Vaccines in the Time of COVID: An Employer’s Perspective
by Mag Bickford and Chase Stoecker

In the time of Coronavirus, with many municipalities implementing restrictions on business and individual activity, banks may currently allow employees to work remotely to the greatest extent possible. However, given the nature of the business, many bank managers may be anxious to return to normal branch operations, with staff onsite, as soon as possible. With vaccines becoming available you may be wondering: Can I require bank employees to get a vaccine?

The benefits of vaccination, in general and in a given workplace, are many: improved employee health, fewer employee absences, and improved staff morale. But that doesn’t mean all employees are necessarily interested in being vaccinated.

The Equal Employment Opportunity Commission (EEOC) recently issued guidance which allows employers to require employees to receive an FDA approved COVID vaccine. Requiring an employee to receive a vaccination does not rise to the level of what would constitute an impermissible medical examination under the Americans with Disabilities Act (“ADA”). However, an employer may not compel an employee to receive a COVID vaccine if the employee asserts a valid disability-related or religious objection. That is, if the vaccine presents a health risk due to a diagnosed disability (such as a severe allergic reaction, which has been reported), requiring an employee to receive the shot may represent a violation of (ADA). Likewise, requiring an employee to receive the shot despite a “sincerely held religious belief” may constitute a violation of Title VII of the Civil Rights Act (for example, if the employee’s religion prohibits vaccinations). Notably, simply not wishing to be vaccinated, even citing ethical objections, is typically not a sufficient legal argument should an employer require vaccination. An employer has the right to exclude those employees who do not have a sufficient legal argument under the ADA or Title VII of the Civil Rights Act from the workplace.

If your bank decides to require vaccination for employees and an employee seeks an accommodation under either the ADA or Title VII of the Civil Rights Act, you should ensure that the accommodation request process is documented and well-communicated. An interested employee will need to know how to go about that process, and it is her responsibility to make that request. Once an employee asserts a valid objection, the bank will need to engage in an “interactive dialogue” to discuss other options for that employee, such as allowing remote work, assigning him to a specific location within the bank, or even granting him a difference in performance in order to execute his work without being vaccinated. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available.

If an employee presents a valid concern outlined above, but the bank feels that it is essential for the employee to perform her existing role in its exact “pre-COVID” circumstances, the business may reasonably argue granting exception to the vaccine requirement would present a “undue hardship.” We expect these instances to come up over the course of the next year, and anticipate an interesting debate in the Supreme Court of the United States when they do.
The Occupational Safety and Health Administration (OSHA) has not issued clear guidance on mandatory vaccines except for in certain industries (such as healthcare), but it did allow employers to mandate flu vaccines in 2009 with limited exceptions. More guidance is expected from OSHA in coming months. It should also be noted that the National Labor Relations Act protects employees’ rights to engage in concerted activity, which includes employees who collectively discuss, object to, or protest employer-mandated vaccination programs. Additionally, existing collective bargaining agreement language may impact a vaccination program.

Of note, under normal circumstances, an employer would be prevented under the ADA from performing any kind of medical examination or making disability-related inquiries. However, the ADA also permits an employer to engage in a medical screening of its employees if there is a “direct threat to health and safety,” which according to EEOC guidance is met in this situation. Temperature checks, mandatory self-reporting of diagnoses and symptoms, and other recommendations published by the CDC have been accepted as compliant. The recent EEOC guidelines also permit employers to administer COVID testing to employees before permitting them to enter the workplace.

Neither the Alabama Department of Labor nor the Alabama Department of Public Health have published specific guidance regarding employer vaccination programs. Alabama is an at will employment state, which means that an employer has the right to enforce a vaccine policy. However, an employer should approach this right with caution as it is limited by those exemptions included under the ADA and Title VII of the Civil Rights Act summarized above.

The best practice considerations for banks considering vaccines for employees are:

- determine your goal;
- know your audience;
- anticipate and address questions and concerns;
- evaluate whether mandatory or voluntary vaccination makes sense for your workforce;
- consider and address operational and productivity concerns;
- analyze risks;
- determine a policy which allows fairness and consistency;
- keep in mind legal concerns; and
- do the right thing.

If your bank deems it essential for employees to be vaccinated, you may elect to require vaccination. Employers who decide to make this requirement should review accommodation request and other policies and procedures, and should understand that certain employees may present valid refusal to receive the vaccine. At the end of the day, banks (indeed, any employer) should remember that members of the workforce are their first customers, and the bank’s performance depends on its employees’ ability to execute their jobs well.

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The Future of the Paycheck Protection Program Under the Biden Administration

By Brian Malcom

The Paycheck Protection Program (PPP) was passed into law by Congress as part of the CARES Act earlier this year in response to the COVID-19 pandemic. While considered a relative success at its intended goal of temporarily preserving jobs during the
pendency of the pandemic, the PPP ended its initial run with tens of billions of dollars left on the table and frustrated borrowers and lenders because of opaque and frequently changing rules and regulations. President-elect Joe Biden, although supportive of a second round of PPP, criticized the Trump administration during the campaign for “allowing big banks to provide “concierge treatment” to their larger, existing customers ... [in obtaining PPP loans first]... while mom-and-pop small businesses struggled to obtain relief” as well as promised increased focus on “fraud and unjust enrichment” in his administration with respect to the Small Business Administration’s (SBA) investigation into and audit of larger PPP borrowers.

Second Draw PPP Loans
While passage is by no means assured, it is widely expected that, as part of any bipartisan legislation that successfully makes its way through Congress, an additional round of funding for PPP loans somewhere in the neighborhood of $300 billion would be included in any bill that would allow certain eligible small businesses to obtain a second tranche of a PPP loan. The current proposal in the House Democrats’ HEROES Act draft would empower PPP lenders to make a second PPP loan of up to $2 million to a small business with less than 200 employees and at least a 25% reduction in revenue year-over-year due to the pandemic. Publicly-traded companies would be prohibited from receiving a second loan, and for borrowers receiving loans more than $350,000, they would now be required to prove to a PPP lender they were unable to “find credit elsewhere,” a restoration of the original standard for SBA loans, but a significant change from the original PPP program which promoted quick processing of PPP loan applications from lenders. By contrast, Senate Republicans favor a PPP bill that permits a second draw to businesses with less than 300 employees, and has fewer restrictions, but their frameworks are quite similar. The inclusion of a substantial drop in revenue requirement to both of the bills seems likely to result in a second draw being largely inaccessible to many potential PPP borrowers.

Importantly to lenders, both sets of bills have modifications to the PPP loan forgiveness process that essentially allow borrowers with smaller loans (the specific amounts differ from bill to bill, but $100,000 to $150,000 seems to be a common threshold), which are the vast majority of PPP borrowers, to “self-certify” as to the accuracy of their application and compliance with the program, rather than requiring each borrower to submit a fulsome application and wait for the lender to fully evaluate and render a decision on whether and to what extent the borrower has complied with the program. Lenders have long expressed concern about this process since they often are not familiar at all with the business of a particular borrower and are instead relying almost entirely on the borrower’s submission, which could cause errors to be made in their judgment. The pre-existing submission and lender review process would remain in place for larger loans. The possibility of this easier forgiveness process has encouraged many borrowers to adopt a “wait-and-see” approach on submitting their forgiveness applications, since, due to the passage of the PPP Flexibility Act in July 2020, they have until sometime next year to apply before repayment of principal and interest begins.

Enforcement Concerns
Under the Biden administration, it is possible that the SBA will place greater emphasis on prosecution and enforcement of PPP fraud cases - in particular with respect to eligibility questions, given the high-profile news stories about large corporations, celebrities, sports teams, and so on receiving PPP Loans. Notably, the PPP loan application required a certification be made that, at the time of the application, “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” without much elaboration by the SBA. This caused much uncertainty in the small business and lending communities, resulting in many borrowers returning their funds unused and many other potential applicants electing to not apply at all out of fear and uncertainty. In response, the SBA noted that with respect to all PPP loan recipients with loans under $2 million (the vast majority), they would be deemed to have made the certification...
in good faith, and for those with loans of more than $2 million, they would be subject to an audit by the SBA before their loan forgiveness application would be approved.

Recently the SBA has required PPP lenders to have all applicants with loans above $2 million fill out an SBA form questionnaire alongside its forgiveness application. Lenders are not required to verify the information provided by the borrower in its questionnaire. Although ostensibly intended to assist the SBA in evaluating the “economic need” of these particular applicants at the time of application as part of its audit process, the substance of the questionnaire suggests that the SBA will also consider the post-application actions of the business in evaluating this need, rather than relying on a subjective good-faith determination by the management of the borrower at the time of the application. For example, the questionnaire asks borrowers to compare second quarter 2020 revenue against the same quarter in 2019, despite that most PPP applicants made their certifications prior to the end of the second quarter.

Furthermore, the questionnaire asks applicants to disclose whether they paid dividends (other than those made to fund pass-through tax payments), prepaid other debt, made capital improvements, and paid any of their employees more than $250,000 a year on an annualized basis, in each case after the loan application was made. The $250,000 number in particular seems to suggest a new after-the-fact requirement, since the PPP and implementing regulations do not in any way restrict compensation paid to employees. In fact, the only relevant compensation threshold is $100,000 in that cash compensation above $100,000 for an employee could not be included in the loan amount, and that compensation of employees who make more than $100,000 could be cut by more than 25% without incurring a reduction in loan forgiveness. Requiring disclosure of the making of capital improvements, payment of dividends, payment of salaries to highly-compensated employees, and prepayment of debt after the application seem like new criteria that ignores the profound uncertainty among U.S. businesses in March and April of 2020 and may instead function as a clumsy attempt to identify businesses that happened to have greater-than-expected economic results during the pendency of the pandemic, and does so mostly as a result of public outrage about a few bad actors. Wasn’t economic stability the point of the Paycheck Protection Program?

Conclusion
Recent reports suggest that the FBI has opened several hundred PPP-related investigations involving hundreds of millions of dollars of loans. The SBA’s office of inspector general said that “tens of thousands of organizations also appear to have received more money than they should have based on their headcounts and compensation rates.” With the incoming Biden administration expected to be in power as these investigations continue and come to a head, borrowers and lenders should be sure to consult with their attorneys, accountants, and other advisors to stay up to date on all new statutes, rules and regulations concerning the Paycheck Protection Program, which is ever-changing.

Brian Malcom is a partner at Waller Lansden Dortch & Davis LLP in Birmingham. Representing banks, lenders, financial institutions, and healthcare firms in litigation matters, Brian constantly seeks to insulate clients from liability, while minimizing the impact on their operations. Clients depend on Brian’s analytic abilities to resolve commercial disputes related to financial products liability, contractual agreements, and other business issues.

Top 10 Changes to Consumer Bankruptcy Proposed in the Consumer Bankruptcy Reform Act of 2020
By Elizabeth Brusa, Chris Hawkins, and Alex Dugan

On Dec. 9, Congressional Democrats, including Elizabeth Warren (D-Mass.) and Jerrold Nadler (D-N.Y.), proposed sweeping
legislation that would overhaul consumer bankruptcy law. The proposed changes, if adopted, generally would make it easier for consumers to access the bankruptcy system and discharge their debts. Below is a discussion of ten critical changes proposed in the Consumer Bankruptcy Reform Act of 2020 (CBRA).

1. Chapters 7 and 13 are Replaced with New Chapter 10
The CBRA proposes to replace the current consumer bankruptcy Chapters 7 and 13 with the all-new Chapter 10. Currently, Chapter 7 allows consumers with nominal disposable monthly income to discharge their debts after liquidating any nonexempt assets to repay their creditors. Chapter 13 provides for consumers to discharge their debts after paying their disposable income to creditors under a three- or five-year repayment plan.

Under the CBRA, consumers with debts less than $7.5 million would file under the new Chapter 10. Consumers with debts greater than $7.5 million would seek relief under Chapter 11. To seek relief under Chapter 10, consumers will need to file a petition and some additional schedules and statements, similar to those currently filed pursuant to Bankruptcy Code section 521.

2. No More Credit Counseling
The most recent major amendments to the Bankruptcy Code were passed as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Under BAPCPA, consumers’ discharges were contingent on participation in a credit counseling course and filing a certificate of completion in their bankruptcy cases. The new CBRA eliminates this seemingly arbitrary credit counseling requirement.

3. Remote 341 Meetings that Do NotConflict with Consumers’ Employment Schedules
Pre-COVID, consumers were required to appear in person for section 341 meetings where they were examined under oath by bankruptcy trustees and creditors. As the nation quarantined, 341 meetings began occurring remotely, via conference calls and videoconferencing. Under the CBRA, consumer debtors will still be examined at 341 meetings, but those meetings can be conducted remotely. Additionally, 341 meetings will be scheduled at times that do not conflict with consumers’ work schedules.

4. Focus on Consumers’ Ability to Pay Rather than Choices of Expenses
Under the current Bankruptcy Code, consumers’ bankruptcy cases may be converted to a different chapter or dismissed as “abusive” if consumers choose to spend their money on certain “luxury” expenses, such as private school tuition, expensive vehicles payments, and support payments for adult children. The CBRA eliminates the analysis of whether consumers are spending their disposable income on acceptable, non-luxury expenses. Instead, the CBRA looks only to whether consumers have funds to make a “minimum payment obligation” based on the value of their nonexempt assets and their annual income.

5. Three Types of Chapter 10 Plans: “Residence” and “Property” Plans for Repayment of Secured Debts and General Repayment Plans for Unsecured Debts
Consumers in Chapter 10 can file one or more plans, including (1) a “Residence” plan, which addresses mortgages on consumers’ principal residences; (2) a “Property” plan, which addresses debts secured by other property; and (3) a general repayment plan, which addresses unsecured debts, such as credit card, medical, and student loan debts. Consumers who must pay a minimum payment obligation will not receive a discharge without confirming a repayment plan.

Residence and property plans under the CBRA allow consumers to change loan interest rates, adjust amortization schedules, and cure defaults. Unlike the current Chapter 13, consumers can change the terms of mortgages on their principal residences under the CBRA. However, unless the residence or property plans are proposed in conjunction with a repayment plan, consumers will not receive discharges with respect to the residence or property debts. Secured creditors retain their liens until receipt of the full amounts owed as of the plans’ effective dates. Consumers have either 15 years or five years after the maturity date, whichever is longer, to make payments toward secured debts. Significantly, if a consumer defaults under a residence or property plan, the secured creditor is stayed from taking action until the consumer is 120 days delinquent for mortgages and 90 days delinquent for other liens.

6. Some Consumers Receive Immediate Discharges without Making Any Payments
Currently, consumers who file for Chapter 7 bankruptcy relief generally receive their discharges in approximately 90 days. Consumers under Chapter 13 receive their discharges after the successful completion of a three- or five-year repayment plan. Instead of these waiting periods, the CBRA provides that consumers who have insufficient non-exempt assets and income to trigger a minimum payment obligation will receive their discharges immediately. Notably, though, certain debts under section 523 of the Bankruptcy Code will still be nondischargeable. Also, liens on property will continue to survive discharge under the CBRA.

7. Consumers with Minimum Payment Obligations Receive Discharges upon Plan Confirmation
The CBRA evaluates consumers’ abilities to make payments to their creditors based on the amount of their non-exempt assets and their income. Consumers who must make payments to their creditors will propose repayment plans under which their minimum payment obligation must be paid over a three-year period. Creditors would
receive payment under Chapter 10 plans pursuant to the current priority scheme. Plans are confirmed so long as they are feasible, not proposed in bad faith, and pay the full minimum payment obligation amount. Additionally, consumers receive their discharges at the time of confirmation, rather than after the successful completion of plan payments.

8. Debtors’ Attorneys Paid Over Time
Currently, some consumers cannot afford the required pre-filing, lump sum payment for legal representation in a Chapter 7 bankruptcy case. Insufficient cash may lead consumers who would have been eligible for Chapter 7 relief to file under Chapter 13, which allows for debtors’ attorneys’ fees to be paid over the course of the case. Consumers in these situations often do not successfully complete their Chapter 13 plans, do not repay their creditors, and do not receive discharges. The CBRA remedies this issue, allowing for consumers’ attorneys to be paid over time. This provides access to bankruptcy relief for those consumers who would otherwise not be able to afford to file for bankruptcy.

9. Student Loan Debts can be Discharged
The CBRA amends section 523 to allow consumers to discharge certain previously nondischargeable debts, including student loan debts. This includes both private and federal student loans. Under the CBRA, student loan debts are generally treated like other unsecured consumer debts.

10. Other Federal Consumer Protection Financial Laws are Amended
Beyond amending the Bankruptcy Code, the CBRA also revamps some federal consumer protection financial laws. A new “unclean hands” provision provides for claims to be disallowed if the claimholder, or its predecessor, violated a federal consumer financial law with regard to the consumer. Additionally, the Fair Debt Collection Practices Act (“FDCPA”) is amended to provide that filing a proof of claim in bankruptcy for stale debt (i.e., debt that is non-collectable under the applicable statute of limitations) is an unfair practice. The FDCPA is further expanded to provide that collection of or attempts to collect discharged debts, other than those voluntarily paid by consumers, are also unfair practices. To watch over federal consumer protection financial laws in connection with bankruptcies, the CBRA creates a new Consumer Bankruptcy Ombuds at the Consumer Financial Protection Bureau.

Economies of Scale in Community Banks: An FDIC Study
by Michael Murphey

Overview
In December 2020, the FDIC produced a staff study entitled Economies of Scale in Community Banks which concluded community banks generate 90% of potential efficiency gains when a bank’s loan portfolio reaches $300 million and continue to accrue cost savings until the portfolio reaches $3.3 billion, at which time unit cost begin to increase. This article will summarize these findings and will speak to the relevance of this paper to today’s Alabama community bankers.

Economies of Scale
Scale economies occur when the per unit cost of production inputs falls as the level of output increases. As reflected below, economic theory states unit costs will fall as production rises until a certain point, at which underlying unit costs rise due to inefficiencies. In this study, the FDIC assumed production Inputs are labor, deposits, physical assets and credit capital, Output is loan production. An efficient bank operates where the marginal cost of one additional loan equals the average cost to produce that loan. As will be demonstrated in this article, this concept is reflected in the FDIC findings for community banks.

A. Scale Economies: Cost per Unit Versus Level of Output

Source Data and Unit Cost Definitions
The FDIC utilized Call Report and CAMELS data from 2000 to 2019 on all banks with assets under $10 billion to assess the impact of loan portfolio size and credit quality on a bank’s underlying cost structure. Specialty lenders such as credit card, Ag lenders or Mortgage brokers were excluded. Porter, White & Co estimates
this total approximately 120,000 data points. Scale inputs and outputs discussed above were derived from the following Call Report fields:

### Input/Output

<table>
<thead>
<tr>
<th>Input/Output</th>
<th>Call Report field</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor</td>
<td>Salaries &amp; Benefits</td>
</tr>
<tr>
<td>Deposits</td>
<td>Interest Expense on deposits</td>
</tr>
<tr>
<td>Physical assets</td>
<td>Premises &amp; Fixed Asset expense</td>
</tr>
<tr>
<td>Credit capital</td>
<td>Provision for Credit Losses</td>
</tr>
<tr>
<td>Loan production</td>
<td>Total Loans &amp; Leases (ex HFS)</td>
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### Findings

For every bank in the database, the FDIC determined each bank's average cost by adding the inputs together, dividing that sum into total loans, and plotting the result onto a graph which reflected loan size and average cost of every community bank for that given year. The study provided four major findings, as reflected in Chart B and C:

- **The Cost Curve is real:** As reflected in the U-shaped curves in the graphs below, banks of a certain size have a real cost advantage over smaller competitors in all economic scenarios and carry lower costs than larger banks in recessions.

- **Credit trumps everything:** In recessions, banks with higher credit costs suffer. In the Great Recession, larger community banks often held large construction related portfolios and carried high provision costs, resulting in higher unit cost for those banks. As a result, smaller portfolios optimized cost realization as reflected in the fall in optimal portfolio size from $811 million in 2006 to $404 million in 2009.

- **Size matters:** In today's environment of very low interest rates, benign credit and rapidly improving technology, larger loan portfolios lower unit costs at a much greater rate than prior years. See 2019 below, where the optimal portfolio has grown from $404 million in 2009 to $3.2 billion in 2019 providing an average unit cost of 3.9% of total loans versus 7.0% for the optimal portfolio in 2009.

- **The 80/20 rule works:** As reflected in Chart C, in today's environment a bank achieves significant cost savings when it reached approximately $300 million in loans, with incremental savings accruing as the portfolio grows.

### B. Community Bank Cost Curves for 2000, 2006, 2009 and 2019

[Image of charts showing cost curves for different years]
C. 2019 Cost Levels by Loan Portfolio Size

![Chart showing cost levels by loan portfolio size.]

**Alabama Banks**

Chart D reflects the Q3 2020 loan portfolios of the 105 banks in our state. 82 of these banks have portfolios less than $300 million, indicating they could accrue significant cost savings from merging into a larger entity.

D. Alabama Community Bank Q3 20 Loan Size

![Bar chart showing loan size distribution.]

**Summary**

A recently conducted study conducted by the FDIC covering nearly 120,000 Call Reports since 2000 indicate that in today’s market the optimal loan size for a community bank is $3.2 billion, and that very significant cost savings can accrue to banks with loan portfolios of $300 million or more. In Alabama, 82 of our 105 banks have loan portfolios less than $300 million, indicating banks in our state could generate meaningful cost savings by merging into larger banking entities.

Michael S. Murphey is a financial analyst who supports Porter White’s Community Banking practice. He has spent forty years in the southeastern US banking industry in various capacities related to commercial lending, including relationship management, underwriting, credit, and portfolio management.