

DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

Docket No. OCC-2020-0009 and RIN 1557-AE81

FEDERAL RESERVE SYSTEM

12 CFR Part 217

Regulations Q; Docket No. XXX and RIN XXX

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064-AF40

Regulatory Capital Rule: Eligible Retained Income

AGENCY: Board of Governors of the Federal Reserve System (Board), Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim Final Rule with Request for Comments

SUMMARY: In light of recent disruptions in economic conditions caused by the coronavirus disease 2019 (COVID-19) and current strains in U.S. financial markets, the Board, OCC and FDIC (together, the agencies) are issuing an interim final rule that revises the definition of eligible retained income for all depository institutions, bank holding companies, and savings and loan holding companies subject to the agencies' capital rule (together, a banking organization or banking organizations). The revised definition of eligible retained income will make any automatic limitations on capital distributions that could apply under the agencies' capital rules more gradual.

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

ADDRESSES:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Regulatory Capital Rule: Eligible Retained Income” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal – Regulations.gov Classic or Regulations.gov Beta:*
Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0009” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. For help with submitting effective comments please click on “View Commenter’s Checklist.” Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov Site*” from the *Regulations.gov* Classic homepage. Enter “Docket ID OCC-2020-0009” in the Search Box and click “Search.” Public comments can be submitted via the “Comment” box below the displayed document information or by clicking on the document title and then clicking the “Comment” box on the top-left side of the screen. For help with submitting effective comments please click on “Commenter’s Checklist.” For assistance with the *Regulations.gov* Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail regulations@erulemakinghelpdesk.com.

- *E-mail:* regs.comments@occ.treas.gov.

- *Mail:* Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street, SW., suite 3E-218, Washington, DC 20219.
- *Fax:* (571) 465-4326.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2020-0009” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- *Viewing Comments Electronically – Regulations.gov Classic or Regulations.gov Beta:*

Regulations.gov Classic: Go to <https://www.regulations.gov/>. Enter “Docket ID OCC-2020-0009” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen. Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to <https://beta.regulations.gov/> or click “Visit New *Regulations.gov Site*” from the *Regulations.gov* Classic homepage. Enter “Docket ID OCC-2020-0009” in the Search Box and click “Search.” Click on the “Comments” tab. Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. Supporting materials can be viewed by clicking on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen.” For assistance with the *Regulations.gov* Beta site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9am-5pm ET or e-mail regulations@erulemakinghelpdesk.com.

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

Board: You may submit comments, identified by Docket No.[●]; RIN 7100-AF[●], by any of the following methods:

- Agency website: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- E-mail: 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 may also be viewed electronically or in paper in Room 146, 1709 New York Avenue, NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452-3684.

FDIC: You may submit comments, identified by RIN [●], by any of the following methods:

- *Agency Web Site*: <http://www.fdic.gov/regulations/laws/federal>. Follow instructions for submitting comments on the Agency Web site.

- *E-mail*: Comments@FDIC.gov. Include "RIN [●]" on the subject line of the message.

- *Mail*: Robert E. Feldman, Executive Secretary, Attention: Comments/RIN [●], Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

- *Hand Delivery/Courier*: Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. All comments received must include the agency name (FDIC) and RIN [●] and will be posted without change to <http://www.fdic.gov/regulations/laws/federal>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

OCC: Margot Schwadron, Director, or Benjamin Pegg, Risk Expert, Capital and Regulatory Policy, (202) 649-6370; or Carl Kaminski, Special Counsel, or Kevin Korzeniewski, Counsel,, Chief Counsel's Office, (202) 649-5490, for persons who are deaf or hearing impaired, TTY, (202) 649-5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Anna Lee Hewko, Associate Director, (202) 530-6360, Constance Horsley, Deputy Associate Director, (202) 452-5239, Juan Climent, Manager, (202) 460 2180, Matthew McQueeney, Senior Financial Institution Policy Analyst II, (202) 452-2942, Division of Supervision and Regulation; Benjamin McDonough, Assistant General Counsel, (202) 452-2036, Asad Kudiya, Senior Counsel, (202) 475-6358, or Mary Watkins, Senior Attorney, (202) 452-3722, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263-4869.

FDIC: Bobby R. Bean, Associate Director, bbean@fdic.gov; Benedetto Bosco, Chief, Capital Policy Section, bbosco@fdic.gov; Noah Cuttler, Senior Policy Analyst, ncuttler@fdic.gov; regulatorycapital@fdic.gov; Capital Markets Branch, Division of Risk Management Supervision, (202) 898-6888; or Michael Phillips, Counsel, mphillips@fdic.gov; Catherine Wood, Counsel, cawood@fdic.gov; Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (800) 925-4618.

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I. Background

Under the capital rule, a banking organization¹ must maintain a minimum amount of regulatory capital.² In addition, a banking organization must maintain a buffer of regulatory capital above its minimum capital requirements to avoid restrictions on capital distributions and discretionary bonus payments.³ The agencies established the buffer requirements to encourage better capital conservation by banking organizations and to enhance the resilience of the banking

¹ Banking organizations subject to the capital rule include national banks, state member banks, state nonmember banks, savings associations, and top-tier bank holding companies and savings and loan holding companies domiciled in the United States not subject to the Board's Small Bank Holding Company Policy Statement (12 CFR part 225, Appendix C), but exclude certain savings and loan holding companies that are substantially engaged in insurance underwriting or commercial activities or that are estate trusts, and bank holding companies and savings and loan holding companies that are employee stock ownership plans.

² See 12 CFR 3.10 (OCC), 12 CFR 217.10 (Board), and 12 CFR 324.10 (FDIC).

³ See 12 CFR 3.11 (OCC); 12 CFR 217.11 (Board); 12 CFR 324.11 (FDIC).

system during stress periods.⁴ In particular, the agencies intend for the buffer requirements to limit the ability of banking organizations to distribute capital in the form of dividends and discretionary bonus payments and therefore strengthen the ability of banking organizations to continue lending and conducting other financial intermediation activities during stress periods. The agencies are concerned, however, that the buffer requirements do not limit capital distributions in the gradual manner intended when the buffer requirements were developed. Rather, the limitations on capital distributions could be sudden and severe if such banking organizations were to experience even a modest reduction in their capital ratios, undermining the ability of banking organizations to use their capital buffers.

The agencies are adopting an interim final rule that revises the definition of eligible retained income. The interim final rule also addresses the impact of recent dislocations in the U.S. economy as a result of COVID-19. By modifying the definition of eligible retained income and thereby allowing banking organizations to more freely use their capital buffers, this interim final rule should help to promote lending activity and other financial intermediation activities by banking organizations and avoid compounding negative impacts on the financial markets.⁵

During this stress period, the agencies encourage banking organizations to make prudent decisions regarding capital distributions. In addition, this interim final rule does not make changes to any other rule or regulation that may limit capital distributions or discretionary bonus payments. For instance, under the prompt corrective action framework, an insured depository institution that becomes less than adequately capitalized will be subject to dividend restrictions.⁶

⁴ 78 FR 62018, 62034 (Oct. 11, 2013).

⁵ The interim final rule also would apply to the U.S. intermediate holding companies of foreign banking organizations required to be established or designated under 12 CFR 252.153.

⁶ 12 CFR 6.6 (OCC); 12 CFR 208.40 (Board); 12 CFR 324.405 (FDIC).

In addition, S-corporation banks do not pay federal income taxes. Income and losses are attributed to shareholders, potentially increasing their personal tax liability when the S-corporation has income and potentially reducing their personal tax liability if the S-corporation has losses. In a situation where the S-corporation has income but does not pay dividends, its shareholders are responsible for meeting the increased tax liability from their own resources. A situation in which S-corporation shareholders' dividends would be insufficient to pay their share of taxes on the banks' income because of the capital conservation buffer is most likely to occur when the bank is adequately capitalized but one or more of its risk-based capital ratios breach the capital conservation buffer requirements.⁷ The revised definition of eligible retained income would assist in the ability of S-corporation banks to provide dividends to shareholders in order to meet their pass-through tax liabilities.

II. The Interim Final Rule

The capital rule requires a banking organization to maintain minimum risk-based capital and leverage ratios.⁸ The capital rule also requires a banking organization to maintain certain buffers above its risk-based capital and leverage ratios, as applicable, to avoid increasingly stringent restrictions on capital distributions and discretionary bonus payments.⁹ All banking organizations are currently subject to a fixed capital conservation buffer equal to 2.5 percent of risk-weighted assets. Banking organizations subject to Category I, II, and III standards also are subject to a countercyclical capital buffer requirement, and the largest and most systemically important banking organizations — global systemically important bank holding companies, or

⁷ FDIC, FIL-40-2014 (July 21, 2014).

⁸ 12 CFR 3.10 (OCC); 12 CFR 217.10 (Board); 12 CFR 324.10 (FDIC).

⁹ See 12 CFR 3.11 (OCC); 12 CFR 217.11 (Board); 12 CFR 324.11 (FDIC).

U.S. GSIBs—are subject to an additional capital buffer based on a measure of their systemic risk, the GSIB surcharge.¹⁰ In addition, a minimum supplementary leverage ratio of 3 percent applies to banking organizations subject to Category I, II, and III standards. U.S. GSIBs also are subject to enhanced supplementary leverage ratio standards. U.S. GSIB bank holding companies must hold a leverage buffer of tier 1 capital to avoid limitations on distributions and discretionary bonus payments. The depository institution subsidiaries of U.S. GSIB holding companies generally must maintain a similarly higher supplementary leverage ratio to be considered well capitalized under the agencies’ respective prompt corrective action frameworks. On March 4, 2020, the Board adopted a final rule that simplified the Board’s capital framework for large banking organizations with the introduction of a stress capital buffer requirement (SCB final rule).¹¹ Under the SCB final rule, a banking organization will receive a new stress capital buffer requirement on an annual basis, which replaces the static 2.5 percent capital conservation buffer requirement.

Under the capital rule, if a banking organization’s capital ratios fall within its buffer requirements, the maximum amount of capital distributions and discretionary bonus payments it can make is a function of its eligible retained income. For example, a banking organization in the bottom quartile of its capital conservation buffer may not make any capital distributions

¹⁰ In October 2019, the agencies finalized the tailoring rule, which more closely matches the regulations applicable to large banking organizations with their risk profile. The tailoring rule groups large U.S. and foreign banking organizations into four categories of standards (Category I through IV), with the most stringent standards applying to banking organizations subject to Category I standards. 84 FR 59230 (November 1, 2019).

¹¹ Amendments to the Regulatory Capital, Capital Plan, and Stress Test Rules, March 4, 2020, available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200304a2.pdf>. The SCB final rule applies to bank holding companies and U.S. intermediate holding companies of foreign banking organizations subject to the capital plan rule (covered holding company). 12 CFR 225.8.

without prior approval from the Board, OCC, or FDIC, as applicable. The countercyclical capital buffer, the GSIB surcharge, and enhanced supplementary leverage ratio standards use the same definition of eligible retained income. As adopted, eligible retained income was defined as four quarters of net income, *net* of distributions and associated tax effects not already reflected in net income.

Under a benign business environment when banking organizations have significant capital cushions above their capital requirements, some banking organizations decide to distribute all or nearly all of their net income. Because the measure of eligible retained income subtracts capital distributions made during the previous year, a period of sudden stress following a period of relatively benign conditions could result in very low or zero eligible retained income. Similarly, if a banking organization with eligible retained income that is very low or negative experiences an increase in its stress capital buffer requirement, because, for example, the banking organization's risk profile changed, then the banking organization's capital levels might not be sufficient to meet the stress capital buffer requirement. In either scenario, the banking organization could face sudden and severe distribution limitations even if its capital ratios only marginally fall below applicable buffer requirements.

To address this concern, the SCB final rule revised the definition of eligible retained income for the stress loss portion of a covered holding company's capital conservation buffer requirement. Under the SCB final rule, if a covered holding company's capital ratios are above minimum requirements plus the fixed 2.5 percent portion of the capital conservation buffer plus any applicable GSIB surcharge and countercyclical capital buffer, the covered holding company's eligible retained income is defined as the average of its previous four quarters of net income. Under the SCB final rule, if a covered holding company's capital ratios are below its

minimum requirements plus the fixed 2.5 percent portion of the capital conservation buffer plus any applicable GSIB surcharge and countercyclical capital buffer, the covered holding company's eligible retained income is defined as net income for the four preceding calendar quarters, net of any distributions.

Recent events have suddenly and significantly impacted financial markets. The spread of the COVID-19 virus has disrupted economic activity in many countries. In addition, financial markets have experienced significant volatility. The magnitude and persistence of the overall effects on the economy remain highly uncertain. In light of these developments, banking organizations may realize a sudden, unanticipated drop in capital ratios. This could create a strong incentive for these banking organizations to limit their lending and other financial intermediation activities in order to avoid facing abrupt limitations on capital distributions. Thus, the current definition of eligible retained income, particularly in light of present market uncertainty, could serve as a deterrent for banking organizations to continue lending to creditworthy businesses and households.

To better allow a banking organization to continue lending during times of stress, the agencies are issuing the interim final rule to revise the definition of eligible retained income to the greater of (1) a banking organization's net income for the four preceding calendar quarters, net of any distributions and associated tax effects not already reflected in net income, and (2) the average of a banking organization's net income over the preceding four quarters. This definition will apply with respect to all of a banking organization's buffer requirements, including the fixed 2.5 percent capital conservation buffer, and, if applicable, the countercyclical capital buffer, the GSIB surcharge, and enhanced supplementary leverage ratio standards. Once the SCB final rule is effective, this definition will also apply to all parts of a covered holding company's buffer

requirements, including the stress loss portion of a covered holding company's capital conservation requirement. The agencies believe that having one definition for all banking organizations as described in this interim final rule simplifies the regulatory capital framework and ensures fairness across banking organizations of all sizes.

This interim final rule is intended to strengthen the incentives for a banking organization to use its capital buffers as intended in adverse conditions and serve as a financial intermediary and source of credit to the economy. This revision would reduce the likelihood that a banking organization is suddenly subject to abrupt and restrictive distribution limitations in a scenario of lower than expected capital levels.

Question 1: What would be the advantages and disadvantages of defining eligible retained income as the average of a banking organization's net income over the preceding four quarters instead of the greater of (i) a banking organization's net income for the four preceding calendar quarters, net of any distributions and associated tax effects not already reflected in net income, and (ii) the average of a banking organization's net income over the preceding four quarters?

Question 2: What are the advantages and disadvantages of applying the revised definition of eligible retained income to depository institution subsidiaries? Would, and if so how would, applying the revised definition of eligible retained income to depository institutions be consistent with the purposes of the buffer requirements discussed above? How, if at all, do, the incentives for using a capital buffer differ for depository institutions compared to bank holding companies and savings and loan holding companies? Similarly, would, and if so how would, applying the revised definition of eligible retained income to U.S. intermediate holding

companies be consistent with the purposes of the buffer requirements discussed above? How, if at all, do the incentives for using a capital buffer differ for U.S. intermediate holding companies?

Question 3: Under what circumstances, if any, should a banking organization be restricted from making any capital distributions?

III. Impact Assessment

In ordinary economic circumstances, many banking organizations will pay out a significant portion of their net income, and retain the rest to support growth. As banking organizations enter stress periods, the restrictions in the capital buffers limit distributions and help to preserve capital and support lending. However, if the limits to distributions are too restrictive, banking organizations can face a sharp increase in their distribution limitations when they enter the buffer due to stress. This may create an incentive for banking organizations to reduce lending or take other actions to avoid falling into the buffer. The revised definition of eligible net income in the interim final rule allows banking organizations to more gradually reduce distributions as they enter stress, and provides banking organizations with stronger incentives to continue to lend in such a scenario. On the other hand, by enabling banking organizations to gradually decrease capital distributions in stress (rather than mandating a sharp decrease), the rule could incrementally reduce the banking organization's loss-absorption capacity in stress.

The definition of eligible retained income affects the distributions of banking organizations within their capital conservation or stress capital buffers. It does not have an impact on minimum capital requirements, *per se*. As such, the revised definition of eligible retained income in the interim final rule is not likely to have any noticeable effect on the capital requirements of banking organizations. Furthermore, banking organizations currently maintain

robust capital levels, with only a small number of banking organizations having capital levels within the capital conservation buffer.

IV. Administrative Law Matters

A. Administrative Procedure Act

The agencies are issuing the interim final rules without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).¹² 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.”¹³

The agencies believe that the public interest is best served by implementing the interim final rule immediately upon publication in the Federal Register. As discussed above, the spread of COVID-19 has disrupted economic activity in the United States. In addition, U.S. financial markets have featured extreme levels of volatility. The magnitude and persistence of COVID-19 on the economy remain uncertain. In light of the current market uncertainty, banking organizations may have a strong incentive to limit their lending activity in order to avoid facing abrupt restrictions on distributions. By making the automatic limitations on a banking organization’s distributions more gradual as the banking organization’s capital ratios decline, the interim final rule would allow banking organizations to focus on continuing to lend to creditworthy households and businesses rather than on managing their capital buffers and

¹² 5 U.S.C. 553.

reducing the potential of exacerbating negative impacts on the financial markets. For these reasons, the agencies find that there is good cause consistent with the public interest to issue the rule without advance notice and comment.¹⁴

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.¹⁵ Because the rules relieve a restriction, the interim final rule is exempt from the APA's delayed effective date requirement.¹⁶

While the agencies believe that there is good cause to issue the rule without advance notice and comment and with an immediate effective date, the agencies are 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 Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a "major" rule.¹⁷ If a rule is deemed a "major rule" by the Office of Management and Budget (OMB), the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.¹⁸

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

¹⁴ 5 U.S.C. 553(b)(B); 553(d)(3).

¹⁵ 5 U.S.C. 553(d).

¹⁶ 5 U.S.C. 553(d)(1).

¹⁷ 5 U.S.C. 801 *et seq.*

¹⁸ 5 U.S.C. 801(a)(3).

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, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.¹⁹

For the same reasons set forth above, the agencies are 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.²⁰ In light of current market uncertainty, the agencies believe that delaying the effective date of the rule would be contrary to the public interest. In addition, as discussed above, the revised definition of eligible retained income in the interim final rule is not likely to have any significant effect on the capital requirements of banking organizations.

As required by the Congressional Review Act, the agencies 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 of 1995 (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. The interim final rule affects

¹⁹ 5 U.S.C. 804(2).

²⁰ 5 U.S.C. 808.

the agencies' current information collections for the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051). The OMB control numbers for the agencies are: OCC OMB No. 1557-0081; Board OMB No. 7100-0036; and FDIC OMB No. 3064-0052. The Board has reviewed this interim final rule pursuant to authority delegated by the OMB.

Although there is a substantive change to the actual calculation of retained income for purposes of the Call Reports, the change should be minimal and result in a zero net change in hourly burden under the agencies' information collections. Submissions will, however, be made by the agencies to OMB. The changes to the Call Reports and their related instructions will be addressed in a separate Federal Register notice. Also, the Board has temporarily revised the Consolidated Financial Statements for Holding Companies (FR Y-9; OMB No. 7100-0128) to reflect the changes made in this interim final rule. On June 15, 1984, OMB delegated to the Board authority under the PRA to temporarily approve a revision to a 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 obligation.

The Board's delegated authority requires that the Board, after temporarily approving a collection, solicit public comment on a proposal to extend the temporary collection for a period not to exceed three years. Therefore, the Board is inviting comment on a proposal to extend the FR Y-9 reports for three years, with revision. The Board invites public comment on the FR Y-9 reports, which are being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

- a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;
- b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected;
- d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and
- e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Comments must be submitted on or before [insert date 60 days after publication in the Federal Register]. At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Adopted Revision, With Extension for Three Years, of the Following Information Collection:

Report title: Financial Statements for Holding Companies

Agency form number: FR Y-9C; FR Y-9LP; FR Y-9SP; FR Y-9ES; FR Y-9CS.

OMB control number: 7100-0128.

Effective date: December 31, 2020.

Frequency: Quarterly, semiannually, and annually.

Affected public: Businesses or other for-profit.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs),²¹ securities holding companies (SHCs), and U.S. intermediate holding companies (IHCs) (collectively, holding companies (HCs)).

Estimated number of respondents:

FR Y-9C (non AA HCs) with less than \$5 billion in total assets – 155,

FR Y-9C (non AA HCs) with \$5 billion or more in total assets – 189,

FR Y-9C (AA HCs) – 19,

FR Y-9LP – 434,

FR Y-9SP – 3,960,

FR Y-9ES – 83,

FR Y-9CS – 236.

Estimated average hours per response:

Reporting

FR Y-9C (non AA HCs) with less than \$5 billion in total assets – 40.48,

FR Y-9C (non AA HCs) with \$5 billion or more in total assets – 46.34,

FR Y-9C (AA HCs) – 47.59,

FR Y-9LP – 5.27,

FR Y-9SP – 5.40,

FR Y-9ES – 0.50,

FR Y-9CS – 0.50.

²¹ A savings and loan holding company (SLHC) must file one or more of the FR Y-9 family of reports unless it is: (1) a grandfathered unitary SLHC with primarily commercial assets and thrifts that make up less than 5 percent of its consolidated assets; or (2) a SLHC that primarily holds insurance-related assets and does not otherwise submit financial reports with the SEC pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

Recordkeeping

FR Y-9C (non AA HCs) with less than \$5 billion in total assets – 1,

FR Y-9C (non AA HCs) with \$5 billion or more in total assets – 1,

FR Y-9C (AA HCs) – 1,

FR Y-9LP – 1,

FR Y-9SP – 0.50,

FR Y-9ES – 0.50,

FR Y-9CS – 0.50.

Estimated annual burden hours:

Reporting

FR Y-9C (non AA HCs) with less than \$5 billion in total assets – 25,098,

FR Y-9C (non AA HCs) with \$5 billion or more in total assets – 35,033,

FR Y-9C (AA HCs) – 3,617,

FR Y-9LP – 9,149,

FR Y-9SP – 42,768,

FR Y-9ES – 42,

FR Y-9CS – 472.

Recordkeeping

FR Y-9C (non AA HCs) with less than \$5 billion in total assets – 620,

FR Y-9C (non AA HCs) with \$5 billion or more in total assets – 756,

FR Y-9C (AA HCs) – 76,

FR Y-9LP – 1,736,

FR Y-9SP – 3,960,

FR Y-9ES – 42,

FR Y-9CS – 472.

General description of report: The FR Y-9 family of reporting forms continues to be the primary source of financial data on holding companies that examiners rely on in the intervals between on-site inspections. Financial data from these reporting forms are used to detect emerging financial problems, to review performance and conduct pre-inspection analysis, to monitor and evaluate capital adequacy, to evaluate holding company mergers and acquisitions, and to analyze a holding company's overall financial condition to ensure the safety and soundness of its operations. The FR Y-9C, FR Y-9LP, and FR Y-9SP serve as standardized financial statements for the consolidated holding company. The Board requires HCs to provide standardized financial statements to fulfill the Board's statutory obligation to supervise these organizations. The FR Y-9ES is a financial statement for HCs that are Employee Stock Ownership Plans. The Board uses the FR Y-9CS (a free-form supplement) to collect additional information deemed to be critical and needed in an expedited manner. HCs file the FR Y-9C on a quarterly basis, the FR Y-9LP quarterly, the FR Y-9SP semiannually, the FR Y-9ES annually, and the FR Y-9CS on a schedule that is determined when this supplement is used.

Legal authorization and confidentiality: The Board has the authority to impose the reporting and recordkeeping requirements associated with the FR Y-9 family of reports on BHCs pursuant to section 5 of the Bank Holding Company Act of 1956 (BHC Act) (12 U.S.C. 1844); on SLHCs pursuant to section 10(b)(2) and (3) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)(2) and (3)), as amended by sections 369(8) and 604(h)(2) of the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act); on U.S. IHCs pursuant to section 5 of the BHC Act (12 U.S.C

1844), as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Act (12 U.S.C. 511(a)(1) and 5365); and on securities holding companies pursuant to section 618 of the Dodd-Frank Act (12 U.S.C. 1850a(c)(1)(A)). The obligation to submit the FR Y-9 series of reports, and the recordkeeping requirements set forth in the respective instructions to each report, are mandatory.

With respect to the FR Y-9C report, Schedule HI's memoranda data item 7(g) "FDIC deposit insurance assessments," Schedule HC-P's data item 7(a) "Representation and warranty reserves for 1-4 family residential mortgage loans sold to U.S. government agencies and government sponsored agencies," and Schedule HC-P's data item 7(b) "Representation and warranty reserves for 1-4 family residential mortgage loans sold to other parties" are considered confidential commercial and financial information. Such treatment is appropriate under exemption 4 of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(4)) because these data items reflect commercial and financial information that is both customarily and actually treated as private by the submitter, and which the Board has previously assured submitters will be treated as confidential. It also appears that disclosing these data items may reveal confidential examination and supervisory information, and in such instances, this information would also be withheld pursuant to exemption 8 of the FOIA (5 U.S.C. 552(b)(8)), which protects information related to the supervision or examination of a regulated financial institution.

In addition, for both the FR Y-9C report and the FR Y-9SP report, Schedule HC's memorandum item 2.b., the name and email address of the external auditing firm's engagement partner, is considered confidential commercial information and protected by exemption 4 of the FOIA (5 U.S.C. 552(b)(4)) if the identity of the engagement partner is treated as private

information by HCs. The Board has assured respondents that this information will be treated as confidential since the collection of this data item was proposed in 2004.

Aside from the data items described above, the remaining data items on the FR Y-9C report and the FR Y-9SP report are generally not accorded confidential treatment. The data items collected on FR Y-9LP, FR Y-9ES, and FR Y-9CS reports, are also generally not accorded confidential treatment. As provided in the Board's Rules Regarding Availability of Information (12 CFR part 261), however, a respondent may request confidential treatment for any data items the respondent believes should be withheld pursuant to a FOIA exemption. The Board will review any such request to determine if confidential treatment is appropriate, and will inform the respondent if the request for confidential treatment has been denied.

To the extent the instructions to the FR Y-9C, FR Y-9LP, FR Y-9SP, and FR Y-9ES reports each respectively direct the financial institution to retain the workpapers and related materials used in preparation of each report, such material would only be obtained by the Board as part of the examination or supervision of the financial institution. Accordingly, such information is considered confidential pursuant to exemption 8 of the FOIA (5 U.S.C. 552(b)(8)). In addition, the workpapers and related materials may also be protected by exemption 4 of the FOIA, to the extent such financial information is treated as confidential by the respondent (5 U.S.C. 552(b)(4)).

Current actions: The Board has temporarily revised the instructions for the FR Y-9C to reflect the modification to the definition of eligible retained income contained in this interim final rule. Specifically, the Board has temporarily revised the instructions for the item capturing eligible retained income for HCs not subject to the capital plan rule on FR Y-9C, Schedule HC-R. The Board has determined that the revisions to the FR Y-9C must be instituted

quickly and that public participation in the approval process would defeat the purpose of the collection of information, as delaying the revisions would result in the collection of inaccurate information and would interfere with the Board's ability to perform its statutory duties. The Board also proposes to revise the instructions for a forthcoming item, which will be added to Schedule HC-R for the December 31, 2020 as-of date, that captures eligible retained income for HCs subject to the capital plan rule.

The Board also proposes to extend the FR Y-9 reports for three years, with the revisions discussed above.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)²² requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.²³ 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 agencies have determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the agencies are not issuing a notice of proposed rulemaking. Accordingly, the agencies have concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

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

²² 5 U.S.C. 601 *et seq.*

²³ Under regulations issued by the Small Business Administration, 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.

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),²⁴ 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), each Federal banking agency 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.²⁵ For the reasons described above, the agencies find 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 on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Nevertheless, the agencies seek comment on RCDRIA.

F. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act²⁶ requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the interim final rule in a simple and straightforward manner. The

²⁴ 12 U.S.C. 4802(a).

²⁵ 12 U.S.C. 4802.

²⁶ 12 U.S.C. 4809.

agencies invite 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?

G. Unfunded Mandates

As a general matter, the Unfunded Mandates Act of 1995 (UMRA), 2 U.S.C. 1531 et seq., requires the preparation of a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. However, the UMRA does not apply to final rules for which a general notice of proposed rulemaking was not published. See 2 U.S.C. 1532(a). Therefore, because the OCC has found good cause to dispense with notice and comment for this interim final rule, the OCC has not prepared an economic analysis of the rule under the UMRA.

List of Subjects

12 CFR Part 3
Administrative practice and procedure, Capital, National banks, Federal savings associations, Risk.

Office of the Comptroller of the Currency

For the reasons set out in the joint preamble, 12 CFR part 3 is amended as follows.

PART 3—CAPITAL ADEQUACY STANDARDS

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, and 5412(b)(2)(B).

2. Section 3.11 is amended by revising paragraph (a)(2)(i) to read as follows:

§3.11 Capital conservation buffer and countercyclical capital buffer amount.

(a) ***

(2) ***

(i) *Eligible retained income.* The eligible retained income of a national bank or federal savings association is the greater of:

(A) The national bank’s or federal savings association’s net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the national bank’s or federal savings association’s net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter.

* * * * *

**PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES,
SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS
(REGULATION Q)**

List of Subjects

12 CFR Part 217

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Risk, Securities.

Authority and Issuance

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

PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS

(REGULATION Q)

3. The authority citation for part 217 continues to read as follows:

Authority: 12 U.S.C. 248(a), 321-338a, 481-486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p-1, 1831w, 1835, 1844(b), 1851, 3904, 3906-3909, 4808, 5365, 5368, 5371.

4. Section 217.11 is amended by revising paragraph (a)(2)(i) to read as follows:

§217.11 Capital conservation buffer, countercyclical capital buffer amount, and GSIB surcharge.

(a) ***

(2) ***

(i) *Eligible retained income.* The eligible retained income of a Board-regulated institution is the greater of:

(A) The Board-regulated institution's net income, calculated in accordance with the instructions to the FR Y-9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the Board-regulated institution’s net income, calculated in accordance with the instructions to the FR Y-9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter.

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Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the Supplementary Information section, chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

5. The authority citation for part 324 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub.L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub.L. 102–242, 105 Stat. 2236, 2355, as amended by Pub.L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub.L. 102–242, 105 Stat. 2236, 2386, as amended by Pub.L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub.L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note).

6. Section 324.11 is amended by revising paragraph (a)(2)(i) to read as follows:

§324.11 Capital conservation buffer, countercyclical capital buffer amount, and GSIB surcharge.

(a) ***

(2) ***

(i) *Eligible retained income.* The eligible retained income of an FDIC-supervised institution is the greater of:

(A) The FDIC-supervised institution's net income, calculated in accordance with the instructions to the Call Report, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the FDIC-supervised institution's net income, calculated in accordance with the instructions to Call Report, for the four calendar quarters preceding the current calendar quarter.

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