

BCAC Follow-up from January seminar – FDIC Regulatory Exam Issues

1. Would a transaction with a town's Housing Authority qualify as a CRA investment if the Housing Authority issues a tax-exempt bond and the bank purchases the bond?

In order to qualify as a community development investment, housing-related securities must primarily address affordable housing. The San Francisco Federal Reserve website contains a very good article discussing municipal securities in general and housing bonds in particular. The article is available at the following link:

<http://www.frbsf.org/publications/community/investments/cra02-2/qms.pdf>. I would encourage the bank to contact their primary regulator if there are questions regarding a specific security.

2. Are there any RESPA Section 8, fair lending, CRA, or other issues if a bank offers "relationship packaging/pricing" and uses targeted marketing, such as to doctors' offices and to offices consisting of other professionals; the packaging/pricing would apply to all employees in the office, not just to the professionals. Example: if the doctor's firm has an account with the bank, the doctors and all of the employees in the office are eligible for higher rates on deposit accounts, reduced rates on safe deposit boxes, and reduced rates or waived fees on mortgage loans. (Is this scenario considered to be "relationship packaging/pricing" and not a "referral" under RESPA?)

A key point to consider is whether the receipt of any discounts is contingent upon referral of business. Given the information presented in the above question, it appears that the discounts are provided based on the relationship of the business to the bank not the referral of loans by that business to the bank. So if, for example, a discount is available for all businesses with accounts at the bank then it would not be problematic if employees of a realty company received the same discount if that realty company also had an account at the bank. It is just very important that the bank establish clear criteria for determining which businesses are included in the discount program and that such criteria bear no relationship to which of those businesses are likely to also refer customers to the bank and that the continuation of the discount not be contingent on a certain number of referrals.

3. What compliance issues are there for bank-to-bank transfers made by or on behalf of a business customer?

Banks should review such transfers for compliance with Part 329 of the FDIC's Rules and Regulations (Interest on Deposits) to be sure that the transfers don't exceed the transfer limitations if the funds are moving in or out of an interest bearing account held by a business. In addition, business customers should have received the TLGP disclosure to the extent funds are moving from a transaction account with an unlimited FDIC guarantee amount and into an interest bearing account subject to the \$250,000 deposit insurance limit. Banks should also note that funds moved out of the bank pursuant to a sweep agreement will also need to comply with the disclosure requirements of Part 360 of the FDIC's Rules and Regulations.

Regulation CC – Elimination of Non Local Check Classification:

We have confirmed with our Washington Office that banks should be changing their EFA disclosures to eliminate any reference to longer delays for nonlocal checks since those longer delays will no longer be permissible once the rule changes become effective on February 27, 2010. The revised disclosures must be available for new customers beginning with the revised rule's effective date. As for existing customers, the bank has 30 days following the rule's effective date to notify them of the change in terms given that the change is advantageous to the consumer.

Regulation CC's Official Staff Commentary explains when the change in policy notice has to be sent and what the notice has to communicate. Here is a copy of what the commentary indicates:

E. 229.18(e) Changes in Policy

1. This paragraph requires banks to send notices to their customers when the banks change their availability policies with regard to consumer accounts. A notice may be given in any form as long as it is clear and conspicuous. If the bank gives notice of a change by sending the customer a complete new availability disclosure, the bank must direct the customer to the changed terms in the disclosure by use of a letter or insert, or by highlighting the changed terms in the disclosure.
2. Generally, a bank must send a notice at least 30 calendar days before implementing any change in its availability policy. If the change results in faster availability of deposits--for example, if the bank changes its availability for nonlocal checks from the fifth business day after deposit to the fourth business day after deposit--the bank need not send advance notice. The bank must, however, send notice of the change no later than 30 calendar days after the change is implemented. A bank is not required to give a notice when there is a change in Appendix B (reduction of schedules for certain nonlocal checks).

Deposit Balance Disclosure at NonProprietary ATMs

As an attendee noted during the session, the new rule regarding disclosure of balances at ATMs applies equally to both proprietary and nonproprietary ATMs. This rule was effective on January 1, 2010. The commentary from the Federal Register regarding the issue of disclosure at nonproprietary ATMs is provided below for additional background on this issue (see <http://edocket.access.gpo.gov/2009/pdf/E8-31183.pdf> for full Federal Register announcing this rule):

Proposed comment 11(c)–2 also clarified that the reference to ATMs applies equally to ATMs owned or operated by a consumer’s account-holding institution, as well as to “foreign” ATMs, including those operated by non-depository institutions. Some industry commenters supported the proposed comment, stating that it reflected the current practice at some institutions. However, other industry commenters argued that the account balance disclosure requirement should only apply to disclosures at proprietary ATMs. They stated that if the institution makes two balances available to the ATM network, one for balances and one for authorizations, it would have no control over what balances are displayed by a foreign ATM.

The comment, renumbered as comment 11(c)–3, is adopted with minor adjustments. The balance disclosure requirements apply to account balances an institution discloses through any ATM. Because account-holding institutions have discretion with respect to the balances they provide to an ATM network, they ultimately determine what additional funds (whether from the institution’s discretionary overdraft service, an overdraft line of credit, or a linked account) are included in those balances (*i.e.*, the institution has the discretion to provide to the network only balances that exclude overdraft funds). Thus, the Board believes that it is appropriate to include the information that accountholding institutions disclose through foreign ATMs within the scope of the rule.

Flood Insurance - Condominiums

An attendee asked whether a lender can make a loan in a condo with an RCBAP of less than 80%. The short answer is yes. That being said, the new guidance does generally require that the RCBAP equal 100% of the replacement cost of the building. And a dwelling policy is required to cover any deficiency below that 100%. But the Qs and As also provide some very good information about the risks a lender assumes when it accepts collateral in buildings with less than 80% coverage (risks that are not fully mitigated by dwelling policies). So it is important for lenders to understand these risks prior to making such loans.

The attendee also asked whether the principal amount of the loan was still relevant in determining adequate coverage in a condo scenario. The answer is that yes – the principal amount is still an important factor in determining minimum required coverage. The following question and answer makes that clear:

Example: The lender makes a loan in the principal amount of \$175,000 secured by a condominium unit in a 50-unit condominium building, which is located in an SFHA within a participating community, with a replacement cost value of \$10 million; however, there is no RCBAP. Outstanding principal balance of loan is \$175,000. Maximum amount of coverage available under the NFIP, which is the lesser of:

Maximum limit available for the residential condominium unit is \$250,000; or

Insurable value of the unit based on 100 percent of the building's replacement cost value ($\$10 \text{ million} \div 50 = \$200,000$).

The lender must require the individual unit owner/borrower to purchase a flood insurance dwelling policy in the amount of at least \$175,000, since there is no RCBAP, to satisfy the Regulation's mandatory flood insurance requirement. (This is the lesser of the outstanding principal balance (\$175,000), the maximum coverage available under the NFIP (\$250,000), or the insurable value (\$200,000).)

ECOA Credit Report Issue

Do we have a fair lending concern when:

1. A bank gets a merged credit report for married joint applicants and two separate credit reports for non-married joint applicants, AND

1a – bank absorbs the cost (completely) for both the merged and separate reports, or

1b – cost (somehow) is the same

From Joe Chaloux, Fair Lending Specialist, New York Region - In my opinion; cases where married and unmarried applicants receive the same pricing, and consistent standards are applied in evaluating both individual and merged reports, would be viewed as a variation in "process" not "disparate treatment." However, without a detailed legal review of specific facts it is not possible to say definitively that it would be viewed as acceptable under Regulation B.

Furthermore, I feel compelled to ask why banks would consider this approach when pulling a merged report for all joint applicants would appear the most efficient course of action. Merged reports are available for all joint applicants, cost less than two individual reports, and two individual reports will need to be reviewed for possible duplicate records. If the bank chooses to absorb the additional costs they would also need to invest monitoring time to ensure no part of the pricing difference was ever passed on to the applicants.