



**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 722**

**RIN 3133-AF17**

**Real Estate Appraisals**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** The NCUA Board (Board) is adopting as final an interim final rule to temporarily amend its regulations requiring all federally insured credit unions to provide appraisals of real estate for certain real estate related transactions. The final rule defers the requirement to obtain an appraisal or written estimate of market value for up to 120 days following the closing of certain residential and commercial real estate transactions, excluding transactions for acquisition, development, and construction of real estate. Credit unions should make best efforts to obtain a credible estimate of the value of real property collateral before closing the loan, and otherwise underwrite loans consistent with safety and soundness principles. The final rule allows credit unions to expeditiously extend liquidity to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of the coronavirus disease 2019 (COVID event). The final rule adopts the interim final rule without change. The final rule is similar to a recent final rule issued by the Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (FRB); and Federal Deposit Insurance Corporation (FDIC) (collectively, the other banking agencies) that also defers the requirement to obtain an

appraisal or evaluation for up to 120 days following the closing of a transaction for certain residential and commercial real estate transactions.

**DATES:** The final rule is effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER], through December 31, 2020.

**FOR FURTHER INFORMATION CONTACT:** *Technical information:* Uduak Essien, Director - Credit Markets, (703) 518-6399, and Lou Pham, Senior Credit Specialist, (703) 548-2745, Office of Examination and Insurance. *Legal information:* Rachel Ackmann, Senior Staff Attorney, (703) 548-2601, and Gira Bose, Staff Attorney, (703) 518-6562, Office of General Counsel, National Credit Union Administration, each at 1775 Duke Street, Alexandria, VA 22314.

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### **I. Introduction**

*Impact of the COVID event on appraisals and written estimates of market value.*

Due to the impact of the COVID event, and the need for businesses and individuals to quickly access additional liquidity, the Board published an interim final rule in the *Federal Register* on April 21, 2020 (interim final rule),<sup>1</sup> to defer the requirement to obtain an appraisal or written estimate of market value for up to 120 days following the closing of a transaction for certain residential and commercial real estate transactions, excluding transactions for acquisition, development, and construction of real estate. The interim final rule allows businesses and individuals to quickly access liquidity from real estate equity during the COVID-19 event.<sup>2</sup>

In this final rule, the Board is adopting the interim final rule as final and without change. The amendments to the NCUA's appraisal regulations allow for the deferral of appraisals and written estimates of market value for qualifying transactions through December 31, 2020, as detailed further below.

### **II. Background**

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<sup>1</sup> 85 FR 22014 (Apr. 21, 2020).

<sup>2</sup> The coronavirus disease 2019 outbreak was declared a national emergency under Proclamation 9994, 85 FR 15337 (Mar. 18, 2020).

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Title XI)<sup>3</sup> directs each Federal financial institutions regulatory agency to publish appraisal regulations for federally related transactions within its jurisdiction.<sup>4</sup> The purpose of Title XI is to protect federal financial and public policy interests<sup>5</sup> in real estate-related transactions by requiring that real estate appraisals used in connection with federally related transactions (Title XI appraisals) are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.<sup>6</sup>

Title XI directs the Board to prescribe appropriate standards for Title XI appraisals under its jurisdiction.<sup>7</sup> At a minimum, Title XI provides that a Title XI appraisal must be:

(1) performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP); (2) a written appraisal, as defined by Title XI; and (3) subject to appropriate review for compliance with USPAP.<sup>8</sup> While appraisals ordinarily are completed before a lender and borrower close a real estate transaction, there is no specific requirement in USPAP that appraisals be completed at a specific time relative to the closing of a transaction.

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<sup>3</sup> 12 U.S.C. 3331 *et seq.*; Pub. L. 101-73; 103 Stat. 183.

<sup>4</sup> The term “Federal financial institutions regulatory agencies” means the FRB, the FDIC, the OCC, the National Credit Union Administration, and, formerly, the Office of Thrift Supervision. 12 U.S.C. 3350(6).

<sup>5</sup> These federal financial and public policy interests include those stemming from the Federal Government’s roles as regulator and deposit insurer of financial institutions that engage in real estate lending and investment, guarantor or lender on mortgage loans, and as a direct party in real estate-related financial transactions. These interests have been described in predecessor legislation and accompanying Congressional Reports. *See* Real Estate Appraisal Reform Act of 1988, H.R. Rep. No. 100-1001, pt. 1, at 19 (1988); 133 Cong. Rec. 33047-33048 (1987).

<sup>6</sup> 12 U.S.C. 3331.

<sup>7</sup> 12 U.S.C. 3339.

<sup>8</sup> *Id.*

All federally related transactions must have Title XI appraisals. Title XI defines a “federally related transaction” as a real estate-related financial transaction<sup>9</sup> that is regulated or engaged in by a federal financial institutions regulatory agency and requires the services of an appraiser.<sup>10</sup> The Board has the authority to determine those real estate-related financial transactions that do not require the services of an appraiser and thus are not required to have Title XI appraisals.<sup>11</sup> The Board has exercised this authority by exempting certain categories of real estate-related financial transactions from its appraisal requirements.<sup>12</sup>

The Board has used its safety and soundness authority to require written estimates of market value for a subset of transactions for which an appraisal is not required.<sup>13</sup> Under the appraisal regulations, for these transactions, credit unions must obtain an appropriate written estimate of market value that is consistent with safe and sound practices.<sup>14</sup>

*Authority to defer appraisals and written estimates of market value.*

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<sup>9</sup> 12 U.S.C. 3350(5). A real estate-related financial transaction is defined as any transaction that involves: (i) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or financing thereof; (ii) the refinancing of real property or interests in real property; and (iii) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

<sup>10</sup> 12 U.S.C. 3350(4).

<sup>11</sup> Real estate-related financial transactions that the Board has exempted from its appraisal requirement are not federally related transactions under its appraisal regulations.

<sup>12</sup> See 12 CFR 722.3(a). The NCUA has determined that these categories of transactions do not require appraisals by state-certified or state-licensed appraisers in order to protect federal financial and public policy interests or to satisfy principles of safety and soundness.

<sup>13</sup> See 12 CFR 722.3(d).

<sup>14</sup> The NCUA and the other banking agencies have provided guidance on appraisals and evaluations (referred to as written estimates of market value in part 722) through the Interagency Guidelines on Appraisals and Evaluations. See 75 FR 77450 (Dec. 10, 2010), available at <https://www.ncua.gov/files/letters-credit-unions/LCU2010-23Encl.pdf>.

In general, the Board requires that Title XI appraisals for federally related transactions occur prior to the closing of a federally related transaction.<sup>15</sup> The Interagency Guidelines on Appraisals and Evaluations provide similar guidance about written estimates of market value.<sup>16</sup> Under the interim final rule, and this final rule, deferrals of appraisals and written estimates of market value allow for expeditious access to credit. The Board authorized the deferrals, which are temporary, in response to the COVID event. Credit unions that defer receipt of an appraisal or written estimate of market value are still expected to conduct their lending activity consistent with safe and sound underwriting principles, such as the ability of a borrower to repay a loan and other relevant laws and regulations.<sup>17</sup> These deferrals are not an exercise of the NCUA's waiver authority, because appraisals and written estimate of market value are being deferred, not waived. The deferrals also are not a waiver of USPAP requirements, given that: (1) USPAP does not address the completion of an appraisal assignment with the timing of a lending decision; and (2) the deferred appraisal must be conducted in compliance with USPAP.

The deferral of written estimates of market value reflects the same considerations relating to the impact of the COVID event as the deferral of appraisals. The Board requires written estimates of market value for certain exempt transactions as a matter of safety and soundness. Written estimates of market value do not need to comply with USPAP, but must be sufficiently robust to support a valuation conclusion. A written estimate of market value can be less complex

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<sup>15</sup> See 12 CFR 722.3(a), 722.4(b)&(d) (requiring an appraisal to: (1) contain sufficient information and analysis to support the credit union's decision to engage in the transaction, and (2) be based on the definition of market value in the regulation, which takes into account a specified closing date for the transaction).

<sup>16</sup> See 75 FR 77450 (Dec. 10, 2010), available at <https://www.ncua.gov/files/letters-credit-unions/LCU2010-23Encl.pdf>

<sup>17</sup> See, 12 U.S.C. 1786(b) and (e); and 12 CFR 723.4; 12 CFR 741.3(b).

than an appraisal and usually takes less time to complete than an appraisal, but it also commonly involves a physical property inspection. For these reasons, the Board also is using its safety and soundness authority<sup>18</sup> to allow for deferral of written estimates of market value.

By the end of the deferral period, credit unions must obtain appraisals or written estimates of market value that are consistent with safe and sound practices as required by the NCUA's appraisal regulations.

### **III. The Interim Final Rule and Summary of Comments**

The Board issued the interim final rule to allow a temporary deferral of the requirements for appraisals and written estimates of market value under the NCUA's appraisal regulations. The deferrals apply to both residential and commercial real estate-related financial transactions, excluding transactions for acquisition, development, and construction of real estate. The Board is excluding transactions for acquisition, development, and construction of real estate because these loans present heightened risks not associated with the financing of existing real estate.

The Board found good cause to issue the interim final rule without advance notice-and-comment procedures, but provided for a 45-day comment period. The comment period ended on June 5, 2020. The Board received five comments. Comments were received from credit union trade associations, a state credit union league, and an organization of state credit union

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<sup>18</sup> *Id.*

supervisors. All of the commenters expressed general support for the interim final rule, and none opposed it. A few commenters suggested amendments and clarifications to the interim final rule, which are discussed in detail below.

### *Supervisory Expectations*

Under the interim final rule, credit unions may close a real estate loan without a contemporaneous appraisal or written estimate of market value, subject to a requirement that credit unions obtain the appraisal or written estimate of market value, as would have been required under the appraisal regulations without the deferral, within a period of 120 days after closing of the transaction. While appraisals and written estimates of market value can be deferred, the Board expects credit unions to use best efforts and available information to develop a well-informed estimate of the collateral value of the subject property. In addition, the Board continues to expect credit unions to adhere to internal underwriting standards for assessing borrowers' creditworthiness and repayment capacity, and to develop procedures for estimating the collateral's value for the purposes of extending or refinancing credit. The NCUA also stated in a Letter to Credit Unions that the agency "encourages credit unions to make every effort to



obtain an appraisal or written estimate of value during the early stages of a real estate loan transaction.”<sup>19</sup>

Two commenters were concerned about supervisory expectations for credit unions that exercise their option to defer an appraisal or written estimate of market value. One commenter stated that the NCUA should ensure credit unions that avail themselves of the deferment period are not penalized, regardless of the steps they took to obtain an appraisal during the COVID event. The commenter suggested adopting a supervisory policy stating that when considering enforcement actions the NCUA will consider the circumstances that credit unions may face as a result of the pandemic and will be sensitive to good-faith efforts demonstrably designed to assist members. The commenter also stated that such a good-faith policy is consistent with the recent Executive Order on regulatory relief.<sup>20</sup> Another commenter similarly expressed concern that there is no assurance of a safe harbor for credit unions and requested further commentary or guidance to direct examiners to be flexible in working with credit unions delaying appraisals and written estimates of market value. The Board understands the difficulties caused by the COVID event and intends to be sensitive to good-faith efforts to comply with applicable rules during the pandemic. The Board also notes recent efforts to clarify post crisis expectations for managing loans for which regulatory flexibilities have been used. Generally, the Board expects that, after the COVID event, credit unions should continue to adhere to safety and soundness standards and should refer to prudent risk management guidance for managing loans that were made during the

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<sup>19</sup> Residential Appraisals Threshold Increase and Other COVID-19 Related Relief Measures, Letter to Credit Unions 20-CU-10 (Apr. 2020), *available at* <https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/residential-appraisals-threshold-increase-and-other-covid-19-related-relief-measures>.

<sup>20</sup> Exec. Order No. 13,924, 85 FR 31353 (May 22, 2020).

COVID event. Existing flexibilities in appraisal standards and the interagency appraisal regulations are described in the *Interagency Statement on Appraisals and Evaluations for Real Estate Related Financial Transactions Affected by the Coronavirus*.<sup>21</sup> Credit unions should also consider the *Joint Statement on Additional Loan Accommodations Related to COVID-19*<sup>22</sup> (Joint Statement), issued by the Federal Financial Institutions Examination Council (FFIEC) member agencies.<sup>23</sup> The Joint Statement provides guidance on managing loans as they approach the end of COVID event-related accommodation periods. The Joint Statement also provides guidance on offering additional accommodations.

#### *Acquisition, Development, and Construction Loans*

Under the interim final rule, transactions for acquisition, development, and construction of real estate are excluded from the flexibility to defer appraisals and written estimates of market value for 120 days. One commenter requested case-by-case leeway to delay valuation for acquisition, development, and construction loans as well, if, for example, additional collateral secures such borrowings and all other legal and safety and soundness requirements are met and documented. The Board does not believe it is prudent to allow deferrals of appraisals or written estimates of market value for acquisition, development, and construction loans. As discussed in

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<sup>21</sup> Press Release: *Interagency Statement on Appraisals and Evaluations for Real Estate Related Financial Transactions Affected by the Coronavirus* (Apr. 14, 2020).

<sup>22</sup> *Joint Statement on Additional Loan Accommodations Related to COVID-19*, available at <https://www.ncua.gov/files/press-releases-news/joint-statement-additional-loan-accommodations.pdf>.

<sup>23</sup> The FFIEC is composed of the following: a member of the FRB, appointed by the Chairman of the FRB; the Chairman of the FDIC; the Chairman of the NCUA; the Comptroller of the Currency; the Director of the Bureau of Consumer Financial Protection; and, the Chairman of the State Liaison Committee.

the interim final rule, repayment of loans for such transactions is generally dependent on the completion or sale of the property being held as collateral as opposed to repayment generated by existing collateral or the borrower. Therefore, it would be more prudent to have a formal appraisal or written estimate of market value that can provide an accurate assessment of collateral before any credit extension is necessary for such transactions.

### *Appraisals with Lower Valuations*

The interim final rule also stated that the Board expects credit unions to develop an appropriate risk mitigation strategy if the appraisal or written estimate of market value ultimately reveals a market value significantly lower than the expected market value. The interim final rule further provided that such a risk mitigation strategy should consider all risks that affect the credit union's safety and soundness, balanced with mitigation of financial harm to COVID event affected borrowers. One commenter asked the NCUA to provide clear guidance to address instances where a final valuation differs from the initial assessment. The commenter did not believe that credit unions should be required to take any action pertaining to the borrower and the loan at issue.

The Board did not prescribe methods or documentation standards for valuations estimated during the deferral period, but prudent credit unions should retain information that was used to support their estimates. Credit unions should continue to develop a loan-to-value estimate in accordance with overall standards for safety and soundness. Some examples of information that may help to develop an informed estimate are existing appraisals, tax assessed

values, comparable sales, and lender estimates. As stated in the interim final rule, the Board expects credit unions to develop an appropriate risk mitigation strategy if the appraisal or written estimate of market value ultimately determines a market value for a property that is significantly lower than expected when the loan is made. Appropriate risk mitigation strategies may vary based on circumstances and borrower. The *Joint Statement* clarifies that a reasonable accommodation may not necessarily result in an adverse risk rating solely because of a decline in the value of underlying collateral, provided that the borrower has the ability to perform according to the terms of the loan. However, credit unions should recognize a heightened degree of risk if the subsequently obtained appraisal or written estimate of market value ultimately reveals a market value significantly lower than the expected market value and take appropriate action to mitigate the risk.

#### *Effective Date*

The temporary provision permitting credit unions to defer an appraisal or written estimate of market value for eligible transactions will expire on December 31, 2020 (a transaction closed on or before December 31, 2020 is eligible for a deferral), unless extended by the Board. The Board believes that the limited timeframe for the deferral strikes the appropriate balance between safety and soundness and the need for immediate relief due to the COVID event. Two commenters requested an extension of the deferral period. One commenter specifically requested that the deferral period be extended through the first quarter of 2021. The commenter noted that states are in various phases of re-opening and credit unions may not have the ability to get an appraisal within the grace period based on local

restrictions continuing until after the December expiration date. The commenter also noted that many credit unions were experiencing difficulties in obtaining an appraisal before the COVID event. The Board has no plans to extend the effective date of the interim final rule at this time but will continue to consider flexibilities as needed while supporting safe and sound collateral valuation practices during and after the COVID event.

#### *Other Comments*

One commenter asked the NCUA to work closely with the Federal Housing Finance Agency to align real estate appraisal standards with those of the government-sponsored enterprises, Fannie Mae and Freddie Mac, and do so in a timely fashion. The Board agrees it is important to work closely with other agencies involved in the mortgage industry and align industry standards when appropriate. However, the Board notes that real estate loans that qualify for sale to Fannie Mae, Freddie Mac, and other federal agencies are exempt from the NCUA's appraisal regulations. Credit unions that originate real estate loans that qualify for this exemption should follow applicable appraisal requirements set forth by Fannie Mae, Freddie Mac, or other government agencies as appropriate.<sup>24</sup>

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<sup>24</sup> 12 CFR 722.3(a), Real estate related financial transactions not requiring an appraisal under this part.

#### **IV. Final Rule**

For the reasons discussed above, the Board is adopting the interim final rule as a final rule with no changes. Accordingly, under the final rule, credit unions may defer required appraisals and written estimates of market value for up to 120 days for all residential and commercial real estate-secured transactions, excluding transactions for acquisition, development, and construction of real estate. The temporary provision allowing credit unions to defer appraisals or written estimates of market value for covered transactions will expire on December 31, 2020, unless extended by the Board. As with the interim final rule, this final rule does not revise any of the existing appraisal exceptions or any other requirements with respect to the performance of written estimates of market value. The Board expects all appraisals, including deferred appraisals, to comply with USPAP.

#### **V. Administrative Law Matters**

##### ***A. Administrative Procedure Act***

The Administrative Procedure Act (APA) generally requires that a final rule be published in the *Federal Register* no less than 30 days before its effective date except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>25</sup> Because the

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<sup>25</sup> 5 U.S.C. 553(d).

final rule relieves a restriction, the final rule is exempt from the APA's delayed effective date requirement.<sup>26</sup> Additionally, as an independent basis, the NCUA finds good cause to publish the final rule with an immediate effective date. The NCUA believes that the public interest is best served by implementing the final rule as soon as possible. As discussed above, recent events have suddenly and significantly affected global economic activity, increasing the needs of businesses and individuals for timely access to liquidity from equity in real estate. In addition, the spread of COVID-19 has greatly increased the difficulty of performing real estate appraisals and evaluations in a timely manner. The relief provided by the final rule will continue to allow credit unions to better focus on supporting lending to creditworthy individuals and businesses in light of recent strains on the U.S. economy as a result of the COVID event, while reaffirming the safety and soundness principle that valuation of collateral is an essential part of the lending decision. Finally, the Board believes that implementing the final rule as soon as possible is consistent with its intent to grant expedited relief. Therefore, the final rule will become effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER], through December 31, 2020.

### ***B. Congressional Review Act***

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) generally provides for congressional review of agency rules.<sup>27</sup> A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.<sup>28</sup> As required by SBREFA, the NCUA submitted the April 2020 interim final

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<sup>26</sup> 5 U.S.C. 553(d)(1).

<sup>27</sup> 5 U.S.C. 801-804.

<sup>28</sup> 5 U.S.C. 551.

rule to OMB for it to determine if it was a “major rule” for purposes of SBREFA. OMB determined the interim final rule was not a major rule. The NCUA also filed the appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed. This final rule makes no changes to the interim final rule.

### ***C. Paperwork Reduction Act***

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden<sup>29</sup>. For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid OMB control number.

The information collection requirements of this part are approved under OMB control number 3133-0125, which requires that a federally insured credit union retain a record of either the appraisal or estimate, whichever applies. The deferral to obtain an appraisal or estimate will not result in a change in burden; therefore, no submission will be made to OMB for review.

### ***D. Regulatory Flexibility Act***

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<sup>29</sup> 44 U.S.C. 3507(d).



The Regulatory Flexibility Act (RFA)<sup>30</sup> generally requires an agency to consider whether the rule it proposes will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, the Board considers credit unions with assets less than \$100 million to be small entities.<sup>31</sup>

The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).<sup>32</sup> Since the NCUA was not required to issue a general notice of proposed rulemaking associated with the interim final rule or this final rule, no RFA is required. Accordingly, the Board has concluded that the RFA's requirements relating to a final regulatory flexibility analysis do not apply.

#### ***E. Executive Order 13132***

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. § 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles.

This final rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

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<sup>30</sup> 5 U.S.C. 601 *et seq.*

<sup>31</sup> NCUA Interpretive Ruling and Policy Statement 15-1. 80 FR 57512 (Sept. 24, 2015).

<sup>32</sup> 5 U.S.C. 604(a).

responsibilities among the various levels of government. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

***F. Assessment of Federal Regulations and Policies on Families***

The NCUA has determined that this rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

**List of Subjects in 12 CFR Part 722**

Appraisal, Appraiser, Credit unions, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

By the National Credit Union Administration Board on September 17, 2020.

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Gerard Poliquin

Secretary of the Board

For the reasons set forth in the preamble, the Board adopts the interim rule amending 12 CFR part 722, which was published at 85 FR 22014 on April 21, 2020, as final without change.