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**Huddle: COVID-19 Banking Edition C/A Top 10 FAQs April 29, 2020**

**Regulation D Questions**

1. **All Things Regulation D:**
2. **What is the effective date and is there an expiration date?**

The effective date of the Final Rule is April 24, 2020. Comments must be received on or before June 29, 2020. Additionally, the changes to the numeric limits on certain kinds of transfers and withdrawals that may be made each month from accounts characterized as “savings deposits” were applicable on April 23, 2020. As the interim final rule is currently written, these changes are not set out as "temporary", and do not appear to be tied directly to the current COVID-19 pandemic:

"In January 2019, the FOMC announced its intention to implement monetary policy in an ample reserves regime. Reserve requirements do not play a role in this operating framework. In light of the shift to an ample reserves regime, the Board announced that, effective March 26, 2020, reserve requirement ratios were reduced to zero percent. This action eliminated reserve requirements for thousands of depository institutions and helped to support lending to households and businesses. As a result of the elimination of reserve requirements on all transaction accounts, the retention of a regulatory distinction in Regulation D between reservable “transaction accounts” and non-reservable “savings deposits” is no longer necessary. In addition, financial disruptions arising in connection with the novel coronavirus situation have caused many depositors to have a more urgent need for access to their funds by remote means, particularly in light of the closure of many depository institution branches and other in-person facilities." p. 5: <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200424a1.pdf>

Also note that because this is an interim final rule, there is an allowance for comments--so it is possible that there can be changes to it after those are considered and a finalized rule is issued.

See generally: <https://www.federalregister.gov/documents/2020/04/28/2020-09044/regulation-d-reserve-requirements-of-depository-institutions>

1. **How does this affect a bank’s monitoring reporting?**

Banks are not required to suspend enforcement of the six-transfer limit. It will be up to the bank to determine how to proceed, as set out below. Refer to generally the Interim Final Rule’s FAQs here:

Q.2. May depository institutions continue to report accounts as “savings deposits” on their FR 2900 deposit reports even after they suspend enforcement of the six-transfer limit on those accounts?

A.2. Yes. Depository institutions may continue to report these accounts as “savings deposits” on the FR 2900 reports after they suspend enforcement of the six-transfer limit on those accounts.

Q.3. If a depository institution suspends enforcement of the six-transfer limit on a “savings deposit,” may the depository institution report the account as a “transaction account” rather than as a “savings deposit”?

A.3. Yes. If a depository institution suspends enforcement of the six-transfer limit on a “savings deposit,” the depository institution may report that account as a “transaction account” on its FR 2900 reports. A depository institution may instead, if it chooses, continue to report the account as a “savings deposit.”

Reference: <https://www.federalregister.gov/d/2020-09044/p-28>

1. **Does this impact a bank’s ability to charge for transactions in excess of a bank’s parameters?**

"Regulation D does not require or prohibit depository institutions from charging their customers fees for transfers and withdrawals in violation of the six-transfer limit. Accordingly, the deletion of the six-transfer limit does not have a direct impact on the policies or account agreements of depository institutions that charge such fees to their customers."

Reference: <https://www.frbservices.org/resources/central-bank/faq/reserve-account-admin-app.html>

1. **Are Reg CC holds applicable if the bank removes transaction limits on savings and money market accounts?**

This question is a result of a conflict between Regulation CC and Regulation D. Regulation CC states:

“*[A]ccount* means a deposit as defined in 12 CFR 204.2(a)(1)(i) that is a transactions account as described in 12 CFR 204.2(e). …[B] the term does not include savings deposits or accounts described in 12 CFR 204.2(d)(2).”

Reference: <https://www.ecfr.gov/cgi-bin/text-idx?SID=69fc4b460acf5269ed6542b0da5f4439&mc=true&node=se12.3.229_12&rgn=div8>

Under Regulation D amendments, 204.2(e) now includes savings accounts. See generally from 229.2(a): "*Account* also includes accounts at a bank from which the account holder may make third party payments at an ATM, remote service unit, or other electronic device, including by debit card, but the term does not include savings deposits or accounts described in 12 CFR 204.2(d)(2) even though such accounts permit third party transfers."

This discrepancy at least gives the appearance of an argument that savings accounts are to remain excluded because the exclusion appears after the general rule. Unfortunately, banks will ultimately have to make a judgment call until an FAQ is issued or additional guidance is brought forth.

1. **Is advance notice required if the bank removes the 6-withdrawal limitation requirement?**

If the bank removes the limitations, there is no advance notice requirement under Reg DD since it is a benefit to the customer. However, if the bank then reinstates those limits, a 30-day advance notice is required.

**COVID-19 Loan Modification Questions**

1. **Will COVID-19 loan modifications count towards CRA credit or HMDA reporting?**

In regards to CRA credit and COVID-19 loan modifications, the Agencies put out a joint statement on CRA Consideration for Activities in Response to COVID-19, included here: <https://www.federalreserve.gov/supervisionreg/caletters/CA%2020-4%20Attachment.pdf>

The agencies statement says that they will favorably consider services/lending activities that are responsive to the needs of LMI's, small businesses, and small farms:

"Working with Customers. Pursuant to the Community Reinvestment Act (CRA), the agencies will favorably consider retail banking services and retail lending activities in a financial institution’s assessment areas that are responsive to the needs of low- and moderate-income individuals, small businesses, and small farms affected by COVID-19 and that are consistent with safe and sound banking practices. These activities may include, but are not limited to:

...

Offering payment accommodations, such as allowing borrowers to defer or skip payments or extending the payment due date, which would avoid delinquencies and negative credit bureau reporting, caused by COVID-19-related issues.

...

The agencies emphasize that prudent efforts to modify the terms on new or existing loans for affected low- and moderate-income customers, small businesses, and small farms will receive CRA consideration and not be subject to examiner criticism. For example, when appropriate, a financial institution may restructure a borrower’s debt obligations due to temporary hardships resulting from COVID-19-related issues. Such efforts can ease cash flow pressures on affected borrowers, improve their capacity to service debt, help to recover or maintain customers’ financial capacity, and facilitate the financial institution’s ability to collect on its loans"

Reference: <https://www.federalreserve.gov/supervisionreg/caletters/CA%2020-4%20Attachment.pdf>
at pg. 1-2 of PDF

Regarding HMDA reporting, the bank would need to determine whether or not the changes to the loan constitute a reportable transaction under HMDA. Generally, modifications are not considered a new extension of credit. See generally:

"(e) Covered loan means a closed-end mortgage loan or an open-end line of credit that is not an excluded transaction under § 1003.3(c)."

Reference: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1003/2/#e>

"(d) Closed-end mortgage loan means an extension of credit that is secured by a lien on a dwelling and that is not an open-end line of credit under paragraph (o) of this section."

Reference: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1003/2/#d>

"2. Extension of credit. Under § 1003.2(d), a dwelling-secured loan is not a closed-end mortgage loan unless it involves an extension of credit."

Reference: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1003/2/#2-d-Interp-2>

So, while CRA credit may be applicable and that the agencies will be taking these services/lending into consideration, safety and soundness are still principles upon which banks should be determining CRA applicability.

**SBA PPP Questions:**

1. **Can C/A please go over again CRA credit and PPP loan applicability?**

It is important to call out the FDIC guidance here: <https://www.fdic.gov/coronavirus/smallbusiness/faq-sb.pdf>

***Will loans originated under the PPP receive CRA Credit?***

In most cases, yes. According to existing examination guidance as well as the March 19, 2020 Joint Statement on CRA Consideration for Activities in Response to the COVID-19, when consistent with safe and sound banking practices and applicable law, loans that benefit small businesses and small farms impacted by COVID-19 serve the long-term interest of those communities and the financial system. Generally, loans to for-profit businesses in amounts of $1 million or less are considered small business loans in CRA evaluations and will be considered as such under the lending test. Additionally, PPP loans to small businesses could receive consideration as innovative or flexible lending practices. Generally, loans to businesses greater than $1 million to small businesses that create or retain jobs would qualify as community development loans under economic development if the loans create or retain jobs or under revitalization/stabilization if they benefit primarily low- and moderate-income areas or distressed middle-income areas.

So, while CRA credit may be applicable and that the agencies will be taking these services/lending into consideration, safety and soundness are still principles upon which banks should be determining CRA applicability. Regulators will be looking to apply both CRA and Fair Lending oversight to all PPP origination activity and as such, banks need to be documenting their decisions, controls and oversights that are applied, including discussion with the Board of Directors in regards to capitalizing on the possibility of CRA credit available for PPP loans. Additionally, banks need to be capturing and documenting a proper compliance narrative. There is not essentially going to be a “relaxed” town to the oversight of the PPP.

1. **What are a bank’s obligations regarding the Limited Safe Harbor?**

The SBA issued its Supplemental Interim Final Rule (found here: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>) which introduces a limited safe harbor with respect to certification concerning a need for a PPP loan request. In it, the SBA warned that unqualified borrowers who did not have a “need” for the loan are subject to penalties and loss of loan forgiveness unless the borrower repays all the loan in full by May 7, 2020. If that is the case, then the SBA will have deemed the certification to have been made in good faith.

At this time, there is no additional guidance on the responsibility or role banks will be playing in this other than collecting the repayment of the PPP loan funds prior to May 7, 2020. Borrowers are the ones who are going to be facing potential criminal investigations and civil proceedings under the False Claims Act. If the bank feels it may have customers that did not necessary demonstrate a “need,” a notice informing them of the Limited Safe Harbor option may be beneficial.

What this boils down to is that PPP loans are going to be audited and borrowers may face enforcement scrutiny. Areas of risk remain: (1) necessity for the loan; (2) size eligibility; (3) loan amount requested); and (4) use of loan proceeds). The SBA has already mentioned they intend to audit all loans over $2 million.

1. **What changes have been implemented for PPP loans and Regulation O requirements?**

The Board issued an Interim Final Rule that excepts certain loans that are guaranteed under the SBA PPP from the requirements of section 22(h) of the Federal Reserve Act and corresponding provisions of Regulation O. The rule can be found here: <https://www.federalregister.gov/documents/2020/04/22/2020-08574/loans-to-executive-officers-directors-and-principal-shareholders-of-member-banks> and became effective April 22, 2020, with comments to be received no later than June 8, 2020.

Normally, SBA regulations would prohibit a PPP lender from making a PPP loan to “[b]usinesses in which the [PPP lender] or any of its Associates owns an equity interest” (SBA lending restrictions). See 13 CFR 120.11(o). SBA regulations define “associate” of a PPP lender to be “[a]n officer, director, key employee, or holder of 20 percent or more of the value of the [PPP] [l]ender’s…stock or debt instruments” and any entity in which one of these individuals or certain relatives “own or controls at least 20 percent.”

On April 14, 2020, the SBA issued an interim final rule stating that SBA lending restrictions “shall not apply to prohibit an otherwise eligible business owned (in whole or in part) by an outside director or holder of less than 30 percent equity interest in a PPP [l]ender form obtaining a PPP loan from the PPP [l]ender on whose board the director serves or in which the equity owner holders an interest, provided that the eligible business owned by the director or equity holder follows the same process as similarly situated customer or account holder of the [l]ender.” It also stated that SBA lending restrictions would continue to apply to officers and key employees of a PPP lender, and that any favoritism by the PPP Lender in processing time or prioritization of a director’s or equity holder’s PPP application was prohibited.

The exception to the Interim Final Rule only applies to loans made during the February 15, 2020 and June 30, 2020 timeframe. Additionally, this determination does not impact the application of other restrictions that may apply to PPP loans, including section 22(g) of the Federal Reserve Act or 215.5 of Regulation O, nor does it affect SBA lending restrictions.

1. **How are banks to be handling potential fraud concerns with PPP loans?**

Fraud is no doubt a common theme when it comes to the SBA’s PPP as many bad actors try to take advantage of the program and funds. And as we’ve seen, entities that are not legitimately entitled to these funds, which were meant for struggling businesses, receive these funds, it reduces the amount available to small businesses and may impact overall economic recovery.

Banks need to be considering different avenues of potential fraud: identity thieves, foreign-based criminals and money launderers are three of the most common examples. Banks need to be maintaining their KYC and other regulatory loan processing standards to mitigate fraud risk in the PPP. Lenders and borrowers who participate in the PPP are subject to potential investigations by the SBA Office of Inspector General (SBA OIG) if their practices do not comply with the law. The SBA OIG has to power to issue subpoenas for documents and other records and has the direct law enforcement authority under the IG Act, including independent authority to seek and execute search and arrest warrants. All criminal activity discovered by the SBA OIG must be expeditiously referred to the U.S. Department of Justice.

Financial institutions need to be following SAR, CTR, KYC and other applicable BSA/AML requirements as it relates to the onboarding, funding and monitoring of these PPP loans.

1. **What are banks supposed to be doing in regard to loan forgiveness?**

Many questions continue to remain unanswered for this aspect of the Program. The SBA was required to issue guidance on loan forgiveness within 30 days after the enactment of the CARES Act or April 26, 2020. Several key provisions were provided in regard to forgiveness:

* The covered period begins on the date the lender makes the first disbursement of the loan and lasts for 8-weeks.
* A breakdown of the costs eligible for loan forgiveness include:
	+ Salary, wages, commission or similar compensation (which includes all cash compensation, including a housing stipend or allowance)
	+ Payments for vacation, parental, family, medical or sick leave
	+ Allowance for dismissal or separation
	+ Payments for the provision of group health care benefits, including insurance premiums
	+ Payments for retirement benefits
	+ State or local payroll taxes
* **A breakdown of non-payroll costs that are eligible for loan forgiveness:**
	+ **Interest payments on a mortgage incurred in the ordinary course of business on real or personal property and that was in existence on February 15, 2020**
	+ Rent payments under leasing agreements in existence on February 15, 2020
	+ Utility payments for electricity, gas, water, transportation, telephone or internet for which service was in existence on February 15, 2020
* **A breakdown of payroll costs that are not eligible for loan forgiveness:**
	+ Payments to an independent contractor
	+ Cash compensation in excess of $100,000
	+ The employer’s share of federal payroll taxes
	+ Qualified sick leave and qualified parental leave wages for which credit is allowed under the Families First Coronavirus Response Act (FFCRA).
* **The limitations on loan forgiveness (75%/25%) breakdown**
* **The formula for reduction in FTE employees in loan forgiveness amount calculations**
* **The formulate for reduction in wages for loan forgiveness amount calculations**
* **The loan amount terms for any amount not forgiven:**
	+ **Two-year maturity date form date of disbursement**
	+ **Six-month deferment**
	+ **Interest rate of 1 percent per year**
	+ **No prepayment penalty (prior notice of repayment may be required if the loan has been sold on the secondary market)**
* **And, a list of the documentation that must be submitted by the borrower to the lender for loan forgiveness applications.**

**However, many outstanding questions are still present and need to be answered. Some of those include the guidance on the actual loan forgiveness application and approval process, including submission to the SBA. Keep reviewing the Compliance Alliance Pandemic Toolkit for update-to-date access to these questions.**

**See generally:** <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> ; <https://home.treasury.gov/system/files/136/How-to-Calculate-Loan-Amounts.pdf>

1. **Bank has a customer whose only business is rental properties, and only income is from rent on those rental properties.  Applicant files a Schedule E and not a Schedule C.  Is this applicant eligible for a PPP loan and can a Schedule E be used?**

Unfortunately, more guidance is needed in this area when it comes to rent or royalties being able to be applied to the PPP. If an S-Corps, LLC or other entity, generally that would be reflected in K-1 statements.

This also brings into consideration ineligibly requirements of the PPP and passive income when considering income from rental properties.

"c. How do I determine if I am ineligible?
Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110
and described further in SBA’s Standard Operating Procedure (SOP) 50 10,
Subpart B, Chapter 2, except that nonprofit organizations authorized under the
Act are eligible. ..."

Resource: <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf> at pg. 7

This cross references the SBA's standard operating procedures, which are found here: <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>. Passive businesses are addressed on p.105 in the link above.

**Stimulus Check Questions:**

1. **How are banks to handle stimulus checks for accounts that the bank does not have?**

This is being more recently seen in scenarios where the recipient of the stimulus check filed their taxes through a third-party provider (TurboTax, H&R Block, etc.) and elected to have their tax preparation fees deducted from their tax return. Regulations prohibit tax prep companies from receiving refunds directly, so a special, temporary account is created at a bank that acts as the intermediary. The bank would withdraw any fees that are owed to the tax prep company and then would pass the remainder on to the taxpayer.

Without additional guidance, a conservative approach is that banks should not be retaining fees from stimulus funds to accounts the bank does not hold and should be returning it to the IRS. This is because in scenarios where a stimulus recipient is coming to a bank to cash a check, that person is *choosing* to use the bank’s financial services and to be subject to the bank’s fee schedule. However, someone whose stimulus was deposited or sent to a bank where they have no prior relationship and without their consent is the distinction advocating for no fees to be assessed in that scenario. Additionally, the bank is free to refer anyone asking to the IRS’s website FAQ on the subject:

#### [I don’t recognize the bank information shown on my Payment Status. What can I do? What will happen to my payment?  [Added: April 26, 2020]](https://www.irs.gov/coronavirus/get-my-payment-frequently-asked-questions#collapseCollapsible1588083783280)

If you received your refund via a prepaid card or through your tax preparer, you may not recognize the information shown. In some cases, your preparer may have used an account number similar to your Social Security number.

Your bank account information for your Economic Impact Payment is captured from:

* the most recently filed tax return if you received a refund by direct deposit in 2018 or 2019, or
* the bank information you provided on our [Get My Payment](https://www.irs.gov/coronavirus/get-my-payment) application, or
* the bank information you provided on the [Non-Filers: Enter Payment Info Here](https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here) tool.

If we issue a direct deposit and the bank information is invalid or the bank account has been closed, the bank will reject the deposit. We will then mail your payment as soon as possible to the address we have on file for you. Get My Payment will be updated to reflect the date your payment will be mailed. Typically, it will take up to 14 days to receive the payment, standard mailing time. No action is needed on your part to ensure the payment will be re-issued.

Reference: <https://www.irs.gov/coronavirus/get-my-payment-frequently-asked-questions#collapseCollapsible1588083783280>

1. **If a customer receives a stimulus check payable to him and a deceased wife, does the bank need to return the check? What about ACHs?**

This is a very heated topics at the moment. While C/A hasn’t found that the Treasury has indicated this in writing, representatives of the Treasury have said on several recent calls (within the last week) that the payments to now-deceased individuals have been screened and are eligible based on date of death. So, the unofficial Treasury guidance seems to be that the deposits will not be retracted and the bank can accept payments to deceased customers because these payments have been screened and deemed eligible by the IRS, and that is true for both paper checks and ACH. This is the most recent call in which this was addressed, for reference: <https://bsr.stlouisfed.org/askthefed/Auth/LogOn?ReturnUrl=%2faskthefed%2fHome%2fArchiveCall%2f249>

NACHA has also echoed this here:

​Reference: <https://www.nacha.org/rules/ach-network-rules-pandemic-related-frequently-asked-questions>

However, Treasury Secretary Steve Mnuchin made several public announcements, most recently to the *Wall Street Journal* within the last day, that individuals who received stimulus checks for a deceased relative should be returning that money. A representative for the Treasury Department mentioned that they will be issuing additional guidance on this so it is unclear at this time how banks are to proceed.