



The National Voice of the State Credit Union System

**Special Call for
NASCUS Legislative & Regulatory Affairs Committee on
CARES Act and SBA's Payment Protection Program
Q&A with Venable LLP
Part II**

April 15, 2020

Transcript

Neither the April 15, 2020 NASCUS Legislative and Regulatory Affairs Committee conference call, nor this transcript of the call, represent legal advice. No opinions expressed in this transcript are official regulatory interpretations of any state or federal regulatory agency. For formal answers to any questions related to the COVID-19 response, reader should individually consult qualified legal counsel.

The transcript has been edited for brevity and clarity.

Brian Knight: It's 3 PM and we'll get started with call number 2, with our friends from the Venable Law Firm here in Washington, DC. Everyone's call line is muted. We're on an operator assisted call. What we're going to do is walk through a series of topics with Venable. At the end of each group of topics, I'll ask our operator, Phyllis, to open the line for questions. And of course, we'll reserve time at the end, 10 – 15 minutes, for open forum for any questions you have on anything that we want to discuss.

Disclaimer:

Again, just a quick disclaimer on behalf of NASCUS, we're providing this conference call with the Venable Law Firm as an informational service to our members. NASCUS does not speak specifically for any federal or state regulatory body, and we are not providing anyone on the call any specific legal advice. We are providing you information on the myriad of issues related to the SBA lending program, the CARES Act, the general response to the COVID-19 crisis.

With that, I'd like to say hello to Ed Wilson and Laura Biddle, partners with the Venable Law Firm. Ed and Laura, thank you for joining us for Part II of our conference call series with the NASCUS Legislative & Regulatory Affairs Committee.

Question (Brian): The PPP loan process rolls onward. We're already seeing litigation arise related to the program. I saw yesterday that a district court in Maryland sided with Bank of America over its gating of PPP applicants. So, I'd like to start the call there. What is gating? What does the district court say? What would you say is a takeaway from that decision, as we look at this process and move forward? And with that, welcome Ed and Laura.

Answer 1 (Laura): Thank you, Brian, so yes, the District Court siding with Bank of America (BoA). The issue is that BOA had initially decided only to provide PPP loans to its existing business credit customers, and then it opened up to its checking customers as well. The plaintiffs were not customers of BoA and claimed they were harmed by not being able to get a loan at BoA. Where the district court came out was that there was not a private cause of action and that there's nothing in the Act that would require them to only look at the eligibility requirements under the Act. I think, from my perspective, and Ed can jump in as well, there are two things. First, it looked beyond the PPP itself and the broader Small Business Act

and the 7(a) program, and where PPP was silent looked to the longstanding 7(a) protocols. But, second, the court also recognized that BoA as a lender has more to consider when it makes a loan than just the requirements of the PPP. As you recall, the idea has always been to have lenders lend to as many as possible BUT within the bounds of safety and soundness. In BoA's case, it felt like it could do it quicker, better, and safer, with just its existing loan customers that have been underwritten in the past. You need to keep the safety and soundness consideration in mind and do what you do normally that makes you comfortable under your policies and procedures to get these through.

Answer 2 (Ed): I would agree with that, Laura. One of the things the court does is it goes out of its way to point to what other financial institutions are doing in their lending decisions, and it has the following line in it. It says, indeed, numerous other financial institutions have imposed financial eligibility requirements beyond CARES Act. For example, survey data suggests that some banks have focused on processing loans for among others, regional clients, better known business, world markets and economically disadvantaged owners. So, the court was trying to be careful to make sure banks had the ability and flexibility to lend to different groups within the other requirements of the law.

Brian: Thank you, so kind of a big, broad takeaway would be that the credit unions, financial institutions had a lot of discretion as to who they're going to make the loans to, as long as it's not for an impermissible reason. As long as it's not some type of gender, racial, or other prohibited lending discrimination for example.

Ed: That's it exactly.

Question (Brian): We've talked a lot about the PPP, but that's not the only SBA loan that is out there to help deal with the pandemic crisis. What other SBA-administered loan programs should we be aware of?

Answer 1 (Ed): I'm going to break this into two pieces. The first is within the scope of Brian's question, which is the other SBA-administered loan programs:

- As I think we know by now, the PPP is part of the SBA 7(a) Loan Program and generally speaking, offers loans up to \$5M. It's an all-inclusive loan program employed by lending partners all over the US and its territories. You don't have to be a depository institution to participate. Their purpose is to get money into the hands of small businesses for working capital, expansion, renovation, new construction, purchase of lands and buildings.
- There is also an Express Loan Program. That's a quick hit. It's no more than seven years with an option to be revolving, and that's up to \$350K, I think. And that usually comes out within 36 hours from the time you complete the application. You can use the proceeds for just about the same thing that you can use the 7(a) for.
- Then there's All Small Loans up to about \$250K in underserved markets with. You can use them for the same reason. They're pretty quick. These are tied to the Mentor-Protégé Program, which allows an established small business to take on a protégé, someone who's trying to start a business, and you can get funding for that too.
- Then there's a 504 Loan Program, which is really job creation and retention and really have to show that you're – this one I always have a little trouble with because they want you to show that you are going to create jobs and you have a history of creating jobs. And if you have a history of creating jobs, then you probably wouldn't need an SBA loan. But there are people who work through that program repeatedly.
- There's a \$10,000 Grant Program that you can get pretty quickly and another one for \$50,000 microloan programs, and those are, by and large, used to go to nonprofit lending organizations.

And they are focused on underserved markets trying to get very small entrepreneurs up and running.

That's the SBA world and there are other programs, but that's a broad picture.

At the same time, what we have on the other side is the CARES Act, Title 4, which is a series of programs that the Federal Reserve is rolling out and the Secretary of the Treasury is rolling out. The one that the Secretary of Treasury is responsible for: airlines, passenger and cargo, and national security issues. The Federal Reserve is kind of responsible for all else, everything else which is the roughly \$460 billion dollar program—the money that's going from Treasury to the Fed to do these PPP loans, and then loans from Main Street businesses, small-medium size businesses, buying bonds to help larger companies, etc. So that's the broad brush of everything else that's going on out there. And, as with the PPP, we're seeing new regulation on a regular basis. Laura, anything you'd like to add?

Answer 2 (Laura): No, I think that's good. As you said there are a number of programs, some that the Fed had used back in 2008-2009 and sort of reinvented and we have some term seeds but some are not up and running, so we're watching that and check back with us.

Brian: Before we leave the lending program, SBA, and look at the broader CARES Act, Phyllis, if you can open the lines. Does anybody have any questions on the BoA gating case or the discretion in making the loans or any of the lending programs or follow-up PPP before we move to the other CARES Act provisions.

[Phyllis: Asks participants if they have questions. No questions asked.]

Question (Brian): Laura, you've noted the PPP is just one part of the CARES Act. There were numerous other provisions that affected credit unions, other financial institutions. Obviously, there are other changes being made to NCUA's Central Liquidity Facility, forbearance on accounting for loan modifications related to COVID distress, relief from TDR accounting. There are new guidelines for reporting for credit bureaus, discretion for NCUA and FDIC (kind of in consultation to raise deposit insurance). Just a myriad of provisions. From your perspective, can you take a few minutes to talk to us about some of these other relief provisions in the CARES Act. What are they, from your perspective, what are some of the questions that they raise or things that you think the credit union system should be looking at carefully as we move forward? I'll put in a caveat--let's leave issues related to the stimulus payments that are hitting today and coming out next week in paper checks for last. Let's tackle everything else, because I know there are a host of issues around the stimulus payments. With that, talk to us about the CARES Act.

Answer (Ed): Laura, you want me to start this? You can fill in?

Laura: Sure, I'll fill in.

Answer 1 (Ed): The CARES Act really comes in two major titles, as we've discussed, but just to recap this. Title 1 is the PPP. Title 4 is the Federal Reserve program. And as Laura said, a lot of those programs started out long ago. I first saw some of the beginnings of these programs in the 1982 during the S&L crisis and then they got more sophisticated. This time, by far, the Fed was ahead of the CARES Act. The CARES Act ratified some of the stuff they did. Thank goodness nobody was looking too closely at what the Fed was doing before the Act passed. And there are individual parts of the CARES Act that, title by title, they deal with additional appropriations for different agencies. For example, the SBA gets additional money to run its own programs. There's money for people who run small businesses at airports. There's

money for airport relief, not just airplane relief—that's in Title 4, but this goes beyond that. It goes to the people who rent space in airports. What happens to them? How do the airports keep running? And that's an example of the multiple things that are in that part of the Act. Now, there are some other things that are not in the Act that keep coming up. For example, let's look at the Central Liquidity Facility, which was amended two days ago or a day and a half ago, depending on when it came out. If we can take that up for a second...It allows more liquidity, easier membership, trying to make sure that there are no freeze ups, lockups in the system, as we move through. The troubled debt-relief restructuring issue: If somebody comes to you and says their loan is current, you can do a forbearance for up to six months and it doesn't count against your capital as troubled debt. That's also the way the Federal Reserve has put in a program to buy paycheck protection loans and they will count as zero in the books against regulatory capital. So, there are a myriad of things like this. I want to make sure I'm not spending too much time on these but will be glad to take questions as you see them. Laura, could you perhaps talk a little more about the forbearance issues?

Answer 2 (Laura): Yes. In addition what Ed was talking about, Title 4 took what the agencies (NCUA and the banking agencies) were trying to encourage the banking industry to do before the CARES Act was enacted and made it possible. One of the things it did was it brought back the possibility of the TAG program (the Transaction Account Guaranteed program) that was instituted by the Dodd-Frank Act which allowed for deposit insurance for all sums in a non-interest-bearing transaction account because there had been a concern that people aren't going to want to put their money in a bank as they're afraid banks are going to fail. Interestingly, what the Act did was it provides a maximum to be established for banks but gives NCUA the ability to provide *unlimited* share insurance for non-interest-bearing transaction accounts, and I think NCUA is still working through that. As Ed said, there was also follow-up on forbearance on loans—both loans made prior to this period that have an issue as a result of the COVID-19 and then those of the troubled-debt restructure that are modified because of COVID-19 that continued to be an issue.

Ed: That leads us to another question, for Laura and I to figure out. On the PPP loans, there's a forbearance period on the first couple of months. What happens to the interest? And if you've read through the regulations and the two subsequent amendments the authors of those regulations are very careful to point out that the Secretary of the Treasury and the Administrator of the SBA talked about this issue a good deal and decided that putting the amount of forbearance and the time period of the loan was enough, but what happens to that interest? And Laura's run into this in her practice, so I'll ask her to comment on that.

Laura: So, interest does accrue during the forbearance period. What we are seeing is how generally the lenders are treating it. They have principal interest payments beginning at the end of the forbearance period. And then once the two years are up, there's a balloon payment of the interest that accrues during the forbearance period. Whether that's the only way to do it is not clear—the guidance isn't there. But that's the practice we're seeing somewhat consistently.

Question (Brian): And, Laura, the interest accrued during the forbearance period—that's also the analysis, when you look under the CARES Act, for forbearance on mortgages, right? The borrower is going into the forbearance period up-to-date and COVID has caused them distress. There's provision in the CARES Act that talks about how that is treated and talks about additional interest. Is that the same analysis?

Answer (Ed): It's the same analysis, except there they can extend the period of the loan.

Brian: Talk to me a little about that. I'm a borrower, I've been up to date, and I come into the credit union and I say that because of the pandemic, my work has been disrupted, and I'm asking for three months of forbearance. Under the CARES Act, you are to treat me as though I'm still up to date, the same status I was when I came in and asked for that pandemic forbearance, but you're also prohibited on charging me additional interest fees and penalties. So, now walk me through how you would treat that.

Ed: The interest would continue to accrue on the amount of the loan. What is not yet been published is what happens to that interest. Is it just held to pay at the end? Well, that's on a 2-year loan. That's if there's no provision for refinancing, rolling it into something else, unless, of course, if you haven't been in a EIDL loan from SBA, in which case it is rolled into your PPP loan. But in this case where it's a mortgage, it's not supposed to go against your credit. It's supposed to be flat, it doesn't count against the bank as distressed capital. But the issue is out there. What happens? How does it get restructured? Do you just push the loan out another 3 – 6 months, however long the agreement is? Is the interest capitalized? Are you now paying interest on that again? Those things are very much up in the air. We're waiting for additional guidance. You might imagine there's some people (representatives of the borrowers) who are going to be very vocal on that issue; that it shouldn't be an opportunity for the banks to "capitalize"—using that term purposely—on the distress of the borrowers. It should just push the whole thing out however long the agreement is. But the interesting thing is, both you and I said, Brian, that I think is key. At Venable, we represent a lot of small and mid-size companies, and we've been telling those people who own those companies, if you or your employees are going to try to use this, find a way to be current when you walk in the door. Because if you're not current, the bank has no obligation.

Ed: Let's go on and look at the next thing. We're going to see—as we did in 2008—the deposit share insurance cap on non-interest-bearing transaction accounts raised. We're going to see things that took months in 2008 happen quickly in this particular situation.

Phyllis, can you see if there are questions on other provisions of the CARES Act?

[Phyllis: Asks participants if they have questions.]

Question from Bill Lynch (BECU):

Is it possible that the NCUA and FDIC will go beyond the scope of the definitions of transaction account that were used in 2008-2009 legislation and construe the term more broadly to pick up a broader range of accounts since there is no definition at this time? (And the new authorizing provisions aren't being inserted in the same places in existing acts that include definitions.)

Answer (Ed): One of the things we found, over and over again, in each of these things is that these are good people, and they're trying to do things right. But they don't have time to go back and think through--did they define this term? Did they put it in exactly the right place? So, what I'd suggest to you is, I think there's some flexibility here. To the extent you (and your institution and other institutions, like NASCUS) see that there are things that should be done, we can encourage the regulators to make some changes. Let me give you an example. What came out today under the PPP loan was a change in the affiliation rules. It's just a couple pages, maybe four pages from the Federal Register, but what it says is this: If you're a franchise operation, and you're in the SBA list, then your franchisees can be treated as an independent entity and can apply for a PPP loan itself. But what happened to some of our faith-based institutions is that they are not franchises—they're not separately owned, even though they may be separate congregations. And what the SBA has said is we're going to treat individual congregations, regardless of how organized, as separate entities, for purposes of PPP loans. So, we saw the flexibility.

We saw an enhancement when The Fed came out with their Main Street lending program. The Fed is saying, “We’re going to be flexible in how we apply this.” For example, as a test, if you have no more than X number of employees, or certain revenue thresholds, I don’t think either one of those is locked in stone. If enough people go to the Fed and say you should have done this and not that, the Fed will change. An example of this was the night before the lending window opened for the PPP loans and SBA changed its form from “Are you a foreigner?” to “Are all your employees in the U.S?” So, we’re seeing a good bit of flexibility. Some of it is because they’re thinking through better. Some, it’s simply because they’ve committed a foot fault, and they’re trying to make it right.

Laura: And they’ve heard from the industry groups...

Ed: Bill, I’m picking up what Laura just said. If there are things in it that you think should have been done in 2008, but weren’t, I’d talk to Mr. Knight about putting his John Hancock on the letter.

Brian: I will say that the NASCUS Legislative & Regulatory Affairs Committee has created a COVID-19 sub working group that’s going to be pulling together issues related to guidance, issues on the 30-day comment period for the SBA PPP, other issues. So, Bill, continue to send those to me. I know you’ve sent me some things over the weekend as well that we’re looking at.

Question (Brian): Before we leave the CARES Act, I want to talk about the stimulus payments. A lot of big questions and issues related to the stimulus payments—the 80 million or so payments that are electronically hitting people’s accounts starting today and next week’s 70 million or so paper Treasury checks that are going to be coming out. From your perspective, talk to us about the stimulus payments. I imagine that there will be a number of these payments that hit the credit unions with problems—did not posts lists, either the account numbers are no longer valid or there was a mistake in the transactions. Very quickly, any considerations for the RDFI (receiving depository financial institution)? What are you going to do with that? Do you just return it? Do you make it right if you know where it’s supposed to go and then if the RDFI owns the transaction?

Answer (Ed): The ones coming in are ACH, and there are going to be some mistakes. I’ll use one of my own sons as an example. He files his taxes electronically and two years ago he had his account stolen. So, he went through a long process to reestablish who he really is. The bank has to connect his old account with his new account. They have the software for it, that will happen. However, if someone comes in and all the other identifying elements on an ACH payment don’t allow the bank to connect the dots to great satisfaction, then the question is how much risk are you willing to take? Because it really is the bank’s/FI’s/CU’s decision to say: Do I put this into Ed Wilson’s account even though a number got cut off here or two digits got reversed? That’s where the issues are going to come. And depending on where you are and your credit union’s risk threshold, the credit union can return the ACH. I suspect some of you are going to hit this, and I think it’s going to be a highly bank-dependent issue. And it also depends a lot on an institution’s software situation

Question (Brian): Thank you, Ed. Let’s say the stimulus payment hits and it’s the correct account. What are the rules related to these payments for garnishment?

Answer 1 (Ed): This is a great question, we just picked up something new just today on this that confirmed my confusion. The way I’ve always looked at garnishment is that they come in with certain identifiers that identify the paying agency. If it’s a certain agency, then you may not garnish certain federal benefits. But if it comes in for other things, then it is subject to garnishment. Well, payments are going to come in under what [statutory] codes? We’re not sure—probably a tax code. But then if it’s Ed Wilson, and I get a paper check and I turn around and I take that paper check and deposit it, the bank doesn’t know—it’s just a deposit of a federal government check. It’ll be different from other federal

government checks because (1) it's out of time and (2) it's for a sum certain and (3) it has the president's name on it as opposed to just the Secretary of the Treasury and the Treasurer. Those[paper checks] are going to be easier to garnish because they're just going into an account and a garnishment is usually against an account (as opposed to when something comes in via ACH and it has those identifying codes from the agency on them). So, that's where I think I sit at the moment. Laura, do you have anything to add on that?

Answer 2 (Laura): I think that's right. At this point, it's just one of those unknowns.

Brian: So, there's nothing on the face of the CARES Act that's going to prohibit the garnishment if it somehow comes in coded like a prohibited transaction such as a railroad pension or social security. Otherwise, they're going to have to take a look if the state has taken action. We do know there are a few states that are looking at putting in state prohibitions on the garnishment of these funds, but nothing in the CARES Act prohibits it. So, you're going to look at the state level and then make sure it doesn't come coded as a restricted transaction.

Laura: Right, and I do know through channels that the Bank Policy Institute is looking at this because it considers it a big issue and is likely working with Treasury to figure out how to get some clarity on that. Hopefully that will come.

Question (Brian): And, of course, the question we're not answering on this call is even if you can garnish it, if they owe your credit union money or another payment, should you? Is that a good look? I think that is a separate issue people must decide for themselves. For the people who receive the paper checks that will be coming probably next week, clear up for us—there's nothing related to the paper check program that mandates a credit union or financial institution to cash this check for a non-member. If their state law allows them to cash a check for a non-member, is there a prohibition against them charging fees for that service?

Answer (Ed): There's no prohibition. I think you hit on something that we should have picked up on sooner. That is, given the public nature of those program, any fee that's charged must be reasonable or it should be. Otherwise, you're likely to be reading about it. One of our partners in New York saw a sign when he was out doing his grocery shopping early in the morning today that said "COVID-19 checks cashed, \$5 fee" in a check cashing institution's window. And he said that's like remittance fees. And he raised it with me, and he wonders if we're going to see a lot of that. I said I think we are, and we don't want to be on the wrong side of the publicity. So, I'd keep that in mind as you do it. You're perfectly within your rights to say, "We're only cashing checks for people who have accounts or are members of our credit union." But if you're going to charge a fee, give it a little thought.

Laura: [Breaking news.] I just got feedback from the Bank Policy Institute on the garnishment: Treasury has taken the position, notwithstanding pressure from state attorneys general, that the stimulus payments are not exempt from garnishment. They are tax refunds and not federal benefits. So, there's the answer to that—at least unofficially.

Ed: Are we going to see something formally on that, Laura, from Treasury?

Laura: I would think so. This apparently came up at an "Ask the Fed" call.

Question (Brian): Thank you for that. Before we change gears, as a segue in, we're going to talk about some Bank Secrecy Act issues related to all of this, responding to the COVID-19 crisis. Obviously BSA takes us down the road of fraud. What we know is that unfortunately during any time of economic downturn or crisis, we see fraud increase. I know there's a lot of concerns among financial service

communities and amongst credit unions, but particularly looking at the paper checks, forged checks, fraudulent checks, general fraud related to these transactions. Any general things from your practice, where you sit, related to BSA, in particular?

Answer 1 (Ed): In preparation for this meeting, I consulted with one of our partners who is a former assistant U.S. attorney and was in charge of all the money laundering prosecutions for the district of Maryland, headquartered in Baltimore. So, I called him and said we got a lot of really great financial institutions that are being deluged with people wanting money. What should they do? He said they should do what they always do: make sure there's a good KYC program coming in. I know there's no time for underwriting in this game, and there's really no need for it because the regulations put it all on the borrowers. If the borrower certifies, then the bank can accept, as long as they make a good faith effort to check it. So, he said it's the usual sorts of things. It's much what FinCEN put out back in mid-March when they were just looking at it. They put out a series of things—it was March 16th maybe. The very routine identity theft: A fraudulent company doctored and dummied up documents...somebody printed out a tax return off of Quicken. As an old friend of mine (who was one of the founders of the FinCEN) used to tell me, there are no new frauds under the sun—there are just new ways of trying to accomplish them by people who think they reinvented the fraud. Everybody on this call knows what to look for. We have to be careful.

Ed: Let me jump ahead. One of the things that concerns me is some FinCEN guidance. If I come to you and say I'd like to apply for a PPP loan and I'm a member of Treasury Credit Union, and credit union says okay, fine. Does the credit union need to do a Know Your Customer check on me? Well, if I already have an account there and they've already done a KYC enhanced due diligence—or whatever we're going to call it—and they have it on file, unless they think there's a reason to think it's not current, then we're good to go. But here's the flipside that FinCEN said in its guidance: If I come to you and you've never done due diligence on me and you don't think there's a reason to, you don't have to...

Answer 2 (Laura): ...Unless you go back to your risk-based approach to BSA compliance.

Ed: That's exactly right, thank you. Why would I be a member and never have had due diligence on me? Because I was a member from before the beneficial ownership rules went in place—that's it. But they don't say that in the rules, so it's a little confusing.

Laura: And the sense that we're getting from our insured institution clients is that they're following their normal AML and KYC procedures. It may take them a little bit longer but they're doing the full check.

Ed: I'm hearing the same thing. What our clients are doing is they're making sure that Ed Wilson is Ed Wilson. They're making sure that the company Biddle Wilson Hardware store exists—all those things. They are not spending a lot of time but they are at least pausing long enough – as we say in our household – to say grace over it.

Question (Brian): As NASCUS looked at the FinCEN guidance, we've had the reaction that with the exception of rolling back the CTR changes that went into effect in February about doing business as sole proprietorships, our takeaway from the FinCEN guidance issued on March 16, April 3, and now the April 13 is this. What FinCEN is really saying is "We understand your compliance departments are dispersed. You're overwhelmed. We are very sympathetic. Do your best." But FinCEN didn't really offer any specific relief. As Laura said it kept coming back to risk-based. We understand that but to the extent that it's been characterized as there's been relief, I'm not really sure that there was.

Answer (Ed): You're right. The only definite relief was the relief from having to fill out the new form to get all that information for an indefinite period of time. They didn't say when they were going to roll it back. I'm completely with you.

(Brian): The one thing that definitely is in the guidance is FinCEN did create a portal, and I encourage FIs to reach out to FinCEN to talk about any COVID-related distress—both to help FinCEN determine if formal additional relief is needed but also to put your place marker down. But in terms of broad-based relief, I think, Ed and Laura, that what you're saying is they're very sympathetic, but if you're looking for concrete relief then there wasn't a whole lot there.

Answer (Ed): By the way, it's really easy to get to their page. You just go to "Need Assistance" on the home page and that pops up a screen and you put your name, etc. If you go down to the subject line, it's a dropdown menu and the second one down is "COVID-19". And what they're asking for is any way it's affecting you, anything you're seeing. They want to hear from you.

[Phyllis: Asks participants if they have questions.]

Question: (Nicola Foggie, CrossState Credit Union Association)

Hi. Good afternoon and thank you for hosting the session today. My question to the attorneys is have you seen or heard from a credit union where they have two spouses, they file jointly, but only one direct deposit of \$1,200 went into their account instead of \$2,400?

Answer (Laura): I have not, but that is something we can circulate and see if our network is seeing that and get back to you.

Question (Brian): Looking at the clock, I want to move into two final issues: **First: As credit unions are responding to the pandemic and trying to assist their members, the kind of mantra we're hearing at all levels is: "Serve your members, help the small businesses, get these PPP loans out the door. We understand these are extraordinary circumstances, we understand your staff will be dispersed. Trust us, there'll be regulatory and supervisory forbearance in the future. Everything will be fine, just serve your members and customers."** But as we know with FinCEN, with the exception of temporary changes with TDR, there's not been a lot of concrete, definitive, here is your protection when all of this settles down. So, from your perspective, Ed and Laura, as credit unions are moving quickly to serve their members, what are some of the consumer compliance and other pitfalls that you can foresee out there that everyone should be thinking about as they do their best to serve their members? We've talked about: Are you going to end up having had a disparate impact with whose loans you modified and whose loans you didn't? All of these things we know aggrieved parties will come back with 6 months, 8 months from now. Anything major we should be looking out for, any pearls of wisdom on that one?

Answer (Laura): We have to remember that the PPP is a subset of the 7(a) loan, and it's also a loan that's going to pick up some of the consumer compliance statutes like the ECOA or Equal Opportunity Credit Act. And going back to the BoA, pretend you're a small institution somewhere, I think you said Oklahoma, Brian, and you're only processing applications for existing customers. Well, what if that completely excludes Native Americans? Well, that wasn't intentional but that's the disparate impact. Is that going to become an issue down the road? We don't know and there's been a lot of talk but it's not clear how it's going to look on the backend. So, you have to remember all these things that would normally apply and at least consider them in your underwriting process—and not just a flip-the-switch type of reaction.

Brian: Thanks, Laura. Ed, anything to add?

Ed: What I'm worried about is that in the haste of trying to process these things we create problems inadvertently. So there needs to be some good quality control along the way.

Ed: One of the questions asked last time was can you make a loan to an officer, a director, a board member, etc., and the answer clearly is in the Q&As: Yes.

Question (Brian): I would like to go back to the forbearance issues and just get clarification on this issue. I'm a member in good standing, I walk in the door of the credit union—I am now distressed, I would like 3-months forbearance, the credit union agrees to give me 3-months forbearance under the CARES Act on the payment of my mortgage. My mortgage is at 3.78% interest. The CARES Act says the credit union can't charge me any additional interest. So, again, during that 90 days, what happens to that 3.78% interest on my mortgage that I am not paying? After 90 days, on Day 100, can the credit union ask me to pay the entire 3 months, plus interest that was due? Can they ask me to pay the entire interest? Do I just pick up in Month 4, as if we were in Month 1 and we push everything back three months? What are my options as a credit union for recouping that interest rate that was not paid for the 90 days?

Ed: Good question. I'm going to start, and we'll let Laura correct me. There's nothing in the Act that speaks to exactly this issue. We've asked, we've raised the question, we've raised our hand and said there needs to be some clarity on this. Can we just keep the exact same loan terms, just push it out three months so that Month 4 really becomes Month 1? At the end of it, do we have an additional three months until the mortgage is paid? Can you require a balloon payment of the interest, which is what is happening? At least we have good anecdotal evidence that that's happening under the PPP loan program. But I think this is something that a lot of people are going to be discussing, and we're going to see some guidance come out along the way. One of my other issues is who's going to issue the guidance. Is it going to be the FFIEC that comes out and says this is what we need? That might be best so we get uniform treatment across the board. Laura?

Laura: I think that's right. The reality is if you're deferring it for X period of time, and this situation continues, do we really think someone can come in and catch up as soon as it's over?

Ed: Well, let's talk about that for a second.

Brian: Right, because that kind of begs the question. I didn't have the money to pay for 90 days. Now, all of a sudden at Day 100, I've got money?

Ed: Well, unfortunately, the PPP regs hint that they think there will be enough money. The forbearance period on the PPP loans—it's going to be sufficient because this is all going to be over and we're going to come back and people will be able to pay these loans without a problem in two years. When you read those regs, there's a little bit more confidence in what's happening and in what's going to happen than what I have personally.

Brian: But on the mortgage issue, outside of the PPP, there's nothing definitive that says what happens in Month 4. Ok, we will stay tuned.

Brian: It is a little bit before 4 o'clock, I know I wanted to ask you questions about looking ahead past the crisis as businesses re-open, but let's pause with those. Phyllis, can we open the lines for any questions that anyone has on anything related to the COVID, and after we get through that, I'll close out with asking for your thoughts on HR and other things that we should be thinking about now for when business starts to re-open and people start coming back to the office. Phyllis, if you can reopen the lines for any questions, that would be great. Thank you.

[Phyllis: Asks participants if they have questions.]

Question (Patrick Basler, Illinois Credit Union League)

Hi. Thank you. Ed and Laura, we have a question about the different executive orders that are taking place in some of the states and specifically how some of executive orders are impacting state-chartered credit unions that operate in those states, but their main office is domiciled in a different state. For example, New York has some fee moratoriums that urge credit unions not to charge overdraft fees and such. Well, we have credit unions in Illinois that have branches or members in that state, so we're looking for guidance on how to handle those executive orders in multi-state situations.

Ed: Sometimes federalism in the United States can be a burden. Sometimes it's a real benefit. You put your finger on something we've talked about. What we've tried to come up with is to say you want to be a good citizen in the state where you are. Most of the state executive orders, when it comes to telling different groups what they may or may not do, some of them are mandatory, some of them are hortatory—meaning a “courtesy.” What we see is the lack of appreciation for how much fee-based income means to FIs. But at the end of the day, you want to keep your members. So, I would come back to what Brian said earlier, to the extent you can, you ought to eat pie with a fork. By that I mean the pie is the executive order, and you eat it with the fork you've got in that state so that you're not singled out and you're doing the right thing by your members to the extent you can. Laura, you want to hit this. It troubles me a good bit—the difference from state to state if you're a multi-state but are a state-chartered entity.

Laura: Yes, I would just talk briefly about the New York order. That one, in particular, only applies to those institutions that New York has jurisdiction over, so for the most part those that are chartered by the state. So, I think you have to look at the order to see how far it goes because it may not be an issue.

Brian: And, Laura, would you think that, also, aside from the public relations aspect, would the legal analysis also be affected by whether you have a physical presence in that state?

Laura: If you're not in the state and your members just happen to reside there...

Ed: I tried to find out just for the fun of it what Navy Federal Credit Union is doing. I realize it's a federal credit union and it's NCUA, but it's got people everywhere. They probably have the same problems with this going on around the world. I didn't get an answer, but I just wanted to hear what Navy Federal was doing since I have a couple of children of goods friends of mine are on various ships around the world. If I hear anything back, I'll let Brian know and he can put it out.

Brian: Does that help at all Patrick?

Patrick: Yes, it does. We've gone around and around on that same issue, and really the challenge is operationally. Everything you've said makes sense, and we want to do good by the members in that state, but there's an operational challenge with data processing for credit unions to just slice off their New York members or just their California members. So it's good to hear—I'm glad you used the phrase “to the extent you can” because I think that comes into play. But yes it does help. We would appreciate any follow up guidance if any clarity comes in on the issue. Thank you for this call, I really appreciate it.

Ed: We will.

Question (Bill Lynch, BECU):

I was interested to hear Ed refer to regulatory guidance or regulations saying that they're expressing confidence that the loans could be paid without a problem, but I believe that at the end of that sentence he said “in 2 years.” I'm just asking for confirmation that it really did say in two years?

Because if that's the case, that would indicate you would hold the balance of interest until the end of two years and then have it paid off, for example, rather than require that it be paid up front. But please tell specifically what the regulators indicated in that regard.

Answer (Ed): They have not spoken to this particular issue. They said, okay, you get a forbearance period and then you start paying. But they haven't said what happens to that interest and when it is paid. Laura has got anecdotal experience, so I think she ought to pick this up.

Laura: I think the institutions that I deal with are taking the position that we can't expect borrowers to pay right after the deferment or right after the forbearance period and are giving them until whenever the period is to make a payment—whether they want to spread it out over time or whether they want to make it a balloon payment. But the reality that you can turn it around at the flip of a switch and make your regular payment and your catch-up payment is somewhat unrealistic and I think they see that.

Brian: Ed and Laura, final thoughts. Let's be optimistic as we look beyond this crisis and we begin to return to the offices and life begins to return to normal, there are going to be a lot of questions as to how credit unions, organizations begin to re-integrate their employees into the office space. What jumps out at you as some of the things we'll have to think about, in terms of policy, procedure, HR issues. Can the credit unions sit the employee out front with a temperature gun and gun everybody as they're coming into the credit union—both employees and customers—into the future? Do we have to notify each other when somebody is sick? What are all these issues we're going to have to grapple with in a few months as we re-open?

Answer (Ed): Well, that's a fabulous set of issues. Just so you know, we have a group in our firm, looking at just these issues. Some of the things that group came up with were: Can you require your employees to report any illness? To stay home when you're sick? And this goes back to the issue of what are you going to do, how are people going to account for their personal leave and their sick leave versus their vacation leave? It changes the way people think about it. But during the time of the pandemic, our practice group was quite clear that asking questions about health and travel are perfectly permissible, including temperature testing when people come into the building. You have to take reasonable precautions: fewer desks, move things out, space things out, alternate working in the office and not. Basic reasonable measures will cut down on your legal exposure and the ones we talked about. The other issue is what do you say to your employees about what are the right things you do before you come to work—wearing a mask, wearing gloves, using hand sanitizer? What are the right things you do before you go home? You're going home to your family and everything you've come into contact with during the day, you're bringing home with you. Do you encourage your employees to get undressed outside before they go in the house, to put their clothes into the washing machine? If you are a union shop, does that become part of the worktime? These are all things our folks are looking at. What obligations are there to report a COVID-19-related illness to other employees? Right now you have a fight between the privacy laws and the health laws, so you really do not divulge to employees or family members the fact of an illness. But, that's going to raise some problems, and we do not really have a good solution for it yet. We think we will likely re-open slowly. There's going to be a lot of social distancing, staggered work times and work schedules, altered days at work. Do you put a sign up outside the elevator that says only two at a time or only one at a time? Those are all issues that are yet to be worked out. But I think that each of you needs to be in touch with your HR department and your HR outside counsel because there are going to be some really serious work issues here. Venable just put out on our webpage articles on this.

Brian: Thank you. So, a lot to think about there. Thank you for the things we need to think about. Phyllis, if you can open the lines for questions on any matter.

[Phyllis: Asks participants if they have questions.]

Brian: Ed and Laura, thank you so much for taking another afternoon to spend time with NASCUS and its members and our L&R Committee to answer all of these questions. We will follow-up with you on remaining questions. Any last observations before we wrap up today's call?

Laura: Just that there's still so many unanswered questions. I think we're still going to be seeing updates to the PPP FAQs, everything is developing. Just stay tuned. We're following it. We're happy to help.

Brian: I know we threw a lot of questions at you on short notice, both Friday and today. I hope you've had some fun answering them. Would you be willing to come back and join us again for a third call?

Ed: We'd love to. We learn a lot from these things, too. And you guys get us thinking of ways we haven't. It's a two-way street.

Wrap up

Brian: Well, on behalf of NASCUS and our membership, thank you both very much. For everyone who joined us this afternoon on the call, thank you for taking time. I know how busy you are managing the crisis for the credit union system and for your members. We thank you for everything that you're doing. If there are any questions that you didn't get answers to or that you want us to follow up on, please feel free to reach out to anyone at NASCUS. Send an email. With that, thank you and we'll conclude the call. Phyllis, thank you for your assistance. Thank you everyone and have a good afternoon.