

FEDERAL RESERVE SYSTEM

12 CFR Part 215

Regulation O; Docket No. R-1722 and RIN 7100-AF93

AGENCY: Board of Governors of the Federal Reserve System (Board)

ACTION: Interim final rule with request for comments

SUMMARY: On April 17, 2020, the Board issued an interim final rule to except certain loans made by June 30, 2020, that are guaranteed under the Small Business Administration's Paycheck Protection Program from the requirements of section 22(h) of the Federal Reserve Act and the corresponding provisions of the Board's Regulation O. The Board is issuing this interim final rule to expand the exception to apply to PPP loans made through August 8, 2020.

DATES: This interim final rule is effective on [DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on the interim final rule must be received no later than [INSERT DATE THAT IS 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by **Docket No. R-1722 and RIN 7100 AF93**, by any of the following methods:

- **Agency Web Site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- **Email:** regs.comments@federalreserve.gov. Include docket and RIN numbers in the subject line of the message.
- **Fax:** (202) 452-3819 or (202) 452-3102.
- **Mail:** Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments also may be viewed electronically or in paper form in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT:

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I. Background

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act which, among other things, created the Paycheck Protection Program (PPP) to facilitate lending to small businesses affected by COVID-19. The CARES Act specified that the PPP would end on June 30, 2020. On July 4, 2020, the President signed into law the Prioritized Paycheck Protection Program Act (PPPP Act), which extends the PPP to August 8, 2020.¹

On April 17, 2020, the Board issued an exception to section 22(h) and the corresponding provisions of Regulation O for PPP loans made to insiders that would not be prohibited from receiving a PPP loan under the Small Business Administration (SBA) lending restrictions (original IFR).² The exception was intended to facilitate lending by banks to a broad range of small businesses within their communities, consistent with applicable law and safe and sound

¹ Prioritized Paycheck Protection Program Act, S. 4116, 116th Cong. § 1 (2020).

² “Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks,” 85 Federal Register 22345 (April 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-04-22/pdf/2020-08574.pdf>.

banking practices. The exception applied only to PPP loans made by June 30, 2020, the original date on which the PPP was set to expire.

The Board is issuing this interim final rule to extend the exception in the original IFR to August 8, 2020, the new date on which the PPP will expire.

II. The Interim Final Rule

Section 22(h) authorizes the Board to adopt, by regulation, exceptions to the definition of “extension of credit” in section 22(h) for transactions that “pose minimal risk.”³ Therefore, the Board may except PPP loans from the restrictions imposed by section 22(h) and the corresponding provisions of Regulation O upon a determination that such loans pose minimal risk.

The Board determined in the original IFR that PPP loans pose minimal risk.⁴ The PPP Act does not change any of the features of PPP loans on which the Board relied in the original IFR to determine that PPP loans pose minimal risk. Accordingly, the Board has determined that PPP loans continue to pose minimal risk for the reasons cited in the original IFR.

SBA lending restrictions continue to apply to certain PPP loans that also would be subject to section 22(h) and the corresponding provisions of Regulation O.⁵ Excepting PPP loans that

³ 12 U.S.C. 375b(9)(D)(ii).

⁴ 85 Federal Register 22346.

⁵ SBA regulations normally would prohibit a PPP lender from making a PPP loan to “[b]usinesses in which the [PPP lender] or any of its Associates owns an equity interest.” 13 CFR 120.110(o). SBA regulations define an “Associate” of a PPP lender to be “[a]n officer, director, key employee, or holder of 20 percent or more of the value of the [PPP] [l]ender’s . . . stock or debt instruments” and any entity in which one of these individuals or certain relatives “own or controls at least 20 percent.” 13 CFR 120.10.

On April 14, 2020, the SBA issued an interim final rule stating, among other things, that SBA lending restrictions “shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of less than 30 percent equity interest in a PPP [l]ender

would be prohibited by the SBA lending restrictions from the requirements of section 22(h) and the corresponding provisions in Regulation O would not achieve any meaningful regulatory purpose. Excepting these loans from one regime and not the other also may create confusion because some lenders may mistakenly interpret an exception under one regime to extend to both regimes. Accordingly, the exception continues to apply only for insiders that would not be prohibited from receiving a PPP loan by the SBA lending restrictions.

This interim final rule does not except a PPP loan from other restrictions that may apply to the loan, including section 22(g) of the Federal Reserve Act or section 215.5 of Regulation O.⁶ This determination also does not affect application of SBA lending restrictions to a PPP loan. The SBA has stated that “[f]avoritism by [a PPP] [l]ender in processing time or prioritization of [a] director’s or equity holder’s PPP application is prohibited.”⁷ The Board will administer the interim final rule accordingly.

Question 1: What are the advantages and disadvantages of extending the exception to PPP loans made through August 8, 2020?

Question 2: Are there any additional terms or conditions that should apply? Why?

from obtaining a PPP loan from the PPP [l]ender on whose board the director serves or in which the equity owner holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as similarly situated customer or account holder of the [l]ender.” The interim final rule also stated that SBA lending restrictions would continue to apply to officers and key employees of a PPP lender. Interim Final Rule: “Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans” (April 14, 2020), <https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf>.

⁶ 12 U.S.C. 375a; 12 CFR 215.5.

⁷ *Id.* at 14-15.

Question 3: The Board may want to extend the exception again to match any further extension of the PPP by Congress and the President, if the material terms of PPP loans do not change. What are the advantages and disadvantages of doing so?

III. Administrative Law Matters

A. Administrative Procedure Act

The Board is issuing the interim final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).⁸ Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁹

The Board believes that the public interest is best served by implementing the interim final rule immediately. As discussed in the original IFR, the spread of COVID-19 has disrupted economic activity in the United States and other countries. In addition, U.S. financial markets have featured substantial levels of volatility. The magnitude and persistence of COVID-19 on the economy remain uncertain. In light of the substantial disruptions in the economy, and the likelihood that this interim final rule would help ameliorate those disruptions by promoting lending to small businesses, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.¹⁰

⁸ 5 U.S.C. 553.

⁹ 5 U.S.C. 553(b)(B).

¹⁰ 5 U.S.C. 553(b)(B); 553(d)(3).

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.¹¹ Because the rules relieve a restriction by providing an exception to the definition of “extension of credit” in section 22(h) and Regulation O, the interim final rule is exempt from the APA’s delayed effective date requirement.¹²

While the Board believes that there is good cause to issue the rule without advance notice and comment and with an immediate effective date, the Board is interested in the views of the public and requests comment on all aspects of the interim final rule.

B. Congressional Review Act

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule.¹³ If a rule is deemed a “major rule” by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.¹⁴

The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment,

¹¹ 5 U.S.C. 553(d).

¹² 5 U.S.C. 553(d)(1).

¹³ 5 U.S.C. 801 *et seq.*

¹⁴ 5 U.S.C. 801(a)(3).

investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.¹⁵

For the same reasons set forth above, the Board is adopting the interim final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.¹⁶ In light of disruption in economic activity due to COVID-19, the Board believes that delaying the effective date of the rule would be contrary to the public interest.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board, as well as the authority to temporarily approve a new collection of information without providing opportunity for public comment if the Board determines that a change in an existing collection must be instituted quickly and that public participation in the approval process would defeat the

¹⁵ 5 U.S.C. 804(2).

¹⁶ 5 U.S.C. 808.

purpose of the collection or substantially interfere with the Board's ability to perform its statutory obligation.

This interim final rule does not contain any collections of information subject to the PRA.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁷ requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.¹⁸ The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the Board has determined for good cause that general notice and opportunity for public comment are unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board seeks comment on whether, and the extent to which, the interim final rule would affect a significant number of small entities.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),¹⁹ in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), the federal banking agencies must

¹⁷ 5 U.S.C. 601 *et seq.*

¹⁸ Under regulations issued by the SBA, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of \$600 million or less and trust companies with total assets of \$41.5 million or less. *See* 13 CFR 121.201.

¹⁹ 12 U.S.C. 4802(a).

consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form, with certain exceptions, including for good cause.²⁰ For the reasons described above, the Board finds good cause exists under section 302 of RCDRIA to publish this interim final rule with an immediate effective date.

As such, the final rule will be effective immediately on publication. Nevertheless, the Board seeks comment on RCDRIA.

F. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act²¹ requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the interim final rule in a simple and straightforward manner. The Board invites comments on whether there are additional steps it could take to make the rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the regulation clearly stated? If not, how could the regulation be more clearly stated?

²⁰ 12 U.S.C. 4802.

²¹ 12 U.S.C. 4809.

- Does the regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

List of Subjects

12 CFR Part 215

Credit, Penalties, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends 12 CFR chapter II as follows:

PART 215— LOANS TO EXECUTIVE OFFICERS, DIRECTORS, AND PRINCIPAL SHAREHOLDERS OF MEMBER BANKS (REGULATION O)

1. The authority citation for part 215 continues to read as follows:

Authority: 12 U.S.C. 248(a), 375a(10), 375b(9) and (10), 1468, 1817(k), 5412; Pub. L. 102-242, 105 Stat. 2236 (1991) (12 U.S.C. 1811 note) and Pub. L. 116-136, 134 Stat. 281.

2. In § 215.3, revise the heading of paragraph (b)(8) and paragraph (b)(8)(ii) to read as follows:

§ 215.3 Extension of credit.

* * * * *

(b) * * *

(8) Except for purposes of section 215.5 of this part, a loan:

* * *

(ii) That is made during the period beginning on February 15, 2020, and ending on August 8, 2020; and

* * * * *

By order of the Board of Governors of the Federal Reserve System, July 13, 2020.

Michele Talyor Fennell,
Assistant Secretary of the Board.