

## **Bank Regulations and the CARES Act: Loan Modifications, Capital Requirements, Mortgage Forbearance and Servicing**

---

TUESDAY, JUNE 16, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Sanford M. Brown, Partner, **Alston & Bird**, Dallas

Ross M. Speier, Attorney, **Alston & Bird**, Atlanta

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

## Bank Regulations and the CARES Act: Loan Modifications, Capital Requirements, Mortgage Forbearance and Servicing

Presented by Sanford Brown and Ross Speier

# CARES Act Provisions - Accounting and Capital Requirements

- **Section 4012 - Reduction of Community Bank Leverage Ratio (CBLR)**
  - Directs the agencies to:
    - (1) Temporarily lower the new CBLR framework from 9% to 8%; and
    - (2) Provide a qualifying community banking organization (QCBO) whose leverage ratio falls below 8% a reasonable grace period to satisfy that requirement.
  - On April 6, 2020, the FDIC, the OCC, and the Federal Reserve issued two final interim rules implementing Section 4012

# CARES Act Provisions - Accounting and Capital Requirements

## ■ Section 4012 - Applicable Agency Guidance

- The interim final rules:
  - (1) Temporarily modify the CBLR framework so that, through the end of 2020, a QCBO that has a leverage ratio of 8% or greater and meets certain other criteria may still elect to use the CBLR framework;
  - (2) Give community banking organizations until January 1, 2022, before the CBLR requirement is re-established at greater than 9%;
  - (3) Provide community banking organizations with a clear and gradual transition back to the previously established 9% ratio; and
  - (4) Maintain a two-quarter grace period for a QCBO whose leverage ratio falls below 8%, so long as the community banking organization maintains a leverage ratio of 7% or greater.

# CARES Act Provisions - Accounting and Capital Requirements

## ■ **Section 4011 - Temporary Lending Limit Waiver**

- Creates temporary exemptions from the loans-to-one-borrower limitations applicable to national banks by temporarily permitting the OCC to:
  - (1) Approve loans in excess of the statutory limitations to a nonbank financial company (including securities exchanges, clearing agencies, swap facilities and other listed entities); and
  - (2) Exempt any transaction from lending limit requirements upon the OCC's determination that such exemption is within the "public interest."

# CARES Act Provisions - Accounting and Capital Requirements

## ■ **Section 4011 - Temporary Lending Limit Waiver**

- First, Section 4011 expands the ability of the OCC to exempt loans or other extensions of credit made to any “nonbank financial company” from the lending limits stated under federal law, in addition to existing OCC authority for loans to financial institutions.
  - A “nonbank financial company” is defined as any U.S. or foreign company that is predominately engaged in financial activities, including companies such as mortgage and other lenders, insurance companies, and funds.

# CARES Act Provisions - Accounting and Capital Requirements

## ■ **Section 4011 - Temporary Lending Limit Waiver**

- Second, Section 4011 authorizes the OCC to, by order, exempt any transaction or series of transactions from legal lending limit requirements upon a finding that an exemption is in the public interest.
  - This provision of the CARES Act only applies directly to national banks and federal savings associations.
  - State-chartered institutions should determine whether its state banking regulator has implemented a similar lending-limit waiver or otherwise has determined that the state bank may rely on this CARES Act provision.

# CARES Act Provisions - Accounting and Capital Requirements

## ■ **Section 4013 – Temporary Relief from Troubled Debt Restructurings**

### ■ **Summary**

- Suspends GAAP requirements for loan modifications related to COVID-19 that would otherwise be considered a troubled debt restructuring (TDR).

### ■ **Loan modifications must be:**

- Related to the COVID-19 pandemic;
- Involve a loan that was not more than 30-days past due as of December 31, 2020;
- Be made between March 1, 2020 and the earlier of 60 days after the date the COVID-19 national emergency is terminated, or December 31, 2020.

# CARES Act Provisions - Accounting and Capital Requirements

- **Section 4013 – Applicable Interagency Guidance Regarding TDR Relief**
- First interagency statement released on March 22, 2020
  - Agencies would not direct institutions to automatically categorize all coronavirus-related loan modifications as TDRs.
  - Agencies stated that, “financial institutions should work constructively with borrowers and other customers in affected communities” and that “prudent efforts that are consistent with safe and sound lending practices should not be subject to examiner criticism.”
- Second interagency statement released On April 7, 2020 (following the passage of the CARES Act)
  - The Federal Reserve, FDIC, NCUA, OCC, and CFPB released a revised interagency statement, clarifying the interaction between the previous statement and the temporary relief provided by Section 4013 of the CARES Act.

## CARES Act Provisions - Accounting and Capital Requirements

- **Key Takeaways from the Revised Interagency Statement**
  - A loan modification does not need to be treated as a TDR if:
    - The loan is not more than 30 days past due at the time of modification, related to COVID-19, and is a short-term (e.g, six months) modification;  
or
    - The modification is government-mandated.
  - Financial institutions may account for loan modifications under Section 4013 or ASC Subtopic 310-40.
  - Nonaccrual reporting is not automatically required.

# CARES Act Provisions - Accounting and Capital Requirements

- **Section 4014 – Optional Temporary Relief from CECL**
  - **Summary**
    - Provides temporary relief from applying CECL
    - Applies to any insured depository institution, credit union regulated by the NCUA, bank holding company, or affiliate thereof.
    - Applies from March 27, 2020 until the earlier of: (1) the date the COVID-19 national emergency is terminated, or (2) December 31, 2020.

# CARES Act Provisions - Accounting and Capital Requirements

## ■ Section 4014 – Applicable Agency Guidance

- FFIEC granted a 30-day extension to financial institutions to submit reports
- On March 27, 2020, the OCC, Federal Reserve, and FDIC issued an interim final rule that in effect gives certain institutions a five-year transition period to adopt CECL
- Chief Accountant for the SEC, Sagar Teotia acknowledged that the deferral of CECL applied to public companies.
- Push-back from the Senate Banking Committee, which led to the introduction of the *Community Bank Regulatory Relief Act*.

## Mortgage Forbearance and Servicing Under the CARES Act

- **Section 4022 - Foreclosure Moratorium and Consumer Right to Request Forbearance**
  - CARES Act grants forbearance rights and protection against foreclosure to borrowers with a “Federally backed mortgage loan” who are experiencing a financial hardship due to the COVID–19 emergency
  - Foreclosure Moratorium: all judicial and non-judicial foreclosure activities prohibited through May 18, 2020 under CARES Act (extended to June 30, 2020 by GSE’s)
  - Forbearance requirements:
    - Servicers must grant forbearance upon a borrower’s request and attestation to a financial hardship caused by the COVID–19 emergency
    - Forbearance period must be “up to” 180 days, and may be extended for up to an additional 180 days at borrower’s request
    - During forbearance, no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full) shall accrue

## Mortgage Forbearance and Servicing Under the CARES Act

- **Section 4023 - Forbearance Of Mortgage Loan Payments For Multifamily Properties**
  - A borrower with a Federally backed multifamily mortgage loan experiencing a financial hardship due to the COVID–19 emergency may request a forbearance
    - Upon receipt of a forbearance request, servicers must: (1) document the financial hardship; (2) provide the forbearance for up to 30 days; and (3) extend the forbearance for up to 2 additional 30 day periods upon the request of the borrower.
  - Renter protections during forbearance period:
    - A multifamily borrower that receives a forbearance may not, for the duration of the forbearance—
      - (1) evict a tenant from a dwelling unit located on the property solely for nonpayment of rent or other fees or charges;  
or
      - (2) charge any late fees, penalties, or other charges to a tenant for late payment of rent.
  - **Notice:** A multifamily borrower that receives a forbearance may not
    - (1) require a tenant to vacate their unit earlier than 30 days after the borrower provides the tenant with a notice to vacate;  
and
    - (2) issue a notice to vacate until after the expiration of the forbearance.

## Mortgage Forbearance and Servicing Under the CARES Act

### ■ **Section 4021- Credit Reporting During Forbearance**

- CARES Act amends the FCRA to provide special instructions for reporting consumer credit information to credit reporting agencies during the COVID-19 emergency.
  - This section applies from January 31, 2020 through the later of 120 days after: (i) enactment of the CARES Act, or (ii) termination of the national emergency declaration.
  
- If a creditor or other furnisher offers a COVID-19 related “accommodation” to a borrower who was current on their account, and the borrower satisfies the conditions of such accommodation, the furnisher must report the credit obligation or account as “current.”
- If the account was delinquent before the accommodation, the furnisher must maintain the delinquent status during the effective period of the accommodation, or, if the consumer brings the account current during such period, then to report the account as current.
  
- An “accommodation” includes relief granted to impacted borrowers such as an agreement to defer a payment, make a partial payment, grant forbearance, or modify a loan or contract.
  
- The reporting requirements set forth in Section 4021 do not apply to charged-off accounts.

## Mortgage Forbearance and Servicing Under the CARES Act

### ▪ **Enforcement of Act under Regulation X and Regulation Z**

- While Regulation X does not require servicers to offer borrowers any specific loss mitigation option, the CARES Act requires servicers to offer certain forbearances to certain borrowers.
- Mortgage servicers may provide borrowers a CARES Act forbearance under the existing Regulation X mortgage servicing rules without having to comply with all of the otherwise applicable rules.
  - For example, under Regulation X, servicers do not have to obtain a complete loss mitigation application from a borrower before offering a short-term loss mitigation option, such as the CARES Act forbearance.
  - However, if there is an *incomplete* application, the rules still require servicers to provide an acknowledgement notice within five days of receipt of that application, even if the borrower has been offered or is in a short-term option.
- Servicers can provide multiple sequential short-term payment forbearance programs under the Regulation X mortgage servicing rules.
- If a borrower is not delinquent when requesting CARES Act forbearance, the early intervention requirements of Regulation X do not apply, but if the borrower is delinquent, servicers must comply with the early intervention requirements.
- “Small servicers” as defined in Regulation X and Regulation Z do not have to comply with the early intervention or the loss mitigation requirements under Regulation X.

## Mortgage Forbearance and Servicing Under the CARES Act

### ■ **New flexibility in agency supervision of mortgage servicers**

- Regulatory agencies are “adopting a flexible supervisory and enforcement approach relating to Regulation X.”
- In evaluating compliance with Regulation X, if a mortgage servicer offers or provides a borrower a CARES Act forbearance, the agencies do not intend to take supervisory or enforcement action against servicers for:
  - failing to provide the required acknowledgment notice within five days of the receipt of an incomplete forbearance application, provided the servicer sends the notice before the end of the forbearance period;
  - delays in (1) sending the loss mitigation-related notices and taking the actions described in Regulation X; (2) sending the required written early intervention notice to delinquent borrowers (the 45-day letter); or (3) sending the required annual escrow statement, provided that servicers are making good faith efforts to provide these notices and take the related actions within a “reasonable time;” or
  - delays in establishing live contact with delinquent borrowers as required by Regulation X, provided that servicers are making good faith efforts to establish live contact within a “reasonable time;”
- “Good faith efforts” consist of reasonable steps, under the circumstances.

# CARES Act Provisions – FDIC Debt Guarantee Authority

## ■ Summary of FDIC Debt Guarantee Authority

### ■ Dodd-Frank Act

- The *Dodd-Frank Wall Street Reform and Consumer Protection Act* established programs that would guarantee bank debt, including deposits, in the event of a financial liquidity crisis.

### ■ CARES Act - Section 4008

- Section 4008 of the Cares Act authorizes the FDIC to establish liquidity guaranty programs for financial institutions and their holding companies under the Dodd-Frank structure.
- Section 4008 effectively gives the FDIC the ability to insure certain deposits beyond the current \$250,000 limit.

## CARES Act Provisions – FDIC Debt Guarantee Authority

### ■ Debt Guarantees under Dodd-Frank

- Financial institutions face a liquidity mismatch.
  - Assets generally have a long term payment structure and liabilities are generally short term, which creates a mismatch in the duration of items on each side of the balance sheet.
  - A liquidity mismatch generally does not pose a short term risk for the banking market as a whole unless there is a market panic and a related run on deposits which could prevent a bank from meeting its obligations.
- Financial Crisis and Response under Dodd-Frank
  - The 2008 financial crisis revealed deficiencies in existing government guarantees that could exacerbate a run on deposits.
    - For example, the deposit insurance limit was not sufficient to cover amounts in many business and government accounts.
  - The Dodd-Frank Act included provisions authorizing programs that would guarantee certain financial institution debt, and in effect, remove the insurance limit for certain deposit accounts.

## CARES Act Provisions – FDIC Debt Guarantee Authority

- **COVID-19 and Debt Guarantees under the CARES Act**
  - Congress believed that significantly reduced economic activity resulting from COVID-19 could create a liquidity event.
  - The CARES Act expands the FDIC's authority to guaranty bank liabilities:
    - The CARES Act permits a FDIC debt guarantee program authorized under Section 1105 of the Dodd-Frank Act to back non-interest bearing transaction accounts without limitation as to the insured amount. This effectively permits the FDIC to insure non-interest bearing deposit accounts beyond the current limit of \$250,000.
    - Section 4008 also preemptively grants the necessary congressional approval for such a program up to any limit, provided the FDIC's guarantee terminates no later than December 31, 2020.
  - As of today, the FDIC has not exercised its authority under Section 4008.

## Thank You



Sandy Brown  
Partner  
214.922.3505  
sanford.brown@alston.com



Ross Speier  
Senior Associate  
404.881.7432  
ross.speier@alston.com