Proposed Rules

Federal Register
Vol. 85, No. 195
Wednesday, October 7, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206–AN83

Attorney Fees and Personnel Action Coverage Under the Back Pay Act

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations governing the coverage of, and attorney fee awards under, the Back Pay Act. The proposed regulations would add a definition of ''employee's personal representative'' for purposes of the payment of attorney fees and, clarify the actions qualifying for back pay, add a definition of ''personnel action'' and revise the definition of ''unjustified or unwarranted personnel action''.

DATES: Comments must be received on or before November 6, 2020.

ADDRESSES: You may submit comments, identified by the docket number and/or Regulation Information Number (RIN) and title by the following method:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: John York by telephone at (202) 606–2858 or by email at *Backpay@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is proposing revisions to regulations governing the coverage of the Back Pay Act (5 U.S.C. 5596). The Back Pay Act waives the United States' sovereign immunity and allows employees who are ''found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the[ir] pay, allowances, or differentials'' to obtain redress in the amount of pay, allowances, or differentials they would have received, but for such unjustified or unwarranted personnel actions (5 U.S.C. 5596(b)(l)). The Back Pay Act also permits payment of reasonable attorney fees in some circumstances, generally when in ''the interest of justice'' (5 U.S.C. 5596(b)(l)(A)(ii) and 7701(g)).

OPM has authority under 5 U.S.C. 5596(c) to issue regulations carrying out the Back Pay Act. These regulations are found at 5 CFR part 550, subpart H. In December 1981, OPM finalized regulations implementing the Civil Service Reform Act changes at 5 CFR part 550, subpart H, §§ 550.803 and 550.807 (46 FR 58275). OPM has not substantively revised its attorney fee regulations since.

OPM proposes modifying § 550.803 of these regulations to add a definition of the term ''personnel action'' and revise the definition of ''unjustified or unwarranted personnel action'' to clarify that an unjustified or unwarranted personnel action must involve a personnel action such as a suspension, change in grade, or removal, and that the Back Pay Act does not cover pay actions unrelated to personnel actions. OPM also proposes defining the term ''employee's personal representative'' to clarify who can request payment of attorney fees on behalf of an employee.

5 CFR Part 550, Subpart H—Back Pay

§ 550.803 Definitions

Meaning of Personnel Action

The Back Pay Act of 1966 (Pub. L. 89–390, March 30, 1966) provided for paying back pay to Federal employees who undergo an ''unjustified or unwarranted personnel action.'' The Civil Service Reform Act of 1978 (CSRA) modified the Back Pay Act to allow recovery of attorney fees, to cover personnel actions of omission as well as commission, and to cover unfair labor practices or grievances. The Back Pay Act now applies to an employee who is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or any part of the pay, allowance, or differentials of the employee (5 U.S.C. 5596(b)(1)). CSRA further defined a personnel action to include ''the omission or failure to take an action or confer a benefit'' (5 U.S.C. 5596(b)(5)).

OPM prescribed regulations defining ''unjustified or unwarranted personnel action'' on December 1, 1981 (see 46 FR 58275) and has not revised the definition since. The regulations at 5 CFR 550.803 state define ''unjustified or unwarranted personnel action'' as an act of commission or an act of omission (*i.e.,* failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

OPM is concerned that this current regulatory definition is in tension with the text of the Back Pay Act, which only discusses personnel actions and makes no reference to pay actions unrelated to personnel actions. It is also in tension with legislative history and Supreme Court precedent indicating that Congress intended the term ''personnel action'' in the Back Pay Act to have a substantially narrower scope.

When Congress passed the Back Pay Act in 1966, it understood the term ''personnel action'' to mean a suspension, removal, or demotion. As the Senate Report accompanying the legislation stated:

> The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and other unwarranted or unjustified actions affecting pay or allowances that could occur in the course of reassignments and change from full-time to part-time work. (S. Rep. No. 1062, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2097, 2099)

In 1976, the Supreme Court unanimously interpreted the term ''personnel actions'' to apply only to such actions and rejected the contention

that the Back Pay Act applied to other actions affecting employee pay:

''[T]he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position.'' (*United States* v. *Testan,* 424 U.S. 392, 407 (1976))

During the CSRA debate Congress considered expanding the Back Pay Act's coverage beyond personnel actions to any action affecting employee pay. The Senate passed version of the CSRA would have applied the Back Pay Act to an ''unjustified or unwarranted action taken by the agency'' (Section 702 of S. 2640 as passed the Senate, August 24, 1978). The Senate committee report noted that this change was intended to ''reflect the broader interpretation of the statute that has been given the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulations'' (S. Rep. No. 969, 95th Cong., 2d Sess., p. 114). The House passed version retained the Back Pay Act's original ''unjustified or unwarranted personnel action'' language but expanded the definition of personnel action to include actions of omission as well as commission. (Section 702 of HR. 11208, as passed the House, September 13, 1978). The House Committee report makes no reference to broadening the Back Pay Act's application beyond this (H. Rep. No. 1403, 95th Cong., 2d Sess., pp. 60–61) final version that passed into law retained the House language, not the broader Senate language.

Notably, in the CSRA Congress included two substantially expanded definitions of ''personnel action'', but expressly limited the application of these definitions to determining when a prohibited personnel practice (PPP) has occurred in the FBI or the rest of the Federal government (5 U.S.C. 2302(a)(2)(A) and 2303(a)). Congress did not give either of these definitions general applicability across the rest of title 5, United States Code (Title 5), including the Back Pay Act.

The legislative history indicates Congress understood the Back Pay Act's definition of personnel action was limited in scope and considered broadening it to cover all actions that affect Federal employee pay but, outside the context of defining prohibited personnel practices, decided to retain the original definition with only slight modification. OPM's regulatory definition, which extends the Back Pay Act to cover pay actions unrelated to personnel actions, appears to contravene OPM's statutory authority and Congressional intent.

The structure of the Back Pay Act reinforces this conclusion. The enacted version of the CSRA ties the standards for awarding Back Pay Act attorney fees in grievance cases to the ''interest of justice'' standards in Merit Systems Protection Board (MSPB) cases (5 U.S.C. 5596(b)(l)(A)(ii)). OPM believes this makes sense if the Back Pay Act covers personnel actions similar to those appealable to the MSPB (*i.e.,* adverse actions). Congress required employees to choose either a grievance procedure or MSPB appeal but prohibited pursuing redress in both forums. Connecting Back Pay Act attorney fee awards in grievance cases to MSPB standards for attorney fees ensures the same standards apply no matter which forum the employee choses. This structure makes much less sense if the Back Pay Act also covers pay actions that are not appealable to the MSPB. It is dubious that Congress meant to grant the MSPB a role in setting attorney fee standards in cases that would never appear before the MSPB.

Other authorities reviewing Back Pay Act liability have concluded its coverage is more limited than OPM's regulations currently provide. While these agencies aren't provided the same deference as OPM on interpretation of the Back Pay Act, their decisions are notable and worthy of consideration. In 1984 the Comptroller General considered whether the Back Pay Act authorized attorney fees when an employee successfully challenged an agency's garnishing his retirement payments. The Comptroller General examined the legislative history showing that ''personnel actions'' meant ''reductions in grade, removals, suspension, and other unwarranted or unjustified actions affecting pay or allowances that could occur in the course of reassignments and change from full-time to part-time work.'' The Comptroller General concluded that the action was ''a money claim for which relief under the Back Pay Act is not available'' (Leland M. Wilson: Claim for Attorney Fees and Interest, CG B–205373 (April 24, 1984)).

The Civilian Board of Contract Appeals (CBCA) came to a similar conclusion more recently. In 2013 the CBCA heard a case from a claimant applying for interest on funds improperly collected from him, in addition to the funds themselves (see *In the Matter of JEFFREY E. KOONTZ,* Civilian Board of Contract Appeals, No. 3436–TRAV (July 23, 2013)). The claimant argued that while the Debt Collection Act did not waive sovereign immunity and allow such interest to be paid, the Back Pay Act did. The Board analyzed the Back Pay Act's text and legislative history and concluded that the Back Pay Act did not apply to pay actions unrelated to personnel actions:

[O]ne of this Board's predecessor boards analyzed the origin and purpose of the Back Pay Act with regard to the issue of whether interest could be paid when relocation expenses were not timely paid by the employee's agency. In that decision, the Board stated:

The Senate Report accompanying the Back Pay Act says that the bill ''would consolidate and liberalize existing law'' S. Rep. No. 1062, 89th Cong., 2d Sess., *reprinted* in 1966 U.S.C.C.A.N. 2097. The consolidation applied to laws dealing with separation, suspension, and demotion. 1966 U.S.C.C.A.N. at 2098. The liberalization was to ''allow credit for pay increases and accumulation of annual leave.'' *Id* at 2097. In either event, the law was supposed to pertain only to ''the restoration of an employee to his position after an adverse action against him has been found.'' *Id*

It is clear that the collection of the debt from claimant pursuant to the Debt Collection Act of 1982 was not an action contemplated within the scope of the Back Pay Act. Claimant's position was not affected by the collection of the debt, as he was neither separated, suspended, nor demoted, and the payment of the refund was therefore not the result of restoring the claimant to his position. We find no authority in law or contract that would permit payment of interest on the refund received by claimant.

The Federal Labor Relations Authority (FLRA) recently reached a similar conclusion, holding that ''Agency attempts to recoup monies that it actually overpaid grievants, however, do not constitute unwarranted and unjustified personnel actions that resulted in the withdrawal or withholding of pay under [Back Pay Act]'' (See *DoDEA and FEA,* 70 FLRA 718 (2018)).

Furthermore, the Back Pay Act waives the United States' sovereign immunity. The Supreme Court has made it clear that, ''a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign . . . when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will 'constru[e] ambiguities in favor of immunity' '' (see *Lane* v. *Pena,* 518 U.S. 187, 192 (1996)). To the extent the meaning of ''personnel action'' is open to multiple interpretations, the Supreme Court has directed that it be construed to narrow the United States' waiver of sovereign immunity.

Based upon a review of these decisions, the text and legislative history of the Back Pay Act, and Supreme Court precedent, the

regulatory definition of ''unjustified or unwarranted personnel action'' now appears to have exceeded OPM's statutory authority. The text of the Back Pay Act only mentions personnel actions, which Congress expressly understood to mean changes in grade, suspensions, removals or separations, reassignments, or changes to full- or part-time work. In the CSRA Congress expanded the definition of ''personnel action'' but only with regard to defining prohibited personnel practices, such as coercing political activities or retaliation against a whistleblower. The term ''personnel action'' does not refer to other actions that could, outside the context of a PPP, affect employee pay, such as debt collections, improper overtime payments, rejections for cash awards, leave denials, or denials of taxpayer-funded union time. In addition, Congress has expressly provided alternative means of redress for employees affected by many of these actions. For example, the Fair Labor Standards Act requires agencies to make employees denied overtime payments whole. The Debt Collection Act similarly prescribes procedures for employees to appeal potentially improper debt collections.

OPM does not have regulatory authority to extend the definition of ''personnel actions'' to include pay actions that Congress expressly declined to cover under the Back Pay Act's waiver of sovereign immunity.

OPM also has policy concerns with the existing regulations. By extending the Back Pay Act's coverage beyond personnel actions they encourage and subsidize expensive litigation over any matter that affects employee pay, such as non-selection for a performance award. For example, on January 12, 2020, an arbitrator held that the Jesse Brown VA hospital should have given an employee a $1,000 performance award. In addition to ordering the Department of Veterans Affairs to pay the performance award, the arbitrator also ordered $30,387.50 in attorney fees under the Back Pay Act. Requiring agencies to pay tens of thousands of dollars in attorney fees in litigation over much smaller performance awards wastes agency resources. It also encourages agencies to broadly distribute performance awards, to avoid litigation. This undermines the purpose of performance awards, which is to recognize, reward, and incentivize high performance.

OPM accordingly proposes changing its regulations at § 550.803 to clarify that pay actions that do not involve personnel actions do not constitute unjustified or unwarranted personnel actions under the Back Pay Act. For the same reason OPM proposes defining a personnel action as an appointment, a prohibited personnel practice under chapter 23 of title 5, United States Code, an action based on unacceptable performance under chapter 43 of title 5, United States Code, an adverse action taken under chapter 75 of title 5, United States Code, any other removal or suspension, a promotion or demotion, a change in step or grade, a transfer or reassignment, or a change from full-time to part-time work.

This definition encompasses the actions that the legislative history of the Back Pay Act indicates Congress understood ''personnel action'' meant. It includes the related acts of omission that the CSRA extended the Back Pay Act to cover, such as non-selection for a promotion or failure to increase an employee's step or grade. It also reflects the CSRA's expanding the definition of personnel action for the purpose of defining prohibited personnel practices.

Personal Representative

OPM also proposes adding a definition of the term ''employee's personal representative'' to § 550.803. This term does not appear in the Back Pay Act itself but appears in OPM's regulations at § 550.807 in the context of individuals who may request attorney fee payments. OPM proposes clarifying that an employee's personal representative is defined as the executor or administrator of a deceased employee. It should not refer to other potential representatives in administrative or legal proceedings. This definition tracks the commonly used meaning of ''personal representative'' among the Code of Federal Regulations, *e.g.,* 28 CFR 104.4, 38 CFR 38.600, 42 CFR 2.15.

OPM believes this clarification is necessary because the courts have interpreted OPM's use of this term to include labor organizations. Courts have then granted *Chevron* deference to this construction of OPM's regulations and interpreted the Back Pay Act to authorize attorney fees to labor organizations. See *American Federation of Government Employees* v. *Federal Labor Relations Authority,* 944 F.2d 922 (D.C. Circuit 1991) and *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984) (Chevron)).

This is not what OPM meant by ''personal representative'' in its regulations. The term ''personal representative'' is a term of art the meaning of which follows OPM's proposed definition (see Black's Law Dictionary, 5th Edition, 1170 (1979)). It does not encompass other potential representatives, to include a collective bargaining representative.

The text of the Back Pay Act clearly prohibits paying attorney fees to any entity other than an individual employee. 5 U.S.C. 5596(b)(l) only authorizes back pay and attorney fee payments to ''an employee of an agency.'' 5 U.S.C. 2105(a) defines the term ''employee'' as an officer or individual who has ia—

1. Appointed in the civil service by one of the following acting in an official capacity:
   - The President;
   - a member or members of Congress, or the Congress;
   - a member of the uniformed service;
   - an individual who is an ''employee'' under 5 U.S.C. 2105
   - the head of a Government controlled corporation; or
   - the adjutant general designated by the Secretary concerned under 32 U.S.C. 709(c);
2. Engaged in the performance of a Federal function under authority of law or an Executive act; and
3. Subject to the supervision of an individual named in 5 U.S.C. 2105(a)(1) while engaged in the performance of the duties of his position.

Title 5's definition of ''employee'' refers only to employees as individuals and says nothing about groups or organizations. In addition to this plain text, the Federal Service Labor-Management Relations Statute (FSLMRS) expressly differentiates between ''persons''—which may include agencies and labor organizations as well as individuals—and ''employees'' which are only individuals (5 U.S.C.: 7103(a)(l) and (a)(2)). OPM believes that, if Congress wanted the Back Pay Act to permit attorney fee awards to unions or other organizations, Congress would have used the term ''person'' in section 5596(b)(l) instead of ''employee'', which in the context of title 5 only refers to individuals. OPM included the term ''personal representative'' as a term of art in its regulations to provide for rare circumstances in which an agency owes funds under the Back Pay Act to a deceased employee. OPM expressly noted in its 1981 rulemaking that the regulatory reference to ''personal representative'' does not address the question of who may *receive payment* for reasonable attorney fees. Rather, it provides that an employee's personal representative may *request payment* of reasonable attorney fees on the employee's behalf (46 FR 58274, December 1, 1981). OPM did not intend this term to extend entitlement to

attorney fees to organizations and believes this construction is contrary to the statutory framework Congress established. Since courts have interpreted this term beyond its intended meaning, OPM proposes revising § 550.803 to make the definition of ''personal representative'' clear and thereby clarify that other potential representatives are not entitled to attorney fees under the Back Pay Act.

OPM recognizes that the courts have construed the Back Pay Act to authorize attorney fee awards to labor organizations, and not just the employee or employees they represent. As discussed, this judicial holding rests on a misinterpretation of OPM regulations. The D.C. Circuit held in its' interpretation that OPM's definition of personal representative encompassed labor organizations and that Supreme Court precedent required deferring to this construction: ''OPM's regulation is significant as an authoritative interpretation of the Back Pay Act . . . when, as here, 'the legislative delegation to an agency on a particular question is implicit rather than explicit[,] . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.' '' See *AFGE* at 930, quoting *Chevron.*

The Supreme Court has held that ''a court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'' See *National Cable & Telecommunications Assn.* v. *BrandX internet Services,* 545 U.S. 967, 982 (2005). Where the Court's prior construction rested on a misreading of agency regulations there is no legal impediment to the agency modifying its regulations to comport with its understanding of the statute.

Severability

OPM also proposes adding a severability clause to § 550.803. This would clarify that the provisions of the section are severable and that if any portion of this proposed regulation is held to be invalid that shall not affect the operability of the remaining portions.

Regulatory Impact Analysis

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While this rule has been designated a ''significant regulatory action,'' under Executive Order 12866, it is not economically significant.

Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be no more than de minimis costs.

Regulatory Flexibility Act

I certify that this proposed regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and Federal employees.

Federalism

This rulemaking regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This proposed regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

Paperwork Reduction Act of 1995

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR part 550, subpart H as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart H—Back Pay

■ 1. The authority citation for 5 CFR part 550, subpart H, continues to read as follows:

Authority: 5 U.S.C. 5596(c); Pub. L. 100–202, 101 Stat. 1329.

■ 2. Amend § 550.803 as follows:
■ a. Designate the introductory text as paragraph (a);
■ b. Add a definitions in alphabetical order for ''employee's personal representative'' and personnel action in newly designated paragraph (a).
■ c. Amend the definition for *unjustified or unwarranted personnel action;* and
■ d. Add paragraph (b).

The revisions and additions read as follows:

§ 550.803 Definitions.

* * * * *

Employee's personal representative means only the executor or administrator of a deceased employee. It does not encompass other potential employee representatives.

* * * * *

Personnel action means an appointment, an action based on a PPP under chapter 23 of title 5, United States Code, an action based on unacceptable performance under chapter 43 of title 5, United States Code, an adverse action taken under chapter 75 of title 5, United States Code, any other removal or suspension, a promotion or demotion, a change in step or grade, a transfer or reassignment, or a change from full-time to part-time work.

* * * * *

Unjustified or unwarranted personnel action means a personnel action of commission or of omission (*i.e.,* failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, or mandatory personnel policy established by an agency or through a collective bargaining agreement. It does not include pay actions that do not involve personnel actions.

* * * * *

(b) The definitions in this section are severable. If any definition in this section is held to be invalid that shall not affect the operability of the remaining definitions.

[FR Doc. 2020–20428 Filed 10–6–20; 8:45 am]

BILLING CODE 6325–39–P

FEDERAL RESERVE SYSTEM

12 CFR Parts 225, 238, and 252

[Regulations Y, LL, and YY; Docket No. R–1724]

RIN 7100–AF95

Amendments to Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies

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

ACTION: Notice of proposed rulemaking with request for comment.

SUMMARY: The Board is inviting comment on a notice of proposed rulemaking (proposal) to tailor the requirements in the Board's capital plan rule (capital plan rule), which applies to large bank holding companies and U.S. intermediate holding companies of foreign banking organizations. Specifically, as foreshadowed in the Board's October 2019 rulemaking that updated the prudential framework for these companies (tailoring framework), the proposal would make conforming changes to the capital planning, regulatory reporting, and stress capital buffer requirements for firms subject to Category IV standards to be consistent with the tailoring framework. To be consistent with recent changes to the Board's stress testing rules, the proposal would make other changes to the Board's stress testing rules, Stress Testing Policy Statement and regulatory reporting requirements relating to business plan change assumptions, capital action assumptions, and the publication of company-run stress test results for savings and loan holding companies. This proposal also solicits comment on the Board's guidance on capital planning for all firms supervised by the Board, in light of recent changes to relevant regulations and as part of the Board's ongoing practice of reviewing its policies to ensure that they are having their intended effect.

DATES: Comments must be received by November 20, 2020.

ADDRESSES: You may submit comments, identified by Docket No.R–1724 and RIN 7100–AF95 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.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the docket number and RIN number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website 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 FURTHER INFORMATION CONTACT: Constance Horsley, Deputy Associate Director, (202) 452–5239, Elizabeth MacDonald, Manager (202) 475–6316, Hillel Kipnis, Senior Financial Institution Policy Analyst II, (202) 452–2924, Christopher Appel, Senior Financial Institution Policy Analyst II, (202) 973–6862, and Palmer Osteen, Financial Institution Policy Analyst, (202) 785–6025, Division of Supervision and Regulation; Benjamin McDonough, Assistant General Counsel, (202) 452–2036, Julie Anthony, Senior Counsel, (202) 475–6682, Asad Kudiya, Senior Counsel, (202) 475–6358, Jonah Kind, Senior Attorney, (202) 452–2045, or Jasmin Keskinen, Legal Assistant/Attorney, (202) 475–6650, 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.

SUPPLEMENTARY INFORMATION:

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I. Changes to the Capital Plan Rule

A. Introduction

i. Background on Capital Planning, Stress Testing and Stress Capital Buffer Requirements

Stress testing is a core element of the Board's regulatory framework and supervisory program for large firms. Stress testing enables the Board to assess whether large firms have sufficient capital to absorb potential losses and continue lending under severely adverse conditions. The Board implemented its capital plan rule, which requires large firms to develop and maintain capital plans supported by robust processes for assessing their capital adequacy, in 2011.[1] The Board made changes to its capital rule—which establishes minimum regulatory capital requirements—in 2013. These changes address weaknesses observed during the 2008—2009 financial crisis, including the establishment of a minimum common equity tier 1 (CET1) capital requirement and a fixed capital conservation buffer equal to 2.5 percent

[1] Capital Plans, 76 FR 74631 (Dec. 1, 2011). Originally, as a part of the capital plan rule, the Federal Reserve could object to a firm's capital plan based on a qualitative assessment. A subsequent rulemaking changed this requirement such that after CCAR 2020 no firm will be subject to a potential qualitative objection if the firm successfully passed several qualitative evaluations. Amendments to the Capital Plan Rule, 84 FR 8953 (March 13, 2019). All firms subject to the capital plan rule have successfully passed the required number of qualitative evaluations such that no firms are subject to the qualitative objection going forward. As a result, the proposal would revise the capital plan rule to remove references to the qualitative objection.