Volume 38, Issue 8 | AUGUST 2021

DISCLOSURE

A MONTHLY COMPLIANCE REVIEW PUBLISHED BY THE IOWA BANKERS ASSOCIATION

ESCROW ERRORS

How to Avoid Common Mistakes

ALSO IN THIS ISSUE:

ACH ORIGINATION AGREEMENT REQUIREMENTS AND BEST PRACTICES

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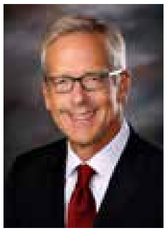

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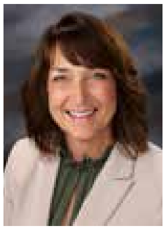

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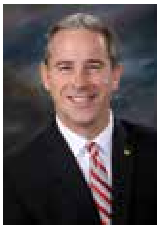

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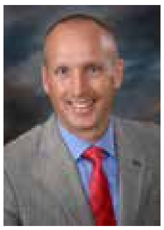

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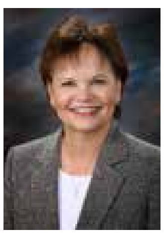

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DISCLOSURE

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HIGHLIGHTS

FEATURE

REGULATORY UPDATE

NOTES OF INTEREST

COMPLIANCE FORUM

ACH ORIGINATION AGREEMENT REQUIREMENTS AND BEST PRACTICES

KIM BEALS, CRCM, AAP

As ACH origination services grow in volume and complexity, it is more important than ever for financial institutions to have a strong legal agreement in place to protect themselves. Detailed below is information to assist institutions in ensuring their ACH origination agreements are compliant with Nacha rules and best protect the financial institution, as well as best practices for maintaining agreements already executed.

WHO IS REQUIRED TO ENTER INTO AN ACH ORIGINATION AGREEMENT?

Nacha rules require an originating depository financial institution to enter into an origination agreement with each originator and third-party sender[1] before the ODFI originates entries on its behalf. The rules also require each third-party sender to enter into an agreement with each originator it sends entries into the ACH Network on behalf of through the ODFI.

WHAT DO NACHA RULES REQUIRE IN THE ACH AGREEMENT?

Subsection 2.2.2.1 of the Nacha rules outlines minimum requirements that should be included in originator agreements:

- The originator must authorize the ODFI to originate entries on behalf of the originator to receivers' accounts;
- The originator must agree to be bound by the Nacha rules;
- The originator must agree not to originate entries that violate the laws of the United States;
- The agreement must outline any restrictions on types of entries that may be originated;
- The ODFI must have the right to terminate or suspend the agreement for breach of the Nacha rules; and
- The agreement must provide the right of the ODFI to audit the originator's compliance with the origination agreement and the Nacha rules.

As stated above, an ODFI must also enter into an origination agreement with each third-party sender for which the ODFI will originate entries. The third-party sender agreement must include the minimum requirements listed above. In addition, the rules requires the third-party sender to agree, before permitting an originator to originate any entry directly or indirectly through the ODFI, to enter into an agreement with each originator that satisfies each of the requirements.

Other issues that should be addressed in the origination agreement between ODFI and the originator or third-party sender are detailed below, as reflected in Appendix C of the Nacha rules:

- The nature, format and medium of entries, or entry information to be furnish by the originator.
- The place and time the entry information is to be furnished by the originator.
- The originator's obligation to obtain valid authorization of entries from receivers.
- The level of security to be established for delivery of the payment data from the originator to the ODFI.
- Other data security and data breach provisions.
- Responsibilities of the participating ODFI and originator with respect to remaking rejected entries or files.
- The deadline for reversals, corrections, or changes by the originator of entry information furnished to the ODFI.

- The ODFI's responsibility for delay by the ACH operator or receiving depository financial institution in processing any credit or debit the depository financial institution transmits to the ACH operator, or failure to process, credit or debit any such entry or other acts of omission of the third party.
- Whether the origination agreement covers credit or debit entries or both.
- Any restrictions on the types of ACH entries that may be originated.
- The time when the funds may be available to the originator.
- The time when the funds are to be provided to the ODFI by the originator.
- The charges or fees by the ODFI for providing services to the originator under the origination agreement.
- Exposure limits for the originator, including the type of entry and frequency.
- Responsibilities of the ODFI and originator with respect to handling returns, notifications of change, dishonored returns and refused notification of change.
- The conditions under which a third-party service provider[2] will be utilized.
- Procedures for terminating the origination agreement and the timeframes under which the processing of entries under that origination agreement will cease.
- The right of the ODFI to terminate or suspend an agreement for breach of the Nacha rules.
- The originator's obligation regarding prenotifications.
- The originator's obligation to obtain, retain and provide copies of authorizations.
- The originator's obligation with respect to consumer alleged errors, including under Regulation E.
- The right of, and procedures for, the ODFI to audit an originator for compliance with the origination agreement and the Nacha rules.
- Record retention requirements.
- Use of proper authorization methods, authorization forms and ACH formats.
- The use of appropriate encryption standards for ACH entries involving banking information that is transmitted or exchanged via an unsecured network.
- Responsibilities of the ODFI and originator with respect to handling acknowledgment entries.
- An acknowledgment by the originator that ACH transactions it originates comply with the provisions of U.S. Law.
- The originator's responsibility for matters warranted or agreed by the ODFI in the Nacha rules pertaining to entries exchanged through the ACH Network, which may vary depending on the entry type.
- For International ACH Transactions (IAT entries) the terms and conditions for the allocation of gains, losses and the assumption of risk for foreign exchange conversion and the rights and responsibilities of the ODFI in the event of an erroneous entry.

HOW OFTEN SHOULD THE ODFI REVIEW OR RENEW ORIGINATION AGREEMENTS?

As part of ODFI's risk management efforts, the ODFI must perform due diligence on originators and third-party senders to ensure the originator or third-party sender is conforming with Nacha rules. This can be particularly challenging when rules change often. For example, consider the recent expansion of the Same Day ACH window. If your financial institution is an ODFI, you will need to consider how this new functionality might impact your originator/third-party sender relationships and originator agreements. Some things to consider include:

- Will you offer the service to your originators/third-party senders?
- Will you charge your originator/third-party sender for the service?

- Will processing through the new window be charged differently than the first two windows?

You may need to update your agreements with your business clients to include or exclude the option and to disclose fees. The ODFI risk management due diligence efforts should also include proper monitoring of the relationship, so the ODFI is able to identify changes in origination activity and the relationship that may require modifications to the origination agreement.

Industry experts have stated as a best practice, executed agreements three years old or older should be reviewed for adequate coverage of the Nacha rules. Staff should also have a process in place to ensure an executed origination agreement has been completed for each originator and third-party dender, and all fields and signatures are complete. In some situations, adding an addendum or additional schedules to the origination sgreement to reflect Nacha rule changes is sufficient, but legal advice should be obtained prior to making any amendments or changes to the agreement.

Additionally, best practice measures should include a process for reviewing and renewing executed agreements five years old or older. This provides an opportunity to revisit each originator and third-party sender's responsibilities with the ODFI and third-party sender, ensure the authorized Standard Entry Class codes and current exposure limits are disclosed, and recent Nacha rule changes are reflected in the agreements.

In summary, whether your ACH origination offerings have remained the same or grown in volume, there is risk in ACH origination and it is important to periodically review your agreements to ensure the ODFI has limited its risk as much as possible by having a compliant, up-to-date origination agreement.

Footnotes:

[1]A third-party sender is defined by Nacha rules as a type of third-party service provider that acts as an intermediary in transmitting entries between an originator and an ODFI, including through Direct Access, and acts on behalf of an originator or another third-party dender. A third-party sender is never the originator for entries it transmits on behalf of another organization.

[2]A third-party service provider is an organization that performs any functions on behalf of the originator, the third-party sender, the ODFI, or the RDFI (not including the originator, ODFI, or RDFI acting in such capacity for such entries) related to the processing of entries, including the creation of the files or acting as a sending point or receiving point on behalf of a participating DFI.

FEATURE

ESCROW ERRORS

HOW TO AVOID COMMON MISTAKES

JACKIE OSTRANDER, CRCM

On June 2, 2021, the Consumer Financial Protection Bureau published a series of FAQs on escrow accounts. The FAQs provide good background on the escrow accounting rules to produce accurate account statements at the time establishing escrow accounts as well as maintaining escrow accounts. The FAQs can be found **here**.

This article reviews common errors found in escrow account statements, and provides the reader with an explanation of how to avoid these mistakes.

COMMON ERROR 1 — ANNUAL ESCROW STATEMENT ERRORS EXPECTATIONS

RESPA requires the servicer[1] to provide an annual statement to the borrower within 30 calendar days of the end of the escrow account computation year,[2] after the servicer conducts an escrow account analysis. A common mistake servicers make is sending the statement late (more than 30 calendar days) after the end of the escrow account computation year. The notice needs to be sent on a timely basis so the borrower has adequate notice of changes in their escrow payment.

The annual escrow account statement must include an account history reflecting the activity in the escrow account during the **prior** escrow account computation year, and a projection of the activity in the account for the **upcoming** escrow account computation year. The servicer must also include the previous year's projection or initial escrow account statement along with the history and projection. The annual statement must detail:[3]

- The amount of the currently monthly mortgage payment and the portion going into the escrow account;
- The amount of the past year's monthly mortgage payment and the portion of it that went into the escrow account;
- The total amount paid into the escrow account during the past escrow account computation year;
- The total amount paid out of the escrow account during the past account computation year for taxes, insurance premiums, and other charges (as separately identified).
- The balance in the escrow account at the end of the account computation year;
- An explanation of how any surplus is being handled;
- An explanation of how any shortage or deficiency is to be paid by the borrower; and
- If applicable, the reason(s) why the estimated low monthly balance was not reached as indicated by noted differences between the most recent account history and last year's projection.

Common errors related to the content of annual escrow statements include not reflecting the account history for the full twelve months of the escrow computation year. This error often occurs because the annual statement is generated prior to the end of the computation year, thus not all payments into and out of the escrow account have been made at that point. The rule anticipates this and provides that, in preparing the statement, the servicer may assume scheduled payments and disbursements will be made for the final 2 months of the escrow account computation year. Thus, the servicer can include in its "history" the final two payments that have actually not yet been made.

Another common error related to the account history is failing to provide the reasons the estimated low monthly balance was not reached by noting differences between the most recent account history and last year's projection. Many servicers are unsure how to accommodate this requirement. A common acceptable practice is to denote the differences between the actual history and projection by placing an asterisk by the payment on the history that was different than estimated on the previous year's projection.

COMMON ERROR 2 — ESCROW ACCOUNT COMPUTATION YEAR MORE THAN 12 MONTHS

Regulation X requires an escrow account analysis be conducted for each "escrow account computation year." The regulation defines an escrow account computation year as a 12-month period, beginning **with the borrower's initial payment date,** and includes each 12-month period thereafter, unless the servicer issues a short year statement. A short year statement will reflect a time period of less than 12 months. Short year statements are most often used to change one escrow account computation year to another.

The short year statement ends the current escrow account computation year and establishes the beginning date of a new escrow account computation year. By using a short year statement, a servicer may adjust its production schedule or alter the escrow account computation year for the escrow account. Short year statements are required within 60 days of loan payoff and servicing transfer.

Often servicers include 13 months in the initial analysis when the first payment date is delayed; including that extra month in the escrow account analysis is a common error. For example, assume a loan closed February 5, 2021 with the first payment due on April 1, 2021. Because property taxes are due March 1, 2021, the servicer started the escrow analysis beginning in March and included the March tax installment as a disbursement and ended the computation year in April of the following year, (in this example, April 2022), reflecting a 13-month computation year. The regulation is specific that the escrow computation year should reflect only 12 months and begin with the borrower's initial (first) periodic payment. In our example, the March 1, 2021 tax installment should have been disclosed as a prepaid item on the Closing Disclosure and not included in the initial escrow analysis/statement.

COMMON ERROR 3 — INCORRECT INITIAL ESCROW ACCOUNT STATEMENT

The amounts paid into escrow for property taxes and insurance premiums should reflect what is actually owed and will be paid out during the 12-month escrow account computation year, plus an amount for a cushion according to the servicer's escrow practices. A cushion may be an amount that is equal to one month, but no more than two months escrow amount paid on a monthly basis.[4]

A common mistake for purchase money transactions is including the property taxes for the entire year, when the seller paid the first half of the property taxes at closing. Conversely, it would also be an error if the amount included in the escrow account analysis includes only half of the property taxes due, when the borrower is going to owe both property tax installments during the first escrow account computation year because the seller did not prepay the taxes and instead the taxes were prorated at closing and credit provided to the buyer from the seller. The property tax amount should be an accurate reflection of the amounts that are **actually due and payable** during the 12-month computation period, and can vary with each purchase transaction.

Whether or not hazard insurance is included in the escrow account can vary per loan as well — especially for refinance transactions. If hazard insurance is collected as part of the escrow, the initial analysis should reflect the amount actually due during the escrow account computation year and verified with third party documentation (e.g., the hazard insurance premium statement from the insurance company). A common error related to hazard insurance for refinances is failing to correctly detail the month the hazard insurance is due when doing the annual analysis. If the servicer indicates in the analysis the annual premium is due early in the computation year but it is not actually due until later in the computation year, the servicer will over-collect for insurance and have more in the escrow account than needed to pay the premium when it is due.

COMMON ERROR 4 — COLLECTING ESCROW ACCOUNT SHORTAGES

A shortage in the escrow account occurs when the current escrow account balance falls short of the target balance at the time of the escrow analysis. What can the servicer do if the escrow account analysis reveals a shortage? It depends on the amount of the shortage. If the shortage is equal to or more than one month's escrow account payment, the servicer may:

- Allow a shortage to exist and do nothing to change it; or
- Require the borrower to repay the shortage in equal monthly payments over at least a 12-month period.

If the shortage is **less than** one month's escrow payment, the servicer may select one of the options just discussed for shortages in amounts more than one month's escrow payment, or alternatively may require the borrower to repay the shortage amount within 30 days.[5]

A common mistake servicers make is requiring the borrower to pay a shortage equal to or greater than one month's escrow account payment in a lump sum or including the lump sum payment option on the annual escrow statement. This "lump sum" option is not provided for in the rule.

The recently issued CFPB FAQs mentioned at the beginning of this article address lump sum payments of escrow shortages and deficiencies. The FAQs inquire if the service may accept a voluntary lump sum payment of an escrow account shortage or deficiency by the borrower. The CFPB indicates that a servicer may indeed accept a voluntary lump sum payment of an escrow account shortage. The CFPB even states the servicer may communicate to the borrower a lump sum payment is an option BUT may not include lump sum payment information on the annual escrow statement itself. However, a separate communication could be included with the annual escrow statement, provided the communication clearly indicates the lump sum payment is truly an option and not required by the servicer.

ADDITIONAL BONUS TIP

Many escrow account computation errors occur because the servicer's systems don't communicate properly. To assist in avoiding common escrow account errors, the software producing loan documentation, including the initial escrow statement, should communicate with the loan accounting core software system. The amounts entered into both systems should be checked for accuracy and consistency at the time of loan closing.

Escrow accounts can be a challenge for many servicers. The IBA's compliance team is presenting a 90-minute webinar on escrows on Aug. 18. For more tips and tricks on creating and maintaining compliance escrow accounts, register **here**.

Footnotes:

[1]Banks are considered the "servicer" of escrow accounts they maintain for their borrowers.
[2]12 CFR 1024.17(b)
[3]12 CFR 1024.17(i)
[4]12 CFR 1024.17 (i)
[5]12 CFR 1024.17 (b) and (f)(3)

MORTGAGE SERVICING CHANGES EFFECTIVE AUG. 31

The Consumer Financial Protection Bureau issued a final rule (2021 Mortgage Servicing Rule) amending certain provisions of Regulation X, providing additional assistance to borrowers experiencing COVID-19 financial hardships. The rule is effective Aug. 31, 2021, although the CFPB noted a servicer may voluntarily implement the rule changes prior to the effective date. The CFPB issued an **Executive Summary** of the rule as well as an **unofficial redline** of the regulatory text.

The 2021 Mortgage Servicing Rule generally has the same coverage requirements as the original mortgage servicing rules. The 2021 Mortgage Servicing Rule only applies to a mortgage loan secured by the borrower's principal residence, and as such, generally does not apply to investment properties or second homes. Similarly, small servicers (defined as a servicer, who with its affiliates, does not service more than 5,000 mortgage loans, all of which the servicer or an affiliate is the creditor or assignee) are generally not subject to the new requirements.

The final rule is divided into five key amendments:

- Temporary special COVID-19 procedural safeguards (foreclosure moratorium).
- COVID-19 related streamlined loan modification exception.
- Temporary early intervention communication requirements.
- Due diligence requirements for borrowers in forbearance.
- COVID-19 related hardship definition.

In lieu of the proposed foreclosure moratorium until Dec. 31, 2021, the final rule implements special loss-mitigation procedural safeguards that will require servicers to give borrowers a "meaningful" opportunity to apply for loss mitigation before the account is referred to foreclosure. Mortgages covered by the rule may only proceed to foreclosure following a full evaluation of the borrower's loss-mitigation options and whether all existing foreclosure protections are met.

The final rule adds new exemptions to the evaluation requirements. The new exemptions include:

- Borrowers unresponsive to servicer outreach.
- Borrowers more than 120 days delinquent prior to March 1, 2020.
- Abandoned property, as defined by state or local law.
- Foreclosure actions with an applicable statute of limitations that will expire before Jan. 1, 2022.

If the servicer meets the temporary procedural safeguards or if one of the exemptions applies, the servicer may proceed with the foreclosure referral, to the extent permitted by other laws and existing foreclosure protections in the Mortgage Servicing Rules (e.g., the loan is at least 120 days past due). Servicers must maintain records that document actions taken with respect to a borrower's mortgage loan account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer.

Again, the final rule clarifies that "small servicers" are not subject to these additional requirements; however, the pre-foreclosure review period in the existing mortgage servicing rule still applies to small servicers. The existing rule states that a servicer may not make a first filing or notice for foreclosure unless: (1) a borrower's mortgage loan obligation is more than 120 days delinquent; (2) the foreclosure is based on a borrower's violation of a due-on-sale clause; or (3) the servicer is joining the foreclosure action of a superior or subordinate lienholder.

The 2021 Mortgage Servicing Rule also provides servicers the ability to offer borrowers certain COVID-19-related streamlined loan modifications without a complete loss mitigation application, requires servicers to provide additional information promptly after early intervention live contacts are established with certain delinquent borrowers, and establish timing requirements for when servicers must renew reasonable diligence efforts to obtain complete loss mitigation applications from certain borrowers.

It is important that financial institutions, particularly those who are "large servicers", thoroughly understand these requirements and properly train their servicing staff to provide consumers full and accurate information about their forbearance and loss mitigation options. The CFPB has made clear that "unprepared is unacceptable" and will be closely monitoring how servicers engage with borrowers, respond to borrowers' request, and process applications for loss mitigation. Read the 2021 Mortgage Servicing Rule in its entirety in the **June 30, 2021 Federal Register**.

FINCEN ISSUES NATIONAL AML/CFT PRIORITIES

The Financial Crimes Enforcement Network has issued the first government-wide priorities for anti-money laundering and countering the financing of terrorism (AML/CFT) policy, following consultation with other relevant Department of the Treasury offices, as well as Federal and State regulators, law enforcement, and national security agencies. **The Priorities** identify and describe the most significant AML/CFT threats currently facing the United States. In no particular order, these include: corruption, cybercrime, domestic and international terrorist financing, fraud, transnational criminal organizations, drug trafficking organizations, human trafficking and human smuggling, and proliferation financing.

FinCEN also issued an **Interagency Statement** and a **FinCEN Statement** (the "AML/CFT Priorities Statements") to provide guidance to covered institutions on how to approach the Priorities.

The Priorities and accompanying AML/CFT Priorities Statements are intended to assist covered institutions in their AML/CFT efforts and enable those institutions to prioritize the use of their compliance resources. In particular, the Priorities highlight key threat trends as well as informational resources that can assist covered institutions in managing their risks. FinCEN will update these Priorities to highlight new or evolving AML/CFT threats at least once every four years, as required by the AML Act.

Covered institutions are not required to make any immediate changes to their risk-based AML programs in response to these Priorities. However, FinCEN does anticipate to engage in rulemaking to address the Priorities. FinCEN, the Federal functional regulators, and State regulators will not examine any covered institution for the incorporation of the Priorities into their risk-based AML programs until implementing regulations have been finalized.

PROPOSED INTERAGENCY GUIDANCE ON FINTECH PARTNERSHIPS

The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency **proposed interagency guidance** on how banks should manage third-party relationships, including partnerships with fintech companies. The proposal would offer a framework for banks when developing risk management practices for their third-party relationships, taking into account the level of risk, complexity, size of the organization, and the nature of the third-party relationship. Comments are due Sept. 17, 2021. The proposed interagency statement can be found in the **July 19, 2021 Federal Register**.

Banks routinely partner with third-parties and fintech companies to offer an expanded array of innovative products and services. These third-party relationships allow banks to offer products or services that would otherwise be too difficult, cost-prohibitive, or time-consuming to develop internally. Partnerships with fintech companies can also allow banks to meet the banking needs of underbanked or underserved consumers. The proposed guidance identifies a number of such partnerships, including marketplace lending arrangements with nonbank entities, networking arrangements, merchant payment processing services, fraud detection services, anti-money laundering services, and data aggregation services.

The proposed guidance would broadly apply to all third-party relationships with a focus on those involving what the agencies consider "critical activities." These activities include significant banking functions (e.g., payments, clearing, settlements, and custody), significant shared services (e.g., information technology) and other activities that could cause a bank to face significant risk or customer impacts.

JOINT CRA RULEMAKING AHEAD

The Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) signaled they plan to work together on Community Reinvestment Act reform. In a **joint statement** issued on July 20, the agencies indicated they "are committed to working together to jointly strengthen and modernize regulations implementing the Community Reinvestment Act." The statement stated joint agency action will best achieve a consistent, modernized framework across all banks to help meet the credit needs of the communities in which they do business, including low- and moderate-income neighborhoods.

On the same day, the OCC **announced** it will propose rescinding its CRA rule issued in May 2020 and is committed to working with the Federal Reserve and the FDIC to put forward a joint rulemaking that strengthens and modernizes the CRA.

HUD PROPOSES REINSTATING 2013 DISPARATE IMPACT RULE

The Department of Housing and Urban Development has **proposed** to recodify its 2013 discriminatory effects rule. If finalized, it would overturn HUD's September 2020 final rule that conformed HUD's 2013 disparate impact rule with the Supreme Court's 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, which recognized disparate impact analysis to demonstrate discrimination claims under the FHA but added key limitations to ensure the burden of proof in disparate impact cases is with the plaintiffs. The 2020 final rule never took effect because a Massachusetts federal district court judge stayed the rule pending consideration of consumer advocates' challenge to the rule as arbitrary and capricious.

Under the 2013 rule that HUD proposes to recodify, the burden shifts to the defendant to prove that its policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest, if the plaintiff first proves that the policy or practice caused or predictably will cause a disparate impact on a protected group. Read HUD's proposal in the **June 25, 2021 Federal Register**. Comments are due Aug. 26, 2021.

NOTES OF INTEREST

FHFA REMOVES ADVERSE MARKET REFINANCE FEE

The Federal Housing Finance Agency **announced** that it will eliminate its "adverse market refinance fee" of 50 basis points for no-cash-out and cash-out refinance mortgages for loan deliveries effective Aug. 1. The fee was originally put in place to help cover losses at Fannie Mae and Freddie Mac due to the coronavirus pandemic.

In a statement announcing the withdrawal of the fee, FHFA noted that "the success of FHFA and the Enterprises' COVID-19 policies reduced the impact of the pandemic and were effective enough to warrant an early conclusion of the Adverse Market Refinance Fee," and added that "FHFA's expectation is that those lenders who were charging borrowers the fee will pass cost savings back to borrowers."

NEW GUIDE ON IT ARCHITECTURE, INFRASTRUCTURE & OPERATIONS

The Federal Financial Institutions Examination Council issued a new booklet providing guidance to help examiners assess the risk profile and adequacy of an entity's information technology architecture, infrastructure, and operations. The new booklet, "Architecture, Infrastructure, and Operations," replaces the "Operations" booklet issued in July 2004 and provides examiners with fundamental examination expectations regarding architecture and infrastructure planning, governance and risk management, and operations of regulated entities. It also provides examination procedures to help examiners assess whether a financial entity's management adequately addresses risks and complies with applicable laws and regulations. **Read the booklet.**

BROKERED DEPOSIT RESOURCES UPDATED

The Federal Deposit Insurance Corp. (FDIC) has updated its **resource page** on brokered deposit regulations, adding a list of entities for which a primary purpose exception notice was filed and updating a question and answer page. The site also includes information on national rates and rate caps, a compliance guide for small entities and previous FDIC staff interpretations that are set to be phased out in 2022.

HMDA & CRA RESOURCE UPDATES

The Federak Financial Institutions Examinations Council (FFIEC) has updated its HMDA and CRA websites to include the **2021 Census Flat File** and the **2021 FFIEC Median Family Income Report**.

COMPLIANCE FORUM

Q. We are in the process of acquiring a new branch location and as a result, revising our CRA Assessment Area. This new branch is located in a new market for us and a larger market than we are accustomed. Can our CRA AA include only portions of a Political Subdivision (county, city, or town)?

A. Yes — but only under certain circumstances. The CRA regulation does allow a bank to adjust the boundaries of its AA to include only the portion of a political subdivision that it reasonably can be expected to serve. The regulation further states that an adjustment may be particularly appropriate if the AA would otherwise be extremely large, of unusual configuration, or divided by significant geographic barriers. However, excluding a portion of a political subdivision may increase potential discrimination risk, and/or the risk of arbitrarily excluding low- or moderate -income (LMI) geographies.

As part of its analysis of the CRA AA designation, regulators suggest banks should consider using American Community Survey five-year statistics from the U.S. Census Bureau, which provides relevant demographic data by census tract. The FFIEC provides convenient access to these data on their website, including the **census tract LMI status**. These data can support an understanding of whether LMI tracts or protected-status populations are concentrated in particular areas of the political subdivision.

For this boundary analysis, institutions are encouraged to also take into consideration the appropriateness of the adjustment. For example, banks may want to consider an adjustment to an AA based on the bank's business strategy in the context of the CRA AA. If the bank accepts loan applications online, why does it consider portions of the political subdivision extremely large/ too far? It may be helpful to reflect on the information in the **Interagency Questions and Answers** regarding Community Reinvestment that specifies the Agencies do not expect that, simply because a census tract is within an institution's AA, the institution must lend to that census tract. Rather, regulators are likely to raise questions if there are conspicuous gaps in loan distribution that are not explained by the performance context. Similarly, if an institution delineated the entire county in which it is located as its AA, it would not be inconsistent with CRA's requirements to lend only in that portion of the county it can reasonably serve so long as that portion does not reflect illegal discrimination or arbitrarily exclude LMI geographies.

The Q&As also note that an institution may adjust the boundaries of an AA when there are significant geographic barriers. Examples of such barriers in the Q&As include rivers, mountains, or major highway systems. However, in considering whether an adjustment to the AA should be made on this basis, a bank should analyze whether the barrier is actually significant. For example, a small river or non-arterial highway that people can readily cross may not be a significant barrier.

Ultimately, when adjusting the boundaries of the bank's AA as permitted by the regulation, a best practice is to regularly assess the designated CRA AA, documenting the analysis, including steps the bank took to determine that the CRA AA does not exclude LMI areas or reflect illegal credit discrimination. If you have questions regarding designating a CRA AA, reach out to your federal regulator or community affairs specialist for assistance.

The Compliance Forum is not intended to be a definitive analysis of the subjects discussed or a substitute for personal legal advice.

Q. When there are multiple transactions of the same type (for example: cash deposits with dollar and cents for each transaction) in one day which in aggregate exceed the $10,000 threshold, are these same type transactions added together (e.g.., cash deposits) and then the total rounded up to the next whole dollar?

A. Yes. Directly from FinCEN, "For rounding purposes, the actual amount of transactions **of the same type would be added, then rounded."** This is supported by FinCEN CTR Electronic Filing Requirements:

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> ***13. Monetary amounts:*** *Record all U.S. Dollar amounts rounded up to the next whole dollar. The amount $15,265.25 would be recorded as $15,266.*

FinCEN also has a frequently asked question regarding Currency Transaction Report (CTR) on this topic:

> *Question 17. Should we aggregate "multiple transactions"? What is the proper way to complete a CTR on transactions involving multiple business entities?*
>
> *Yes. All the individual transactions a financial institution has knowledge of being conducted by or on behalf of the same person during a single business day* ***must be aggregated.*** *Debits must be added to debits, and credits must be added to credits. If cash debit or credit totals exceed $10,000 in a business day, a CTR is required. If debits and credits each exceed $10,000, they can each be reported on a single CTR, but financial institutions should not off-set debits and credits against one another or reconcile for reporting purposes cash-in transactions with cash-out transactions.* ***Multiple transactions in currency must be treated as a single transaction if the financial institution "has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day."***

Q. When there are different types of cash transactions in one day (for example: cash deposits and loan payments with dollar and cents for each transaction amount) which in aggregate exceed the $10,000 threshold, how are the amounts rounded and reported on the CTR?

A. FinCEN has acknowledged that totals in Item 25 (cash in by transaction type) and 27 (cash out by transaction type) may differ (or be slightly more) from Item 21 (cash in for person listed in Part I) and 22 (cash out for person listed in Part I) due to rounding and has provided some flexibility. In Item 25/27, the bank should round the total of each like type transaction amount up to the next whole dollar and represent that total in the correct row (25a for cash deposits and 25b for payments). Then, in Item 21/22 the bank can provide the total of all transactions rounded up to the next whole dollar (which could be less than the total in Item 25/27) or the total of each transaction type rounded up to the next whole dollar and then all transaction types added together (same as totals in Item 25/27).

This is supported by FinCEN CTR FAQs #28 as provided below.

> *Question 28. When we round the amounts on the FinCEN CTR, the total in Item 25/27 may differ from that in Item 21/22 due to rounding. Is this acceptable??*
>
> *Yes, this is acceptable, if the difference was a result of a financial institution following the instructions on rounding dollar amounts. The following scenario outlines the two choices available for the filing institution to follow in completing Items 21/22 and Items 25/27:*
>
> *Scenario: A customer deposits $8,345.18 into his or her personal account and also makes a loan payment of $2,345.43 in the same business day. The daily report shows this customer brought in $10,690.61 in one business day.*
>
> - *Option 1: Per the FinCEN CTR instructions, each dollar amount reported on the FinCEN CTR is to be rounded-up to the next dollar. Therefore, the financial institution would enter $10,691 in Part I Item 21 of the FinCEN CTR. In Part II, the financial institution would enter $8,346 in Item 25a and $2,346 in Item 25b. As a result, the total in Item 25 would reflect $10,692. The FinCEN CTR will validate and be accepted as the total in Item 21 (or Item 22 for a cash-out transaction) is not more than the total for Item 25 (or Item 27 for a cash-out transaction). Filers can internally document as a general note to their FinCEN CTR files that the amounts may differ in these situations as a result of following the FinCEN CTR rounding instructions. Both regulators and law enforcement were involved in the designing of the FinCEN CTR, and are aware and accepting of the possible discrepancy.*

- *Option 2: As a means of avoiding these differences on the FinCEN CTR, the filer can round up all the amounts involved separately and then aggregate the separately rounded amounts. For example, using the above scenario, the filer would round-up the $8,345.18 and $2,345.43 transactions separately, to $8,346 and $2,346, respectively, which would aggregate to $10,692 and then enter this amount in Part I Item 21 of the FinCEN CTR. In Part II, the financial institution would enter $8,346 in Item 25a and $2,346 in Item 25b. As a result, the total in Item 25 would reflect $10,692 and Items 21 and 25 would match. If applicable, a financial institution should still internally document as a general note to its FinCEN CTR files if these amounts differ slightly from the amounts shown on the daily reports due to rounding the amounts involved separately.*

Q. We are being told affidavits related to real estate transaction must be prepared by an attorney. Is that true? Is there an Iowa Code section that addresses this?

A. That is true when it comes to affidavits related to identity, payment of spousal or child support, or issues related to clearing title associated with real estate transactions. Actually, this stems from a Supreme Court rule found in 37.5 that was effective February 2002:

> ***Rule 37.5 Limited real estate practice.***
>
> ***37.5(1)*** *Purpose. The purpose of this rule is to authorize nonlawyers to select, prepare, and complete certain legal documents incident to residential real estate transactions of four units or less. The preparation of documents beyond that authorized by this rule may constitute the unauthorized practice of law.*
>
> ***37.5(2)*** *Scope of practice authorized. Except to the extent authorized by this rule, the selection, preparation, and completion of legal documents* ***in connection with real estate transactions*** *by nonlawyers constitutes the unauthorized practice of law unless the nonlawyer is acting on his or her own behalf as a buyer or seller.*
>
> a *Upon written request of a buyer or seller, a nonlawyer may select, prepare, and complete form documents for use incident to a residential real estate transaction of four units or less. Such documents are limited to:*
>
> 1. *Purchase offers or purchase agreements, provided the parties are given written notice that these are binding legal documents and competent legal advice should be sought before signing.*
> 2. *Groundwater hazard statements.*
> 3. *Declaration of value forms.*
>
> b ***Nonlawyers cannot select, prepare or complete:***
>
> 1. ***Deeds.***
> 2. ***Real estate installment sales contracts.***
> 3. ***Affidavits of identity or nonidentity.***
> 4. ***Affidavits of payment of spousal or child support.***
> 5. ***Any other documents necessary to correct title problems or deficiencies.***

Q. If a customer disputes a transaction on an interest-bearing account under Reg. E, and we provide provisional credit, when are we required to credit the interest that the disputed transaction would have earned?

A. Section 1005.11(c)(2)(i) of Reg. E states that if the bank is unable to complete its investigation within ten business days of receiving the dispute, the bank can take additional time to complete the investigation if it provides provisional credit, including interest where applicable. In other words, the interest should be provided with the provisional credit.

In its Summer 2021 issue of [Supervisory Highlights], the Consumer Financial Protection Bureau reviewed a series of recently cited Reg. E violations. One of the findings was "Excluding interest from the provisional credit" as a violation of Reg. E's provisional credit requirements. This finding reinforces that interest is to be provided with the provisional credit.