

## **FEDERAL RESERVE SYSTEM**

### **12 CFR Part 215**

#### **Regulation O; Docket No. R-1740**

#### **RIN 7100-AG 10**

#### **Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks**

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

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** On April 17, 2020, the Board issued an interim final rule to except certain loans made through 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 associated provisions of the Board's Regulation O. The Board issued two additional interim final rules to extend the exception when Congress approved extensions to the Paycheck Protection Program. To reflect a further extension approved by Congress and to automatically capture any further extensions, the Board is issuing this interim final rule to extend this exception to such loans made through March 31, 2022.

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

**ADDRESSES:** You may submit comments, identified by **Docket No. R-1740 and RIN 7100 AG 10**, 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](mailto: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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## **SUPPLEMENTARY INFORMATION:**

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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 the outbreak of COVID-19 and the imposition of associated containment measures (COVID event). Although the CARES Act specified that the PPP would end on June 30, 2020, Congress later extended the program to August 8, 2020, and again to March 31, 2021.<sup>1</sup> On March 30, 2021, the President signed into law the PPP Extension Act of 2021 (PPP Extension Act), which further extended the PPP to June 30, 2021.<sup>2</sup>

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<sup>1</sup> Prioritized Paycheck Protection Program Act, S. 4116, 116th Cong. section 1 (2020); Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133, 116<sup>th</sup> Cong. section 311 (2020).

<sup>2</sup> PPP Extension Act of 2021, H.R. 1799, 117<sup>th</sup> Cong. section 2 (2021).

Sections 22(g) and 22(h) of the Federal Reserve Act and Regulation O set forth quantitative and qualitative requirements for loans made by a bank<sup>3</sup> to its directors, executive officers, and principal shareholders, as well as to any companies owned by such persons (collectively, insiders).<sup>4</sup> Regulation O also sets forth procedural and recordkeeping requirements for loans by banks to their insiders. These requirements normally would apply to PPP loans made by banks to the small businesses owned by their insiders. In some cases, the restrictions in Regulation O could delay or entirely prohibit a bank from making a PPP loan to such a business. This could be particularly challenging in small communities where bank insiders often own small businesses and there are few alternative lenders.

On April 17, 2020, the Board issued an exception to section 22(h) and amended 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).<sup>5</sup> 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 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 has extended the exception each

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<sup>3</sup> Sections 22(g) and 22(h), and Regulation O, apply to all banks that are members of the Federal Reserve System. Other federal law subjects federally insured state non-member banks and insured savings associations to sections 22(g) and 22(h) in the same manner and to the same extent as if they were member banks. 12 U.S.C. 1828(j) (non-member banks); 12 U.S.C. 1468(b) (savings associations); 12 CFR 337.3 (state non-member banks and state savings associations); 12 CFR 31.2 (national banks and federal savings associations). Accordingly, any reference to “bank” in this notice applies to all member banks and institutions subject to sections 22(g) and 22(h) in the same manner and to the same extent as member banks.

<sup>4</sup> See generally 12 U.S.C. 375a and 375b; 12 CFR part 215.

<sup>5</sup> “Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks,” 85 FR 22345 (Apr. 22, 2020)).

time that Congress has extended the PPP.<sup>6</sup> The Board responded to the dozen comments it received in response to the interim final rules issued in April and July in the interim final rule issued on February 17, 2021.<sup>7</sup> Since issuing its last interim final rule, the Board received two comments, neither of which discussed the interim final rules, sections 22(g) and 22(h), or Regulation O.

The Board is issuing this interim final rule to extend the exception to PPP loans made through June 30, 2021.<sup>8</sup> The exception will continue to apply if Congress and the President extend the PPP further, but will sunset on March 31, 2022.

## **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.”<sup>9</sup> Therefore, the Board may except PPP loans from the restrictions in 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.<sup>10</sup> Among other things, this determination relieved member banks from ensuring that PPP loans made to

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<sup>6</sup> “Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks,” 85 FR 43119 (July 16, 2020); “Loans to Executive Officers, Directors, and Principal Shareholders of Member Bank,” 86 FR 9837 (Feb. 17, 2021).

<sup>7</sup> *Id.* at 9839.

<sup>8</sup> References in this IFR to “PPP loans” include “PPP second draw loans,” which are PPP loans that can be made to borrowers who already have received a first PPP loan. PPP second draw loans have the same features as PPP loans, except that fewer borrowers are eligible for PPP second draw loans. For example, only borrowers with 300 or fewer employees may obtain a PPP second draw loan. *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133, 116<sup>th</sup> Cong. section 311 (2020).

<sup>9</sup> 12 U.S.C. 375b(9)(D)(ii).

<sup>10</sup> 85 FR 22345, 22346.

certain insiders complied with the qualitative, quantitative, and procedural requirements set forth in section 22(h) and Regulation O. The PPP Extension Act did 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, for the same reasons cited in the original IFR, the Board has determined that PPP loans appear to pose minimal risk to bank safety and soundness.<sup>11</sup>

The exception will continue to apply if Congress and the President further extend the PPP, provided that the material terms of the PPP on which the Board has justified the exception remain the same. Specifically, the exception will continue to apply to PPP loans made under an extended program as long as the SBA continues to fully guarantee the loans and the material terms of the loan, including the interest rate and term, are set by the SBA. The exception will not apply for any loans made after March 31, 2022. The duration of the sunset provision is consistent with other exceptions the Board has made in response to the COVID event.<sup>12</sup>

SBA lending restrictions continue to apply to PPP loans that are subject to section 22(h) and the corresponding provisions of Regulation O.<sup>13</sup> Excepting loans that 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,

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<sup>11</sup> 85 FR 22345, 22346 (Apr. 22, 2020); 85 FR 43119, 43119-20 (July 16, 2020); 86 FR 9837, 9838 (Feb. 17, 2021).

<sup>12</sup> *E.g.*, Temporary Exclusions of U.S. Treasury Securities and Deposits at Federal Reserve Banks From the Supplementary Leverage Ratio, 85 FR 20578 (Apr. 14, 2020).

<sup>13</sup> Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by the Economic Aid Act, 86 FR 3712 (Jan. 6, 2021).

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.<sup>14</sup> 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.”<sup>15</sup> The Board will administer the interim final rule accordingly.

*Question 1: Please describe any additional terms or conditions that should apply to the exception.*

*Question 2: What are the advantages and disadvantages for the exception to automatically extend if the PPP is again extended?*

### **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).<sup>16</sup> 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

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<sup>14</sup> 12 U.S.C. 375a; 12 CFR 215.5.

<sup>15</sup> 86 FR 3712, 3696.

<sup>16</sup> 5 U.S.C. 553.

rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>17</sup>

The Board believes that the public interest is best served by implementing the interim final rule immediately in light of the short timeframe for execution of the renewed PPP mandated by the PPP Extension Act. Accordingly, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup>

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. 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 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

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<sup>17</sup> 5 U.S.C. 553(b)(B).

<sup>18</sup> 5 U.S.C. 553(b)(B); 553(d)(3).

<sup>19</sup> 5 U.S.C. 553(d).

<sup>20</sup> 5 U.S.C. 553(d)(1).

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

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

### ***C. Regulatory Flexibility Act***

The Regulatory Flexibility Act (RFA)<sup>21</sup> requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.<sup>22</sup> 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 affects a significant number of small entities.

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<sup>21</sup> 5 U.S.C. 601 *et seq.*

<sup>22</sup> 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.

***D. Riegle Community Development and Regulatory Improvement Act of 1994***

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>23</sup> 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 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.<sup>24</sup> The Board believes that the public interest is best served by implementing the interim final rule immediately. As discussed in the original IFR, the COVID event has disrupted economic activity in the United States and other countries. The magnitude and persistence of the COVID event on the economy continue to present some uncertainty. In light of the substantial disruptions in the economy, and the likelihood that this interim final rule will help ameliorate those disruptions by promoting lending to small businesses, the Board finds good cause exists under section 302 of RCDRIA to publish this interim final rule with an immediate effective date.

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<sup>23</sup> 12 U.S.C. 4802(a).

<sup>24</sup> 12 U.S.C. 4802.

As such, the interim final rule will be effective immediately on publication.

Nevertheless, the Board seeks comment on RCDRIA.

#### ***E. Use of Plain Language***

Section 722 of the Gramm-Leach-Bliley Act<sup>25</sup> 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?*
- *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?*

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<sup>25</sup> 12 U.S.C. 4809.

## **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; and Pub. L. 102-242, 105 Stat. 2236 (1991) (12 U.S.C. 1811 note)

2. In § 215.3, revise paragraphs (b)(8)(i)-(iii) to read as follows:

#### **§ 215.3 Extension of credit.**

\* \* \* \* \*

(b) \* \* \*

(8) \* \* \*

- (i) Made pursuant to the “Paycheck Protection Program” in which the participation by the Small Business Administration on a deferred basis is 100 percent;
- (ii) For which material terms, including the maturity and the interest rate, are set by the Small Business Administration;

- (iii) That is made during the “covered period,” as that term is defined in 15 U.S.C. 636(a)(36)(A)(iii), but in no case later than March 31, 2022; and
- (iv) That would not be prohibited by 13 CFR 120.110(o) or rules or interpretations thereof issued by the Small Business Administration.

\* \* \* \*

By order of the Board of Governors of the Federal Reserve System, April [\*\*], 2021.

**Ann Misback,**  
*Secretary of the Board.*