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DEPARTMENT OF THE TREASURY

31 CFR Part 35

Docket No. TREAS-DO-2021-0004

RIN 1505-AC76

Emergency Capital Investment Program – Restrictions on Executive Compensation, Share Buybacks, and Dividends

AGENCY: Department of the Treasury.

ACTION: Interim final rule and request for public comment.

SUMMARY: Section 104A of the Community Development Banking and Financial Institutions Act of 1994, which was added by the Consolidated Appropriations Act, 2021, establishes the Emergency Capital Investment Program to support capital investments in low- and moderate-income community financial institutions. The program is available to eligible minority depository institutions and community development financial institutions that are (1) insured depository institutions, (2) bank holding companies, (3) savings and loan holding companies, or (4) federally insured credit unions. Under Section 104A, the Secretary of the Treasury is required to issue rules setting restrictions on executive compensation, share buybacks, and dividend payments for recipients of capital investments under the program. This interim final rule establishes these restrictions.

DATES:

Effective date: This interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by number TREAS-DO-2021-0004 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Treasury will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ECIPInquiries@Treasury.gov. Highlight the information that you consider to be CBI and explain why you believe Treasury should hold this information as confidential. Treasury will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: For further information regarding this interim final rule contact Brian Donovan, Emergency Capital Investment Program, Treasury, at Brian.Donovan2@treasury.gov, or Eric Froman, Assistant General Counsel (Banking and Finance), Treasury, at Eric.Froman@treasury.gov.

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I. Background Information

On December 27, 2020, the Consolidated Appropriations Act, 2021 (Pub. L. 116-260), was signed into law. It added Section 104A of the Community Development Banking and Financial Institutions Act of 1994 (the Act) (12 U.S.C. 4701 et seq.), which was enacted as part of the Riegle Community Development and Regulatory Improvement Act of 1994 (Pub. L. 103-325). Section 104A authorizes the Secretary of the Treasury to establish the Emergency Capital Investment Program (ECIP or Program) to make investments in low- and moderate-income community financial institutions. These investments are to support the efforts of low- and moderate-income community financial institutions to, among other things, provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities, including persistent poverty counties, which may be disproportionately impacted by the economic effects of the COVID-19 pandemic.

Under Section 104A(h) of the Act, the Department of the Treasury (Treasury) must issue rules setting restrictions on executive compensation, share buybacks, and dividend payments for

recipients of capital investments under ECIP. This rulemaking establishes those restrictions, which are described in section III below.

II. Comments and Immediate Effective Date

ECIP is intended to be used to make investments in low- and moderate-income community financial institutions expeditiously.¹ Section 104A(h) of the Act requires Treasury to issue rules no later than 30 days after the statute's effective date that set restrictions on executive compensation, share buybacks, and dividend payments for recipients of capital investments under ECIP. This legislative mandate, along with the dramatic and ongoing effects of the COVID-19 pandemic—the public health crisis, continuing closures of small businesses and minority-owned businesses, and heightened consumer unemployment, especially in low-income and underserved communities—provides good cause for Treasury to issue this interim final rule without advance notice and public comment and to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553). The immediate effective date of this interim final rule will benefit low- and moderate-income community financial institutions, as well as the communities served by such institutions, by allowing low- and moderate-income community financial institutions to expeditiously apply for capital investments with a full understanding of the executive compensation, share buyback, and dividend payment restrictions that will apply to participants in the Program. Otherwise, potential recipients of capital investments under ECIP could decide not to participate in the Program or to delay their

¹ For example, section 104A(d)(1) of the Act requires Treasury to begin accepting applications for capital investments under ECIP within 30 days after enactment of the statute, and section 104A(h)(1) requires Treasury to issue rules setting restrictions on executive compensation, share buybacks, and dividend payments for ECIP recipients within 30 days after enactment of the statute.

applications for a material period of time pending the establishment of these requirements, which would reduce or delay the provision of much-needed assistance to communities that have suffered economic impairment due to the COVID-19 pandemic. Although this interim final rule is effective immediately, comments are solicited from the public on all aspects of the interim final rule. Comments must be submitted on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER], 2021. Treasury will consider these comments and the need for making any revisions as a result of these comments.

III. Interim Final Rule

A. Background on the ECIP

The purpose of ECIP is to support the efforts of low- and moderate-income community financial institutions to, among other things, provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities, including persistent poverty counties, which may be disproportionately impacted by the economic effects of the COVID-19 pandemic.² To support these objectives, the Act makes up to \$9 billion available to Treasury to make capital investments in minority depository institutions and community development financial institutions that are (1) insured depository institutions that are not controlled by eligible bank holding companies or eligible savings and loan holding companies, (2) bank holding companies, (3) savings and loan holding companies, or (4) federally insured credit unions. Certain additional eligibility criteria apply, including a requirement for applicants to provide Treasury

² Section 104A(b)(2) of the Act.

with an investment and lending plan that provides certain specified information concerning the applicant's lending history and plans.³

A community development financial institution or minority depository institution that submits an application and is selected to participate in the Program (ECIP recipient) will receive a capital investment from Treasury.^{4, 5} Consistent with statutory requirements, the investment by Treasury will take the form of preferred stock, except in cases where Treasury determines that an institution cannot feasibly issue preferred stock, Treasury may purchase subordinated debt instruments.⁶ The statute sets forth certain economic terms of the capital investments under ECIP⁷ and limitations on the amount of capital investments Treasury may purchase from individual institutions.⁸ In addition, the statute prohibits institutions with certain types of conflicts of interest from participating in ECIP.⁹ Treasury's authority to make new capital investments in ECIP will end six months after the date on which the national emergency concerning the COVID-19 outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates.

³ Sections 104A(d)(3)-(4), 104A(i) of the Act.

⁴ An ECIP capital investment may be treated as equity or subordinated debt for accounting purposes depending on the type of instrument issued and the corporate form and regulatory classification of the ECIP participant.

⁵ Currently, the only federally insured credit unions that may accept these types of investments as secondary capital under the secondary capital rules of the National Credit Union Administration (NCUA) are those with a designation of low-income status. See 12 CFR 701.34(b). Credit unions that do not meet the low-income credit union designation may participate through the issuance of subordinated debt, but the subordinated debt would not be secondary capital.

⁶ Section 104(d)(5)(B) of the Act.

⁷ Sections 104A(d)(5)-(8) of the Act.

⁸ Sections 104A(e), (f) of the Act.

⁹ Section 104A(h) of the Act.

B. Overview of the Interim Final Rule

This interim final rule establishes restrictions on executive compensation, share buybacks, and dividend payments, as required by the Act. In developing these restrictions, Treasury has considered two primary objectives. First, these restrictions should seek to promote the integrity of ECIP by ensuring that the funds provided under the Program are used to provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities. Second, the restrictions generally should seek to encourage a large number of minority depository institutions and community development financial institutions to participate in ECIP, because the Program will have the most beneficial impact on the intended communities if a broad range of institutions participate in the Program.

The restrictions under this interim final rule generally apply to an ECIP recipient during the “ECIP period,” defined as the period from the date the ECIP makes its investment until the earliest of (i) the date on which the ECIP recipient has fully redeemed or repaid the capital investment received under ECIP; (ii) the date on which the capital investment the ECIP recipient received under ECIP is no longer held, in full or in part, by Treasury or a Treasury affiliate, or a custodian, trustee, or agent acting on behalf of Treasury or a Treasury affiliate, and (iii) the date that is ten years after the ECIP investment date. The restrictions apply to the ECIP recipient on a consolidated basis. Treasury anticipates that the ECIP period will provide sufficient time to ensure that ECIP investments are deployed in a manner that supports the statutory objectives. Accordingly, the requirements of the interim final rule will cease to apply when the ECIP investment is no longer held by Treasury or an entity established by Treasury (Treasury affiliate).

1. Restrictions on Compensation

The restrictions on executive compensation under the interim final rule include (i) a requirement to ensure that the total compensation paid to senior executive officers is appropriate and not excessive; (ii) a restriction on severance pay for an ECIP recipient's senior executive officers if the ECIP recipient is in troubled condition; and (iii) a requirement to adopt policies and procedures prohibiting excessive or luxury expenditures (as defined below). Each of these compensation-related restrictions is intended to help ensure that the proceeds of ECIP investments have the effect intended by Section 104A of the Act and are not to fund excessive compensation for ECIP recipients' executives.

The restrictions on excess compensation apply to total compensation, which is defined as all compensation, other than any severance payment, provided by an ECIP recipient to an officer or employee, including salary, wages, bonuses, awards of stock, deferred compensation, and other financial benefits.

A "senior executive officer" means an ECIP recipient's president, any vice president in charge of a principal business unit division or function (such as sales, administration, or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions.

i. Policies and procedures prohibiting excessive compensation

Under the interim final rule, an ECIP recipient is required to ensure that the total compensation paid to its senior executive officers is appropriate and not excessive. Unless informed otherwise by Treasury, an ECIP recipient is considered to have satisfied the requirements regarding excessive executive compensation under the interim final rule if it

maintains compliance with the guidelines or standards established by its primary federal regulator that address excessive compensation, corporate practices, and operations. Specifically, ECIP recipients that are insured depository institutions are subject to the Interagency Guidelines Establishing Standards for Safety and Soundness as issued by the appropriate federal banking agency for the particular ECIP recipient.¹⁰ Bank holding companies and savings and loan holding companies are required to maintain compliance with corporate practice¹¹ and operations requirements¹² issued by the Board of Governors of the Federal Reserve System (Federal Reserve Board), and, under the interim final rule, to ensure their subsidiary insured depository institutions adopt and maintain policies and procedures that are consistent with the applicable guidelines or standards established by their primary federal regulators that address excessive compensation. In addition, federally insured credit unions must maintain compliance with the requirements on compensation and benefits for federally insured credit unions as issued by the National Credit Union Administration (NCUA).¹³ Treasury reserves the authority to take action as necessary to address potential anti-evasion concerns relating to the interim final rule's requirements for ECIP participants.

ii. Limit on severance pay

Under the interim final rule, an ECIP recipient is prohibited from making excessive severance payments to a senior executive officer. Severance pay is defined to include all types of cash payments, benefits, and other amounts paid or provided in connection with an

¹⁰ For national banks and federal savings associations, 12 CFR part 30, Appendix A; state member banks, 12 CFR part 208, Appendix D-1; and insured state nonmember banks and state savings associations, 12 CFR part 364, Appendix A.

¹¹ 12 CFR 225.4.

¹² 12 CFR 238.8.

¹³ 12 CFR 701.19(a); 12 CFR 701.21(c)(8); 12 CFR 702.203(b)(10); 12 CFR 702.204(b)(10).

individual's termination of employment, except for payment for services performed or benefits that were accrued prior to termination of employment or otherwise accrued with respect to services performed.

Unless informed otherwise by Treasury, an ECIP recipient that is an insured depository institution, bank holding company, or savings and loan holding company is considered to have satisfied the requirements regarding severance payments if it maintains compliance with the limits and prohibitions on the ability of insured depository institutions and their affiliated holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties, as issued by the FDIC.¹⁴ The FDIC rules place restrictions on payments to institution-affiliated parties whenever an insured depository institution or depository institution holding company is in "troubled condition," as determined by the appropriate federal banking agency. An ECIP recipient that is not designated in troubled condition by the appropriate federal banking agency during the ECIP period generally would not be subject to restrictions on severance payments under the interim final rule. Similarly, a federally insured credit union is considered to have satisfied the requirements regarding severance payments if it maintains compliance with the limits and prohibitions on the ability of federally insured credit unions to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties as issued by the NCUA.¹⁵ This restriction is designed to align the requirements of the ECIP with existing standards applicable to ECIP recipients under regulations issued by federal regulators.

¹⁴ 12 CFR part 359.

¹⁵ 12 CFR part 750.

iii. Limit on excessive or luxury expenditures

Under the interim final rule, ECIP recipients are required to establish and maintain policies designed to eliminate excessive or luxury expenditures. The term “excessive or luxury expenditures” is defined as excessive expenditures on any of the following to the extent such expenditures are not reasonable expenditures for staff development, reasonable performance incentives, or other similar reasonable measures conducted in the normal course of the ECIP recipient’s business operations: (1) entertainment or events; (2) office and facility renovations; (3) aviation or other transportation services; (4) tax gross-ups (i.e., reimbursement of taxes owed with respect to any compensation); and (5) other similar items, activities, or events for which the ECIP recipient may reasonably anticipate incurring expenses, or reimbursing an employee for incurring expenses. Capital investments, including investments in technology, equipment, and similar items that expand the long-term capability of an ECIP recipient to provide products and services to its customers and community are not excessive or luxury expenditures.

The interim final rule requires an ECIP recipient to adopt and maintain an “excessive or luxury expenditures policy” that sets forth written standards applicable to the ECIP recipient and its employees that address the five categories of expenses set forth in the definition of “excessive or luxury expenditures” and that are reasonably designed to eliminate excessive or luxury expenditures. The standards must (1) identify the types or categories of expenditures which are prohibited; (2) identify the types or categories of expenditures for which prior approval is required (which may include a threshold expenditure amount per item, activity, or event or a threshold expenditure amount per employee receiving the item or participating in the activity or event); (3) provide reasonable approval procedures for expenditures requiring prior approval; (4) require the ECIP recipient to deliver a certification, executed by two senior executive officers

(one of which must be either the ECIP recipient’s chief executive officer (or individual performing a similar function) (defined as the “principal executive officer”) or its chief financial officer (or individual performing a similar function) (defined as the “principal financial officer”) that the approval of any expenditure requiring the prior approval of any senior executive officer, any executive officer of a substantially similar level of responsibility, or the ECIP recipient’s board of directors (or a committee of such board of directors) was properly obtained with respect to each such expenditure; (5) require the prompt internal reporting of violations to an appropriate person or persons identified in this policy; and (6) mandate accountability for adherence to the policy. The requirement to establish a policy regarding excessive or luxury expenditures is intended to promote the integrity of ECIP by ensuring that the funds provided under the Program are used to provide loans, grants, and forbearance, without restricting ECIP participants’ discretion to establish policies and procedures that are tailored to meet the needs and business objectives of their respective organizations.

To facilitate compliance with this requirement, Treasury is making available to ECIP recipients a form of excessive or luxury expenditures policy in Appendix A to the interim final rule. An ECIP recipient may use this form to satisfy the requirement in the interim final rule to adopt and maintain an excessive or luxury expenditures policy. Alternatively, an ECIP recipient may use other forms or existing policies relating to excessive or luxury expenditures, but such other forms or policies must satisfy all the requirements of the interim final rule.

iv. Material Changes to Policies or Procedures

An ECIP recipient must obtain prior approval from Treasury before making any material change to the policies or procedures that it maintains for purposes of compliance with the compensation, severance pay and excessive or luxury expenditures requirements described in the

preceding discussion.¹⁶ A change to such policies or procedures will be considered material if the change is likely to have a negative effect on the financial condition of the ECIP recipient, limit the ability of the ECIP recipient to make payments under the terms of an ECIP instrument, or otherwise impair the ECIP recipient's ability to meet its obligations to Treasury under the Program. An ECIP recipient would bear the initial responsibility for determining whether a change in policy or procedures is material; however, Treasury would retain the authority to take enforcement as appropriate (i.e., an ECIP recipient should not revise its compensation policy to permit or pay excessive compensation if its cash is insufficient to pay dividends on ECIP instruments). A request by an ECIP recipient to make a material change to its compensation, severance pay, or excessive or luxury expenditures policies or procedures must be submitted to Treasury in writing at least 30 days prior to the effective date of the policy change. The notice will be deemed approved 30 days after the ECIP submits the notice to Treasury unless prior to the expiration of the 30-day period Treasury (i) objects to the proposed change or (ii) notifies the ECIP recipient that additional time is required in order to better evaluate the impact of the proposed change to policy or procedures.

Treasury specifically solicits comments from members of the public concerning the following issues:

Question #1: Are the restrictions on compensation sufficiently tailored to facilitate the ECIP Program objectives without discouraging participation in the program?

¹⁶ Disclosures by ECIP recipients of any proposed material changes to any such policies or procedures will be subject to their federal regulators' applicable restrictions in respect of the disclosure of confidential supervisory information.

Question #2: Are there other reasonable alternatives to the Program's excessive or luxury expenditures policy requirement that would be as effective in ensuring that funds provided under the Program are used to provide loans, grants, and forbearance, without restricting ECIP participant discretion to establish policies and procedures that are tailored to meet the needs and business objectives of their respective organizations?

Question #3: What additional guidance or clarification regarding the compensation and expenditure restrictions would help facilitate compliance with these restrictions and ensure that the restrictions are working as intended?

2. Restrictions on Dividends, Share Buybacks, and other Capital Distributions

The restrictions on dividends, share buybacks, and other capital distributions under the interim final rule include two components. The first is a prohibition on discretionary dividends, share buybacks and other capital distributions on non-senior securities if an ECIP recipient has not (i) for preferred stock issued to Treasury, paid in full the dividends for the last completed dividend period, or (ii) for instruments issued to Treasury other than in the form of preferred stock, such as subordinated debt, paid all amounts due and payable and all amounts previously deferred under the terms of the instruments. The second is a limit on dividends, share buybacks, and other capital distributions based on separate earnings-based tests for (i) insured depository institutions, bank holding companies and savings and loan holding companies, on the one hand, and (ii) federally insured credit unions, on the other.

However, the interim final rule provides an exception from these restrictions for ECIP recipients that are S corporations or other pass-through entities for purposes of the Internal Revenue Code of 1986. The interim final rule will permit S corporations and other pass-through

entities to make capital distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings. Such distributions shall be subject to an annual reconciliation, with any surplus or deficiency to be deducted or added to distributions, as applicable, in the following year.

The exemption for tax-related distributions in the interim final rule does not supersede otherwise applicable limitations or determinations with respect to distributions established by an ECIP recipient's federal regulators. Accordingly, tax-related distributions permitted under the interim final rule must also comply with any applicable limitations or determinations established by an ECIP recipient's federal regulators.

Similar to the restrictions on executive compensation described above, these limitations on capital distributions are intended to ensure that the funds provided under ECIP have the effect intended by Section 104A of the Act, and are not to provide undue compensation to an ECIP recipient's shareholders or owners. In addition, these restrictions serve to protect the taxpayer's financial interest in connection with the instruments issued by an ECIP recipient to Treasury in connection with the Program.

i. Restriction on dividends, share buybacks and other capital distributions

The interim final rule defines "non-senior securities" as any equity interests in or other instruments issued by an ECIP recipient that are *pari passu* with or junior to Treasury's investment, or equity interests in or other instruments issued by a depository institution holding company of which the ECIP recipient is a subsidiary. Under the interim final rule, an ECIP recipient will be prohibited from making capital distributions, such as declaring or paying any dividend on, or purchasing or redeeming, any non-senior securities unless (i) if Treasury holds

shares of preferred stock, the company has paid in full dividends on the preferred stock with respect to the last completed dividend period (prior to the current dividend period); or (ii) if Treasury holds an instrument other than preferred stock (e.g., subordinated debt), all amounts due and payable on the instrument have been paid in full, and no deferred amounts are unpaid. These restrictions reflect customary contractual protections to prevent an ECIP recipient from making discretionary distributions on non-senior securities if payments are not being made to Treasury on its investment. These restrictions would not prevent an ECIP recipient from making required, non-discretionary payments on non-senior securities, such as payments required at stated maturity in accordance with an instrument's terms, or payments of interest that may not be deferred.¹⁷

For these purposes, a "capital distributions" are defined as (i) dividends, including discretionary dividends, on non-senior securities and any other payments on a share of stock or other equity or equivalent interest, (ii) payments, including interest payments, on non-senior securities that the issuer has full discretion to permanently or temporarily suspend without triggering a default, (iii) redemptions or repurchases of non-senior securities or (iv) any similar transaction that Treasury determines to be in substance a capital distribution. Excluded from this definition, however, are (a) redemptions or repurchases of shares that are part of an employee stock ownership plan for an ECIP recipient that is not publicly traded, provided that the repurchase is required solely by virtue of the Employee Retirement Income Security Act of 1974, as amended; (b) in the case of federally insured credit unions, payments of dividends and interest (as defined by 12 CFR 707.2(h) and (o)) on accounts held by their members and redemptions of

¹⁷ Such payments may be subject to limitations established by an ECIP recipient's primary federal regulator.

membership share interests upon voluntary or involuntary terminations of membership by a credit union or its members, as applicable; and (c) solely in the case of the earnings test described below, redemptions or repurchases of non-senior securities if the issuer of the non-senior securities being repurchased or redeemed funds the redemption or repurchase by issuing at least a corresponding amount of new non-senior securities that rank equally in liquidation with, receive the same capital treatment as and, if applicable, have a stated maturity date no earlier than the non-senior securities being redeemed or repurchased. An extraordinary or special dividend (which excludes an ordinary dividend on a special share account) by a federally insured credit union is a capital distribution and is not subject to the exclusion for payments of dividends and interest by credit unions on accounts held by their members.

ii. Limit on the amount of capital distributions

Under the interim final rule, an ECIP recipient will be required to obtain prior approval from Treasury in order to make capital distributions in excess of the following earnings-based tests.

Treasury determined that the limits on capital distributions are appropriate based on a review of publicly available data regarding average dividend rates among banking organizations with \$10 billion or less in total assets, in the period before the Covid-19 pandemic. Thus, the limitation on capital distributions strikes an appropriate balance between allowing ECIP recipients to make capital distributions and helping to ensure that the proceeds of the ECIP investment are used to expand lending to low- and moderate-income and other targeted populations.

A. Earnings Test for Insured Depository Institutions, Bank Holding Companies, and Savings and Loan Holding Companies

The interim final rule provides that, without prior approval from Treasury, an ECIP recipient that is an insured depository institution, bank holding company, or savings and loan holding company may not make a capital distribution if the total capital distributions made during the calendar year, including the proposed capital distribution, exceeds its “eligible distributable income,” which is calculated as the ECIP recipient’s (a) year-to-date net income as of the end of the most recent calendar quarter, plus net income for the two preceding calendar years, less (b) any dividends or capital distributions for the year to date as of the end of the most recent calendar quarter, and for the two preceding calendar years, where (a) and (b) are calculated in accordance with the instructions to the Call Report or applicable reporting form. While approval may be awarded by Treasury to make capital distributions, the interim final rule confirms that such approval does not supersede any applicable regulatory requirements of the ECIP recipient’s appropriate federal banking agency, or other actions taken by such agency.

The “eligible distributable income” limit is similar to other existing earnings limitations on payments of dividends that apply to certain insured depository institutions.¹⁸ In light of this similarity, an ECIP recipient could calculate eligible distributable income with respect to capital distributions, by applying the methodology set forth in 12 CFR 5.64 or 12 CFR 208.5, as applicable, with respect to dividends, by substituting “capital distributions” for “dividends.” In addition, in the case of 12 CFR 208.5, an ECIP recipient that is not an insured depository institution would use net income, as reported in the ECIP recipient’s FR Y-9C or FR Y-9SP,

¹⁸ See, e.g., 12 U.S.C. 60 (national banks), 12 CFR 5.64 (national banks), and 12 CFR 208.5 (state member banks).

instead of net income as reported in the Reports of Condition and Income. Treasury anticipates that the operational impact the capital distribution approval requirement will be nominal and that the approval requirement will provide meaningful support for the objectives of the Program.

B. Earnings Test for Federally Insured Credit Unions

Consistent with existing distribution limitations applicable to federally insured credit unions,¹⁹ the interim final rule provides that, without prior approval by Treasury, an ECIP recipient that is a federally insured credit union may not make a capital distribution on any non-senior securities if the distribution would (i) in the case of a dividend, be payable from retained earnings (as defined in 12 CFR 702.2(f)) other than undivided earnings; or (ii) cause the credit union's net worth classification to fall below "adequately capitalized" (as defined in 12 CFR 702.102(a)(2)).

3. Exemptive Relief

Under the interim final rule, Treasury retains authority to grant waivers or exemptions from the restrictions under the interim final rule on dividends, share buybacks, and other capital distributions. Such relief may be granted broadly to all ECIP recipients or to particular entities. In considering whether to grant exemptive relief, Treasury will consider whether the relief is necessary or appropriate to achieve the goals of the ECIP or to protect the public interest. Such relief may be granted based on terms and conditions as determined by Treasury, and in making determinations regarding requests for exemptive relief, Treasury may consult with the primary federal regulator when deemed appropriate.

¹⁹ See 12 CFR 702.403.

4. Annual Certification and Enforcement

Each ECIP recipient will be required to submit to Treasury on an annual basis a certification executed by two senior executive officers (one of which must be either the ECIP recipient's principal executive officer or principal financial officer) that the ECIP recipient is in compliance with each of the excessive compensation, severance payments, excessive or luxury expenditures requirements and restrictions on capital distributions set forth in the interim final rule. If an ECIP recipient certifies that it satisfies the severance payments requirements, Treasury expects that the certification will address only compliance with the requirements and will neither address whether the ECIP recipient is in troubled condition for purposes of 12 CFR parts 359 and 750, as applicable, nor contain any confidential supervisory information subject to applicable disclosure restrictions promulgated by the ECIP recipients' federal regulators.

The interim final rule is promulgated under Section 104A of the Act, and agreements between ECIP recipients and Treasury in connection with the Program will be entered into under the Act. Treasury may take action or directly address noncompliance with the requirements of this interim final rule or Program agreements. In addition, Treasury may, in its discretion, inform the appropriate federal banking agencies of any apparent violations by ECIP recipients of the interim final rule or Program agreements between ECIP recipients and Treasury.²⁰

Treasury specifically solicits comments from members of the public concerning the following issues:

²⁰ *See, e.g.*, 12 U.S.C. 4717(b).

Question #4: Are the restrictions on dividends, share buybacks, and other capital distributions sufficiently tailored to facilitate the ECIP Program objectives without discouraging participation in the program?

Question #5: What would be the advantages and disadvantages of aligning limitations on capital distributions under the interim final rule with limitations applicable to each entity pursuant to the requirements of its appropriate federal banking regulator? What are the advantages and disadvantages of calculating eligible distributable income based on (i) income as of the end of the most recent calendar quarter and (ii) year to date reported net income? What are the advantages and disadvantages of calculating the capital distribution limitation using (i) year-to-date dividends or capital distributions; (ii) reported dividends or capital distributions; and (iii) year-to-date dividends or capital distributions as of the end of the most recent calendar quarter?

IV. Regulatory Analyses

A. Administrative Procedure Act

Pursuant to authority at 5 U.S.C. 553(b)(B), the interim final rule is exempt from the rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 551 et seq.), including the requirement to provide prior notice and an opportunity for public comment for the good cause shown in Sections I and II of this Supplementary Information.

B. National Environmental Policy Act

The interim final rule has been reviewed in accordance with 12 CFR part 1815, the CDFI Fund's environmental quality regulations published pursuant to the National Environmental Protection Act of 1969 (NEPA). It is the determination of Treasury that the interim final rule

does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with NEPA and the CDFI Fund's environmental quality regulations at 12 CFR part 1815, neither an Environmental Assessment nor an Environmental Impact Statement is required.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid OMB control number.

The interim final rule will add current information collections for excessive or luxury expenditure policy and exemptive relief requests to the ECIP application process. The “excessive or luxury policy” collection requirements include the adoption and maintenance of the policy (detailed in section 1(iii)); written notices of change (detailed in section 1(iv)); and annual certifications (detailed in section 4). The exemptive relief requests are detailed in section 3. The addition of these collections will increase total annual burden by 44,014 hours: The policy requirements are expected to take 1,100 respondents 40 hours to complete for an annual burden of 44,000 hours, and it is estimated that 55 (or 5%) of respondents will submit an exemptive relief request that will take 15 minutes to complete, for an annual burden of 14 hours. The OMB Control Number for the Emergency Capital Investment Program information collection is 1505-0267.

Comments concerning suggestions for reducing the burden of collections of information should be directed to the Deputy Director for Policy and Programs, Community Development Financial Institutions Fund, 601 13th Street, NW, Suite 200 South, Washington, DC 20005.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed above, consistent with 5 U.S.C. 553(b)(B), Treasury has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore is not issuing a notice of proposed rulemaking. Because no notice of proposed rulemaking is required for this interim final rule, the provisions of the RFA do not apply. Nevertheless, Treasury seeks comment on whether, and the extent to which, the interim final rule would affect a significant number of small entities.

E. Regulatory Planning and Review

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. Treasury, however, is proceeding under the emergency provision at Executive Order 12866 section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency, as discussed in Section II of this Supplementary Information.

F. Executive Order 13132

This interim final rule does not have federalism implications as defined in Executive Order 13132. It will 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 responsibilities

among the various levels of government, as specified in the executive order. As such it does not warrant the preparation of a federalism assessment.

G. Congressional Review Act

The Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule for purposes the Congressional Review Act (CRA) (5 U.S.C. 804(2) et seq.). Under the CRA, a major rule takes effect 60 days after the rule is published in the Federal Register. 5 U.S.C. 801(a)(3).

Notwithstanding this requirement, the CRA allows agencies to dispense with the requirements of section 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). Pursuant to § 808(2), Treasury, for the good cause shown in sections I and II of this Supplementary Information, finds that a 60-day delay to provide public notice is impracticable and contrary to the public interest.

List of Subjects in 31 CFR Part 35

Executive compensation

For the reasons set forth in the preamble, 31 CFR Subtitle A is amended by adding part 35 to read as follows:

PART 35—EMERGENCY CAPITAL INVESTMENT PROGRAM

Contents

Subpart A—[RESERVED]

Subpart B—Compensation and Capital Distributions

Sec.

35.20 Purpose, applicability, and general provisions.

35.21 Definitions.

35.22 Restrictions on compensation.

35.23 Restrictions on dividends, share buybacks, and other capital distributions.

35.24 Annual certification.

35.25 Exemptive relief.

Appendix A to 31 CFR Part 35—Emergency Capital Investment Program Model Excessive or Luxury Expenditures Policy

Authority: Consolidated Appropriations Act, 2021 (Pub. L. 116-260), Division N, Title V, Subtitle B; Community Development Banking and Financial Institutions Act of 1994 (enacted as part of the Riegle Community and Regulatory Improvement Act of 1994 (Pub. L. 103-325)), as amended (12 U.S.C. 4701 et seq.), Section 104A.

Subpart A [RESERVED]

Subpart B – Compensation and Capital Distributions

§ 35.20 Purpose, applicability and general provisions.

(a) *Purpose.* Pursuant Section 104A of the Community Development Banking and Financial Institutions Act of 1994 (Act), as added by the Consolidated Appropriations Act, 2021 (Pub. L. 116-260), this subpart establishes restrictions on executive compensation, dividend payments, and share buybacks for recipients of capital investments under the Department of the Treasury’s Emergency Capital Investment Program (ECIP or Program), as well as additional criteria for participation in the Program that the Secretary has determined are appropriate in furtherance of the Program goals.

(b) *Applicability.* This subpart applies on a consolidated basis to any insured depository institution, bank holding company, savings and loan holding company, or federally insured credit union that issues preferred stock or a subordinated debt instrument to the Department of the Treasury under the Program (an ECIP recipient, as defined in § 35.21 of this subpart). An ECIP recipient must comply with the requirements of this subpart during the ECIP period.

(c) *Limitation of authority.* Nothing in this subpart shall be interpreted to limit the authority of the appropriate federal banking agency to take action under other provisions of law, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law or regulation, under section 8 of the Federal Deposit Insurance Act, section 8 of the Bank Holding Company Act, or section 10 of the Home Owners' Loan Act, or the Federal Credit Union Act, as may be applicable.

§ 35.21 Definitions.

Except as modified in this regulation or unless the context otherwise requires, the terms used in this regulation have the same meaning as set forth in the relevant statutes.

For purposes of this subpart:

Act means the Community Development Banking and Financial Institutions Act of 1994, as amended (12 U.S.C. 4701 et seq.).

Appropriate federal banking agency has the same meaning as in 12 U.S.C. 1813 and also includes the NCUA with respect to a federally insured credit union.

Capital distributions means:

(1) Dividends, including discretionary dividends, on non-senior securities and any other payments on a share of stock or other equity or equivalent interest;

(2) Payments, including interest payments, on non-senior securities, that the issuer has full discretion to permanently or temporarily suspend without triggering a default;

(3) Redemptions or repurchases of non-senior securities; or

(4) Any similar transaction that the Department of the Treasury determines to be in substance a capital distribution;

Provided, that a “capital distribution” does not include:

(i) Redemptions or repurchases of shares that are part of an employee stock ownership plan for an ECIP recipient that is not publicly traded, provided that the repurchase is required solely by virtue of the Employee Retirement Income Security Act of 1974, as amended;

(ii) In the case of federally insured credit unions, (A) payments of dividends and interest (as defined by 12 CFR 707.2(h) and (o)) on accounts held by their members; provided that this exclusion does not apply to any extraordinary or special dividend by a credit union; or (B) redemptions of membership share interests upon voluntary or involuntary terminations of membership by a credit union or its members, as applicable; and

(iii) Solely in the case of § 35.23(b) (Limit on amount of capital distributions), redemptions or repurchases of non-senior securities if the issuer of the non-senior securities being repurchased or redeemed fully funds the redemption or repurchase by issuing at least a corresponding amount of new non-senior securities that rank equally in

liquidation with, receive the same capital treatment as and, if applicable, have a stated maturity date no earlier than the non-senior securities being redeemed or repurchased.

ECIP means the Emergency Capital Investment Program established under Section 104A of the Community Development Banking and Financial Institutions Act of 1994, as amended.

ECIP investment means any preferred stock, subordinated debt, or other instrument (including any successor to any such instrument) issued by an ECIP recipient to the Department of the Treasury under the ECIP.

ECIP investment agreement means the agreement between an ECIP recipient and the Department of the Treasury with respect to the ECIP investment in that ECIP recipient.

ECIP investment date means the date on which an ECIP recipient first issued an ECIP investment.

ECIP period means the period from the ECIP investment date until the earliest of:

(1) The date on which the ECIP recipient has fully redeemed or repaid the ECIP investment received under ECIP;

(2) The date on which the investment the ECIP recipient received under the ECIP is no longer held, in full or in part, by the Department of the Treasury or any affiliate thereof; and

(3) Ten years after the ECIP investment date.

ECIP recipient means any entity that has received a capital investment under the ECIP.

Excessive or luxury expenditures means excessive expenditures on any of the following to the extent such expenditures are not reasonable expenditures for staff development, reasonable

performance incentives, or other similar reasonable measures conducted in the normal course of the ECIP recipient's business operations:

- (1) Entertainment or events;
- (2) Office and facility renovations;
- (3) Aviation or other transportation services;
- (4) Tax gross-ups; and

(5) Other similar items, activities, or events for which the ECIP recipient may reasonably anticipate incurring expenses, or reimbursing an employee for incurring expenses;

Provided, that reasonable capital investments in technology, equipment, and similar items that expand the long-term capability of an ECIP recipient to provide products and services to its customers and community are not excessive or luxury expenditures.

Excessive or luxury expenditures policy means written standards applicable to the ECIP recipient and its employees that address the five categories of expenses set forth in the definition of "excessive or luxury expenditures," and that are reasonably designed to eliminate excessive and luxury expenditures. Such written standards must:

(1) Identify the types or categories of expenditures which are prohibited (which may include a threshold expenditure amount per item, activity, or event or a threshold expenditure amount per employee receiving the item or participating in the activity or event);

(2) Identify the types or categories of expenditures for which prior approval is required (which may include a threshold expenditure amount per item, activity, or event or a threshold expenditure amount per employee receiving the item or participating in the activity or event);

(3) Provide reasonable approval procedures for expenditures requiring prior approval;

(4) Require the ECIP recipient to deliver a certification, executed by two senior executive officers (one of which must be its principal executive officer or principal financial officer) certifying that the approval of any expenditure requiring the prior approval of any senior executive officer, any executive officer of a substantially similar level of responsibility, or the ECIP recipient's board of directors (or a committee of such board of directors), was properly obtained with respect to each such expenditure;

(5) Require the prompt internal reporting of violations to an appropriate person or persons identified in this policy; and

(6) Mandate accountability for adherence to the policy.

FDIC means the Federal Deposit Insurance Corporation.

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

NCUA means the National Credit Union Administration.

Non-senior security means any equity interest or equivalent interest (including but not limited to membership share interests in the case of a credit union) or any other interest in, or instrument issued by, an ECIP recipient that is *pari passu* with, or junior to, the ECIP investment with respect to capital distributions or ranking in liquidation, including but not limited to the common stock (or equivalent equity interest) of the ECIP recipient, or any equity interest or equivalent interest or any other interest in or instrument issued by a depository institution holding company of which the ECIP recipient is a subsidiary.

OCC means the Office of the Comptroller of the Currency.

Principal executive officer means the chief executive officer of an ECIP recipient (or individual performing a similar function).

Principal financial officer means the chief financial officer of an ECIP recipient (or individual performing a similar function).

Senior executive officer means an ECIP recipient's president, any vice president in charge of a principal business unit, division or function, any other officer who performs a policy making function, or any other person who performs similar policy making functions.

Severance payment means any payment or benefit provided to an officer or employee of an ECIP recipient in connection with any termination of such officer or employee's employment with the ECIP recipient (including resignation, severance, retirement, or constructive termination), except for payment for services performed or benefits accrued. A severance payment includes cash payments, health care benefits, perquisites, the enhancement or acceleration of any payment or vesting of any payment or benefit, or any other in-kind benefit payable or provided in connection with any termination of an officer or employee of the ECIP recipient.

Total compensation means all compensation, other than any severance payment, provided by an ECIP recipient to an officer or employee, including salary, wages, bonuses, awards of stock, deferred compensation, and other financial benefits.

§ 35.22 Restrictions on compensation.

(a) *Restriction on executive compensation.* An ECIP recipient must ensure that the total compensation paid to its senior executive officers is appropriate and not excessive. Unless informed otherwise by the Department of the Treasury, an ECIP recipient is considered to have

satisfied the requirements regarding executive compensation in this section if it, and, if applicable, all insured depository institution subsidiaries of the ECIP recipient, maintains compliance with the following (or any successor requirement, as applicable):

(1) For an ECIP recipient or subsidiary of an ECIP recipient that is an insured depository institution, except for federally insured credit unions, the Interagency Guidelines Establishing Standards for Safety and Soundness as issued by the appropriate federal banking agency for the ECIP recipient or subsidiary (*i.e.*, for national banks and federal savings associations, 12 CFR part 30, Appendix A; state member banks, 12 CFR part 208, Appendix D-1; insured state nonmember banks and state savings associations, 12 CFR part 364, Appendix A);

(2) For an ECIP recipient that is a bank holding company, the requirements for corporate practices of bank holding companies as issued by the Federal Reserve Board at 12 CFR 225.4;

(3) For an ECIP recipient that is a savings and loan holding company, the requirements regarding safe and sound operations of savings and loan holding companies as issued by the Federal Reserve Board at 12 CFR 238.8; and

(4) For an ECIP recipient that is a federally insured credit union, the requirements on compensation and benefits for federally insured credit unions as issued by the NCUA at 12 CFR 701.19(a); 12 CFR 701.21(c)(8); 12 CFR 702.203(b)(10); and 12 CFR 702.204(b)(10).

(b) *Restriction on severance payments.* An ECIP recipient shall not make excessive severance payments to any senior executive officer. Unless informed otherwise by the Department of the Treasury, an ECIP is considered to have satisfied the requirements regarding severance payments in this section if it maintains compliance with the following (or any successor requirement, as applicable):

(1) For an ECIP recipient that is an insured depository institution, a bank holding company or a savings and loan holding company, the limits and prohibitions to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties to the extent applicable to the ECIP recipient, as issued by the FDIC at 12 CFR part 359; and

(2) For an ECIP recipient that is a federally insured credit union, the limits and prohibitions on the ability of federally insured credit unions to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties as issued by the NCUA at 12 CFR 750.1.

(c) Excessive or luxury expenditures.

(1) *Policy required.* Ninety days after an ECIP investment date with respect to an ECIP recipient, the board of directors of the ECIP recipient must adopt an excessive or luxury expenditures policy, provide such policy to the Department of the Treasury and the ECIP recipient's appropriate federal banking agency, and post the text of such policy on its Internet website, if the ECIP recipient maintains an Internet website.

(2) If, after adopting an excessive or luxury expenditures policy, the board of directors of the ECIP recipient makes any material amendments to such policy, within ninety days of the adoption of the amended policy the board of directors must provide the amended policy to the Department of the Treasury and the ECIP recipient's appropriate federal banking agency and post the amended policy on its Internet website, if the ECIP recipient maintains an Internet website.

(3) The ECIP recipient must maintain, and continue the disclosure of any material amendments to, the excessive or luxury expenditures policy during the ECIP period, unless the Department of the Treasury determines that discontinuation of the policy would not be contrary to the public interest.

(d) *Material changes in policies or procedures.* An ECIP recipient must obtain prior approval from the Department of the Treasury before making any material change to the policies or procedures that it maintains for purposes of compliance with paragraphs (a), (b), or (c) of this section. A change to the compensation, severance pay, or excessive or luxury expenditures policies or procedures will be considered material for purposes of this section if the change is likely to have a negative effect on the financial condition of the ECIP recipient, limit the ability of the ECIP recipient to make payments under the terms of an ECIP instrument, or otherwise impair the ECIP recipient's ability to meet its obligations to the Department of the Treasury under the ECIP.

(1) A request to make a material change to compensation, severance pay or excessive luxury expenditures policies or procedures, must be submitted by an ECIP recipient in writing and received by the Department of the Treasury at least thirty days prior to the effective date of the policy change. The request should describe the change, reason for the change, and anticipated financial or other impact of the change on the condition of the ECIP recipient.

(2) The request will be deemed approved thirty days after the ECIP recipient has provided a complete request to the Department of the Treasury, unless, prior to the expiration of the thirty-day period, the Department of the Treasury objects to the proposed change or notifies the ECIP recipient that additional time is required in order to complete review of the proposed change to policy or procedures

§ 35.23 Restrictions on dividends, share buybacks, and other capital distributions.

(a) *Restriction on capital distributions due to nonpayment.* An ECIP recipient shall not make any capital distribution on a non-senior security, unless:

(1) If the ECIP investment is in the form of preferred stock, the ECIP recipient has paid in full the dividends for the last completed dividend period on the preferred stock; or

(2) If the ECIP investment is in a form other than preferred stock (including, subordinated debt), the ECIP recipient has paid in full the principal, interest, and other amounts due and payable under the terms of the ECIP investment, and no amount that has been deferred remains unpaid.

(b) *Limit on amount of capital distributions.*

(1) If an ECIP recipient is an insured depository institution, bank holding company, or savings and loan holding company, the ECIP recipient shall obtain the approval of the Department of the Treasury prior to making any capital distribution if the total of capital distributions made during the calendar year, including the proposed capital distribution, exceeds its eligible distributable income; provided, however, that any prior approval of a capital distribution by the Department of the Treasury does not supersede any applicable regulatory requirements of the ECIP recipient's appropriate federal banking agency, or other actions taken by such agency. For purposes of this paragraph, "eligible distributable income" means (A) the ECIP recipient's reported year-to-date net income as of the end of the most recent calendar quarter, plus net income for the two preceding calendar years, less (B) any dividends or distributions for the year to date as of the end of the most recent calendar quarter, and the two

preceding calendar years, where (A) and (B) are calculated in accordance with the instructions to the Call Report or applicable reporting form.

(2) If the ECIP recipient is federally insured credit union, the ECIP recipient shall obtain the Department of the Treasury's prior approval to make any capital distributions if the distribution would (i) in the case of a dividend, be payable from retained earnings (as defined in 12 CFR 702.2(f)) other than undivided earnings; or (ii) cause the ECIP recipient's net worth classification to fall below "adequately capitalized" (as defined in 12 CFR 702.102(a)(2)).

(c) Exception for Subchapter S Corporations and other pass-through entities.

Notwithstanding anything to the contrary in paragraphs (a) and (b) of this section, any ECIP recipient that is an S corporation, as defined in 26 U.S.C. 1361(a), or other pass-through entity may make capital distributions, to the extent reasonably required to cover its owners' tax obligations in respect to the entity's earnings. Such distributions shall be subject to an annual reconciliation, with any surplus or deficiency to be deducted or added to distributions, as applicable, in the following year. Any tax-related distributions permitted under this paragraph (c) must also comply with any applicable limitations or determinations established by an ECIP recipient's federal regulators.

§ 35.24 Annual certification

On an annual basis an ECIP recipient shall, in accordance with the terms and conditions of its ECIP investment agreement, submit to the Department of the Treasury a certification executed by two senior executive officers (one of which must be either its principal executive officer or principal financial officer) that the ECIP recipient is in compliance with each of the

excessive compensation, severance pay, and excessive or luxury expenditures requirements and restrictions on capital distributions set forth in §§ 35.22 and 35.23.

§ 35.25 Exemptive relief.

The Department of the Treasury may grant exemptions or waivers from some or all of the restrictions on share buybacks and dividend payments under this part if such exemption or waiver is necessary or appropriate to effectuate the goals of the ECIP or to protect the public interest. Such exemptions or waivers may be subject to such terms and conditions as deemed necessary or appropriate by the Department of the Treasury.

Appendix A to 31 CFR Part 35—Emergency Capital Investment Program Model Excessive or Luxury Expenditures Policy

I. Introduction

A participant in the Emergency Capital Investment Program (ECIP recipient, as defined at 31 CFR 35.21) is required to establish and maintain policies designed to eliminate excessive or luxury expenditures. The term “excessive or luxury expenditures” means excessive expenditures on any of the following to the extent such expenditures are not reasonable expenditures for staff development, reasonable performance incentives, or other similar reasonable measures conducted in the normal course of the ECIP recipient’s business operations: (1) entertainment or events; (2) office and facility renovations; (3) aviation or other transportation services; (4) tax gross-ups; and (5) other similar items, activities, or events for which the ECIP recipient may reasonably anticipate incurring expenses, or reimbursing an employee for incurring expenses.

To facilitate compliance with this requirement, the Department of the Treasury is making available a model excessive or luxury expenditures policy. An ECIP recipient may refer to this model policy for guidance in satisfying the requirement at 31 CFR 35.22(c) to adopt and maintain an excessive or luxury expenditures policy. Alternatively, ECIP recipients may use other forms of, or existing policies relating to, excessive or luxury expenditures, provided that such other forms or policies satisfy all the requirements of the regulation at 31 CFR 35.22(c).

An ECIP recipient's luxury or excessive expenditure policy should be posted on the ECIP recipient's website. Any material amendments to an ECIP recipient's excessive or luxury expenditures policy must be made in accordance with the provisions set forth in 31 CFR 35.22(d) (Material changes in policies or procedures). If the ECIP recipient makes any material amendments to this policy, then the ECIP recipient must submit a copy of the amended policy to the Department of the Treasury and post the amended policy on the ECIP recipient's website. ECIP recipients should refer to 31 CFR Part 35, Subpart B for additional information regarding definitions of terms used in the model policy, disclosure, material changes, certification, and other compliance requirements.

II. Model Excessive or Luxury Expenditures Policy

A. Purpose

The purpose of this policy is to establish parameters and internal controls governing the expenditures of [NAME OF ECIP RECIPIENT] (together with its subsidiaries and controlled affiliates, referred to hereafter as the Organization). Expenditures of the Organization should be customary, prudent, consistent with applicable laws and regulations, and reasonably related to the Organization's business objectives and needs. This policy identifies expenditures that are

excessive or luxury expenditures, creates processes that are reasonably designed to eliminate such expenditures, and establishes accountability for compliance. Routine operating expenses, capital expenditures, and other reasonable expenses are not prohibited by this policy.

B. Authority

The Organization has authority to provide compensation and benefits that are reasonable. This policy establishes a prohibition on expenditures that are excessive or luxury expenditures as required by the Department of the Treasury's Emergency Capital Investment Program regulations (31 CFR Part 35), and as may be required by other statutes and regulations.

C. Responsibility

This policy is the responsibility of the Organization's board of directors (board). The board has approved this policy and will review compliance with this policy no less frequently than annually, and summary data on excessive or luxury expenditures will be reported to the board as part of the compliance review.

D. Scope

This policy applies to all employees, officers, and directors of the Organization with regard to any expenditure of the Organization. In making any expenditure on behalf of the Organization, employees, officers, and directors should consider whether the expenditure is an excessive or luxury expenditure that is prohibited under this policy.

E. Excessive or Luxury Expenditures

"Excessive or luxury expenditures" means excessive expenditures on any of the following to the extent not reasonable or appropriate expenditures for business development,

staff development, reasonable performance incentives, or other similar reasonable measures conducted in the normal course of the Organization's business operations:

(1) *Entertainment or events.* This category includes fees, dues, tickets costs related to social, athletic, artistic and dining clubs, activities, celebrations or other events, and similar expenditures. Expenditures for charitable contributions and charitable events are not prohibited under this policy. Entertainment or events expenditures in an amount less than \$____ per instance, and \$____ on an annual aggregate basis per individual, are exempt from this policy.

(2) *Office and facility renovations.* This category includes costs and allowances for office renovation, including expenditures related to furniture, art, office personalization, interior finishing, design and decoration, and similar expenditures. Office and facility renovations expenditures in an amount less than \$____ per instance, and \$____ on an annual aggregate basis per individual, are exempt from this policy.

(3) *Aviation or other transportation services.* This category includes charter fees, tickets, slip or docking fees, vehicle installment payments, reservation and travel agent expenses, and similar expenditures associated with transportation services (e.g., airline, train, rental cars, or vans). Mileage reimbursable according to current Internal Revenue Service mileage rates is exempt from this policy. Transportation services in an amount less than \$____ per instance, and \$____ on an annual aggregate basis per individual, are exempt from this policy.

The principal executive officer may establish or delegate to an appropriate executive officer the authority to establish processes for reimbursement of reasonable travel expenditures, which processes must be reviewed by executive management no less frequently than annually.

(4) *Tax gross-ups.* This category includes any reimbursement of taxes owed with respect to any compensation. This category does not apply to tax equalization agreements for employees subject to tax from a non-U.S. jurisdiction.

(5) *Other similar items, activities, or events for which the Organization may reasonably anticipate incurring expenses or reimbursing an employee for incurring expenses.* Expenditures related to other items not listed in the preceding categories are exempt from this policy in an amount less than \$ ____ per instance, and together with all expenditures permitted under this policy, may not exceed \$ ____ on an annual aggregate basis per individual.

For the avoidance of doubt, reasonable capital investments in technology, equipment, and similar items that expand the long-term capability of an ECIP recipient to provide products and services to its customers and community are not excessive or luxury expenditures.

The principal executive officer may establish or delegate to an appropriate executive officer the authority to establish processes for the evaluation and approval of expenditures in the preceding categories that are not luxury or excessive expenditures and that are not otherwise exempt from this policy. These processes must be reviewed by executive management no less frequently than annually, as well as any additional threshold expenditure amounts per item, activity, or event, or a threshold expenditure amount per employee receiving the item or participating in the activity or event under this policy. Such approvals must be reported to the board of directors (which may be in an appropriate summary form) no less frequently than annually.

F. Exceptions or Violations

Any exception or violation of this policy must be promptly reported to the Organization's (i) principal executive officer, (ii) officer with primary responsibility for the Organization's compliance function, or (iii) officer designated with primary responsibility for overseeing the administration, monitoring, and compliance with this policy. Exceptions and violations must be reported to the board of directors no less frequently than annually, or more frequently as the nature and severity of violation may warrant. All employees, officers, and directors of the Organization must adhere to this policy and will be held accountable for compliance. Any employee or officer who violates this policy may be subject to disciplinary action up to and including termination of employment.

Any employee or officer that is aware of any circumstance that may indicate a violation of this policy is required to report such circumstance to their supervisor or the Organization's principal compliance officer or compliance group. The Organization prohibits retaliation against any employee or officer for making a good faith report of actual or suspected violations of the Organization's code of conduct, laws, regulations, or other Organization policies, including this policy. A finding of retaliation against any such employee or officer may result in disciplinary action up to and including termination. Failure to promptly report known violations by others may also be deemed a violation of the Organization's code of conduct.

Employees and officers may ask questions, raise concerns, or report instances of non-compliance with this policy and/or any of the existing underlying relevant policies by contacting the following: [COMPLIANCE HELP LINE OR E-MAIL].

G. Certification

On an annual basis, the ECIP recipient will deliver to the Department of the Treasury a certification, executed by two senior executive officers (one of which must be either the ECIP recipient's principal executive officer or principal financial officer) certifying that (i) the Organization is in compliance with this policy and (ii) the approval of any expenditure requiring the prior approval of any senior executive officer, any executive officer of a substantially similar level of responsibility, or the board of directors (or a committee of such board), was properly obtained with respect to each such expenditure.

David Lebryk
Fiscal Assistant Secretary