

MARCH 26, 2020 | PUBLICATION

Client Alert: Federal Financial Institution Regulators Encourage Financial Institutions to Work with Borrowers; Fed Adjustment to Supervisory Approach

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In a March 22, 2020 Interagency Statement¹ issued by all of the primary federal financial institution regulators² (the “**Regulators**”), the Regulators have encouraged all financial institutions to “work prudently” with borrowers unable to make their regular payments as a result of the effects of Coronavirus Disease 2019 (“**COVID-19**”) and reiterated that the Regulators will not criticize financial institutions for doing so³, nor will they direct or require that all COVID-19 related loan modifications be automatically classified as troubled debt restructurings (“**TDRs**”). Actions taken by financial institutions must continue to be prudent and consistent with safe and sound practices.

Under U.S. GAAP (generally accepted accounting principles), a debt restructuring is classified as a TDR if the lender grants a concession to a borrower, on legal or economic bases because of the borrower’s financial difficulties, if it would not otherwise consider such a concession.⁴ The Regulators have consulted with staff of the Financial Accounting Standards Board (“**FASB**”), which has confirmed short-term⁵ loan modifications, including payment deferrals, fee waivers, extensions of repayment, or other insignificant delays in payment⁶ made in response to COVID-19 will not be considered as TDRs provided that the modification is made in good-faith and the borrower is “current.” “Current” borrowers are those that are less than 30 days past due on their required payments at the time the modification is put in place. Financial institutions are not required to perform any other TDR analysis provided that a borrower is current. Note that the Interagency Statement indicates that federal or state government mandated modification or deferral programs, such as New York Governor Andrew Cuomo’s Executive Order No. 202.9, issued March 21, 2020 (in essence mandating that all institutions regulated by New York’s Department of Financial Services grant 90-day forbearances for

COVID-19-impacted New York borrowers (including persons and businesses), and requiring all such institutions to grant requests to suspend mortgage payments for a specified period), would not be within the TDR provisions of ASC 310-40.

Additionally, the Regulators have indicated in the Interagency Statement that regulated financial institutions will not be required to report as “past-due” a loan with deferred payments granted as a result of the effects of COVID-19, unless such loan is otherwise reportable as past-due. The Regulators’ reasoning is that payment dates of loans are governed by the loan documents evidencing such loans and if the financial institution has agreed to deferral of a payment, this would result in the payment not being contractually past-due. Further, loans that are modified on a short-term basis as discussed in the Interagency Statement would not be required to be reported as nonaccrual assets for regulatory reporting purposes. Although, if additional information indicates that a loan will not be repaid, such loans are subject to the charge-off guidance in the instructions for Consolidated Reports of Condition and Income (commonly referred to as a Call Report) or, as to federally-insured credit unions, NCUA⁷ Letter to Credit Unions No. 03-CU-01, relating to loan charge-off.

Additionally, the Board of Governors of the Federal Reserve (the “Fed”) in a March 24, 2020 press release⁸ has indicated how it will adjust its supervisory approach during the pendency of issues caused by COVID-19. The Fed will (i) focus on monitoring and outreach so that all financial institutions understand the risks and challenges of the current environment, (ii) reduce its examination activities, particularly with the smallest banks, (iii) require large banks to submit their capital plans developed under the Fed’s Comprehensive Capital Analysis and Review by April 6, 2020, (iv) grant additional time to resolve non-critical existing supervisory findings so that institutions can focus on heightened risks and assist consumers, and (v) work with financial institutions regarding specific issues as a result of the different affect that COVID-19 has on various areas of the country.

This Client Alert is a supplement to our initial Client Alert of March 19, 2020 ([*Commercial Loan Documentation: Effects of COVID-19*](#))⁹. We are committed to keeping our clients informed of important issues that affect them, including as a result of the COVID-19 pandemic.

Shumaker’s Financial Services practice group has extensive experience in representing both financial institutions and commercial borrowers in a variety of transactions and structures, in all areas of commercial lending. Please contact us if you have questions regarding this Client Alert or if we can be of assistance in reviewing loan documentation and advising of potential courses of action.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.

¹ See, Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus, March 22, 2020 (the “Interagency Statement”).

² The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Conference of State Bank Supervisors.

³ See, Joint Press Release of Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Conference of State Bank Supervisors, March 9, 2020, 4:30 p.m., EDT, <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200309a.htm>

⁴ TDRs are an accounting categorization codified within Accounting Standards Codification (ASC) Subtopic 310-40, Receivables—Troubled Debt Restructurings by Creditors (ASC 310-40).

⁵ The Interagency Statement uses six (6) months as an example.

6 ASC 310-40 considers the following factors as whether a delay in payment is insignificant: (i) the amount of the delayed/restructured payment is insignificant in relation to the unpaid principal or collateral value of the debt resulting in an insignificant shortfall in the contractual payment due from the borrower and (ii) whether the delay as a result of the restructured payment is insignificant based on payment frequency under, original contractual maturity of, or original expected duration of the debt.

7 National Credit Union Association.

8 See, Press Release of the Board of Governors of the Federal Reserve System, March 24, 2020, 5:30 p.m. EDT, <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200324a.htm>.

9 <https://www.shumaker.com/latest-thinking/publications/2020/03/client-alert-commercial-loan-documentation-effects-of-covid-19>