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

March 20, 2021

Hon. Janet L. Yellen
Secretary of the Treasury
c/o Chief Counsel's Office
OCC Comment Processing
400 7th St. SW, 3E-218
Washington, DC 20219

Hon. Jerome H. Powell
Chairman
c/o Ann E. Misback, Sec'y
Board of Governors of the
Federal Reserve System
20th & Constitution NW
Washington, DC 20551

Hon. Jelena McWilliams
Chairman, FDIC
c/o James P. Sheesley
Asst. Executive Sec'y
Attn: RIN 3064-AF73
550 17th St. NW
Washington, DC 20429

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

RE: Notice Titled "Amendment to the Capital Rule to Facilitate the Emergency Capital Investment Program," Dkt. ID OCC-2021-0002, Regulation Q/Dkt. No. R-1741/ RIN 7100-AG11, and RIN 3064-AF73, 86 *Fed. Reg.* 15076 (March 22, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB)[1] on the Office of the Comptroller of the Currency of the U.S. Department of the Treasury (OCC), Board of Governors of the Federal Reserve System (Board), and Federal Deposit Insurance Corporation (FDIC) interim final rule titled "Amendment to the Capital Rule to Facilitate the Emergency Capital Investment Program" and published in the *Federal Register* of March 22, 2021. The interim final rule implements a statutory authorization for an Emergency Capital Investment Program (ECIP) in which the Treasury invests in financial institutions in low-income or moderate-income communities.[2] NFIB does not object to what OCC, the Board, and the FDIC did in the interim final rule; NFIB objects to how you did it.

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[1] NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies.

[2] Section 104A(b)(2) of the Community Development Banking and Financial Institutions Act of 1994, as enacted by section 522 in title V of division N of the Consolidated Appropriations Act, 2021 (Public Law 116-260, December 27, 2020), provides, with reference to the Secretary of the Treasury: "The Secretary is authorized to establish an emergency program known as the 'Emergency Capital Investment Program' to support the efforts of low- and moderate-income community financial institutions to, among other things, provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities, including persistent poverty counties, that may be disproportionately impacted by the economic effects of the COVID–19 pandemic, by providing direct and indirect capital investments in low- and moderate-income community financial institutions consistent with this section." Under section 104A(j), the authority to make ECIP investments terminates 6 months after the COVID-19 national emergency terminates. Under section 104A(o)(9), "[t]he Secretary may issue such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this section."

Section 553 of title 5 of the U.S. Code generally requires a federal agency issuing a substantive rule to give the public notice of the proposed rule and an opportunity to submit comments on the proposed rule for the agency's consideration. As the U.S. Court of Appeals for the Second Circuit has said:

> *Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking.*[3]

Recognizing that the public needs time to understand and comply with a new rule, section 553 also generally requires the agency to publish the final rule not later than 30 days before its effective date.[4] For major rules, the agency generally must publish the final rule not later than 60 days before its effective date, to allow time for congressional review of the rule.[5]

Congress recognized that emergencies might arise that require an agency to issue a rule and put it into effect immediately. Thus, the law permits an agency for good cause to dispense with advance notice and comment on a rule and the 30-day or 60-day minimum waiting period before the rule takes effect.[6] The U.S. Court of Appeals for the Ninth Circuit has said:

> *Proper invocation of the good-cause exception is "sensitive to the totality of the factors at play." The exception is a "high bar" because it is "essentially an emergency procedure." The government must make a sufficient showing that "'delay would do real harm' to life, property, or public safety," or that "some exigency" interferes with its ability to carry out its mission.*[7]

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[3] *NRDC v. National Highway Traffic Safety Administration*, 894 F. 3d 95, 115 (2d Cir. 2018).

[4] 5 U.S.C. 553(d).

[5] 5 U.S.C. 801.

[6] 5 U.S.C. 553(b)(B) ("(b) General notice of proposed rule making shall be published in the Federal Register .... Except when notice or hearing is required by statute, this subsection does not apply--(B) when the 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."); 5 U.S.C. 553(d)(3) ("(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--(3) as otherwise provided by the agency for good cause found and published with the rule."); and 5 U.S.C. 808(2) ("Notwithstanding section 801-- . . . (2) any rule 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, shall take effect at such time as the Federal agency promulgating the rule determines.").

[7] *East Bay Sanctuary Covenant v. Trump*, 950 F. 3d 1242, 1278 (9th Cir. 2020) (citations omitted). See *International Union, UMWA v. MSHA*, 407 F. 3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (**3**) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."); and see also, *Jifry v. FAA*, 370 F. 3d 1174, 1179 (2004) ("Generally, the 'good cause' exception to notice and comment rulemaking, *see* 5 U.S.C. § 553(b)(3)(B), is to be 'narrowly construed and only reluctantly countenanced.' The exception excuses notice and comment in emergency situations or where delay could result in serious harm." (citations omitted)).

The OCC, the Board, and the FDIC issued the interim final rule on the ECIP without providing the public with notice and the opportunity to comment prior to issuance of the interim final rule and without the 30-day or 60-day waiting period before the rule took effect. Regardless of whether OCC, the Board, and the FDIC made it over the "high bar" they face in dispensing with those requirements, they should in any event show greater respect for advance notice and public comment in rulemaking. The OCC, the Board, and the FDIC should have considered whether, in the circumstances they faced, they could have provided, in advance of issuing the ECIP rule, at least some brief opportunity for advance notice and an opportunity to comment. For example, in the eleven week period between enactment of the Consolidated Appropriations Act, 2021, on December 27, 2020, and promulgation of the interim final rule without public notice and comment in the *Federal Register* of March 22, 2021, the agencies could have published in the *Federal Register* what is now the interim final rule as a proposed rule, allowed the public ten days to comment, taken five days to consider comments, and published a final rule, still invoking (to the extent applicable) the good cause exceptions for the 30-day and 60-day waiting periods.

When agencies obtain comments on proposed rules from the public in advance, the agencies' process of reasoned decisionmaking benefits and the public's faith in that decisionmaking increases. Members of the public who choose to comment have greater confidence that agencies fairly considered their concerns when the comments and consideration precede issuance of a rule. An opportunity to comment only after a rule has taken effect is not the equivalent of the opportunity to comment in advance. Once an agency has made its decision with an interim final rule, public commenters will, as a practical matter (and with good reason), conclude that they now bear a heavy burden in trying to get an agency decisionmaker who has already issued an interim final rule to change the decisionmaker's mind.

Agencies do not face a stark choice between lengthy advance comment periods and no comment period at all -- there are options in between. When your agencies consider issuing a rule in the future in circumstances in which they consider prompt issuance of a rule important, please consider whether at least a short time period for advance public notice, opportunity for public comment, and prompt agency consideration of any public comments is possible. Both agencies issuing a rule and the people ultimately complying with the rule would benefit from at least a brief opportunity for the public to make comments in advance and have them considered.

Sincerely,

David S. Addington
Executive Vice President and General Counsel