QUESTIONS AND ANSWERS FROM THE April 2nd COVID-19 ROUNDTABLE

Note: The questions below were raised during the roundtable and that answers represent Compliance Anchor's interpretations and are not to be considered a legal opinion. An interpretation does not bind Compliance Anchor to any legal liability. If you need a legal opinion, please contact your bank's legal counsel.

QUESTION

We keep hearing that a loan less than 30 days past due with a modification will not be a TDR. What about a substandard credit with material weakness that is in fact current? The way I read the continued March 22nd guidance is that TDRs can take place and be classified as such but banks would just not be criticized for helping the borrower. Or is a blanket under 30 days is not a TDR...that doesn't seem right.

ANSWER

The 3/22 joint issuance stated that short-term modifications made on a good faith basis in response to COVID-19 to borrowers **who were current prior to any relief**, are not TDRs. This includes short-term (e.g., six months) modifications such as payment deferrals, fee waivers, extensions of repayment terms, or other delays in payment that are insignificant.

The issuance defined current as borrowers who are less than 30 days past due on their contractual payments at the time a modification program is implemented.

The CARES Act also addressed TDR's in a manner that was consistent with the 3/22 issuance.

Section 4013 of the Act states that:
During the applicable period, a financial institution may elect to:

- Suspend the requirements under United States generally accepted accounting principles for loan modifications related to the coronavirus disease 2019 (COVID–19) pandemic that would otherwise be categorized as a troubled debt restructuring; and
- **Suspend any determination of a loan modified as a result of the effects of the coronavirus** disease 2019 (COVID–19) pandemic as being a troubled debt restructuring, including impairment for accounting purposes.

Any suspension shall be applicable for the term of the loan modification:

- That occurs during the **applicable period** for a loan that was not more than 30 days past due as of December 31, 2019; and
- **Shall not apply to any adverse impact on the credit of a borrower that is not related to the** coronavirus disease 2019 (COVID–19) pandemic.

Applicable period is defined as the beginning on March 1, 2020 and ending on the earlier of December 31, 2020, or the date that is 60 days after the date on which the national emergency terminates.

So, if you offer a modification to a borrower who is current under the above definition, then this modification will not be considered a TDR. If the loan has a current weakness but is not a TDR at the time the loan is modified due to Covid 19 then, in my opinion, this will not cause it to be a TDR. This is my opinion based on the fact the regulators, generally seem to be "freezing" the status of loans at their pre-Covid status.

FIL-36-2020 dated April 7, 2020 clarifies the interaction between FIL-22-2020 dated March 22, 2020 and the CARES ACT.

This Interagency Statement states that:

- Financial institutions accounting for loan modifications under section 4013 of the CARES Act are not required to treat them as TDR's
- Short term loan modifications that do not fall under Section 4013 that are made on a good faith basis in response to COVID-19 to borrowers who were current prior to any relief are not TDRs
- "Financial Institutions may presume that borrowers are not experiencing financial difficulties at the time of the modification for purposes of determining TDR status and no further TDR analysis is required for each loan modification program if:
  - The modification is in response to the National Emergency;
  - The borrower was current on payments at the time the modification program is implemented; and
  - The modification is short-term (e.g. six months)."

Credit Risk is separately addressed as follows:

- Examiners will exercise judgment in reviewing loan modifications and will not automatically adversely risk rate credits affected by COVID-19. All loan modifications . . .should be consistent with safe and sound practices (including appropriate allowances for loan and lease losses or allowance for credit losses, as applicable).

QUESTION
Since FCRA was amended to require credit reporting for loan deferments, wouldn't those who are not reporting these to the credit agencies be in violation?

ANSWER
No based on a reading of Section 4021 of the Cares Act which states that:

- Except with respect to a credit obligation or account of a consumer that has been charged-off, if a furnisher makes an accommodation, during the covered period, with respect to 1 or more payments on a **credit obligation or account of a consumer**, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall:
  - Report the credit obligation or account as current; or
  - If the credit obligation or account was delinquent before the accommodation—
    - Maintain the delinquent status during the period in which the accommodation is in effect; and
    - If the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current.

The term 'covered period' means the period beginning on January 31, 2020 and ending on the later of 120 days after the date of enactment of this section or 120 days after the date on which the national emergency terminates.

If the loan is being reported to a Credit Bureau, it must be reported as current during the deferment period if it was current prior to the modification. The CARES Act amendments to the Fair Credit Reporting Act reiterates that a Loan Modification legally changes the terms of the loan so the loan cannot be reported as late during the deferral period if the borrower was current at the time of the deferral program implementation.

QUESTION
Banks may not have the capacity to offer this deferment to all borrowers due to safety and soundness liquidity issues. Some borrowers will be declined. Is there guidance on declination reasons? This is regarding portfolio loans. Particularly commercial loans.

ANSWER
We have not seen any specific guidance as of this moment.

However, lenders must set parameters so that all borrowers are equally treated. In this emergency, responding to the requests for relief timely (within 30 days) and ensuring all borrowers know of their right to request relief are key.

The Cares Act mandated that Federally Insured loans receive payment deferral with no underwriting - only attesting that the borrower has been negatively impacted by COVID-19. Relief programs may vary product to product but not offering any relief is contrary to the Regulatory Guidance and could cause reputation issues. What would be the reason for denial? Consider the liquidity tools that have been forthcoming.

QUESTION
Opinion? Will the 7/1 Reg CC changes be delayed? Would it make sense?

ANSWER
I was on a call with the ICBA on Friday. They indicated that the Reg. CC effective date is still good. They are going to request an extension.

QUESTION

Can you require the delinquent amount in order to give a deferment?

At the Federal level I have not seen any guidance directly on this point. However, you must also pay attention to state law. For example, it appears that in NY under the emergency regulations, you would not be permitted to make such a request. It also would seem contrary to the spirit of a number of issuances from the federal regulators that tend to treat the borrower's issues resulting from Covid 19 sperate from issues that arose prior to the virus.