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Via comments@fdic.gov
and U.S. First Class Mail

May 27, 2020

Hon. Jelena McWilliams
Chairman of the Board of Directors
Attn: R. E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
Comment: RIN 3064-AF53
550 17th Street NW
Washington, DC 20429

Dear Madam Chairman:

RE: Federal Deposit Insurance Corporation (FDIC) Notice titled "Assessments, Mitigating the Deposit Insurance Assessment Effect of Participation in the Paycheck Protection Program (PPP), the PPP Lending Facility, and the Money Market Mutual Fund Liquidity Facility," RIN 3064-AF53, 85 *Fed. Reg.* 30649 (May 20, 2020)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking titled "Assessments, Mitigating the Deposit Insurance Assessment Effect of Participation in the Paycheck Protection Program (PPP), the PPP Lending Facility, and the Money Market Mutual Fund Liquidity Facility" and published in the *Federal Register* of May 20, 2020. The proposed rule mitigates the effects on FDIC deposit insurance assessments of an insured depository institution's (IDI) participation in the Paycheck Protection Program (PPP) and the Federal Reserve's PPP Liquidity Facility (PPPLF) and Money Market Mutual Fund Liquidity Facility (MMLF). NFIB recommends that the FDIC adopt the proposed rule and include in the preamble to the final rule a citation to *National Mining Association v. Department of Labor*, 292 F. 3d 849, 859 (D.C. Cir. 2002) as a justification in the administrative record for the effective date of April 1, 2020, for the rule adopted after that date.

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. Small businesses have a substantial interest in laws and regulations adopted to regulate financial institutions, upon which small businesses depend for financial services.

Congress established and funded the PPP with the CARES Act (Public Law 116-136, March 27, 2020) and the PPP and Health Care Enhancement Act (Public Law 116-139, April 24, 2020). The PPP aids small businesses that have ceased or modified their businesses at the direction of the governors of the several states or on the advice of the President as the nation deals with the impact of the Coronavirus Disease of 2019 (COVID-19) pandemic. The PPP provides for financial institutions (including IDIs) to issue loans guaranteed by the Small Business Administration (SBA), with potential repayment forgiveness, to small businesses adversely affected by COVID-19, to help those businesses survive and employ workers. Congress designed the PPP so that financial institutions would provide the PPP loans to small businesses, rather than having the government provide direct loans or grants to them, principally to speed up issuance of loan proceeds to small businesses in need. Success of the PPP depends in large part upon the willingness of financial institutions (including IDIs) to participate in the issuance of PPP loans.

The Board of Governors of the Federal Reserve (BGFR) established the PPPLF under section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)) at the Federal Reserve Banks on April 8, 2020, to provide non-recourse loans to financial institutions (including IDIs) participating in the PPP, thus increasing the liquidity of the institutions, and to take as collateral the SBA-guaranteed PPP loan repayment obligations of small businesses. The success of the PPPLF in providing liquidity that facilitates the PPP depends upon the willingness of financial institutions (including IDIs) to take the non-recourse loans.

The BGFR established the MMLF under section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)) at the Federal Reserve Bank of Boston (FRBB) on March 18, 2020 to assist money market mutual funds that face increased demands from households and other investors for redemptions (i.e., cashing out of fund investments). To provide liquidity to the funds, the MMLF makes non-recourse advance loans to eligible borrowers such as U.S. depository institutions (including IDIs) for the purchase from the funds of certain types of assets (such as U.S. government-backed instruments or asset-backed commercial paper), which the FRBB takes as collateral for the loan. Success of the MMLF in providing liquidity for the funds depends upon the participation in the program of the qualified borrowers, such as U.S. depository institutions (including IDIs).

In the case of all three -- the PPP, PPPLF, and the MMLF -- the success of the program or facility depends in substantial part upon the active and cooperative participation of the IDIs. To encourage such participation, the FDIC seeks to minimize adverse regulatory impacts on the IDIs from participating in the PPP, PPPLF, and MMLF.

Under section 7 of the Federal Deposit Insurance Act (12 U.S.C. 343(3)), IDIs pay quarterly assessments (somewhat in the nature of premiums for insurance that benefits third parties) to the FDIC for insurance of deposit accounts in the IDIs. The amount each IDI pays depends upon factors set by statute (12 U.S.C. 1817) that include the balance of insured deposits and the degree of risk the institution poses to the FDIC Deposit Insurance Fund. Absent a change to FDIC assessment regulations implementing the statute, the participation of IDIs in the PPP, the PPPLF, and the MMLF will increase the amount of the assessments the IDIs pay. Mitigation of the increases in assessments is particularly appropriate given the limited risk to financial institutions in the design of the three programs.

NFIB notes that the FDIC proposes to make its rule effective as of April 1, 2020. Agencies generally cannot make rules retroactive in effect unless Congress has specifically granted the authority to do so. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 207 (1988) (". . . [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). Section 2(g) of the Federal Deposit Insurance Act (12 U.S.C. 1820(g)) grants the FDIC authority to prescribe regulations to carry out the Act, but uses no language giving authority to make regulations retroactive in effect. However, the FDIC choice of the effective date of April 1, 2020, is permissible because the mere use of an effective date for a rule that is prior to the promulgation of the rule does not make the rule retroactive in effect. To be retroactive, the rule must take away or impair a vested right, create a new obligation, impose a new duty, or attach a new disability with regard to actions that occurred before adoption of the rule. *National Mining Association v. Department of Labor*, 292 F. 3d 849, 859 (D.C. Cir. 2002) ("In the administrative context, a rule is retroactive if it ' "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' " (citation omitted).) The FDIC-proposed rule does none of those things; the only effect of the proposed rule on anyone but the government is to reduce the FDIC insurance assessment on insured deposit institutions, leaving more money in their hands than they otherwise would have had -- a benefit and not a burden. In promulgating its final rule, the FDIC should cite in the preamble the *National Mining Association* case, to make clear in the administrative record the propriety of the April 1, 2020, effective date for a rule promulgated thereafter.

NFIB normally would object to the very short (7-day) period permitted for comment on the FDIC-proposed regulation but, given the urgency of ensuring the effective functioning of the PPP, PPPLF, and MMLF in the current economic situation, NFIB appreciates that FDIC allowed at least some opportunity for comment.

The PPP, PPPLF, and the MMLF benefit small businesses. All three programs depend substantially for their success on the participation of insured depository institutions. NFIB appreciates the FDIC's efforts to encourage IDI participation in the programs by mitigating against the increase of IDI deposit insurance assessments that otherwise would result from such participation.

Sincerely,

[redacted]

David S. Addington
Executive Vice President
and General Counsel