

# Proposed Rules

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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.

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 36

RIN 2900-AR05

#### Loan Guaranty: COVID-19 Veterans Assistance Partial Claim Payment Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to establish the COVID-19 Veterans Assistance Partial Claim Payment program (COVID-VAPCP), a temporary program to help veterans return to making normal loan payments on a VA-guaranteed loan (guaranteed loan) after exiting a Coronavirus Aid, Relief, and Economic Security Act (CARES Act) forbearance period. Under this proposed program, a servicer could consider a partial claim option after the servicer has evaluated all loss-mitigation options for feasibility. If the veteran qualifies and opts to move forward, VA would act as a mortgage investor of last resort by purchasing the amount of indebtedness necessary to bring the veteran's guaranteed loan current. The veteran would have up to 60 months to defer repayment to VA and up to 120 months to repay the loan in full, with the interest rate fixed at 1 percent per annum.

**DATES:** Comments must be received on or before January 8, 2021.

**ADDRESSES:** Comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov) or mailed to Stephanie Li, Chief of Regulations, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Please note that due to circumstances associated with the COVID-19 pandemic, VA discourages the submission of comments by mail. Comments should indicate that they are submitted in response to "RIN 2900-AR05—Loan Guaranty: COVID-19 Veterans Assistance Partial Claim

Payment Program." Comments received will be available at [regulations.gov](http://regulations.gov) for public viewing, inspection or copies.

**FOR FURTHER INFORMATION CONTACT:** Andrew Trewayne, Assistant Director, Loan Property and Management, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632-8862. (This is not a toll-free telephone number.)

#### SUPPLEMENTARY INFORMATION:

##### I. Summary of the Proposed Rule

One of the primary goals of VA's Home Loan Guaranty Service is to help veterans who use their guaranteed loan benefit retain their homes and avoid foreclosure. To that end, VA and loan servicers intervene dynamically when guaranteed loans are more than 60 days in default. Such actions to assist veterans in default not only help veterans retain their homes and minimize damage to their credit ratings, but also help produce cost savings to the Government.

Given the unique needs of veterans and loan servicers during the novel coronavirus disease (COVID-19) national emergency, VA proposes to initiate a temporary program that would establish a partial claim option to aid veterans who suffer financial hardship due to COVID-19. VA's program would be modeled after existing partial claim programs already available to borrowers with other federally backed loans; that is, those guaranteed or insured by the U.S. Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA) and the U.S. Department of Agriculture's (USDA) Rural Housing Service.

Under VA's proposed COVID-VAPCP, servicers would consider a veteran for the program only after evaluating the feasibility of loss-mitigation options that are already available in VA's program. If a servicer determines that the veteran satisfies the COVID-VAPCP requirements and the veteran elects to participate, VA would purchase the veteran's forbore indebtedness, which is similar to VA's existing loan refund process. As a mortgage investor of last resort, VA would purchase the amount of indebtedness that is necessary to bring the veteran's guaranteed loan current. The veteran would repay VA for this amount, and the indebtedness

would be secured as a lien against the veteran's home upon execution and recordation of the security instrument. The servicer would handle all aspects of the origination. With the veteran's guaranteed loan brought current, the veteran would resume making regularly scheduled monthly loan payments to the servicer. The veteran would also repay VA for the new loan, under the terms proposed below. The new loan would be serviced under VA's existing loan portfolio.

While VA's proposed COVID-VAPCP would bear many similarities to the COVID-related partial claim programs offered by FHA and USDA,<sup>1</sup> VA's program would not be identical to either. Similarities to such agencies' programs would include the following: (1) The guaranteed loan for which a partial claim payment is requested must have been, on March 1, 2020, either current or less than 30 days past due; (2) a partial claim payment would only be payable to the servicer if the veteran missed at least one scheduled monthly payment under a CARES Act forbearance and at least one such payment remains unpaid; (3) VA would only pay one partial claim payment per veteran; (4) the veteran would need to occupy, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is associated; and (5) the servicer would be required to determine whether the veteran satisfies the program requirements, to prepare the appropriate loan documents on VA's behalf, and to bring the veteran's guaranteed loan current, before submitting to VA a request for partial claim payment.

Distinguishing aspects of VA's program would include the following: (1) The partial claim payment could not exceed 15 percent of the unpaid principal balance of the guaranteed loan as of the date the veteran entered into a CARES Act forbearance; (2) the veteran would have up to 120 months to repay the partial claim VA paid to the servicer on the veteran's behalf; (3)

<sup>1</sup> See 12 U.S.C. 1715u(b); 24 CFR 203.371; Mortgagee Letter 2020-06, *FHA's Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act* (Apr. 1, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsgml.pdf>; Mortgagee Letter 2020-22, *FHA's COVID-19 Loss Mitigation Options* (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsgml.pdf>. See also 42 U.S.C. 1472(h)(14); 7 CFR 3555.304(d).

repayment in full would be required immediately upon the veteran's transfer of title to the property, the refinancing of the guaranteed loan for which the partial claim payment is associated, or payment in full of such guaranteed loan; (4) VA would automatically defer a veteran's monthly payments for the first 60 months of the loan, meaning that a veteran would not have to make any payment to VA during the period of deferment; (5) a veteran would be allowed to pay during such deferment, without premium or fee, the entire indebtedness or any portion thereof, provided that such portion is not less than what would be due for one full monthly payment as specified in the loan documents; (6) VA would charge a fixed interest rate of 1.00 percent per annum on the loan; and (7) VA would require servicers to certify that the veteran's monthly residual income, as described in 38 CFR 36.4340(e), would be adequate to meet living expenses after estimated monthly shelter expenses (e.g., payments on the guaranteed loan) have been paid and other monthly obligations have been met.

Another distinguishing aspect of VA's program is that VA would expect that servicers consider the partial claim payment option only as a last resort, after a servicer has evaluated the feasibility of providing loss-mitigation options that are already available in VA's program. Consistent with VA's existing regulations and policies, servicers would evaluate a veteran's financial situation and, if appropriate, offer the veteran options that are within the servicer's financial capabilities and business model.

As initial CARES Act forbearance periods near their end, VA stakeholders confront numerous decisions that have far-reaching consequences. Many veterans, for example, must decide whether to request additional forbearance and watch their forborene indebtedness grow, or attempt to resume their regularly scheduled monthly payments, despite potential hardships and uncertainties caused by the national emergency. VA's partial claim assistance may well be the determining factor for certain veterans, affecting the extent to which they can recover financially from the crisis. Similarly, servicers must evaluate their liquidity positions and other factors to determine how to make the advances necessary for investor requirements. Some servicers may even be questioning whether they can stay afloat, which ultimately harms not just the servicer, but also the veterans whose guaranteed loans are being serviced.

VA's proposed COVID-VAPCP would create a "soft landing" for certain veterans, enabling them to return to their regularly scheduled monthly payments without suffering another financial shock. The program would also provide a lifeline for certain servicers, thereby mitigating the risk that veterans would be left without the benefit of prudent loan servicing.

## II. Background

### A. VA's Existing Policies for Delinquent Loans

VA's loan administration policies and oversight have resulted in one of the lowest foreclosure inventory rates in the industry over the past decade.<sup>2</sup> Data reported in the most recent Veterans Benefits Administration Annual Benefits Report reflects that such policies and oversight saved approximately 100,000 veterans from foreclosure annually over the past four fiscal years.<sup>3</sup>

VA requires holders of guaranteed loans to establish and maintain a loan servicing program consistent with industry standards.<sup>4</sup> If a veteran misses one loan payment, the guaranteed loan becomes delinquent.<sup>5</sup> Once a guaranteed loan reaches 61 days delinquent, servicers are required to report the delinquency to VA, to work with the veteran to consider loss-mitigation options or alternatives to foreclosure, and to report updates on the status of the guaranteed loan to VA.<sup>6</sup> Upon notification to VA, a VA loan technician will review the case, monitor servicer activities, and intervene as needed during the delinquency to ensure that the servicer has provided adequate servicing and has presented all appropriate options to attempt to reinstate the guaranteed loan or avoid foreclosure.

Servicers are ultimately responsible for utilizing loss-mitigation options and alternatives to foreclosure to help veterans avoid foreclosure. VA regulations allow VA to pay an incentive to a servicer whenever the

servicer completes one of five borrower-assistance actions (i.e., loss-mitigation options and alternatives to foreclosure).<sup>7</sup> Additionally, while VA generally does not require servicers to pursue loss-mitigation options and alternatives to foreclosure in a particular order, VA has informed servicers of VA's preferred order of alternatives (i.e., a hierarchy for review), as follows: Repayment plan, special forbearance, loan modification, compromise sale, and deed-in-lieu of foreclosure.<sup>8</sup>

Loss-mitigation options are pursued with the intent of bringing the delinquent guaranteed loan current and keeping the veteran in his or her home. As mentioned, these options include repayment plans, special forbearances, and loan modifications. Under a repayment plan, the borrower agrees to pay the normal monthly payment plus an agreed upon portion of the delinquency each month to the servicer.<sup>9</sup> A special forbearance suspends or reduces a borrower's normal monthly payments for an agreed upon period of time.<sup>10</sup> A loan modification permanently changes one or more terms of the guaranteed loan and may include re-amortization of the balance due. While all loan modifications must meet the requirements set forth by 38 CFR 36.4315, VA generally classifies a loan modification as one of four types—traditional loan modification, streamline modification, VA affordable modification, and VA disaster modification—depending on a borrower's circumstances.<sup>11</sup>

Servicers generally pursue compromise sales and deeds-in-lieu of foreclosure when a traditional, private sale is not feasible and the borrower either has no desire to retain the property or when a loss-mitigation option is not feasible given the borrower's current financial circumstances. Under a compromise

<sup>7</sup> 38 CFR 36.4319.

<sup>8</sup> 38 CFR 36.4319(a).

<sup>9</sup> A repayment plan is a "written executed agreement by and between the borrower and the holder to reinstate a loan that is 61 or more calendar days delinquent, by requiring the borrower to pay each month over a fixed period (minimum of three months duration) the normal monthly payments plus an agreed upon portion of the delinquency each month." 38 CFR 36.4301.

<sup>10</sup> A special forbearance is "a written agreement executed by and between the holder and the borrower where the holder agrees to suspend all payments or accept reduced payments for one or more months, on a loan 61 or more calendar days delinquent, and the borrower agrees to pay the total delinquency at the end of the specified period or enter into a repayment plan." 38 CFR 36.4301.

<sup>11</sup> VA Servicer Handbook, VA Manual 26-4, Chap. 5: Loss Mitigation, 5.06 (Feb. 26, 2019), [https://www.benefits.va.gov/WARMS/docs/admin26/m26\\_04/Ch5\\_Loss\\_Mitigation.docx](https://www.benefits.va.gov/WARMS/docs/admin26/m26_04/Ch5_Loss_Mitigation.docx).

<sup>2</sup> Mortgage Bankers Association, *National Delinquency Survey Data*, 2010 through 2020, <https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/national-delinquency-survey>.

<sup>3</sup> See VBA Annual Benefits Report: Home Loan Guaranty, Fiscal Year 2019, page 19, <https://www.benefits.va.gov/REPORTS/abr/docs/2019-loan-guaranty.pdf>.

<sup>4</sup> 38 CFR 36.4350(a).

<sup>5</sup> VA Servicer Handbook, VA Manual 26-4, Chap. 4: Delinquent Loan Servicing, 4.01a. (Feb. 26, 2019), [https://www.benefits.va.gov/WARMS/docs/admin26/m26\\_04/Ch4.docx](https://www.benefits.va.gov/WARMS/docs/admin26/m26_04/Ch4.docx).

<sup>6</sup> 38 CFR 36.4317(c)(7) (requiring an electronic default notification (EDN) when the guaranteed loan becomes at least 61 days delinquent).

sale (sometimes called a short sale), the servicer agrees to release the guaranteed loan obligation in exchange for the proceeds of a sale to a third party for an amount that is less than the borrower's total indebtedness on the guaranteed loan.<sup>12</sup> Under this alternative, the servicer recovers some portion of the unpaid balance of the guaranteed loan through the sale. In cases where there is little or no likelihood of a private sale or compromise sale, servicers should consider a deed-in-lieu of foreclosure. Under this alternative to foreclosure, the borrower voluntarily transfers title to the property to the servicer in exchange for a release of all obligations under the guaranteed loan.<sup>13</sup> VA considers compromise sales and deeds-in-lieu of foreclosure to be successfully completed when the servicer files a claim under VA's guaranty.<sup>14</sup>

In cases where servicers are unable to complete a loss-mitigation option or an alternative to foreclosure, servicers must, before initiating a foreclosure, provide VA with the option of what is commonly called a "loan refund." This process, authorized under 38 U.S.C. 3732, is where VA takes assignment of the existing guaranteed loan indebtedness in exchange for VA's payment to the servicer of the unpaid principal balance, plus accrued interest.<sup>15</sup> The loan is then placed into VA's portfolio, and the veteran makes loan payments to VA. VA's internal data from fiscal year 2015 to date indicates that VA has completed an average of 20 loan refunds per fiscal year.

VA has employed contractors since the late 1990s to perform loan boarding and servicing functions for VA's portfolio. VA's portfolio currently comprises approximately 4,500 loans totaling approximately \$420 million. Notably, this amounts to about half the number of loans that VA has held in previous years. The portfolio includes refunded loans, as well as the loans where VA was, in contrast to its role in the refunding program, the direct lender (as in the Native American Direct Loan and vendee loan programs; neither of which would be affected under this rulemaking).

<sup>12</sup> A compromise sale is a sale to a third party for an amount less than is sufficient to repay the unpaid balance on the guaranteed loan where the holder has agreed in advance to release the lien in exchange for the proceeds of such sale. 38 CFR 36.4301. VA requirements for a compromise sale are set forth by 38 CFR 36.4322(e).

<sup>13</sup> VA requirements for a DIL of foreclosure are set forth by 38 CFR 36.4322(f).

<sup>14</sup> 38 CFR 36.4319(c).

<sup>15</sup> See 38 U.S.C. 3732(a)(2); 38 CFR 36.4320.

### B. COVID-19 Emergency and CARES Act Forbearances

By late March 2020, the COVID-19 national emergency was significantly affecting the economy. Between March 15 and May 15, 2020, over 35 million Americans filed initial jobless claims, and the unemployment rate climbed to over 14 percent in April—the highest monthly level since 1948, which is when the U.S. Bureau of Labor Statistics started tracking this data.<sup>16</sup>

On March 27, 2020, the President signed the CARES Act into law. Section 4022(b) of the Act, in relevant part, states that borrowers with a "Federally backed mortgage loan" (e.g., a VA-guaranteed loan) experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request forbearance on such loan, regardless of delinquency status, by submitting a request to the borrower's servicer and affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency. Upon such a request, servicers must, with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency, and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the housing loan contract) provide the forbearance for up to 180 days.<sup>17</sup> The forbearance period can be extended for an additional period of up to 180 days at the request of the borrower, provided that the borrower's request for an extension is made during the covered period. Either the initial or extended period of forbearance may be shortened at the borrower's request.<sup>18</sup> While borrowers can postpone loan payments under a CARES Act forbearance, borrowers are still obliged to repay the forborne indebtedness. In other words, forbearance is not forgiveness. However, many borrowers simply have no choice but to postpone payments to weather the economic storm. Given the broad protections afforded by CARES Act forbearances, servicers have utilized such forbearances as a primary tool in helping borrowers who are struggling to afford housing loan payments due to the COVID-19 emergency.

The CARES Act does not specify how borrowers receiving CARES Act

<sup>16</sup> U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/ces>.

<sup>17</sup> Public Law 116-136, section 4022(c)(1) (Mar. 27, 2020).

<sup>18</sup> Id.

forbearances must repay the forborne payments. To ensure that servicers do not attempt to require immediate payment of forborne amounts upon the borrower's exit from a CARES Act forbearance (as can be required under a special forbearance), VA issued guidance notifying servicers that they should not require a veteran to make a lump sum payment equal to what would have been due if a forbearance was not in effect, after the forbearance period ends. VA is instead encouraging servicers to consider other loss-mitigation options, such as those described above.

As of August 1, 2020, VA's internal data showed that approximately 149,645 active guaranteed loans are in a CARES Act forbearance (approximately 4.3 percent of all active guaranteed loans). Of those loans, 61,795 were current as of March 1, 2020, and were also paid current through July 31, 2020. An additional 51,043 loans were current as of March 1, 2020, but were no longer current through July 31, 2020, meaning the veteran missed at least one loan payment between such dates.

### C. COVID-19 Emergency: Post-Forbearance Options and Post-Delinquency Options

VA and the servicing industry have significant experience applying VA's current loss-mitigation policies to assist veterans struggling financially due to major disasters, such as natural disasters like hurricanes and floods. Nevertheless, there are many key differences between discrete natural disasters and the widespread and long-lasting crisis caused by the COVID-19 pandemic.

The current national emergency will likely have more far-reaching consequences of greater magnitudes for veterans than the consequences posed by a natural disaster, for example. Unlike a natural disaster, it is impossible to approximate when the imminent danger caused by a global pandemic will recede. Generally, at the outset of natural disasters like hurricanes and floods, public policy experts can reasonably predict the endpoint of imminent danger, after which an assessment of the damage and impact to the borrower may be completed. A comparable endpoint to the COVID-19 pandemic is much more difficult to predict because multiple factors change daily, including rates of infection and death. Rising and falling infection rates directly influence economic factors such as employment levels and expected borrower income. These factors are also affected by policy

approaches that may vary at federal, state, and local levels.

Further, unlike geographically and temporally bounded disasters, COVID-19 has spread across the globe over the course of months, affecting communities of all sizes and compositions. Borrowers will likely not have safety nets in place to mitigate the harrowing outcomes. Conversely, borrowers affected by major natural disasters like hurricanes and floods often are covered by hazard and other insurance policies, which can help to offset financial losses.

The duration, scope, and impact of the COVID-19 pandemic, along with the lack of safety nets to help absorb the financial upheaval, has created enormous challenges for the housing finance market. When borrowers do not make their regularly scheduled monthly loan payments, loan servicers are often contractually obligated to step in and advance such missed amounts to the loan holder.<sup>19</sup> The volume of CARES Act forbearances in a servicer's portfolio, coupled with the protracted length of such a forbearance (*i.e.*, up to 360 days), has placed many servicers in a position where they may be required to cover up to 12 months of loan payments for a significant segment of the loans they service. Federally backed mortgages, that is, those for which servicers must generally grant CARES Act forbearances upon a borrower's request, account for approximately 70 percent of all housing loans in the United States.<sup>20</sup> Recent data reveals that approximately 7 percent of all housing loans in the United States, corresponding to 3.6 million homeowners, are currently in forbearance.<sup>21</sup> This increased number of borrowers in forbearance means that servicers can be left without budgetary resources to offer certain loss-mitigation options to borrowers, including veterans with VA-guaranteed loans.

VA notes that most VA-guaranteed loans are not held by the lenders that originate the loans. Rather, lenders that are issuers approved by the Government National Mortgage Association (Ginnie Mae) often originate VA-guaranteed

loans, package them into loan pools, and issue mortgage-backed securities (MBS) backed by such pools. Ginnie Mae can then guarantee, to MBS investors, the timely payment of principal and interest on such securities. Because Ginnie Mae requires servicers to purchase such securitized loans out of the Ginnie Mae pools before completing a loan modification, servicers facing liquidity shortages due to, for example, covering an unprecedented amount of forborne loan payments, may not be financially able to purchase such loans out of the pools. This means that such servicers would not be able to offer crucial loan modifications to veterans.

Servicers' decreased ability to offer loan modifications due to the repurchase requirement discussed above is especially significant given that veterans with large amounts of forborne indebtedness may not be able to return to normal loan repayment under other available loss-mitigation options. For example, while a veteran who ceased making payments under a CARES Act forbearance for 360 days may be able to resume making regularly scheduled monthly loan payments, post-forbearance, the veteran may be unable to repay a whole year's worth of missed payments under a repayment plan, in a relatively short timeframe established by a servicer that may be facing liquidity strains.

Similarly, a special forbearance may also not be financially feasible from the perspective of both the veteran and the servicer. A central issue is the ability of the borrower to repay forborne indebtedness over a relatively short period. A special forbearance could be problematic in that the veteran would have even more forborne indebtedness to repay, and the servicer would need to advance additional payments without receiving any offsetting payments from the veteran.

Given the issues described above, the unprecedented nature of the COVID-19 emergency, its impact on the economy, and the lengthy forbearance period authorized under the CARES Act (*i.e.*, up to 360 days), VA is continuously evaluating how best to help veterans with large amounts of forborne indebtedness avoid foreclosure. For example, VA recently issued guidance clarifying that servicers may offer what the servicing industry commonly calls loan "deferment," as a novel home retention option.<sup>22</sup> Under this option,

the servicer would allow the veteran to defer repayment of forborne payments until the guaranteed loan matures, is refinanced, or otherwise paid in full, or when the borrower transfers the property, whichever occurs first. The deferred indebtedness would not accrue any additional interest, and the veteran would not incur any fees or costs associated with the deferment option. The option would not necessarily require the servicer to modify the existing guaranteed loan. Ordinarily, VA's regulation at 38 CFR 36.4310(a) would prohibit a final installment payment on a guaranteed loan from exceeding two times the average of the preceding installments. In cases where veterans have deferred several months' worth of payments, the final installment (*i.e.*, the total deferred indebtedness), will often exceed the limit. However, in order to provide veterans with a full gamut of options, VA temporarily waived<sup>23</sup> this limit for certain cases where servicers can offer a loan deferment option that complies with VA's policy guidance.

While loan deferment may present the best option for certain borrowers, many servicers are facing a liquidity crunch and lack financial resources to float large amounts of forborne indebtedness for what can be, depending on the case, two to three decades. As a result, VA continues to consider innovative ways to assist veterans mitigate the effects of the COVID-19 emergency, including options that, until recently, were not considered or utilized in VA's home loan program.

#### *D. The Partial Claim Loss-Mitigation Option*

As part of VA's effort to analyze all possible options that could help veterans, VA considered home retention options available to borrowers with other types of federally backed mortgages; that is, those available through single-family loan guarantee/insurance programs administered by

<sup>19</sup> Deloitte, *Mortgage Series on Management Estimates*, pg. 7, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-msme-perseal-considerations-july2013r.pdf>.

<sup>20</sup> Urban Institute, *The Price Tag for Keeping 29 Million Families in Their Homes: \$162 Billion*, (Mar. 27, 2020), <https://www.urban.org/urban-wire/price-tag-keeping-29-million-families-risk-homes-162-billion>; Mortgage Bankers Association (MBA), *Share of Mortgage Loans in Forbearance Declines Slightly to 7.20%*, (Aug. 24, 2020), <https://www.mba.org/2020-press-releases/august/share-of-mortgage-loans-in-forbearance-declines-slightly-to-7.20>.

<sup>21</sup> *Id.*

<sup>22</sup> VA Circular 26-20-33, *Deferment as a COVID-19 Loss-Mitigation Option for CARES Act Forbearance Cases*, (Sept. 14, 2020), [https://www.benefits.va.gov/HOMEOANS/documents/circulars/26\\_20\\_33.pdf](https://www.benefits.va.gov/HOMEOANS/documents/circulars/26_20_33.pdf).

<sup>23</sup> See 38 CFR 36.4338(a) (authorizing VA, notwithstanding any requirement, condition, or limitation stated in or imposed by regulations governing guaranteed loans, to relieve undue prejudice to a debtor, holder, or other person, which might otherwise result, if VA finds that such action does not adversely affect the interests of the Government or impair the vested rights of any person affected thereby). See also Executive Order 13924, 85 FR 31353 (May 19, 2020) (stating that agencies should, to the extent possible, address the economic consequences of the COVID-19 emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery); Executive Order 13945, 85 FR 49935 (Aug. 8, 2020) (stating that it is the policy of the United States to minimize, to the greatest extent possible, residential evictions and foreclosures during the ongoing COVID-19 national emergency).

FHA and USDA. Notably, both agencies offer a “partial claim” as part of the suite of loss-mitigation options available to borrowers and servicers.<sup>24</sup> More recently, FHA announced COVID-19 specific guidelines to maximize use of its partial claim option while providing streamlined loss-mitigation for borrowers and servicers.<sup>25</sup> Under these programs, the partial claim option defers the repayment of housing loan principal through the creation of an interest-free subordinate loan (payable to the Government) that is generally not due until the primary loan is paid off. During the COVID-19 emergency, both FHA and USDA have authorized servicers to utilize the partial claim option to cover all housing loan payments borrowers do not make while under a CARES Act forbearance, up to 30 percent of the unpaid principal balance, subject to certain requirements.

### III. Legal Authority

Unlike FHA and USDA, VA has never had explicit authority to establish a partial claim option. To help veterans recover from the financial hardships posed by the COVID-19 national emergency, VA looked to its loan refund authority in 38 U.S.C. 3732 and the broad powers authorized under 38 U.S.C. 3720. When read together, the text of these two sections authorizes VA to establish the COVID-VAPCP as an emergency measure.

Under 38 U.S.C. 3732(a), VA has the legal right to prevent a foreclosure by purchasing indebtedness that VA has already guaranteed. VA refers to such a purchase as a loan refund. If VA exercises the option, the holder must assign the loan to VA. VA then steps into the shoes of the holder and often allows for a loan modification, which makes the terms more affordable for the veteran.

VA also has broad powers under 38 U.S.C. 3720, “notwithstanding the provisions of any other law,” to purchase assets and pay any claim, however acquired, relating to or arising from matters in the VA-guaranteed loan program and to offer forbearances or indulgences to veterans who have

suffered loss due to disasters.<sup>26</sup> In applying the authorities as a consistent, coherent framework, VA would, by way of a loan to the veteran, purchase from the servicer the veteran’s CARES Act indebtedness and establish repayment terms favorable to the veteran, while leaving intact the veteran’s guaranteed loan.

### IV. COVID-19 Veterans Assistance Partial Claim Payment Program

VA, therefore, proposes to establish a temporary program that would provide a partial claim option to certain veterans who are financially impacted by COVID-19. Under VA’s proposed COVID-VAPCP, servicers would present the partial claim option to a veteran only after evaluating the feasibility of loss-mitigation options already available in VA’s program (*i.e.*, repayment plan, special forbearance, and loan modification). If the veteran qualifies and opts to move forward with a partial claim option, VA would purchase the veteran’s forborne indebtedness, like when VA refunds a guaranteed loan. Acting as a mortgage investor of last resort, VA would purchase the amount of indebtedness that is necessary to bring the veteran’s guaranteed loan current (instead of the whole amount of the guaranteed loan, as would be the case in a typical loan refund). The veteran would repay VA for this amount, and the indebtedness would be secured as a lien against the veteran’s home upon execution and recordation of the security instrument. The servicer would handle all aspects of the origination of the new COVID-VAPCP loan. The new loan would be serviced under VA’s existing loan portfolio.

To ensure that veterans can benefit from a partial claim option in ways like FHA and USDA borrowers, VA proposes to mirror requirements from FHA’s and USDA’s COVID-19 partial claim programs, whenever feasible. Therefore, like FHA’s and USDA’s COVID-related partial claim programs, VA’s proposed COVID-VAPCP would only be available for guaranteed loans that were, on March 1, 2020, either current or less than 30 days past due. Additionally, VA’s partial claim payment would only be payable to a servicer on behalf of a veteran if there remains unpaid at least one scheduled monthly payment that the veteran missed while under a CARES Act forbearance. VA notes that some borrowers have continued to make their monthly loan payments despite being under a CARES Act forbearance. A partial claim payment option would

be unnecessary for those individuals because there would be no forborne indebtedness to resolve upon exiting the forbearance. Consistent with FHA’s COVID-19 National Emergency Standalone Partial Claim, VA would only pay one partial claim payment per veteran and require that the veteran occupy, as a residence, the property securing the guaranteed loan for which the partial claim is requested. Also consistent with FHA and USDA, VA’s proposed COVID-VAPCP would require the servicer to determine whether the veteran satisfies the program requirements, prepare the appropriate loan documents on VA’s behalf, and bring the veteran’s guaranteed loan current, prior to submitting to VA a request for partial claim payment.

While VA’s proposed COVID-VAPCP would bear many similarities to FHA and USDA’s COVID-related partial claim programs, it would not be identical to either program. VA notes that FHA and USDA provide 100 percent and 90 percent backing on their guaranteed/insured loans,<sup>27</sup> respectively, whereas VA’s guaranty is typically no more than 25 percent.<sup>28</sup> VA’s smaller guaranty is relevant for two reasons.

First, compared to FHA- and USDA-backed loans with similar loan balances, VA-guaranteed loans generally expose the Government to less financial risk per loan. While VA’s unique mission requires VA to promote favorable outcomes for veterans, which might increase costs, VA must also continue to be a responsible steward of taxpayer funds. VA has determined that any proposed amount of assistance via a partial claim option cannot cause VA to incur financial risk that would eclipse the guaranty.

Therefore, while both the FHA and USDA partial claim programs provide payment to the servicer, on the borrower’s behalf, up to 30 percent of the unpaid principal balance at the time of initial default,<sup>29</sup> VA’s proposed program would provide for payment to the servicer, on the veteran’s behalf, up to 15 percent of the unpaid principal balance of the guaranteed loan as of the date the veteran entered into a CARES

<sup>24</sup> See 12 U.S.C. 1715u(b); 24 CFR 203.371. See also 42 U.S.C. 1472(h)(14); 7 CFR 3555.304(d) and 3555.307.

<sup>25</sup> Mortgagee Letter 2020-06, *FHA’s Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act*, (Apr. 1, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsngml.pdf>; Mortgagee Letter 2020-22, *FHA’s COVID-19 Loss Mitigation Options*, (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsngml.pdf>.

<sup>26</sup> See 38 U.S.C. 3720(a), 3720(a)(3) through (5), and 3720(f).

<sup>27</sup> See 12 U.S.C. 1709; 42 U.S.C. 1472(h)(2).

<sup>28</sup> See 38 U.S.C. 3703(a)(1). While VA notes that the guaranty may be higher on loans with lower balances, such as 50 percent for loans with balances less than or equal to \$45,000, the average balance on guaranteed loans has exceeded \$200,000 since 2008. See VBA Annual Benefits Reports, Fiscal Years 2008 to 2019, <https://www.benefits.va.gov/REPORTS/abr/docs/2019-loan-guaranty.pdf> (Fiscal Year 2019); <https://www.benefits.va.gov/REPORTS/abr/archive.asp> (Fiscal Years 2008 to 2018).

<sup>29</sup> 12 U.S.C. 1715u(b)(2)(A); 42 U.S.C. 1472(h)(14)(A).

Act forbearance. VA notes that, based on an initial analysis of loans in forbearance, VA believes that a 15 percent cap would provide sufficient room for servicers to bring the guaranteed loans current, even if a veteran invokes the maximum period of forbearance; that is, 360 days, under the CARES Act.

FHA and USDA do not charge borrowers interest on the subordinate indebtedness that results from a partial claim payment. Also, in such programs, no payment on the subordinate indebtedness is generally due until such time as the property securing the insured/guaranteed loan is transferred or sold or the insured/guaranteed loan is refinanced or otherwise paid-in-full. However, in both programs, the partial claim is essentially treated as an advance paid to the servicer, on behalf of the borrower, enabling the insured/guaranteed loan to return to current.<sup>30</sup> This arrangement is to be expected given that FHA and USDA back all, or nearly all, of the insured/guaranteed loan. VA, on the other hand, views its partial claim payment option more like its loan refund program. As previously discussed, under the loan refund program, VA generally takes assignment of the guaranteed loan in exchange for VA's payment of the unpaid balance of the obligation, plus accrued interest. In the event VA takes the loan into its own portfolio for servicing, no guaranty claim is paid. The veteran continues to pay interest on the indebtedness and monthly payments as obligated, but to VA as noteholder, not to the former loan servicer.

Under this rulemaking, VA proposes to make COVID-VAPCP loans on terms extremely favorable to veterans; providing a lifeline to veterans as they recover financially. First, VA proposes to require repayment of the loan within 120 months of origination or upon the veteran's transfer of title to the property, the refinancing of the guaranteed loan with which the partial claim payment is associated, or payment in full otherwise of such guaranteed loan. VA would also automatically defer any monthly payments for the first 60 months of the loan. Based on the partial claim loan balances that VA anticipates, VA believes this time horizon would provide veterans with a reasonable path to repayment without additional undue financial hardship.

<sup>30</sup> See 24 CFR 203.341, 203.371, and 203.401 (casting FHA's partial claim as an "application for insurance benefits"). See also 7 CFR 3555.304(d)(8) (stating that a USDA loss claim will be adjusted by any amount of mortgage recovery advance reimbursed to the lender).

VA also proposes to charge a nominal, fixed interest rate of 1.00 percent per annum on any loan established under the COVID-VAPCP. VA notes that this is below what is generally charged for VA's portfolio loans (including refunded loans) and, in fact, represents no more than the approximate net present value of the money to be paid to servicers on behalf of veterans.<sup>31</sup> In other words, the 1.00 percent interest rate established under the COVID-VAPCP represents roughly the 10-year cost of borrowing money from the U.S. Treasury that would be needed to reimburse servicers, on behalf of veterans, for partial claim payments.

The relatively small size of VA's guaranty is also relevant because the holder<sup>32</sup> of a VA-guaranteed loan bears significantly more financial risk for a VA-guaranteed loan than for a loan insured or guaranteed by FHA or USDA. Due to VA's smaller guaranty percentage, the servicer has just as much, if not more, financial interest than the Government in seeing a delinquent VA-guaranteed loan brought current because, unlike in FHA and USDA's programs, VA will not pay more than 25 percent of the loan. Given the holder's significant financial incentive to offer a veteran the loss-mitigation option that is most likely to help the veteran return to normal repayment, VA generally does not prescribe which loss-mitigation options servicers must first offer to a veteran before considering other options.

Therefore, where FHA has mandated that servicers consider every owner-occupant borrower exiting a CARES Act forbearance who was current or less than 30 days past due as of March 1, 2020, for a COVID-19 National Emergency Standalone Partial Claim, and USDA has authorized a Disaster Mortgage Recovery Advance for similarly situated borrowers, VA would not mandate that servicers consider veterans for a partial claim payment option. Rather, VA would expect servicers to consider the feasibility of loss-mitigation options before considering a partial claim payment. Consistent with VA's existing regulations and policies, servicers would evaluate a veteran's financial situation and, if appropriate, offer loss-

<sup>31</sup> VA's analysis of the net present value of partial claim payments made in accordance with the COVID-VAPCP was based on a review of the 10-year Treasury Yield Rate from Jan. 1, 2020, through Aug. 28, 2020.

<sup>32</sup> 38 CFR 36.4301 defines holder as "[t]he lender or any subsequent assignee or transferee of the guaranteed obligation or the authorized servicing agent (also referred to as 'the servicer') of the lender or of the assignee or transferee."

mitigation options that are within the servicer's financial capabilities and business model.

VA further notes that, because of the way the COVID-VAPCP is structured, the COVID-VAPCP is a standalone home retention option. In other words, the COVID-VAPCP cannot be combined with loss-mitigation options, such as a special forbearance or loan modification, to assist borrowers who are exiting CARES Act forbearances. For example, a servicer cannot tack on a special forbearance period to the end of a CARES Act forbearance and then use the COVID-VAPCP to bring the guaranteed loan current. When a servicer offers a special forbearance to assist the borrower in returning to normal repayment, it indicates that the servicer views the option as the most prudent choice based on the circumstances. Similarly, if a servicer brings a veteran's guaranteed loan current through a loan modification, but shortly thereafter the veteran cannot make payments on the modified loan, the servicer cannot then pursue a partial claim payment. A loan modification requires servicers to ensure that the guaranteed loan "will be reinstated to performing status by virtue of the loan modification."<sup>33</sup> If the servicer reinstated the guaranteed loan to performing status by virtue of the loan modification, there would not be any remaining "indebtedness that [would be] necessary to bring the guaranteed loan current," under VA's proposed rule text below.

By requiring servicers to consider loss-mitigation options before evaluating a veteran for COVID-VAPCP, VA's proposed policy would help ensure that veterans are afforded options that may be more advantageous to them than a partial claim, without imposing additional administrative requirements on servicers. For example, servicers that have adequate resources to offer deferment<sup>34</sup> as a home retention option would be able to do so under VA's proposed program. Deferment can present a better option for certain veterans as compared to the COVID-VAPCP because, as explained above, the deferred amount does not accrue interest and may provide a veteran significantly more time before a payment would become due. Moreover, without a requirement that certain veterans be evaluated for COVID-VAPCP, servicers willing and able to

<sup>33</sup> 38 CFR 36.4315(a)(6).

<sup>34</sup> See VA Circular 26-20-33, *Deferment as a COVID-19 Loss-Mitigation Option for CARES Act Forbearance Cases*, (Sept. 14, 2020), [https://www.benefits.va.gov/HOMELANS/documents/circulars/26\\_20\\_33.pdf](https://www.benefits.va.gov/HOMELANS/documents/circulars/26_20_33.pdf).

offer deferments would not have to alter their servicing process, train employees, and possibly upgrade technology to complete such evaluations.

Nevertheless, the option of COVID-VAPCP assistance may very well be necessary to ensure certain veterans can recover financially. In this regard, as servicers evaluate their liquidity positions and other factors, to determine how to make the advances necessary for investor requirements, some servicers may find themselves unable to offer certain loss-mitigation options, such as a loan modification. VA notes that, unlike a loan modification, a partial claim payment under VA's proposed COVID-VAPCP would not require the guaranteed loan to be purchased out of the Ginnie Mae pools. Thus, for these servicers, and the veterans whose guaranteed loans they service, the assistance VA is proposing would ensure veterans are afforded an option that enables them to retain their home, while simultaneously helping servicers avoid liquidity crunches, thereby affording veterans prudent and uninterrupted loan servicing.

As mentioned above, VA's proposed COVID-VAPCP would be available to veterans whose guaranteed loan was current or less than 30 days past due as of March 1, 2020, and who certify that they can resume making scheduled monthly payments, on time and in full. VA, however, would also require servicers to ensure that the veteran's monthly residual income, as described in 38 CFR 36.4340(e), is adequate to meet living expenses after estimated monthly shelter expenses (*e.g.*, payments on the guaranteed loan) have been paid and other monthly obligations have been met. Residual income has long been a critical component of VA underwriting.<sup>35</sup> As the information collected from the veteran to conduct this analysis coincides with the information already requested to evaluate VA's existing loss-mitigation options, this residual income requirement would help ensure that servicers have considered all loss-mitigation options for feasibility before pursuing a partial claim payment. Veterans would ultimately benefit from this additional financial assessment because servicers would be able to evaluate the financial impact of loss-mitigation options, such as loan modification, compared to a partial claim option. Take, for example, a veteran who enters a CARES Act forbearance with 300 monthly payments

remaining and an unpaid principal balance of \$239,450. Given a total monthly payment of \$1,587.83, at the end of a 12-month forbearance period, the veteran would owe \$19,054 in missed guaranteed loan payments.<sup>36</sup> A loan modification at the same interest rate and a new 30-year term would result in a \$26 decrease in monthly loan payments but \$39,518 in additional interest over the life of the guaranteed loan. Conversely, a VA partial claim payment would result in a \$341.58 per month payment to VA in years 6 through 10 but only \$1,441 in additional interest over the life of the guaranteed loan.

In cases where the servicer could not offer a deferment but could perhaps offer a modification, the partial claim option might present an even more beneficial outcome for both the veteran and the servicer. As the partial claim option would require the servicer to determine that the veteran can meet residual income standards, the veteran would not necessarily need the short-term savings of reduced monthly loan payments under a loan modification. It could be more beneficial for such a veteran to realize an overall interest savings of \$38,077 under a partial claim option.

#### V. Section-by-Section Analysis of the Proposed Regulatory Amendments

As previously noted, VA is proposing the COVID-VAPCP as a temporary program to help veterans return to making normal loan payments on their guaranteed loans after exiting a CARES Act forbearance period. VA further noted that its existing loss-mitigation and other servicing regulations and policies remain in effect. Thus, to avoid confusion, VA is proposing to add a new subpart F to part 36 of the Code of Federal Regulations (CFR) to contain the regulations that would govern this temporary program. The following outlines VA's proposed regulations, with further explanation of each individual section, as necessary.

##### A. Section 36.4800 Applicability

In proposed § 36.4800, VA would note that this subpart applies to all loans guaranteed by VA, to the extent such loans are affected by the COVID-19 national emergency.

##### B. Section 36.4801 Definitions

In proposed § 36.4801, VA would set forth the definitions applicable to new subpart F.

VA would define "alternative to foreclosure", "CARES Act forbearance", "CARES Act indebtedness", "Guaranteed loan", "Loss-mitigation option", "Secretary", and "Servicer" as set out in the regulatory text below.

##### C. Section 36.4802 General Purpose of the COVID-19 Veterans Assistance Partial Claim Payment Program

In § 36.4802, VA would set forth the general purpose of the COVID-VAPCP. Intending to provide some introductory context for this novel option within VA's home loan program, VA would state that the COVID-VAPCP is a temporary program to help veterans who have suffered a COVID-19 financial hardship. Notwithstanding the requirements elsewhere in part 36 regarding payment of a guaranty claim or refunding a loan, this proposed section would allow VA to assist a veteran exiting a CARES Act forbearance by purchasing from the servicer the veteran's CARES Act indebtedness. Such a purchase would be called a partial claim payment. In exchange for VA's partial claim payment on behalf of the veteran, the veteran would have to agree to repay the Secretary, in the amount of such partial claim payment, upon loan terms established by the Secretary.

##### D. Section 36.4803 General Requirements of the COVID-19 Veterans Assistance Partial Claim Payment Program

In § 36.4803, VA would set forth the general requirements of the COVID-VAPCP. First, VA would require that the loan for which a partial claim payment is requested must be a guaranteed loan that was, on March 1, 2020, either current or less than 30 days past due. Second, VA would require that the veteran on whose behalf VA would pay a partial claim payment both received a CARES Act forbearance and missed at least one scheduled monthly payment. Third, VA would require that there remains unpaid at least one scheduled monthly payment that the veteran did not make while under a CARES Act forbearance. Fourth, VA would require the veteran to certify that the veteran can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is requested. Fifth, VA would require the servicer to determine and certify that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and

<sup>35</sup> See Public Law 99-576, section 402(b) (Oct. 28, 1986); 55 FR 4829, 4869 (Feb. 12, 1990); 56 FR 9835, 9853 (Mar. 8, 1991).

<sup>36</sup> This example assumes a starting guaranteed loan balance of \$245,000, fixed 3.75 percent interest rate, 360-month loan term, and monthly escrows of \$453.20.



other monthly obligations have been met. Lastly, VA would require the veteran to execute, in a timely manner, all loan documents necessary to establish an obligation to repay the Secretary for the partial claim payment.

*E. Section 36.4804 Partial Claim Payment as Last Resort*

In § 36.4804, VA would state that a partial claim payment would be an option of last resort. VA would reiterate that the COVID-VAPCP is designed to address the financial hardships due, directly or indirectly, to the COVID-19 national emergency. VA would state that servicers must consider all possible loss-mitigation options and that VA expects the partial claim payment option would be considered only as a last resort, after a servicer has evaluated loss-mitigation options for feasibility. VA would also state that the servicer would be able to immediately proceed to offering an alternative to foreclosure if the veteran notifies the servicer that the veteran does not want to retain ownership of the property securing the guaranteed loan.

*F. Section 36.4805 Terms of the Partial Claim Payment*

In § 36.4805, VA would set forth the terms of the partial claim payment. In paragraph (a), in order for a partial claim payment to be payable, the servicer would be required to submit to the Secretary, not later than 90 days after the date the veteran exits the CARES Act forbearance, a request for such payment, as prescribed in proposed § 36.4807. This would require a servicer to evaluate the veteran for all loss-mitigation options, as well as a partial claim option, and prepare and execute the appropriate loan documents, all before submitting an application to VA. VA notes that 90 days is consistent with FHA's COVID-19 loss-mitigation policies.<sup>37</sup> Nevertheless, in recognition of the fact that servicers will be faced with large numbers of borrowers exiting forbearance in the coming year, VA is specifically requesting comments on the proposed timeframe to complete these actions and submit an application for partial claim payment.

Paragraph (b) of this section would state that the amount of the partial claim payment that VA would pay to the servicer, as calculated under proposed paragraph (e), shall not exceed 15 percent of the unpaid principal balance of the guaranteed loan. For the purposes

of proposed paragraph (b), the unpaid principal balance of the guaranteed loan would mean such balance as of the date the veteran entered into a CARES Act forbearance. Paragraph (c) would state that VA would pay only one partial claim payment per guaranteed loan. Paragraph (d) would state that VA would pay only one partial claim payment per veteran.

In proposed paragraph (e)(1), VA would state that because VA would pay only one partial claim payment per guaranteed loan, and only one partial claim payment per veteran, a servicer would be required, in calculating the amount of partial claim payment to be paid by VA to the servicer, to include the full amount of indebtedness that is necessary to bring the guaranteed loan current. In paragraph (e)(2), VA would state that to bring the guaranteed loan current, servicers must include in the partial claim payment the full CARES Act indebtedness, comprising (i) all scheduled but missed monthly payments of principal and interest; and (ii) as applicable, all scheduled but missed monthly escrow payments for real estate taxes and insurance premiums, or where the guaranteed loan documents do not provide for monthly escrowing, all payments the servicer made to real estate tax authorities and insurance providers, on the veteran's behalf, during the CARES Act forbearance.

VA chose to require inclusion of payments of taxes and insurance because veterans are generally obligated, under the terms of the documents that establish a guaranteed loan, to keep current their taxes and insurance premiums. VA internal data shows that, in a little more than 99 percent of the time, servicers of guaranteed loans require borrowers to remit monthly, in addition to their principal and interest payments, the amounts necessary to ensure payment of the full year's tax and insurance obligations. When servicers require such monthly remittances, they hold the funds in escrow accounts until the sums are due. When the veteran's tax and insurance obligations become due, the servicer takes out of the escrow accounts the amounts necessary to keep the taxes up to date and the insurance coverage in place.

If the guaranteed loan documents provide for monthly escrow obligations, the loan can be considered in default when such obligations are missed. The default, and the resultant consequences of default, are the same as if the veteran defaults on payments of principal and interest. Because an objective of the COVID-VAPCP is to help bring

veterans' guaranteed loans current without additional financial hardship (e.g., having to find a way to replenish escrow accounts), VA determined the veteran's obligation could not be fully met unless VA also included in the partial claim calculation the amounts to cover missed escrow payments.

Also, VA is proposing under § 36.4805(e)(3) that, in cases where veterans make monthly escrow payments for taxes or insurance premiums, or both, servicers would be required to include not just the forborne amounts of taxes and insurance escrows, but also those amounts that are due within 31 days of the date the veteran executes the COVID-VAPCP note and security instrument. This is to help ensure a smooth handoff of the full obligation, rather than to learn, perhaps months after the fact, that an escrow payment was missed during the transfer of paperwork.

VA recognizes that there are cases where a veteran does not make escrow payments to the servicer for taxes or insurance premiums. In such cases, corresponding to less than 1 percent of guaranteed loans, the veterans make their payments directly to tax authorities and insurance providers. In such cases, while servicers are not taking funds from escrow accounts to make these payments, servicers still monitor whether the veteran satisfies the veteran's tax and insurance obligations.

Notably, VA requires servicers to obtain and retain a lien of proper dignity; that is, a primary lien, for all guaranteed loans. In that regard, VA can adjust its guaranty and take other actions against servicers that allow, for example, tax authorities to jeopardize the primacy of the guaranteed loan lien. Similarly, VA requires servicers to ensure that the property is adequately insured. In instances where a veteran does not pay taxes or insurance premiums timely, the servicer will advance payments, from its own funds, to avoid a lapse in payment, and to ensure that future guaranty payments, if any, are not jeopardized.

In cases where servicers were forced to advance payment on a veteran's behalf to tax authorities or insurance providers because the veteran (who normally makes payments directly to such entities) did not meet such obligations during a CARES Act forbearance, the veteran would need to repay the servicer to bring the guaranteed loan current. That is why VA proposes to require these obligations

<sup>37</sup> Mortgagee Letter 2020-22, *FHA's COVID-19 Loss Mitigation Options*, (Jul. 8, 2020), <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-22hsgml.pdf>.



in the partial claim payment.<sup>38</sup> VA would not, however, authorize inclusion of any such amounts to cover payments that were not due on the date the veteran executes the COVID-VAPCP note and security instrument.

For example, consider a veteran who pays property taxes directly to their local tax office on a semi-annual basis (*i.e.*, on the first of January and of July) and elects a seven-month CARES Act forbearance beginning May 1, 2020. Assuming the veteran does not pay the property tax bill on July 1, 2020, the servicer would advance payment from its own funds. The veteran then exits the CARES Act forbearance on November 1, 2020 and executes the note and security instrument, consistent with proposed § 36.4806, on December 1, 2020. The partial claim payment amount calculated under paragraph (e) would include the amount of taxes paid by the servicer on behalf of the veteran in July. The veteran, however, would be responsible for paying the property tax bill due on January 1, 2021, and no dollar amount would be included in the partial claim payment to account for the fact that the veteran was in forbearance five out of the six months leading up to the next property tax bill.

The previous example contrasts with a veteran whose monthly loan payment to the servicer includes an amount that is set aside in an escrow account to be used for payment of property taxes. Using the same dates as above, the servicer would still advance payment from its own funds to cover the July property tax bill. However, the partial claim payment amount calculated under paragraph (e) will include the monthly scheduled amounts for taxes that should have been paid as part of the monthly loan payments missed for May through December 2020. The servicer would be reimbursed from this amount for the advance payment made in July; the remaining amount would be deposited into the veteran's escrow account and would be available for use when the January 1, 2021, property tax bill is due.

While VA does not intend to create differences between veterans who escrow and who do not escrow, VA notes the complexities associated with determining and disbursing funds to the servicer to cover tax and/or insurance bills that are not yet due and payable. In this regard, allowing for inclusion of such amounts in a partial claim payment might assume that veterans who opt to pay taxes or insurance

premiums directly to taxing authorities or insurance providers set aside funds each month to save up for tax and insurance bills that come due throughout the year. It would also put servicers in a situation where they would be required either to remit the amount paid as part of the partial claim directly to the veteran or make another payment on behalf of the veteran. Both scenarios could create unnecessary confusion. There would also be need for oversight by VA to ensure that any amounts to cover future payments not collected as part of a scheduled monthly loan payment are calculated correctly and ultimately used for their intended purpose (*i.e.*, taxes or insurance, or both).

Given VA's estimate that less than 1 percent of veterans pay their taxes and/or insurance directly to the appropriate authority/provider, rather than through monthly escrow payments to their servicer, VA proposes that, for partial claim payments associated with these veterans' guaranteed loans, a servicer can include only amounts the servicer actually paid on behalf of the veteran during the CARES Act forbearance period. Nevertheless, VA invites public comment on whether VA should cover prorated amounts associated with missed guaranteed loan payments for these veterans and, if so, how VA might best accomplish this for veterans and servicers.

In proposed paragraph (e)(3), VA would also require servicers to include all scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that are due within 31 days of the date the veteran executes the note and security instrument described in proposed § 36.4806. VA notes that any such payment due within 31 days of such date may be considered part of the veteran's obligation to bring the guaranteed loan current. As such, VA would require servicers to include this amount in the partial claim payment. From a practical standpoint, this means that a veteran who executes, on January 15, 2021, a COVID-VAPCP note and security instrument described in § 36.4806, would not have a guaranteed loan payment due to the servicer until March 1, 2021, as the February 1, 2021 payment would be due within 31 days and would need to be included in the partial claim amount. (Note: As explained below, the veteran would not have to begin repaying VA under the COVID-VAPCP loan until 2026.)

Additionally, as discussed below, VA proposes to allow servicers to include, if applicable, all scheduled monthly

payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that were missed after March 1, 2020, but before the veteran was granted a CARES Act forbearance, provided the guaranteed loan was, as of March 1, 2020, current or less than 30 days past due. However, in order to include these payments, the servicer must waive any late charges and fees associated with these missed payments.

VA recognizes that some borrowers may not have been immediately aware of the availability of forbearance under the CARES Act, but nevertheless missed their guaranteed loan payment(s) due to circumstances related to the COVID-19 national emergency before requesting forbearance. The effect of the above requirements would be to enable veterans, whose loans meet the criteria, to bring their guaranteed loans current via the COVID-VAPCP. In that circumstance, the servicer would include, if applicable, certain payments not paid between March 1, 2020, and the date the veteran entered the CARES Act forbearance in the amount of the partial claim payment. Additionally, under proposed paragraph (e)(3)(iii), VA would require servicers to include the actual amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument described in proposed § 36.4806.

In proposed paragraph (e)(4), VA would clarify that servicers shall not include any amounts in the partial claim total that are not listed by paragraph (e)(2) or (3). This means servicers could not include any amounts, for example, for fees, penalties, or interest, beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the guaranteed loan, or any late charges and fees that the veteran incurred between March 1, 2020, and the date the veteran entered the CARES Act forbearance.<sup>39</sup>

In proposed paragraph (e)(5), VA would state that nothing in proposed § 36.4805 shall preclude a veteran from making an optional payment or a servicer from waiving a veteran's indebtedness, such that the amount of partial claim payment would not exceed

<sup>38</sup> See 38 U.S.C. 3732(a)(2)(A) (stating that VA's refund authority includes ability to "pay the holder of the obligation the unpaid balance of the obligation plus accrued interest").

<sup>39</sup> See Public Law 116-136, section 4022(b)(3) (Mar. 27, 2020) (expressly prohibiting a servicer from charging any "fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract").

the 15 percent cap described in proposed paragraph (b).

As explained above, VA's initial analysis of guaranteed loans in forbearance suggests that a 15 percent cap (based on the unpaid principal balance as of the date the veteran entered into a CARES Act forbearance) would provide enough room for servicers to bring the guaranteed loans current, even if a veteran invokes the maximum period of forbearance; that is, 360 days, under the CARES Act. In the event that the amount needed to bring an eligible veteran's guaranteed loan current exceeds 15 percent of the unpaid principal balance, VA would allow a veteran to make an optional payment or a servicer to waive the veteran's indebtedness, such that the partial claim payment would not exceed the 15 percent cap.

In proposed paragraph (e)(6), VA would explain that if the servicer miscalculates the partial claim amount, resulting in an overpayment to the servicer, the amount of such overpayment shall constitute a liability of the servicer to the United States. The servicer would be required to remit the overpaid amount immediately to VA. In paragraph (e)(7), VA would state that if the servicer miscalculates the partial claim amount, resulting in underpayment (*i.e.*, an amount insufficient to bring the guaranteed loan current), the servicer would be required to waive the difference.

Finally, proposed paragraph (e)(8) would prohibit servicers from including any amounts for a monthly payment that is scheduled to be paid on a date that is more than 31 days after the veteran executes the note and security instrument described in § 36.4806.

Under proposed paragraph (f), the servicer would be required to prepare a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". Using the "Department of Veterans Affairs" or the "United States" is legally incorrect. Furthermore, certain states have their own Departments of Veterans Affairs, and without the explicit distinction made here, confusion could result. Therefore, it is critical that the note and

security instrument read in favor of "the Secretary of Veterans Affairs, an Officer of the United States".

VA would require that the note be consistent with the terms described in proposed § 36.4806 and include all borrowers who are obligated on the guaranteed loan. The security instrument would also be required to include all persons (borrowers, as well as non-borrowers) who hold a title interest in the property securing the guaranteed loan. In proposed paragraph (g), subject to the requirement that the servicer submit the application for a partial claim payment to VA not later than 90 days after the date the veteran exits the CARES Act forbearance, VA would require all loan documents to be fully executed not later than 90 days after the veteran exits the CARES Act forbearance. Proposed paragraph (h) would require the servicer to record the security instrument timely, as prescribed in § 36.4807. Finally, in paragraph (i), the servicer would be prevented from charging, or allowing to be charged, to the veteran any fee in connection with the COVID-VAPCP.

*G. Section 36.4806 Terms of the Assistance to the Veteran*

If a veteran chooses to accept VA's assistance (*i.e.*, a partial claim payment to the servicer, on the veteran's behalf), the veteran, and all co-borrowers on the guaranteed loan, would be required to execute a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". In addition, all non-borrowers holding a title interest in the property would be required to sign the security instrument. VA would establish the terms of the note and security instrument. Specifically, VA would require the note and security instrument to include the amount to be repaid to the Secretary, by the veteran, to be the amount calculated under § 36.4805(e). The interest rate on the loan created by the note and security instrument would be required to be fixed at 1.00 percent per annum. VA would automatically defer monthly payments for the first 60 months of the loan, meaning that there would be no payment due to the Secretary during the

period of deferment. Interest would accrue on the loan during such deferment and a borrower could, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof, provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term. VA would require the term of the loan to be 120 months. The loan would be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments. VA would require repayment in full immediately upon the veteran's transfer of title to the property, the refinancing, or payment in full otherwise, of the guaranteed loan with which the partial claim payment is associated.

*H. Section 36.4807 Application for Partial Claim Payment*

In proposed § 36.4807, VA would require the veteran and the servicer to complete an application form prescribed by the Secretary.

Along with a complete application form, the original note (required by proposed § 36.4805) must be included when the servicer submits a request for a partial claim. Not later than 180 days following the date the security instrument (as required by § 36.4805) is fully executed, the servicer would be required to provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, the servicer could request an extension of time, in writing, from VA.

Servicers would utilize VA's existing loan servicing platform, the VA Loan Electronic Reporting Interface (VALERI) system, to report the partial claim payment event. Servicers would need to report the event within seven days of the borrower's execution of the note required by § 36.4805. Below, VA has identified the specific data elements that servicers must input into VALERI when reporting the partial claim event.

DATA ELEMENT DEFINITIONS

Event name	Data elements	Business definition of data element
Partial claim .....	Principal amount .....	Total dollar amount of all scheduled but missed monthly payments of principal, as described in § 36.4805(e)(2)(i) and (e)(3)(ii), and all scheduled monthly payments of principal due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim .....	Interest amount .....	Total dollar amount of all scheduled but missed monthly payments of interest, as described in § 36.4805(e)(2)(i) and (e)(3)(ii), and all scheduled monthly payments of interest due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.

## DATA ELEMENT DEFINITIONS—Continued

Event name	Data elements	Business definition of data element
Partial claim .....	Tax payments missed amount .....	Total dollar amount of all scheduled but missed monthly escrow payments for real estate taxes, as described in § 36.4805(e)(2)(ii) and (e)(3)(ii), and all scheduled monthly escrow payments for real estate taxes due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim .....	Insurance payments missed amount .....	Total dollar amount of all scheduled but missed monthly escrow payments for insurance premiums, as described in § 36.4805(e)(2)(ii) and (e)(3)(ii), and all scheduled monthly escrow payments for insurance premiums due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806.
Partial claim .....	Tax advance amount .....	Total dollar amount of all payments the servicer made to real estate tax authorities on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim .....	Tax advance date .....	The date on which the servicer made the tax advance on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim .....	Insurance advance amount .....	Total dollar amount of all payments the servicer made to insurance providers on the veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim .....	Insurance advance date .....	The date on which the servicer made the insurance advance on veteran's behalf, as described in § 36.4805(e)(2)(ii).
Partial claim .....	Recording fees .....	Total dollar amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument, as described in § 36.4805(e)(3)(iii).
Partial claim .....	Partial claim origination date .....	The date the borrower executes the note required by § 36.4805.
Partial claim .....	Partial claim first payment due date .....	The date on which the first payment on the partial claim loan is due to the Secretary.
Partial claim .....	Partial claim maturity date .....	The date on which the final payment on the partial claim loan is due to the Secretary.
Partial claim .....	Partial claim P&I payment amount .....	The monthly payment corresponding to principal and interest on the partial claim loan.
Partial claim .....	Partial claim legal description .....	The legal description of the property.
Partial claim .....	Partial claim lien position .....	The lien position of the partial claim loan.
Partial claim .....	Second borrower birth date .....	The birth dates of all co-borrowers.

VA has proposed VA Standard Form 26–10213, *Application for a COVID–19 Veterans Assistance Partial Claim Payment (COVID–VAPCP)*, to collect basic information necessary to identify the borrower(s), the servicer, and the VA loan number for the guaranteed loan for which partial claim payment is being requested. This form would also collect information regarding the date the veteran entered into a CARES Act forbearance, along with the unpaid principal balance on that date, the latter of which is necessary to determine the maximum amount of the partial claim payment under proposed § 36.4805. VA proposes that the servicer must indicate, on the proposed form, the date on which the borrower will resume monthly guaranteed loan payments to the servicer, along with the amount of those monthly payments. The servicer would then provide the amount of partial claim payment being requested, along with the date the note and security instrument were executed, as required under proposed § 36.4805. Finally, both the borrower and servicer would sign statements certifying to the elements required under proposed § 36.4803.

Further documentation would only be reviewed under VA's existing auditing and oversight processes.

*I. Section 36.4808 No Effect on the Servicing of the Guaranteed Loan*

In § 36.4808, VA would require servicers to continue to service the guaranteed loan in accordance with subpart B of part 36. The liability of the United States for any guaranteed loan would decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the guaranteed loan. A partial claim payment would not affect the guaranty percentage established at the time the guaranteed loan was made. Receipt of a partial claim payment would not eliminate a servicer's option under 38 U.S.C. 3732, to convey to the Secretary the security for the guaranteed loan in the event such loan is foreclosed or if the veteran executes a deed-in-lieu of foreclosure.

*J. Section 36.4809 Expiration of the COVID–19 Veterans Assistance Partial Claim Payment Program*

In proposed § 36.4809, VA would note that the Secretary will not accept a request for a partial claim payment after the date that is 180 days after the date the COVID–19 national emergency ends (as provided under the National Emergencies Act), unless a veteran's CARES Act forbearance does not end until after such date. In cases where a veteran's CARES Act forbearance ends

after the subject date, the Secretary could still accept a request for a partial claim payment, provided that such request is submitted to the Secretary not later than 90 days after the date the veteran exits the CARES Act forbearance. However, in no event would the Secretary accept a request for a partial claim payment after September 9, 2021.

In proposing September 9, 2021, as the last date on which VA could accept a request for a partial claim payment, VA notes that this date is 180 days from the one-year anniversary of the President's March 13, 2020 COVID–19 national emergency declaration. Under the National Emergencies Act, any "national emergency declared by the President . . . not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the **Federal Register** and transmit to the Congress a notice stating that such emergency is to continue . . ." <sup>40</sup> Without clear indication of whether the national emergency will be extended beyond its one-year anniversary, and the future state of the economy and lending

<sup>40</sup> 50 U.S.C. 1622(d).

industry, VA finds it prudent to publish a termination date that is tied to the one-year anniversary and also provides sufficient notice for VA and servicers to close out any actions related to the program. It also provides sufficient time for VA to extend the sunset date via rulemaking, depending on VA's continued monitoring of the national emergency and its impact on veterans.

*K. Section 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment Program*

In proposed § 36.4810, VA would set forth the parameters for oversight of the COVID-VAPCP. It is an almost verbatim restatement of 38 U.S.C. 3704(d). Specifically, subject to notice and opportunity for a hearing, whenever the Secretary finds with respect to a partial claim payment that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary could refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.<sup>41</sup> Notwithstanding the above, but subject to § 36.4328, the Secretary would not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.<sup>42</sup> The Secretary could also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.<sup>43</sup>

As noted above, VA would utilize its existing loan refund process to handle applications for partial claim payments via the VA Loan Electronic Report Interface (VALERI). Upon receipt of an application, VA would conduct a two-tier review and approval of the partial claim payment, utilizing information already in its VALERI systems to verify that the servicer has brought the veteran's guaranteed loan current, that the amount requested is consistent with other proposed requirements, and that VA has received all necessary documentation. Partial claim payments would also be subject to VA's oversight

and audit activities as part of VA's regular monitoring related to adequacy of loan servicing. If VA determines, during an audit, that a servicer did not follow VA's requirements when participating in the COVID-VAPCP, proposed § 36.4810 would expressly authorize appropriate enforcement actions.

*L. Conforming Technical Amendments*

VA proposes to add new section 38 CFR 36.4336 that would reiterate VA's parameters for oversight of loan servicing. This technical amendment is necessary to ensure that servicers adhere to the parameters outlined in § 36.4804, wherein the servicer must consider the partial claim payment option after evaluating loss-mitigation options in subpart B for feasibility. As with proposed § 36.4810, it would include an almost verbatim restatement of 38 U.S.C. 3704(d). Under this new section, subject to notice and opportunity for a hearing, whenever the Secretary finds that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.<sup>44</sup> Notwithstanding the above, but subject to § 36.4328, the Secretary would not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.<sup>45</sup> The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.<sup>46</sup> VA also proposes to amend 38 CFR 36.4333(a)(2) to ensure that records referenced in proposed §§ 36.4336 and 36.4810 are included in VA's maintenance of record requirements. Currently, holders are required to "maintain records supporting their decision to approve any loss-mitigation option for which an incentive is paid in accordance with § 36.4319(a)." <sup>47</sup> VA

proposes to delete the phrase "for which an incentive is paid in accordance with § 36.4319(a)." To ensure that VA's partial claim payment option is covered, VA would add a sentence noting that the holder would be required to maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program as established by proposed subpart F. Regarding the length of the recordkeeping requirement, VA proposes to retain an element of the status quo, namely that such records shall be retained a minimum of three years from the date of any incentive paid in accordance with § 36.4319(a) or the date the veteran's guaranteed loan is made current via the COVID-VAPCP, whichever is later. Finally, VA proposes to amend the specific authority for § 36.4333 to include 38 U.S.C. 3704(d), as this section requires the maintenance of adequate loan accounting records.

**VI. Specific Questions for Comment**

While VA welcomes comments on all aspects of this proposed rule, VA specifically requests comments on the following:

1. Is the servicer's 90-day deadline as proposed by § 36.4805 to submit the request for partial claim payment reasonable? If not, what would be a reasonable timeframe, recognizing VA's goal of ensuring that veterans exiting a CARES Act forbearance are evaluated and processed for home retention actions in a timely manner?

2. Is information collected as part of a complete loss-mitigation evaluation adequate to determine a borrower(s) monthly residual income as described by 38 CFR 36.4340(e)? If not, what additional information would be needed from the borrower(s)?

3. Understanding that many veterans and servicers are in need of VA's assistance, but also that veterans, servicers, and other stakeholders would need time to understand and implement VA's proposed regulatory requirements, VA seeks public comment as to how a final rule that is not effective for 30 or 60 days following publication might negatively impact veterans, servicers, and other stakeholders. VA also requests input as to whether there would be enough time for industry implementation of the partial claim payment program if VA were to publish a final rule that is effective 7 days after publication. Please be specific in communicating any concerns, including any additional costs associated with accelerated timetables for training, technology upgrades, etc.

<sup>41</sup> 38 U.S.C. 3704(d).

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> 38 U.S.C. 3704(d).

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> 38 CFR 36.4333(a)(2).

4. In the case of a veteran who pays real estate taxes and/or insurance premiums directly to a tax authority or insurance provider, should VA allow the partial claim payment to include amounts corresponding to what will be due on tax and/or insurance bills, where the bills were not due and payable during the veteran's CARES Act forbearance? If so, should such amounts be prorated to correspond only to the months during which the veteran was under forbearance? How should servicers handle monies in cases where such future tax and insurance premium payments are not due and payable at the time of the partial claim payment, resulting in an excess of funds being paid to the servicer? Should servicers remit such amounts directly to the veteran? Or should servicers be required to hold such amounts in escrow until the bills become due and payable? How should VA conduct oversight of these activities?

#### VII. Explanation of Comment Period

VA is issuing this proposed rule with a 30-day public comment period. The Administrative Procedure Act (APA) does not specify the length of the comment period, requiring only that an agency give the public an "opportunity to participate."<sup>48</sup> Agencies commonly allow 30 to 60 days for comment on a proposed rule. VA is shortening the comment period to 30 days because this rule is proposed in response to heightened concerns surrounding the COVID-19 national emergency and outcomes for veterans as they exit CARES Act forbearance periods.

Under section 4022 of the CARES Act, enacted on March 27, 2020, borrowers may obtain up to 180 days of forbearance on their Federally backed loans.<sup>49</sup> VA-guaranteed loans are considered Federally backed. Section 4022 also provides borrowers the option of extending the forbearance for an additional 180 days.<sup>50</sup> Section 4022 allows borrowers to shorten their periods of forbearance. This means that some borrowers may have already exited CARES Act forbearances and more borrowers could do so at any time.

As initial CARES Act forbearance periods near their end, VA stakeholders confront numerous decisions that have far-reaching consequences. Many veterans, for example, must decide whether to request additional forbearance and watch their forbore indebtedness grow, or attempt to resume

their regularly scheduled monthly payments, despite potential hardships and uncertainties caused by the national emergency. VA's partial claim assistance may well be the determining factor for certain veterans, affecting the extent to which they can recover financially from the crisis. Similarly, servicers must evaluate their liquidity positions and other factors to determine how to make the advances necessary for investor requirements. Some servicers may even be questioning whether they can stay afloat, which ultimately harms not just the servicer, but also the veterans whose guaranteed loans are being serviced. Many of these servicers will find that the assistance VA is proposing for veterans may simultaneously be the servicer's lifeline, thereby affording veterans prudent and uninterrupted loan servicing.

Despite the urgency noted above, VA strongly believes that the novelty of this program, including the differences between VA's proposed partial claim payment program and other federal agencies' partial claim programs, necessitates an opportunity for public input before finalization and implementation. VA did consider implementing this program via an interim final rule but decided stakeholder feedback was needed in advance of implementation in a number of specific areas, as addressed in section VI above. Further, VA recognizes that allowing for servicers to communicate potential concerns with VA's rule ahead of implementation would ensure veterans are better served when the final rule goes into effect. Balancing the need for a final regulation against the need for public input on this new partial claim option, VA believes that a 30-day public comment period is appropriate to ensure VA can gather input from interested parties while accelerating the process toward a final rule to assist veterans.

#### *Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has

determined that this rule is an economically significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its Regulatory Impact Analysis (RIA) are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

#### *Regulatory Flexibility Act*

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). To assess whether the proposed rule can be expected to have a "significant economic impact" on small entities, VA considers the annual cost of the rule for small entities compared to their annual revenue. VA was able to determine the size of 89 out of 108 companies that service VA-guaranteed loans in CARES Act forbearances, where the borrowers could likely qualify for assistance via a partial claim. VA made this determination using the size standards from the Small Business Administration (SBA).<sup>51</sup> <sup>52</sup> VA used data from InfoUSA and Factiva (two business data providers) along with data from the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA). Out of the 89 servicers for which VA has sufficient data to determine their size, 26 (or 29.21 percent) are considered small by SBA standards. The average annual revenue of those 26 small servicers is \$11.98 million.<sup>53</sup>

<sup>51</sup> VA uses data from InfoUSA and Factiva to determine the industry (as identified by the primary NAICS code) for the active VA-guaranteed loan servicers. For industries where size standards are determined by the average annual revenue, VA compares the revenue of each servicer in these industries, as reported in InfoUSA and Factiva, to the SBA annual revenue threshold for small businesses. For industries where size standards are determined by assets, VA compares the relevant SBA threshold for small businesses to asset data from the FDIC for servicers with primary NAICS codes 522110 (Commercial Banking) and 522120 (Savings Institutions), and asset data from the NCUA for lenders with a primary NAICS code of 522130 (Credit Unions).

<sup>52</sup> U.S. Small Business Administration, *SBA Table of Size Standards*, (2019), [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards\\_Effective%20Aug%202019%2C%202019\\_Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019%2C%202019_Rev.pdf).

<sup>53</sup> VA averages the sales volumes from Factiva for all servicers considered small, including those primarily considered commercial banks, savings institutions, and credit unions.

<sup>48</sup> 5 U.S.C. 553(c).

<sup>49</sup> Public Law 116-136, section 4022(b)(2) (Mar. 27, 2020).

<sup>50</sup> Id.

To determine the economic burden of the proposed rule on small entities, VA compares the average annual costs of the rule that fall on small servicers to the average annual revenue of the small servicers. The costs of the rule come from rule familiarization and the Paperwork Reduction Act (PRA) costs, which include the costs for servicers to complete the VA form 26–10213 and prepare and execute the original note and security instrument. The cost of rule familiarization is \$99.90 for each guaranteed loan servicer, including the small servicers. The PRA cost estimates vary across servicers depending on how many CARES Act forbearance loans they service that either meet or could potentially meet COVID–VAPCP requirements.

As described in the impact analysis, the lower and upper bound estimates for the number of borrowers who will likely qualify for assistance via a partial claim are 33,644 and 60,512, respectively. VA estimates that 28.538 percent of those loans are serviced by small entities, or between 9,601 and 17,269 loans. Given the total PRA cost for servicers of \$54.96 per loan, the total PRA cost per average small servicer is \$20,295.04 at the lower bound and \$36,504.01 at the upper bound.

The total cost of this rule per average small VA-guaranteed loan servicer ranges from \$20,395 (\$99.90 + \$20,295.04) to \$36,604 (\$99.90 + \$36,504.01), while the average annual revenue to small servicers is \$11.98 million. VA considers a rule to have a “significant economic impact” when the total annual cost associated with the rule for a small entity is equal to or exceeds 1 percent of annual revenue. The total upper bound cost to small servicers is 0.30 percent of the average annual revenue to small servicers. This ratio is calculated using the total costs on small servicers, rather than the total annual costs. In subsequent years, absent the rule familiarization costs and with the dispersion of the PRA costs, the average annual cost to small servicers is even below that level. Thus, the rule is not expected to have a significant economic impact on the small servicers.

To assess whether the rule can be expected to affect a “substantial number of small entities,” VA considers a ratio that captures the incidence of small VA servicers in the potential universe of servicers. Specifically, VA uses the ratio of small VA servicers with guaranteed loans in CARES Act forbearance that are likely to participate in the partial claim program to the total number of VA servicers with guaranteed loans in CARES Act forbearance that are likely to

participate in the partial claim program. As described above, 26 VA servicers out of the 89 servicers with sufficient data available are small (29.21 percent). Therefore, the proposed rule is expected to affect a substantial number of small entities.

While the proposed rule is expected to affect a substantial number of small entities, the impact will not be economically significant. On this basis, the Secretary certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

#### *Unfunded Mandates*

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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 (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### *Paperwork Reduction Act*

This proposed rule includes provisions constituting both revised and new collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed §§ 36.4333, 36.4336, 36.4803, 36.4805, 36.4806, 36.4807, and 36.4810 contain collections of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of

Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 or submitted through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900–AR05.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department’s estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, such as permitting electronic submission of responses.

The collections of information contained in 38 CFR 36.4333, 36.4336, and 36.4810 are described immediately following this paragraph, under its respective title.

*Title:* Maintenance of Records.

*OMB Control No.:* 2900–0515.

*CFR Provisions:* 38 CFR 36.4333, 36.4336, and 36.4810.

*Summary of collection of information:* These requirements are covered under OMB control number 2900–0515. VA proposes to revise this information collection to include the proposed revisions to § 36.4333 and new proposed §§ 36.4336 and 36.4810. Under current 38 CFR 36.4333, VA requires holders to maintain and lenders to retain all records pertaining to loans guaranteed by VA. Under this same authority, VA has a right to inspect, examine, or audit, at a reasonable time and place, such records to ensure program participants are in compliance with applicable laws, regulations, policies, procedures, and contract provisions. The revised collection of information in proposed 38 CFR

36.4333 would require holders to maintain records supporting their decision to approve any home retention option exercised by the servicer and borrower. The holder would also be required to maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program. VA would require those records to be retained a minimum of 3 years from the date of any incentive paid in accordance with § 36.4319(a) or, in the case of a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program, the date the veteran's guaranteed loan is made current under such program, whichever is later, and shall include, but not be limited to, credit reports, verifications of income, employment, assets, liabilities, and other factors affecting the obligor's credit worthiness, worksheets, and other documents supporting the holder's decision. In § 36.4336, VA would be authorized to take action if it found that a servicer failed to maintain adequate loan accounting records, to demonstrate proper ability to service loans adequately, to exercise proper credit judgment, or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government. In § 36.4810, VA would extend that authority to a partial claim payment.

*Description of need for information and proposed use of information:* The information collected as a result of revisions associated with this rulemaking will be used by VA to conduct servicer oversight, including the COVID-19 Veteran Assistance Partial Claim Payment program.

*Description of likely respondents:* The respondent population under the current information collection is comprised of holders and lenders, particularly, the individuals with oversight roles in the company, such as a compliance officer. There is no change to this section as a result of this rulemaking.

*Estimated number of respondents:* Under the current information collection, VA estimates an ongoing hour burden associated with holders and lenders submitting files to VA in association with normal audit activities. VA also estimates an hour burden associated with lenders who may voluntarily submit loan records to VA in a computable data format as it begins to pilot that technology. VA does not anticipate additional submissions as a result of the proposed revisions to §§ 36.4333, 36.4336, and 36.4810.

*Estimated frequency of responses:* Under the current information collection, VA estimates a one-time response to an audit request or voluntary electronic submission. VA does not anticipate an increase in the frequency of responses.

*Estimated average burden per response:* The revisions proposed in this rule would neither increase nor decrease the average burden per response, which in this case would be the time a servicer spends uploading records requested by VA in conjunction with servicer audit and oversight activities. Similarly, VA notes that recordkeeping requirements related to servicing and loss-mitigation activities are consistent with customary and usual business practices for loan holders (servicers); VA therefore assigns no additional time burden to servicers in maintaining such records, including those contemplated by the revisions proposed in this rule.

*Estimated total annual reporting and recordkeeping burden:* VA does not, with this proposed rulemaking, anticipate any change in the total annual reporting and recordkeeping burden. In that regard, VA's proposed revisions to this existing information collection merely expand the documentation/information that servicers must keep in their records in regard to existing VA-guaranteed loans and loss-mitigation activities associated with those loans, the cost of which falls within customary and usual business practices. Moreover, VA would request such records for the purpose of conducting oversight of VA's proposed COVID-VAPCP under existing audit and oversight programs with no anticipated impact in the number of loans for which servicers will have to provide VA with additional information.

*Estimated cost to respondents per year:* VA anticipates no additional costs to respondents based on proposed revisions associated with this rulemaking.

The collections of information contained in 38 CFR 36.4803, 36.4805, 36.4806, and 36.4807 are described immediately following this paragraph, under its respective title.

*Title:* Application for a COVID-19 Veterans Assistance Partial Claim Payment (COVID-VAPCP).

*OMB Control No.:* 2900-XXXX (NEW).

*CFR Provisions:* 38 CFR 36.4803, 36.4805, 36.4806, and 36.4807.

*Summary of collection of information:* The new collection of information in proposed 38 CFR 36.4803 would require the veteran to certify that the veteran

can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim is requested. In § 36.4803, the servicer would be required to certify that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and other monthly obligations have been met. In § 36.4805, the servicer would be required to prepare a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". VA would require that the note be consistent with the terms described in § 36.4806 and include all borrowers who are obligated on the guaranteed loan. The security instrument would be required to include all persons (borrowers, as well as non-borrowers) who have a title interest in the property securing the guaranteed loan. The servicer would be required to record the security instrument timely, as prescribed in § 36.4807.

In § 36.4806, VA would require the veteran, and all co-borrowers on the guaranteed loan, to execute a note and security instrument in favor of "the Secretary of Veterans Affairs, an Officer of the United States". VA would require specific terms in the note and security instrument. Specifically, VA would require the note and security instrument to include the amount to be repaid to the Secretary, by the veteran, to be the amount calculated under § 36.4805(e). The interest rate on the loan created by the note and security instrument would be required to be fixed at 1.00 percent per annum. VA would automatically defer monthly payments for the first 60 months of the loan, meaning that there would be no payment due to the Secretary during the period of deferment. A borrower could, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof, provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term. VA would require the term of the loan to be 120 months. The loan would be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments. VA would require repayment in full immediately upon the veteran's transfer of title to the property, the refinancing, or payment in full



otherwise, of the guaranteed loan with which the partial claim payment is associated.

In § 36.4807, VA would require the veteran and the servicer to complete an application form prescribed by the Secretary. VA would also state that along with the completed form, the servicer must provide VA with the original note required by § 36.4805. Not later than 180 days following the date the security instrument, required by § 36.4805, is fully executed, the servicer would be required to provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, VA would allow the servicer to request an extension of time, in writing, from VA. The servicer would also be required to report information related to the partial claim application to VA electronically.

VA proposes to collect information for the partial claim payment application, including the certifications outlined in 36.4803, through use of a new standardized form. Proposed VA form 26–10213, *Application for a COVID–19 Veterans Assistance Partial Claim Payment (COVID–VAPCP)*, would collect basic information necessary to identify the borrower(s), the servicer, and the VA loan number for the guaranteed loan for which partial claim payment is being requested. This form would also collect information regarding the date the veteran entered into a CARES Act forbearance, along with the unpaid principal balance on that date, the latter of which is necessary to determine the maximum amount of the partial claim payment under § 36.4805. VA proposes on this form that the servicer must indicate, on the proposed form, the date on which the borrower will resume monthly guaranteed loan payments to the servicer, along with the amount of those monthly payments. The servicer would then provide the amount of partial claim payment being requested, along with the date the note and security instrument were executed, as required under § 36.4805. Finally, both the borrower and servicer would sign statements certifying to those elements required under § 36.4803.

*Description of need for information and proposed use of information:* The information will be used by VA to determine if the veteran qualifies for a partial claim payment and, if qualified, to administer the payment.

*Description of likely respondents:* Veterans and servicers pursuing a partial claim payment.

*Estimated number of respondents:* VA notes that due to the unprecedented

nature of the current national emergency and the novelty of VA's partial claim payment program, there is some uncertainty as to how many respondents would be impacted by this proposed rulemaking. As discussed in VA's regulatory impact analysis, VA has estimated a lower/upper bound of estimated partial claim payments associated with this temporary program that corresponds directly to those who would be subject to the paperwork requirements associated with this rulemaking. VA has further estimated a distribution of these partial claim payments (or respondents) over fiscal years 2021 and 2022. Given that this proposed temporary program is limited to help veterans recover financially from the COVID–19 national emergency, VA does not anticipate any partial claim payments (or applications) will be received in FY 2023 and beyond. To ensure that VA's paperwork burden estimate coincides with its regulatory impact analysis, VA has presented a range of paperwork burden estimates. However, for purposes of calculating annual reporting and recordkeeping costs, VA will utilize the average of these estimates, annualized over two years (FY 2021 and 2022).

Using the lower/upper bound from VA's regulatory impact analysis, VA estimates the total number of respondents would fall between 33,644 and 60,512. Over the two-year period of this information collection, the annual number of respondents is therefore estimated to fall between 16,822 and 30,256, with an average annual number of respondents equal to 23,539.

*Estimated frequency of responses:* One time per application for partial claim payment.

*Estimated average burden per response:* 60 minutes for veterans (includes 15 minutes to complete VA form 26–10213, 15 minutes to gather and submit any additional financial information needed to enable the servicer to make an assessment under 38 CFR 36.4340(e), and 30 minutes to understand and execute the original note and security instrument). 90 minutes for servicers (includes 15 minutes to complete VA form 26–10213, 15 minutes to review additional financial information provided by the veteran to assess residual income under 38 CFR 36.4340(e), and 1 hour to prepare and execute the original note and security instrument).

*Estimated total annual reporting and recordkeeping burden:* VA estimates the total annual reporting and recordkeeping burden falls between 42,055 and 75,640 burden hours. Using VA's average annual number of

respondents (23,539), VA estimates a total annual reporting and recordkeeping burden of 58,847 hours (23,539 hours for veterans; 35,308 hours for servicers).

*Estimated cost to respondents per year:* VA estimates the annual cost to respondents falls between \$1,357,198 and \$2,441,053. Using VA's average annual number of respondents, VA estimates the total cost to all respondents to be \$1,899,108 per year.<sup>54</sup> (23,539 burden hours for veterans × \$25.72 per hour) + (35,308 burden for servicers × \$36.64 per hour).

*Title:* VA Loan Electronic Reporting Interface (VALERI) System.

*OMB Control No.:* 2900–0021.

*CFR provisions:* 38 CFR part 36, subpart B, and 38 CFR 36.4807.

*Summary of collection of information:* The information collection requirements under 38 CFR part 36, subpart B, which include reporting requirements for servicers, are currently assigned OMB control number 2900–0021 and set to expire on November 30, 2020. In proposed § 36.4807, VA would require servicers to report a partial claim event to VA through its existing electronic loan servicing system. This new reporting requirement therefore requires revisions to the existing information collection under control number 2900–0021. VA therefore seeks to renew and revise this information collection, to include proposed revisions to § 36.4807.

The servicer is already required to report information associated with reinstating the loan as current, as outlined at 38 CFR 36.4317(c)(15), and covered by the existing information collection. VA proposes to revise its information collection to collect new data elements specific to the servicer executing a partial claim. This new information would be transmitted through a VALERI Events Bulk Upload template.

*Description of need for information and proposed use of information:* Regarding the information requested under proposed 38 CFR 36.4807, the information will be used by VA to determine if the veteran qualifies for a partial claim option and, if qualified, to administer the payment to the servicer on behalf of the veteran. It will also serve as a way for VA to track the occurrence of the partial claim home retention event.

<sup>54</sup> To estimate costs associated with servicer respondent burden, VA used the Bureau of Labor Statistics (BLS) median hourly wage for loan officers (occupation code 13–2072) of \$36.64 per hour. To estimate costs associated with veteran respondent burden, VA used the median hourly wage for all occupations of \$25.72 per hour. This information is available at [https://www.bls.gov/oes/current/oes\\_nat.htm#13-0000](https://www.bls.gov/oes/current/oes_nat.htm#13-0000).

*Description of likely respondents:* The renewal encompasses all servicers reporting servicing activity on loans to VA. The revisions encompass a subset of this group; specifically, servicers requesting a partial claim payment on behalf of a veteran.

*Estimated number of respondents:* VA does not anticipate any change in the estimated number of respondents based on VA's renewal request or proposed revisions to this information collection requirement. The current estimated number of respondents reflects the estimated number of VA servicers required to submit loan servicing information to VA annually. As such, the servicers who will submit information in conjunction with the partial claim payment option are contemplated in the current estimated respondent population.

*Estimated frequency of responses:* VA does not anticipate any change in the estimated frequency of responses based on VA's renewal request or proposed revisions to this information collection as servicers are required to report activity on every VA-guaranteed loan in their servicing portfolio, regardless of the home retention options pursued.

*Estimated average burden per response:* VA does not anticipate any change in the average burden per response based on VA's renewal request or proposed revisions to this information collection. Under the existing information collection, VA estimates a one-minute respondent burden as the information reported through VALERI is automated.

*Estimated total annual reporting and recordkeeping burden:* VA does not anticipate any change in the total annual reporting and recordkeeping burden currently associated with this information collection. VA's proposed revisions to this existing information collection merely expand the list of possible home retention events to be reported by servicers to include the partial claim option.

*Estimated cost to respondents per year:* There are no new or increased costs to respondents based on this renewal request or proposed revisions to this information collection. As noted above, there is no change in the estimated average number of respondents and average burden per response for reporting activities associated with this information collection. VA acknowledges that servicers will be required to incorporate new information into the VALERI Events Bulk Upload template within their current servicing platforms. However, VA estimates a de minimis cost for servicers because servicers

already utilize VALERI and the Events Bulk Upload template format to report all servicing activity to VA.

#### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.114, Veterans Housing—Guaranteed and Insured Loans.

#### **List of Subjects in 38 CFR Part 36**

Condominiums, Housing, Individuals with disabilities, Loan programs—housing and community development, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

#### **Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on October 15, 2020, for publication.

#### **Jeffrey M. Martin,**

*Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 36 as set forth below:

#### **PART 36—LOAN GUARANTY**

■ 1. The authority citation for part 36 continues to read as follows:

**Authority:** 38 U.S.C. 501 and 3720.

■ 2. Amend § 36.4333 by revising paragraph (a)(2) and the two parenthetical sentences at the end of the section to read as follows:

#### **§ 36.4333 Maintenance of records.**

(a) \* \* \*

(2) The holder shall maintain records supporting their decision to approve any loss mitigation option. The holder shall maintain records supporting their decision to pursue a partial claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program established under subpart F of this part. Such records shall be retained a minimum of 3 years from the date of any incentive paid in accordance with § 36.4319(a) or, in the case of a partial

claim payment under the COVID-19 Veterans Assistance Partial Claim Payment program, the date the veteran's guaranteed loan is made current under such program, whichever is later, and shall include, but not be limited to, credit reports, verifications of income, employment, assets, liabilities, and other factors affecting the obligor's credit worthiness, work sheets, and other documents supporting the holder's decision.

\* \* \* \* \*

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c)(1), 3704(d))

■ 3. Add § 36.4336 to read as follows:

#### **§ 36.4336 Oversight of servicing.**

(a) Subject to notice and opportunity for a hearing, whenever the Secretary finds that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.

(b) Notwithstanding paragraph (a) of this section, but subject to § 36.4328, the Secretary will not refuse to pay a guaranty or insurance claim on guaranteed loans theretofore entered into in good faith between a veteran and such servicer.

(c) The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0515)

(Authority: 38 U.S.C. 3703, 3704(d), 3720)

■ 4. Add subpart F to read as follows:

#### **Subpart F—COVID-19 Recovery Measures**

##### **Sec.**

36.4800 Applicability.

36.4801 Definitions.

36.4802 General purpose of the COVID-19 Veterans Assistance Partial Claim Payment program.

- 36.4803 General requirements of the COVID-19 Veterans Assistance Partial Claim Payment program.
- 36.4804 Partial claim payment as last resort.
- 36.4805 Terms of the partial claim payment.
- 36.4806 Terms of the assistance to the veteran.
- 36.4807 Application for partial claim payment.
- 36.4808 No effect on the servicing of the guaranteed loan.
- 36.4809 Expiration of the COVID-19 Veterans Assistance Partial Claim Payment program.
- 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment program.

**§ 36.4800 Applicability.**

This subpart applies to all loans guaranteed by VA, to the extent such loans are affected by the COVID-19 national emergency.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4801 Definitions.**

The following definitions of terms apply to this subpart:

*Alternative to foreclosure* means an alternative to foreclosure for which the Secretary may pay an incentive under § 36.4319. These alternatives include compromise sale (sometimes called a short sale) and deed-in-lieu of foreclosure.

*CARES Act forbearance* means forbearance of scheduled monthly guaranteed loan payments, as granted to a veteran under section 4022 of the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136).

*CARES Act indebtedness* means the dollar amount the veteran is obligated to pay under the guaranteed loan terms, but that is not collected during a CARES Act forbearance.

*Guaranteed loan* means a loan guaranteed under chapter 37 of title 38, United States Code.

*Loss-mitigation option* means a loss-mitigation option for which the Secretary may pay an incentive under § 36.4319. These options include a repayment plan, special forbearance, and loan modification.

*Secretary* means the Secretary of Veterans Affairs, or any employee of the Department of Veterans Affairs (VA) authorized to act in the Secretary's stead.

*Servicer* means, for the purposes of this subpart, the holder, servicer, or servicing agent, as defined in § 36.4301. The terms can apply jointly or severally, or jointly and severally.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4802 General purpose of the COVID-19 Veterans Assistance Partial Claim Payment program.**

The COVID-19 Veterans Assistance Partial Claim Payment program is a temporary program to help veterans who have suffered a COVID-19 financial hardship. Notwithstanding the requirements elsewhere in this part regarding payment of a guaranty claim or refunding a loan, VA may assist a veteran exiting a CARES Act forbearance by purchasing from the servicer the veteran's CARES Act indebtedness. Such a purchase is called a partial claim payment. In exchange for VA's partial claim payment on behalf of the veteran, the veteran must agree to repay the Secretary, in the amount of such partial claim payment, upon loan terms established by the Secretary.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4803 General requirements of the COVID-19 Veterans Assistance Partial Claim Payment program.**

The following general requirements must be met before the Secretary will allow for participation in the COVID-19 Veterans Assistance Partial Claim Payment program:

(a) The loan for which a partial claim payment is requested must be a guaranteed loan that was, on March 1, 2020, either current or less than 30 days past due;

(b) The veteran on whose behalf VA will pay a partial claim payment both received a CARES Act forbearance and missed at least one scheduled monthly payment;

(c) There remains unpaid at least one scheduled monthly payment that the veteran did not make while under a CARES Act forbearance;

(d) The veteran certifies that the veteran can resume making scheduled monthly payments, on time and in full, and that the veteran occupies, as the veteran's residence, the property securing the guaranteed loan for which the partial claim payment is requested;

(e) The servicer determines and certifies that the veteran's monthly residual income, as described in § 36.4340(e), will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and other monthly obligations have been met; and

(f) The veteran executes, in a timely manner, all loan documents necessary to establish an obligation to repay the Secretary for the partial claim payment.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4804 Partial claim payment as last resort.**

(a) The Veterans Assistance Partial Claim Payment program is designed to address the financial hardships due, directly or indirectly, to the COVID-19 national emergency. Servicers must consider all possible loss-mitigation options. VA expects that the partial claim payment option will be considered only as a last resort, after a servicer has evaluated loss-mitigation options for feasibility.

(b) If the veteran notifies the servicer that the veteran does not want to retain ownership of the property securing the guaranteed loan, the servicer may immediately proceed to offering an alternative to foreclosure.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4805 Terms of the partial claim payment.**

(a) In order for a partial claim payment to be payable, the servicer must submit to the Secretary, not later than 90 days after the date the veteran exits the CARES Act forbearance, a request for such payment, as prescribed in § 36.4807.

(b) The amount of the partial claim payment that VA will pay to the servicer, as calculated under paragraph (e) of this section, shall not exceed 15 percent of the unpaid principal balance of the guaranteed loan. For the purposes of this paragraph (b), the unpaid principal balance of the guaranteed loan means such balance as of the date the veteran entered into a CARES Act forbearance.

(c) VA will pay only one partial claim payment per guaranteed loan.

(d) VA will pay only one partial claim payment per veteran.

(e)(1) Because VA will pay only one partial claim payment per guaranteed loan, and only one partial claim payment per veteran, a servicer must, when calculating the amount of partial claim payment to be paid by VA to the servicer, include the full amount of indebtedness that is necessary to bring the guaranteed loan current.

(2) To bring the guaranteed loan current, servicers must include the full CARES Act indebtedness, comprising—

(i) All scheduled but missed monthly payments of principal and interest; and

(ii) As applicable, all scheduled but missed monthly escrow payments for real estate taxes and insurance premiums, or where the guaranteed loan documents do not provide for monthly escrowing, all payments the servicer made to real estate tax authorities and insurance providers, on the veteran's behalf, during the CARES Act forbearance.

(3) Also in bringing the guaranteed loan current, servicers must include—

(i) All scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) due within 31 days of the date the veteran executes the note and security instrument described in § 36.4806;

(ii) If applicable, all scheduled monthly payments (comprising principal, interest, and escrow payments for real estate taxes and insurance premiums) that were missed after March 1, 2020, but before the veteran was granted the CARES Act forbearance; and

(iii) The actual amount of recording fees, recording taxes, or other charges levied by the recording authority, that must be paid in order to record the security instrument described in § 36.4806.

(4) Except for amounts identified in paragraphs (e)(2) and (3) of this section, servicers shall not include any amounts (e.g., fees, penalties, or interest) beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the guaranteed loan.

(5) Nothing in this section shall preclude a veteran from making an optional payment or a servicer from waiving a veteran's indebtedness, such that the amount of partial claim payment would not exceed the 15 percent cap described in paragraph (b) of this section.

(6) If the servicer miscalculates the partial claim amount, resulting in an overpayment to the servicer, the amount of such overpayment shall constitute a liability of the servicer to the United States. The servicer must remit the overpaid amount immediately to VA.

(7) If the servicer miscalculates the partial claim amount, resulting in underpayment (i.e., an amount insufficient to bring the guaranteed loan current), the servicer must waive the difference.

(8) Servicers shall not include any amounts for a monthly payment that is scheduled to be paid on a date that is more than 31 days after the veteran executes the note and security instrument described in § 36.4806.

(f) The servicer must prepare a note and security instrument in favor of “the Secretary of Veterans Affairs, an Officer of the United States”.

(1) The note must be consistent with the terms described in § 36.4806 and include all borrowers who are obligated on the guaranteed loan; and

(2) The security instrument must include all persons (borrowers, as well as non-borrowers) who hold a title

interest in the property securing the guaranteed loan.

(g) Subject to paragraph (a) of this section, all loan documents must be fully executed not later than 90 days after the veteran exits the CARES Act forbearance.

(h) The servicer must record the security instrument timely, as prescribed in § 36.4807.

(i) The servicer must not charge, or allow to be charged, to the veteran any fee in connection with the COVID-19 Veterans Assistance Partial Claim Payment program.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

#### **§ 36.4806 Terms of the assistance to the veteran.**

(a) If a veteran chooses to accept VA's assistance (i.e., a partial claim payment to the servicer, on the veteran's behalf), the veteran, and all co-borrowers on the guaranteed loan, must execute a note and security instrument in favor of “the Secretary of Veterans Affairs, an Officer of the United States”.

(b) Specific terms of the note and security instrument shall include the following:

(1) The amount to be repaid to the Secretary, by the veteran, is the amount calculated under § 36.4805(e);

(2) The interest rate on the loan created by the note and security instrument must be fixed at 1.00 percent per annum;

(3)(i) Monthly payments are automatically deferred for the first 60 months of the loan, meaning that there is no payment due to the Secretary during the period of deferment;

(ii) Interest will accrue on the loan during such deferment; and

(iii) A borrower may, without premium or fee, make payments during such deferment for the entire indebtedness, or any portion thereof provided that such portion is not less than what would be due for one monthly payment as calculated based on a 60-month term;

(4) The term of the loan must be 120 months;

(5) The loan shall be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments; and

(6) Repayment in full is required immediately upon—

(i) The veteran's transfer of title to the property; or

(ii) The refinancing, or payment in full otherwise, of the guaranteed loan with which the partial claim payment is associated.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

#### **§ 36.4807 Application for partial claim payment.**

(a) The veteran and the servicer must complete an application form prescribed by the Secretary.

(b) Along with a complete application form, the servicer must provide VA with the original note required by § 36.4805. Not later than 180 days following the date the security instrument, required by § 36.4805, is fully executed, the servicer must provide VA with the original security instrument and evidence that the servicer recorded such instrument. If the recording authority causes a delay, the servicer may request an extension of time, in writing, from VA.

(c) Servicers must report a partial claim event to VA through VA's existing electronic loan servicing system within seven days of the borrower's execution of the note required by § 36.4805.

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers XXXX-XXXX and XXXX-XXXX)

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

#### **§ 36.4808 No effect on the servicing of the guaranteed loan.**

(a) Servicers must continue to service the guaranteed loan in accordance with subpart B of this part.

(b) The liability of the United States for any guaranteed loan shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the guaranteed loan. A partial claim payment does not affect the guaranty percentage established at the time the guaranteed loan was made.

(c) Receipt of a partial claim payment shall not eliminate a servicer's option under 38 U.S.C. 3732 to convey to the Secretary the security for the guaranteed loan.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

#### **§ 36.4809 Expiration of the COVID-19 Veterans Assistance Partial Claim Payment program.**

(a) Subject to paragraph (b) of this section, the Secretary will not accept a request for a partial claim payment after the date that is 180 days after the date the COVID-19 national emergency ends (as provided under the National Emergencies Act).

(b) If a veteran's CARES Act forbearance does not end until after the date described in paragraph (a) of this section, the Secretary may still accept a request for a partial claim payment, provided that such request is submitted to the Secretary not later than 90 days after the date the veteran exits the CARES Act forbearance.

(c) Notwithstanding paragraphs (a) and (b) of this section, the Secretary will not accept a request for a partial claim payment after September 9, 2021.

(Authority: 38 U.S.C. 3703(c), 3720, 3732)

**§ 36.4810 Oversight of the COVID-19 Veterans Assistance Partial Claim Payment program.**

(a) Subject to notice and opportunity for a hearing, whenever the Secretary

finds with respect to a partial claim payment that any servicer has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or of the Government, the Secretary may refuse either temporarily or permanently to guarantee or insure any loans made by such servicer and may bar such servicer from servicing or acquiring guaranteed loans.

(b) Notwithstanding paragraph (a) of this section, but subject to § 36.4328, the Secretary will not refuse to pay a guaranty or insurance claim on

guaranteed loans theretofore entered into in good faith between a veteran and such servicer.

(c) The Secretary may also refuse either temporarily or permanently to guarantee or insure any loans made by a lender or holder refused the benefits of participation under the National Housing Act pursuant to a determination of the Secretary of Housing and Urban Development.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX-XXXX)

(Authority: 38 U.S.C. 3703, 3704(d), 3720)

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