions I & II | Jeffrey Johnson (Stonewall Resort)

July

19 & 20 CLDP Sessions III & IV | John Barrickman (Stonewall Resort)

25 – 27 128th Annual WVBankers Convention (The Greenbrier)

August

22 & 23 CLDP Sessions V & VI | Jeffrey Johnson (Stonewall Resort)

30 – 31 Branch Management School | Christie Drexler (Stonewall Resort)

September

8 HR for Bankers | AlignHR – Lenny Hannigan (Stonewall Resort)

15 & 16 CLDP Sessions VII & VIII | David Osburn (Four Points by Sheraton Charleston)

20 New Accounts & Documentation | Suzie Jones (Sam Bowling Conference Center)

October

18 & 19 BSA/AML Fundamentals | Dianne Barton (Stonewall Resort)

20 & 21 BSA/AML Advanced | Dianne Barton (Stonewall Resort)

November

TBD CEO Forum

TBD CFO Conference

7 & 8 Consumer Lending | David Kemp (Four Points by Sheraton Charleston)

9 Consumer Lending Advanced | David Kemp (Four Points by Sheraton Charleston)

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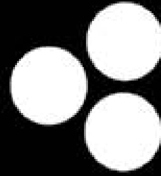

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