Insight

Temporary COVID-19 Rules that Are Candidates for Permanent Relief

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EXECUTIVE SUMMARY

- Congress is floating ideas for a commission-based mechanism to create permanent regulatory relief from rules relaxed during the COVID-19 pandemic.
- This analysis proposes three rules that should be considered if such a mechanism is established; these rules would increase flexibility in the H-2A visa program vital for the food supply chain and provide relief for credit unions and community banks critical to helping economies in smaller communities.
- Congress should consider referring these rules to any commission it establishes, or in absence of a commission, consider direct action to make these reforms permanent.

INTRODUCTION

In response to the COVID-19 national health emergency, many federal agencies provided temporary regulatory relief by relaxing some requirements to help alleviate economic pressures and ensure critical components of the supply chain would remain intact.

Many have called on Congress to make some of these relief measures permanent. Some have advocated for legislation creating regulatory review commissions to identify rules that could be targets for permanent relief. Just recently, a similar bill was introduced in both the House of Representatives and Senate, suggesting that the appetite for reform remains.

This analysis combs through the American Action Forum's COVID-19 Regulation Tracker to identify three key candidates that should be considered by any future relief commission, though the number of regulations ripe for consideration is not limited to these specific examples.

FLEXIBILITY IN THE H-2A VISA PROGRAM

The Department of Homeland Security (DHS) issued a temporary final rule (TFR) in April that provided flexibility for employers in hiring and retaining low-skilled foreign workers in the food and agriculture industry to prevent shortages in the United States' food supply chain because of the COVID-19 pandemic.

The H-2A visa is granted for temporary workers and is designed to last no longer than one year, with the option of renewing the visa for an additional year-long period twice. After spending three years in the United States, a nonimmigrant worker must spend three months outside of the United States and then reapply for the H-2A visa.

DHS's TFR provided two key flexibilities for U.S. employers. First, prior to the pandemic, if an employer wanted to extend a nonimmigrant worker's visa, or if another employer was interested in hiring a nonimmigrant worker whose visa was expiring, the nonimmigrant worker could only begin working for that employer once a petition to renew their visa was approved by DHS. The only exception to the rule was that the nonimmigrant worker could commence work upon receipt of the application for renewal if the employer had previously registered with DHS through an E-Verify program. The TFR suspended this provision, allowing a nonimmigrant worker to start their job as soon as their employer submitted the application to hire or re-hire them without jumping through any additional regulatory hoops. Second, the "three months out for every three years in" provision was temporarily suspended to ensure that employers have all the workers they require.

The relaxed requirements were set to expire on August 18, 2020. But on August 20, 2020, DHS extended part of the relief, citing the ongoing challenges in maintaining "the integrity of our nation's food supply chain." While DHS continued to allow nonimmigrant workers to commence work as soon as their employers petitioned to extend their visas, it opted to reinstate the "three months out for each three years in rule in" provision.

The H-2A visa program is important because over half of all fresh fruit and two-thirds of fresh vegetables are produced domestically and rely heavily on nonimmigrant workers because of an aging rural U.S. workforce.[1] In fiscal year 2019, over 250,000 foreign farm workers were granted the right to work.[2]

The pandemic has highlighted the fragility of the food supply chain, and the need to reform unskilled worker immigration policies. Providing permanent relief would grant employers the flexibility to hire workers in this vital sector without undue limitations. This can be accomplished by allowing nonimmigrant workers to begin working as soon as their employers petition to renew their H-2A visas and allowing nonimmigrant workers to continue to renew their visas without having to leave the United States for three months.

RELIEF FOR CREDIT UNIONS

The National Credit Union Administration (NCUA) issued a TFR in April providing compliance flexibility to credit associations across the country. The rule provides compliance relief to regulated credit unions to prevent a contraction of liquidity in the market. This relief will cease on December 31, 2020, unless permanent changes are made to the regulations.[3]

The rule provides three forms of compliance relief for federally insured credit unions (FICUs). First, it allows FICUs to purchase the greater of $5,000,000 or 200 percent of the FICU's net worth in loan participations, which is more debt than NCUA previously permitted.

Second, the rule suspended limitations placed on Federal Credit Unions (FCUs) relating to the type of obligations that FCUs can purchase. Prior to the rule, FCUs were only permitted to purchase the types of loans that they were able to issue unless they refinance the loan to one which they are permitted to make within 60 days of purchasing the loan. Under the new rule, FCUs are now permitted to purchase loans they were not permitted to issue without having to refinance the loan.

Third, NCUA regulation requires FCUs to only purchase obligations from its members unless they are well capitalized, meaning they meet certain Capital Adequacy, Asset Quality, Management, Earnings, and Liquidity/Asset-Liability Management (CAMEL) standards. Prior to the rule, only FCUs with a composite CAMEL score of "1" or "2" were permitted to purchase obligations from other FICUs or liquidating credit unions. Under the new rule, more credit unions can take on such obligations as it allows FCUs with a composite score of "3" to also purchase loans from FICUs and liquidating credit unions.

While these suspensions and revisions are necessary for credit unions to remain active and competitive during the pandemic, they are changes that can empower credit unions to succeed financially long after the pandemic is over. The pre-pandemic one size fits all, heavy handed regulatory scheme has created a liquidity dilemma—as recognized by the regulator, the solution is to create a status quo where our credit unions are more resilient and financially secure during future national emergencies.

ASSET RELIEF FOR COMMUNITY BANKS

The Office of the Comptroller of the Currency, the Federal Reserve, and the Federal Deposit Insurance Corporation (the agencies) issued a joint interim final rule (IFR) in April regarding leverage requirements for qualified community banks.

Under the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) a qualified community bank—a depository institution or depository institution holding company with total consolidated assets of less than $10 billion—can opt to structure its assets such that between 8 to 10 percent of its assets are held in common stock and disclosed reserves, also known as tier one capital. This percentage is referred to as the Community Bank Leverage Ratio (CBLR) and is used to promote stability in the community banking sector as an alternative to requiring banks to comply with broader regulations that apply to non-community banks.[4]

The relevant agencies are collectively charged with setting the CBLR rate, and in 2019 they set the rate at above 9 percent, meaning any CBLR above 9 percent was in compliance with EGRRCPA and were exempt from broader non-community bank leverage ratios.[5]

The IFR provides relief to community banks by executing section 4012 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which sets the CBLR at 8 percent and requires a grace period (set by the agencies at two quarters) to allow community banks below that CBLR to return to compliance. The CARES Act also set the termination date for this relief to be December 31, 2020.

In the same IFR, the agencies went beyond the relief provided in the CARES Act, setting the community bank leverage ratio at 8 percent in the second quarter through fourth quarter of calendar year 2020, 8.5 percent in calendar year 2021, and returning to 9 percent thereafter.[6]

Congress and the relevant agencies recognized that regulatory relief was necessary to allow community banks to "focus on supporting lending to credit worthy households and businesses given the recent strains on the U.S. economy." And yet, it does not appear that community banks have been receptive to their well-intended relief,[7] with more than 54 percent of community banks having rejected the relief, choosing instead to opt into the General Applicable Capital Rule that larger banks must follow.[8]

This is not to say that community banks do not wish for more flexibility, or that they do not want to invest and lend more. The problem is the regulatory uncertainty left by the CARES Act, which allows the relevant agencies to continue to set and alter the CBLR. Christopher Cole, the senior regulatory counsel at the Independent Community Bankers of America characterizes the dilemma by noting, "[i]f we had a permanent CBLR of 8 percent, I think you wouldn't see these defections back to risk-based[,]"[9] referring to the broader but less fluctuating general applicable capital rules which all banks are subject to and which EGRRCPA provides an alternative to through the CBLR.

Congress took a step in the right direction by providing regulatory flexibility for community banks in the CARES Act, and then a step in the wrong direction by leaving the relevant agencies with authority to alter the CBLR rates. Congress should consider redressing this misstep through legislation that will provide certainty to the regulated community, a permanent 8 percent leverage ratio—as well as other forms of regulatory relief—to grant community banks the flexibility needed to increase flexibility in lending as was originally intended by Congress.

CONCLUSION

Should Congress establish a commission-based mechanism to create permanent regulatory relief from rules relaxed during the COVID-19 pandemic, the three rules discussed above should be among those considered for permanent relief. In the absence of a commission, direct action could be considered in order to make these reforms permanent.

[1] Khimm, Suzy. *U.S. restricts visas for farmworkers, raising concerns about food supply*. NBC News. March 19, 2020. Accessed October 7, 2020. https://www.nbcnews.com/news/us-news/u-s-restricts-visas-farmworkers-raising-concerns-about-food-supply-n1164216

[2] Ibid.

[3] This would return the regulation to its pre-COVID-19 iteration, which limited loan participation the greater of $5,000,000 or one hundred percent of the FICU's net worth.

[4] The broader regulation applicable to larger banks that are not granted the CBLR option are often referred to as the "General Applicable Capital Rule." https://www.govinfo.gov/content/pkg/FR-2013-10-11/pdf/2013-21653.pdf

[5] 85 Fed. Reg. 22930 (2020)

[6] 85 Fed. Reg. 22930, 22932 (2020)

[7] Duren, Carolyn and Clark, Robert. *More than 2,700 community banks say 'no thanks' to reg relief*. S&P Global. September 10, 2020. https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/more-than-2-700-community-banks-say-no-thanks-to-reg-relief-60270427

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[9] Ibid.