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Via www.regulations.gov,
regs.comments@federalreserve.gov,
comments@FDIC.gov,
and U.S. First Class Mail

April 15, 2020

Hon. Steven T. Mnuchin, Secretary of the Treasury
c/o Mr. Jonathan Gould, Chief Counsel
Chief Counsel's Office, Attn: Comment Processing
Docket ID OCC-2020-0018
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

Hon. Jerome H. Powell, Chair
Board of Governors of the
Federal Reserve System
c/o Ann E. Misback, Secretary
R-1712 and RIN 7100-AF-86
20th St. & Constitution Ave. NW
Washington, DC 20551

Hon. Jelena McWilliams
Chairman of the Board of Directors
Attn: Mr. Robert E. Feldman, Executive Secretary
Comments/RIN 3064-AF49
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Dear Mr. Secretary, Mr. Chairman, and Madam Chairman:

RE: Comments on Notice Titled "Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans," Dkt. IDs OCC-2020-0018 (Treasury OCC), R-1712 and RIN 7100-AF-86 (Federal Reserve), and RIN 3064-AF49 (FDIC), 85 *Fed. Reg.* 20387 (April 13, 2020)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the notice titled "Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans," published by your agencies in the *Federal Register* of April 13, 2020. The notice prescribed interim final rules that encourage financial institutions to participate in the Paycheck Protection Program established by Congress to aid America's small businesses, which ceased or modified their businesses at the direction of the governors of the states and territories and on the advice of the President as the nation deals with the impact of the Coronavirus Disease of 2019 (COVID-19) pandemic. NFIB strongly supports the interim final rules.

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB and its members have a substantial interest in laws and regulations adopted to help small businesses and their workers during the COVID-19 pandemic. See NFIB Research Center, "Covid-19 Small Business Loan Programs Survey" (April 9, 2020) (https://www.nfib.com/assets/FINAL_Small-Business-Covid-19-Loan-Program.pdf).

Governmental public health orders to cease or modify the activities of businesses across America and for Americans to stay home have inflicted great damage on America's small businesses and their workers. Prior to the COVID-19 pandemic, America's small businesses generated more than forty percent of the U.S. economy's annual output of goods and services and two-thirds of net new jobs, so the shutdown orders have had a substantial adverse effect on the U.S. economy and the well-being of the American people. As your agencies stated in the preamble of the notice, "[a]s millions of Americans have been ordered to stay home, severely reducing their ability to engage in normal commerce, revenue streams for many small businesses have collapsed."

To increase the chances that small businesses can survive and pay their workers in the shutdown period, Congress enacted the Paycheck Protection Program (PPP) in section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, Public Law 116-136, March 27, 2020). Under section 1102 of the CARES Act, financial institutions lend money to small businesses. The U.S. Small Business Administration (SBA) guarantees to the financial institutions repayment of the principal and interest on the loans if the small businesses cannot repay them or the law forgives the small businesses from repaying the loan. Section 1102 forgives the repayment to the extent the small businesses use the proceeds of the loans for payroll, rent or mortgage payments, or utility payments. A PPP loan to a small business does not exceed the lesser of \$10 million or two-and-a-half times the small business's average monthly payroll costs.

On April 7, 2020, under authority granted for use in unusual and exigent circumstances by section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)), the Board of Governors of the Federal Reserve established the Paycheck Protection Program Lending (PPPL) Facility. The Facility ensured that financial institutions issuing the Paycheck Protection loans backed by SBA guarantees could pledge those loans as collateral for non-recourse loans from Federal Reserve Banks to the financial institutions, thereby ensuring that the financial institutions have continuing access to money they need to issue more Paycheck Protection loans. However, the financial institutions would have balance sheet concerns about pledging the Paycheck Protection loans to borrow money through the PPPL Facility from the Federal Reserve Banks if those borrowings counted against the risk-based and leverage capital ratios that the bank regulating agencies use to determine how large the financial institution's capital reserves must be. To address those concerns and ensure that use of the Facility would not adversely affect the financial institutions' balance sheets, your agencies have issued the interim final rules to "permit banking organizations to exclude exposures pledged as collateral to the PPPL Facility from a banking organization's total leverage exposure, average total consolidated assets, advanced approaches-total risk-weighted assets, and standardized total risk-weighted assets, as applicable." (85 *Fed. Reg.* 20389, col 2.) The interim final rules will

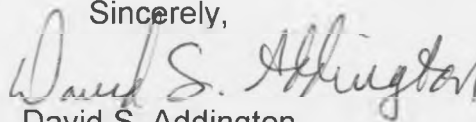
increase the willingness of financial institutions to participate in the Paycheck Protection Program and thus improve the effectiveness of the Program in assisting small businesses and their workers.

Your agencies issued the interim final rules without first giving the public notice of the proposed rules and an opportunity to comment on them. Section 553 of title 5 of the U.S. Code generally requires such prior notice-and-comment. NFIB normally discourages agencies from issuing regulations without prior notice-and-comment, as agencies lose the ability to learn from and respond to the public's input. Section 553(b)(B) of title 5 permits an agency to proceed without prior notice-and-comment when the agency has "good cause" to find that prior notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." The courts have said that the good cause exception to prior notice-and-comment must be "narrowly construed and only reluctantly countenanced," *New Jersey v. U.S. Environmental Protection Agency*, 626 F. 2d 1038, 1045 (D.C. Cir. 1980), and that the exception has a "high bar" and is "essentially an emergency procedure." *East Bay Sanctuary Covenant v. Trump*, 950 F. 3d 1242, 1278 (9th Cir. 2020). In the case of these interim final rules, NFIB concurs with your agencies that good cause exists to find that prior notice-and-comment would have been impracticable, unnecessary, or contrary to the public interest. The emergency is clear: in the face of the government directed shutdown to deal with COVID-19, untold numbers of small businesses will not survive and untold numbers of their workers will have no jobs, unless financial institutions participate at a high volume in the Paycheck Protection Program, and their willingness to do so depends in part upon the balance sheet protection in the interim final rules.

Your agencies' interim final rules took effect immediately upon issuance on April 13, 2020. Section 553 of title 5 generally requires the effective date of a rule to be at least 30 days after issuance. NFIB normally discourages agencies from issuing regulations with immediate effect, because it leaves no time before it takes effect for the public to become aware of the rule and make arrangements to comply with it. Section 553(d)(1) provides an exception to the 30-day rule if the rule is a substantive rule that relieves a restriction or if the agency otherwise finds good cause for not following the 30-day rule. In the case of these interim final rules, NFIB concurs that the rules relieve a restriction (the capitalization ratios requirements) and that good cause exists for making the rules effective immediately so as to increase the willingness of financial institutions to participate at a high volume in the Paycheck Protection Program.

We appreciate the prompt and coordinated action among your agencies to facilitate lending under the Paycheck Protection Program to small businesses to help them survive and keep their workers employed during the COVID-19 crisis. We look forward to the restoration of a robust free market economy, with small businesses continuing to play their central role in furnishing goods and services and creating jobs, when the crisis has passed.

Sincerely,



David S. Addington
Executive Vice President
and General Counsel