Proposed Rules

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 293, 351, 430, and 531

RIN 3206–AH32

Reduction in Force and Performance Management

AGENCY: Office of Personnel Management.

ACTION: Proposed rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations that enhance the opportunity for Federal employees to receive retention service credit during reductions in force based on their actual job performance. The proposal also gives agencies with employees who have been rated under different patterns of summary rating levels a mechanism to take this into account when awarding employees additional retention service credit for reduction in force. These proposed regulations also clarifying certain other retention rights, including the coverage of employees serving under term appointments.

DATES: Comments must be received by April 7, 1997.

ADDRESSES: Send or deliver written comments to: Mary Lou Lindholm, Associate Director for Employment Service, Room 6F08, Office of Personnel Management, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Thomas A. Glennon, Jacqueline Yeatman, or Edward P. McHugh (part 351); (202) 606–0960, FAX (202) 606–2329; or Barbara Colchao or Doris Hausser (parts 293, 430 and 531); (202) 606–2720, FAX (202) 606–2395.

SUPPLEMENTARY INFORMATION:

(1) Performance

Crediting Performance in Reductions in Force

Background to Proposed Regulations

Employee performance is one of four factors specified in 5 U.S.C. 3502(a), and regulations in 5 CFR part 351, that determine an employee's retention standing during reductions in force. The other three factors are tenure of appointment, veterans' preference and length of service. Traditionally, performance has been recognized in the reduction in force process by providing employees with additional years of retention service credit based on the average of their three most recent ratings of record received under the provisions of 5 CFR part 430, subpart B, during the 4 years prior to the reduction in force.

These proposed changes enhance the opportunity for Federal employees to receive retention credit during reductions in force based on their job performance. They do not, however, change the relative importance of performance vis à vis the other retention factors: tenure, veterans' preference and length of service. Further, they retain the present range of additional retention service credit that is provided to good performers during reductions in force (i.e., 12 to 20 years additional retention service credit) and the requirement that additional retention service credit be awarded based on the average of the three most recent ratings of record whenever possible.

Current regulations at section 351.504(d) define the specific amount of additional retention service credit awarded for each rating level and require that it be applied in the same way by each agency subject to the reduction in force regulations. Twenty years of additional retention service credit is specified for a Level 5 rating of record (i.e., ''Outstanding'' or equivalent), 16 years of additional retention service credit for a Level 4 rating of record (i.e., ''Exceeds Fully Successful'' or equivalent), and 12 years of additional retention service credit for a Level 3 rating of record (i.e., ''Fully Successful'' or equivalent). No additional retention service credit is provided for a Level 2 rating of record (i.e., ''Minimally Successful'' or equivalent) or for a Level 1 rating of record (i.e., ''Unacceptable.'').

Currently credit is provided on the basis of the three most recent ratings of record received during the 4 years prior to the reduction in force. The sum of the three most recent ratings is divided by three and rounded to a whole number. For example, an employee whose three most recent ratings are ''Exceeds Fully Successful'' (16), Exceeds Fully Successful (16), and Outstanding (20) is given 18 years extra seniority (16+16+20 = 52/3 = 17.3 = 18). If employees have received fewer than three actual ratings in the last 4 years, agencies are required to substitute an assumed rating of Fully Successful for each missing rating.

New Procedures for Increasing Use of Actual Ratings in RIF

Extending time period during which ratings are considered. One element of the proposal addresses the circumstance where employees have not received three actual ratings of record in the last 4 years. They may have received two ratings, or one, or none. This could occur due to a variety of circumstances; for example: Employees on extended assignments on military reserve duty; employees on official time under chapter 71 of title 5, United States Code; employees new to Government service; or employees who have been absent due to an on-the-job injury. To minimize the use of assumed ratings and to maximize the extent to which additional retention service credit is based on actual job performance, OPM is proposing to lengthen the period of time from which ratings are taken into account from 4 years to 6 years prior to the reduction in force. For example, if an employee has been given two ratings of record during the previous 4 years, a rating given in the fifth year prior to the reduction in force may be taken into account in order to use three actual ratings. In all cases, however, the three most recent ratings of record must be used. OPM is proposing appropriate changes to the recordkeeping requirements in 5 CFR part 293. This change in the time period for crediting performance ratings will be phased in to allow agencies time to change their recordkeeping procedures. The implementation schedule for this provision is explained in the paragraph below on ''Special implementation/ effective dates.''

New computation methods for crediting performance in reduction in force. OPM is also proposing to remove the requirement to fill in missing ratings of record with assumed Fully Successful ratings when an employee has received only one or two actual ratings of record during the 6-year period when ratings can be credited. Under the proposed change, the actual rating(s) of record available will serve as the sole basis of

the employee's credit, and no assumed ratings will be used. Consequently, if an employee has received only two actual ratings of record during this period, the value of each rating will be added together and divided by two to determine the amount of additional retention service credit. If the employee has received only one actual rating during the period, it will be divided by one to determine additional retention service credit. The same computation method (dividing the rating value by one) will be used when crediting an assumed rating when the value is determined under the procedures outlined below.

Crediting performance for employees with no actual ratings. Only in the unusual situation where an employee has no actual rating of record in a 6-year period will an assumed rating be used. The value of that assumed rating will be determined on the basis of two factors: (1) The summary level pattern that applies to the employee's official position of record at the time of the reduction in force; and (2) the amount of current continuous service the employee has.

Employees who have no ratings and have more than one year of current continuous service. An employee who has completed at least one year of current continuous service at the time that reduction in force notices are issued (or by the cutoff date the agency specifies prior to the issuance of RIF notices after which no new annual ratings are put on record) will be given the additional retention service credit for the most common, or ''modal'', summary rating level, as defined in 5 CFR 351.203, for the summary level pattern that applies to the employee's position at the time of the reduction in force. The agency may determine the modal rating using summary ratings in the competitive area, in a larger subdivision of the agency, or agencywide. The applicable modal rating(s) must be applied uniformly and consistently within the competitive area.

For example, if the employee's position would be covered under a five-level rating pattern, the agency would compile the summary ratings on record for the most recently completed appraisal period that were given to employees in the competitive area, subdivision or agency who were rated under a five-level rating pattern. If the results were: 78 Outstanding, 153 Exceeds Fully Successful, 129 Fully Successful, 42 Marginal, and 7 Unacceptable, then the modal rating in this instance would be Exceeds Fully Successful. In this example, the assumed rating for an employee with no rating in the past 6 years, who has at least one year of current continuous service, and whose position is under a five-level program, would be Level 4. This employee would be given additional retention service credit based on a Level 4 rating.

If, using the same process, the most commonly given rating for employees under a four-level summary rating pattern was determined to be a Level 3 rating, this would be the modal rating used for employees covered by this pattern.

Employees without ratings who have less than one year of current continuous service: The modal rating is not used for employees who have completed less than one year of current continuous service. Additional retention service credit is given based on a Level 3 (Fully Successful or equivalent) rating of record under the summary level pattern which applies to the employee's position at the time of reduction in force.

Awarding Retention Service Credit When Employees in the Same RIF Competitive Area Have Been Rated Under More Than One Pattern of Summary Rating Levels

On August 23, 1995, OPM issued final regulations, at 60 FR 43936, giving agencies the option to determine the pattern of summary rating levels under their performance appraisal programs. There are eight possible patterns ranging from a traditional five-level program to a two-level program that uses only Level 1 and Level 3. Agencies can design their appraisal systems to permit the use of different patterns in different organizations and can change the patterns used without prior OPM approval.

This flexibility in the design of performance appraisal programs can affect employees' relative retention standing for reduction in force. Employees compete for retention within a competitive area. It is possible for a competitive area to cover two or more organizations that each use a different pattern of summary rating levels. Also, employees may have been transferred or reassigned into the competitive area from other agencies with different rating patterns. Some employees may have ratings of record from two-level appraisal programs, while others have ratings under five-level programs.

During the comment period on the performance management regulations, agencies asked for flexibility in awarding additional retention service credit when conducting reductions in force when competitive areas include employees rated under different patterns of summary levels. In the final performance management regulations published on August 23, 1995, OPM stated that it would review the existing reduction in force regulations in 5 CFR part 351 and consider whether any changes should be made to address mixed pattern situations. These proposed regulations are a result of that review.

OPM considered the consequences that could occur as a result of agencies making maximum use of performance management flexibilities, resulting in competitive areas that include employees with ratings given under different patterns. OPM concluded that to credit actual performance more appropriately when conducting retention competition among employees rated under different patterns, agencies need flexibility to adjust the credit assigned to rating levels in their patterns. The proposed regulations revise 5 CFR 351.504 to require an agency to take into account different patterns of summary rating levels when awarding employees additional retention service credit in reduction in force competition based on their performance.

New agency authority to determine retention service credit. Under the proposed regulations, an agency with employees in a RIF competitive area who have been rated under different patterns of summary rating levels must decide how many years of retention service credit within the allowable range of 12 to 20 years to assign to particular summary rating levels. OPM has determined that too many potential combinations of rating patterns within a competitive area will occur in the future to mandate any particular crediting formula. The objective of applying flexibility should be to give, to the extent possible, the same credit for equivalent performance. The appropriate solution will of necessity be specific to the RIF competitive area as the agency takes into account the combination of rating patterns used and the relative numbers of employees rated under each pattern.

For example, one RIF competitive area is composed of 200 employees, each with three actual ratings of record. Of those employees, 180 have been rated under a five-level performance appraisal program. Of their ratings, 2 percent were below Fully Successful, 20 percent were Fully Successful, 53 percent were Exceeds Fully Successful, and 25 percent were Outstanding. The other 20 employees were rated under a two-level (pass/fail) program, with 98

percent of their ratings at Level 3 (Pass or Fully Successful).

Under the current regulations, all the Fully Successful ratings of record would receive 12 years of additional retention service credit, Exceeds Fully Successful ratings would receive 16 years credit, and Outstanding ratings would receive 20 years credit. Employees in the two-level system never had the opportunity to be rated and receive credit for performing above the Fully Successful level, even though their performance might well have been rated Exceeds Fully Successful, or even Outstanding, under a five-level program.

Under the proposed regulations, the agency may decide, for example, that to credit performance more appropriately, the Fully Successful ratings of record given under the two-level program should receive the same number of years additional credit as the Exceeds Fully Successful ratings given under the five-level program, because the record indicates that 78 percent of ratings given under a five-level program are above Fully Successful and most of those are Exceed Fully Successful. Under this scenario, the agency might use the flexibility to assign credit based on a mix of rating level patterns within the RIF competitive area to provide what the agency determined to be equivalent credit for similar performance.

If an agency has RIF competitive areas in which all employee ratings of records to be credited were given under the same pattern of summary levels, it is required to follow the current regulations for crediting performance in a reduction in force which now appear in paragraph (d) of section 351.504.

Uniform and consistent treatment of employees in the same RIF competitive area. In using the proposed regulations, the agency's application must be uniform and consistent within the RIF competitive area. For example, each employee covered by a two-level program within the competitive area must receive the same amount of additional retention service credit for their Level 3 rating of record. Under proposed paragraph (f) of section 351.504, the agency must establish its performance crediting procedures for the applicable reduction in force and must keep the procedures available for review. The agency is not required, however, to apply the same performance crediting procedures in different competitive areas, or in different reductions in force.

The proposed regulations are specific to the agency conducting the reduction in force, at the time it carries out the reduction in force action. Thus an agency carrying out a reduction in force may provide different amounts of additional retention service credit for ratings of record received in an employee's former agency than were provided by that former organization.

The proposed regulations also include conforming changes that have been made throughout section 351.504 to make consistent the various references to rating of record and the summary levels. In addition, the exceptions to a current rating of record that are presently in paragraph (e) of section 351.504 are removed and the new definition of ''Current Rating'' in section 351.203 clarifies what the current rating of record is.

Additional Retention Service Credit for Certain Ratings From Appraisal Systems Not Covered by the Provisions of 5 CFR Part 430

Employees in a competitive area may have been rated under an appraisal system not established under the provisions of 5 CFR part 430. OPM is proposing language in the revised section 351.504 that will require agencies to use all ratings of record given to employees for assigning additional retention service credit during a reduction in force. However, a performance evaluation given to an employee under an appraisal system not covered by the provisions of 5 CFR part 430, subpart B, would be considered a rating of record only if it meets the conditions specified in the new paragraph (c) of section 430.201 of the proposed regulations. The agency conducting the reduction in force will make the determination of whether or not such ''non-430'' performance ratings meet the specified conditions.

Related Conforming Amendments

At section 430.201, General, OPM is proposing a new paragraph, Equivalent ratings of record, to specify the conditions which must be met before performance evaluations given under evaluation systems not covered by 5 U.S.C. 43 and 5 CFR 430, subpart B, can be used as the basis for granting additional retention service credit in a reduction in force. These conditions in part address fundamental requirements comparable to those in statute, such as communicating performance standards in advance and evaluating work performance against those standards. In some situations, the agency may need to take the step of identifying a summary level and pattern based on available information. OPM expects that some ''non-430'' performance evaluations will not meet one or more of the specified conditions.

At section 430.208, Rating performance, OPM is proposing amendments and additional language to support the use of additional flexibility for crediting performance in a reduction in force, as proposed here in section 351.504. Regulatory language is added to section 430.208, Rating performance, to include in paragraphs (d)(2) and (d)(4) designation of the summary level pattern as an integral part of a rating of record, and to establish in paragraph (d)(5) an authority to permit, but not require, assigning the same rating of record a different number of years additional retention service credit in a different summary level pattern, competitive area, or reduction in force. To conform with these changes, OPM is also revising the definitions of performance rating and rating of record regarding a summary level within a pattern in section 430.203.

Technical Amendments

OPM is proposing to add regulatory language in the recently issued regulations on performance appraisal systems and programs. In two places, the additions are being made solely to clarify and state explicitly restrictions on the use of critical and noncritical elements that are implicit in the existing regulations. Other clarifying changes are being made regarding the appraisal period and a delay of an acceptable level of competence determination.

Critical Element Definition

In the first instance, OPM proposes to amend the definition in section 430.203 of a critical element to clarify that critical elements may be used to measure performance only at the individual level. A corresponding editorial change is proposed at section 430.206(b)(4) for the description of elements contained in an employee's performance plan. These represent no substantive change in the regulations because of the statutory definition of a critical element. The statutory intent of chapter 43 is to establish and maintain individual accountability. At section 4303, the chapter includes a provision for removing an employee who fails to meet the established performance standard for one or more critical elements. A critical element that measures performance where individual contributions and control are not identifiable would be unusable as a basis for taking such a performance-based action because we conclude that individual control over the performance that meets the standard is a necessary condition for applying the standard and taking that action.

Using a group-level critical element raises the implications of the group or team failing to meet the element's established standards and being deemed, by statutory definition, Unacceptable on the element. The agency would be obligated to carry out the notification and assistance provisions of 5 CFR 432.104, Addressing unacceptable performance, for each member of the group or team, irrespective of the caliber of his or her individual performance. Also, should the timing of an appraisal period coincide with the end of their waiting periods, group members would be denied within-grade pay increases or career ladder promotions, once again without reference to their personal performance. We do not believe that this is in accord with the intent of the statute.

Barring Non-Critical Elements When Only Two Summary Levels Are Used

In the second instance, OPM proposes to add explicit regulatory language in section 430.206(b)(6) prohibiting the use of non-critical elements in employee performance plans in ''Pass/Fail'' summary appraisal situations, and thereby prevent confusion and inappropriate use of non-critical elements in appraisal programs. Adding this language is not a substantive change because it merely states a condition that is the logical consequence of applying other definitions and restrictions already included in the regulations.

This logical conclusion operates with an appraisal program that uses only two summary levels, Level 1 (Unacceptable) and Level 3 (Fully Successful or equivalent), which is commonly referred to as a ''Pass/Fail'' program. The relevant definitions and restrictions are: (1) the definition at section 430.203 of a non-critical element, which includes the requirement that it must affect the summary level; and (2) the provisions at section 430.208(b) (1) and (2), which make it clear that a non-critical element cannot have the effect of summarizing performance as ''Unacceptable.''

In an appraisal program that uses only two summary levels, if an employee's performance on any or all elements not designated as critical was appraised as Unacceptable, but performance on all critical elements was appraised as better than Unacceptable, then the assigned summary level would have to be Level 3. Level 1 cannot be used because no critical element performance was Unacceptable. The only summary level available other than Level 1 is Level 3. This illustrates that under a two-level program, the summary level can only be affected by critical elements. Of course, additional elements could still be included in the employee's performance plan if it was not appropriate to designate them as critical elements (e.g., they measure performance at the team or organizational level).

Appraisal Period

In section 430.206(a)(2), a change is being made to clarify that each appraisal program can designate only one appraisal period. The change reflects OPM's ongoing position that the appraisal period chosen for the program affects the application of all the program's other provisions and is one of the key features that distinguishes one program from another. The other two distinguishing features are employee coverage and pattern of summary levels for ratings of record.

The appraisal period is a specified period of time (e.g., 12 months). Within a single program, agencies are free to start the appraisal period on different dates for different employees or groups of employees.

Delay of an Acceptable Level of Competence Determination

OPM also is proposing technical amendments to 5 CFR 531.409(c) to eliminate any unintended confusion regarding the delay of an acceptable level of competence determination (ALOC) and to make terminology consistent with the performance management regulations. The first change incorporates into regulation OPM's longstanding interpretation of the present regulation, thus clarifying that the two circumstances described in the regulations are the only ones under which the ALOC determination is delayed. A corresponding change is being made to the definition of rating of record in section 430.203 to clarify that a rating of record done to comply with 5 CFR 531.404(a)(1) is a bona fide rating of record for all purposes. In addition, other changes are made to bring the terminology used into conformance with the recent changes in the performance management regulations.

(2) Definitions

''Annual Performance Rating of Record.'' Performance is one of the four factors agencies use to determine an employee's retention rights. (The other three factors are Tenure, Veterans' Preference, and Service.)

Consistent with final performance regulations published in the Federal Register at 60 FR 43936, August 23, 1995, proposed section 351.203 removes the definition of ''Annual Performance Rating of Record'' and adds the definition of ''Rating of Record'' consistent with the meaning given that term in section 430.203 of this chapter. The new definition also introduces equivalent ratings of record.

(3) Competitive Area

Agencies establish ''Competitive Areas'' to set the organizational and geographical boundaries within which employees compete for retention. Proposed section 351.402(b) clarifies existing policy on OPM's minimum standard for a competitive area. This regulatory change maintains the same standard for a minimum competitive area, but reflects current organizational structure and terminology in lieu of existing language.

(4) Competitive Level

Agencies establish ''Competitive Levels'' to group interchangeable positions in the process of determining employees' retention rights. Proposed section 351.403(c) is added to clarify existing policy that an agency may not establish a competitive level based solely upon: (1) A difference in the number of hours or weeks scheduled to be worked by other-than-full-time employees who would otherwise be in the same competitive level; (2) a requirement to work changing shifts; (3) the grade promotion potential of the position; or (4) a difference in the local wage areas in which wage grade positions are located.

(5) Retention Register

Proposed section 351.404(a) clarifies existing policy that upon displacing another employee under this section, an employee retains the same status and tenure in the new position.

Proposed section 351.404(b)(2) provides that the name of each employee in the competitive level with a written decision of removal under part 432 or 752 of this chapter is listed at the bottom of the retention register. Under present section 351.404(b)(2), the name of each employee in the competitive level with a written decision of removal because of ''Unacceptable'' or equivalent performance under part 432 is listed at the bottom of the retention register.

Proposed section 351.405 provides that the name of each employee in the competitive level with a written decision of demotion under part 432 or 752 of this chapter competes for retention from the position to which the employee will be or has been demoted. Under present section 351.405, the name of each employee in the competitive level with a written decision of demotion under part 432

because of ''Unacceptable'' or equivalent performance competes for retention from the position to which the employee will be or has been demoted.

(6) Retention Subgroups

Retention Groups and Subgroups include two of the factors (i.e., Tenure and Veterans' Preference) that are used to determine an employee's retention standing. Proposed section 351.501(b)(3) is revised to clarify existing policy that employees serving under Term appointments are included in retention subgroup III.

(7) Release From Competitive Level

Proposed section 351.602 provides that an agency may not release a competing employee from a competitive level while still retaining in that competitive level another employee who has received a written notice of demotion or removal under either part 432 or 752.

(8) Assignment Rights

Proposed section 351.701(f) is added to clarify existing policy on the procedures agencies use to determine the appropriate grade or grade-interval basis for setting employees' assignment rights.

Excepted service employees have no right of assignment to a position in a different competitive level. Section 351.705(a)(3) provides that, at its discretion, an agency may offer assignment rights to its excepted service employees. Proposed section 351.705(a)(3) clarifies existing policy that an excepted service employee may have a right of assignment on the same basis (i.e., ''Bump'' and ''Retreat'') as provided to competitive service employees, and only to another excepted service position under the same appointing authority.

(9) RIF Notices

Section 351.504(b)(1) provides that an employee is entitled to additional retention service credit based upon the employee's three most recent ratings of record during the applicable 4-, 5-, 6-year period prior to, as appropriate, the date the agency issues specific reduction in force notices or the date the agency freezes ratings before issuing reduction in force notices.

Section 351.802(a)(2) presently provides that an employee's reduction in force notice must identify the employee's annual performance ratings of record received during the last 4 years. Proposed section 351.802(a)(2) provides that the agency must identify the employee's three most recent ratings of record, rather than all ratings of record received in the applicable 4-, 5-, 6-year period, since only the three most recent ratings of record are used to determine the employee's retention standing.

Proposed section 351.803(a) is revised to add a requirement that each employee who receives a specific notice of separation by reduction in force must be given an estimate of severance pay if eligible, and information on benefits available under new subparts F and G (Career Transition Assistance Programs) of part 330 of this chapter and from the applicable State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act. To increase placement opportunities for employees affected by downsizing, the proposed section also provides that agencies must give employees receiving a reduction in force separation notice a form to authorize, at their option, the release of their resumes for employment referral to State Dislocated Worker units and potential public and private sector employers.

Proposed section 351.804 clarifies existing policy on when a specific reduction in force notice expires.

Proposed section 351.805 clarifies existing policy on when an agency is required to issue a new or amended specific reduction in force notice.

Special Implementation/Effective Dates for New Reduction in Force/ Performance Credit Provisions

Except as noted below, it is OPM's intention to make the provisions of these proposed regulations effective 30 days after the publication of final regulations. In order to give agencies adequate lead time to implement some of the procedural changes outlined in these regulations, certain provisions will be implemented as follows:

(a) When implementing proposed section 351.504(b), which extends the time period during which ratings are considered, agencies would have the option to immediately begin using a 5- or 6-year period for consideration of the employee's three most recent ratings. The 5-year period would become mandatory in reductions in force for which notices are issued or performance ratings are frozen on or after October 1, 1998. The 6-year period would become mandatory on October 1, 1999.

(b) The new agency authority to determine retention service credit when employees in a competitive area are rated under multiple rating patterns described in section 351.504(e) would apply only to ratings of record that are put on record, as defined in paragraph (b)(3) of section 351.504, on or after October 1, 1997. The agency credits any ratings of record put on record on or before September 30, 1997, based on the governmentwide 12-, 16-, and 20-year formula for additional retention service credit currently in effect.

(c) Section 351.504(c)(1)(i), in which a modal rating is used as an assumed rating for an employee with no actual ratings, would become effective October 1, 1997. Until that date, agencies would apply the provisions of section 451.504(c)(1)(ii) to employees who have no actual ratings.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects

CFR Part 293

Archives and records, Freedom of information, Government employees, Health records, Privacy.

CFR Part 351

Administrative practice and procedure, Government employees.

CFR Part 430

Decorations, medals, awards, Government employees.

CFR Part 531

Government employees, Law enforcement officers, Wages.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM proposes to amend parts 293, 351, 430, and 531 of title 5, Code of Federal Regulations, as follows:

PART 293—PERSONNEL RECORDS

1. The authority citation for part 293 continues to read as follows:

Authority: 5 U.S.C. 552 and 4315; E.O. 12107 (December 28, 1978), 3 CFR 1954–1958 Comp.; 5 U.S.C. 1103, 1104, and 1302; 5 CFR 7.2; E.O. 9830; 3 CFR 1943–1948 Comp.; 5 U.S.C. 2951(2) and 3301; and E.O. 12107.

2. In § 293.404, paragraph (a)(1) is revised to read as follows:

§ 293.404 Retention schedule.

(a)(1) Except as provided in § 293.405(a), performance ratings or documents supporting them are generally records and shall, except for

appointees to the SES and including incumbents of executive positions not covered by SES, be retained as prescribed as follows:

(i) Agencies shall retain the three (3) most recent ratings of record issued to the employee in the past: 4 years through September 30, 1998; 5 years from October 1, 1998, through September 30, 1999; and 6 years beginning October 1, 1999;

(ii) Supporting documents shall be retained for as long as the agency deems appropriate, but not to exceed 6 years;

(iii) Performance records superseded (e.g., through an administrative or judicial procedure) and performance-related records pertaining to a former employee (except as prescribed in § 293.405(a)) need not be retained for a minimum of 6 years. Rather, in the former case they are to be destroyed and in the latter case agencies shall retain in accordance with General Records Schedule 1; and

(iv) Except where prohibited by law, retention of automated records longer than the maximum prescribed in this section is permitted for purposes of statistical analysis so long as the data are not used in any action affecting the employee when the manual record has been or should have been destroyed.

* * * * *

3. In section 293.405, paragraph (a) is revised to read as follows:

§ 293.405 Disposition of records.

(a) When the OPF of a non-SES employee is sent to another servicing office in the employing agency, to another agency, or to the National Personnel Records Center, the ''losing'' servicing office shall include in the OPF information for the three (3) most recent ratings of record issued to the employee that are 4 years old or less through September 30, 1998, (5 years old or less from October 1, 1998, through September 30, 1999, and 6 years old or less beginning October 1, 1999). The information included shall be the summary pattern within which the rating of record was assigned, the summary level assigned, the date the rating was put on record for reduction in force purposes, and the ending date of the appraisal period. Also, the ''losing'' office will purge from the OPF all rating of record information that is more than 4 years old (more than 5 years old from October 1, 1998, through September 30, 1999, and more than 6 years old beginning October 1, 1999), and other performance-related records, according to agency policy established under § 293.404(a)(2) and in accordance with OPM Operating Manual, ''The Guide to Personnel Recordkeeping.''

PART 351—REDUCTION IN FORCE

4. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503.

5. In § 351.203, the definition of ''*Annual Performance rating of record*'' is removed, and the definitions of *Current rating of record*, *Modal rating,* and *Rating of record* are added in alphabetical order, to read as follows:

§ 351.203 Definitions.

* * * * *

Current rating is the rating of record for the most recently completed appraisal period as provided in § 351.504(b)(3).

* * * * *

Modal rating is the summary rating level assigned most frequently among the actual ratings of record that are:

(1) Assigned under the summary level pattern that applies to the employee's position of record on the date of the reduction in force;

(2) Given within the same competitive area, or at the agency's option within a larger subdivision of the agency or agencywide; and

(3) On record for the most recently completed appraisal period prior to the date of issuance of reduction in force notices or the cutoff date the agency specifies prior to the issuance of reduction in force notices after which no new ratings will be put on record.

Rating of record has the meaning given that term in § 430.203 of this chapter. For an agency not subject to 5 U.S.C. 43, or part 430 of this chapter, it means the officially designated performance rating, as provided for in the agency's appraisal system, that is considered to be an equivalent rating of record under the provisions of § 430.201(c) of this chapter.

* * * * *

7. In § 351.402, paragraph (b) is revised to read as follows:

§ 351.402 Competitive area.

* * * * *

(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

* * * * *

8. In § 351.403, paragraph (c) is added to read as follows:

§ 351.403 Competitive level.

* * * * *

(c) An agency may not establish a competitive level based solely upon:

(1) A difference in the number of hours or weeks scheduled to be worked by other-than-full-time employees who would otherwise be in the same competitive level;

(2) A requirement to work changing shifts;

(3) The grade promotion potential of the position; or

(4) A difference in the local wage areas in which wage grade positions are located.

9. In § 351.404, paragraph (a) introductory text, and paragraph (b)(2), are revised to read as follows:

§ 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Upon displacing another employee under this part, an employee retains the same status and tenure in the new position. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

* * * * *

(b) * * *

(2) The agency shall list, at the bottom of the list prepared under paragraph (b)(1) of this section, the name of each employee in the competitive level with a written decision of removal under part 432 or 752 of this chapter.

10. Section 351.405 is revised to read as follows:

§ 351.405 Demoted employees.

An employee who has received a written decision under part 432 or 752 of this chapter to demote him or her competes under this part from the position to which he or she will be or has been demoted.

11. In § 351.501, paragraph (b)(3) is revised to read as follows:

§ 351.501 Order of retention—competitive service.

* * * * *

(b) * * *

(3) Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of a register, status quo appointments, term appointments, and any other nonstatus nontemporary appointments which meet the definition of provisional appointments contained

in §§ 316.401 and 316.403 of this chapter.

* * * * *

12. Section 351.504 is revised to read as follows:

§ 351.504 Credit for performance.

(a) *Ratings used.* (1) Only ratings of record as defined in § 351.203 shall be used as the basis for granting additional retention service credit in a reduction in force.

(2) For employees who received ratings of record while covered by part 430, subpart B, of this chapter, those ratings of record shall be used to grant additional retention service credit in a reduction in force.

(3) For employees who received performance ratings while not covered by the provisions of 5 U.S.C. 43 and part 430, subpart B, of this chapter, those performance ratings shall be considered ratings of record for granting additional retention service credit in a reduction in force only when it is determined that those performance ratings are equivalent ratings of record under the provisions of § 430.201(c) of this chapter. The agency conducting the reduction in force shall make that determination.

(b) *Time frame.* (1) An employee's entitlement to additional retention service credit for performance under this subpart shall be based on the employee's three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, except as otherwise provided in this paragraph (b)(1), and in paragraphs (b)(2) and (c) of this section. At its option, an agency may instead use the employee's three most recent ratings of record received during a 5-year or 6-year period prior to the date of issuance of reduction in force notices or an agency established cutoff date after which no new ratings of record will be put on record. The 5-year period becomes mandatory on October 1, 1998. The 6-year period becomes mandatory on October 1, 1999.

(2) To provide adequate time to determine employee retention standing, an agency may provide for a cutoff date, a specified number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart. When a cutoff date is used, an employee will receive performance credit for the three most recent ratings of record received during the applicable 4-, 5-, or 6-year period prior to the cutoff date.

(3) To be creditable for purposes of this subpart, a rating of record must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (i.e., the rating of record is available for use by the office responsible for establishing retention registers).

(4) The awarding of additional retention service credit based on performance for purposes of this subpart, including the decision to use a 4-, 5-, or 6-year period for performance ratings, must be uniformly and consistently applied within a competitive area, and must be consistent with the agency's appropriate issuance(s) that implement these policies. Each agency must specify in its appropriate issuance(s):

(i) The conditions under which a rating of record is considered to have been received for purposes of determining whether it is within the applicable 4-, 5-, or 6-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, as appropriate; and

(ii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart.

(c) *Missing ratings.* Additional retention service credit for employees who do not have three actual ratings of record during the applicable 4-, 5-, or 6-year period prior to the date of issuance of reduction in force notices or the applicable 4-, 5-, or 6-year period prior to the agency-established cutoff date for ratings of record permitted in paragraph (b)(2) of this section shall be determined, as appropriate, under paragraphs (d) or (e) of this section, as follows:

(1) An employee who has not received any rating of record during the applicable 4-, 5-, or 6-year period shall receive credit for performance on the basis of an assumed rating. The value of that assumed rating will be determined according to the length of the employee's current continuous service and on the basis of the summary level pattern that applies to the employee's official position of record at the time of the reduction in force.

(i) An employee who has completed at least one year of current continuous service will be given the additional retention service credit based on the modal rating for that summary level pattern.

(ii) An employee who has not completed at least one year of current continuous service will be given the additional retention service credit for a Level 3 (Fully Successful or equivalent) rating of record under that summary level pattern.

(2) An employee who has received at least one but fewer than three previous ratings of record shall receive credit for performance on the basis of the value of the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the ratings is added together and divided by two to determine the amount of additional retention service credit. If an employee has received only one actual rating during the period, its value is the amount of additional retention service credit provided.

(d) *Single rating pattern.* If all employees in a reduction in force competitive area have received ratings of record under a single pattern of summary levels as set forth in § 430.208(d) of this chapter, the additional retention service credit provided to employees shall be expressed in additional years of service and shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the employee's applicable ratings of record, under paragraphs (b)(1) and (c) of this section computed on the following basis:

(1) Twenty additional years of service for each rating of record with a Level 5 (Outstanding or equivalent) summary;

(2) Sixteen additional years of service for each rating of record with a Level 4 summary; and

(3) twelve additional years of service for each rating of record with a Level 3 (Fully Successful or equivalent) summary.

(e) *Multiple rating patterns.* If an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as set forth in § 430.208(d) of this chapter, it shall consider the mix of patterns and provide additional retention service credit for performance to employees expressed in additional years of service in accordance with the following:

(1) Additional years of service shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the additional retention service credit that the agency established for the summary levels of the employee's applicable rating(s) of record.

(2) The agency shall establish the amount of additional retention service credit provided for summary levels only in full years; the agency shall not establish additional retention service credit for summary levels below Level 3 (Fully successful or equivalent).

(3) When establishing additional retention service credit for the summary levels at Level 3 (Fully Successful or equivalent) and above, the agency shall establish at least 12 years, and no more than 20 years, additional retention service credit for a summary level.

(4) The agency may establish the same number of years additional retention service credit for more than one summary level.

(5) The agency shall establish the same number of years additional retention service credit for all ratings of record with the same summary level in the same pattern of summary levels as set forth in § 430.208(d) of this chapter.

(6) The agency may establish a different number of years additional retention service credit for the same summary level in different patterns.

(7) The agency may apply paragraphs (e)(1) through (e)(6) of this section only to ratings of record put on record on or after October 1, 1997. The agency shall establish the additional retention service credit for ratings of record put on record prior to that date in accordance with paragraphs (d)(1) through (d)(3) of this section.

(f) *Documentation of credit.* In implementing paragraph (e) of this section, the agency shall specify the number(s) of years additional retention service credit that it will establish for summary levels. This information shall be made readily available for review.

13. In § 351.602, paragraph (c) is revised to read as follows:

§ 351.602 Prohibitions.

* * * * *

(c) A written decision under part 432 or 752 of this chapter of removal or demotion from the competitive level.

14. In § 351.701, paragraph (f) is added to read as follows:

§ 351.701 Assignment involving displacement.

* * * * *

(f)(1) In determining applicable grades (or grade intervals) under §§ 351.701(b)(2) and 351.701(c)(2), the agency uses the grade progression of the released employee's position of record to determine the grade (or interval) limits of the employee's assignment rights.

(2) For positions covered by the General Schedule, the agency must determine whether a one-grade, two-grade, or mixed grade interval progression is applicable to the position of the released employee.

(3) For positions not covered by the General Schedule, the agency must determine the normal line of progression for each occupational series and grade level to determine the grade (or interval) limits of the released employee's assignment rights. If the agency determines that there is no normal line of progression for an occupational series and grade level, the agency provides the released employee with assignment rights to positions within three actual grades lower on a one-grade basis. The normal line of progression may include positions in different pay systems.

(4) For positions where no grade structure exists, the agency determines a line of progression for each occupation and pay rate, and provides assignment rights to positions within three grades (or intervals) lower on that basis.

(5) If the released employee holds a position that is less than three grades above the lowest grade in the applicable classification system (e.g., the employee holds a GS–2 position), the agency provides the released employee with assignment rights up to three actual grades lower on a one-grade basis in other pay systems.

15. In § 351.705, paragraph (a)(3) is revised to read as follows:

§ 351.705 Administrative assignment.

(a) * * *

(3) Provide competing employees in the excepted service with assignment rights to other positions under the same appointing authority on the same basis as assignment rights provided to competitive service employees under § 351.701 and in paragraphs (a) (1) and (2) of this section.

* * * * *

16. In § 351.802, paragraph (a)(2) is revised to read as follows:

§ 351.802 Content of notice.

(a) * * *

(2) The employee's competitive area, competitive level, subgroup, service date, and three most recent ratings of record received in the applicable 4-, 5-, 6-year period, as provided in § 351.504(b)(1).

* * * * *

17. In § 351.803, paragraph (a) is revised to read as follows:

§ 351.803 Notice of eligibility for reemployment and other placement assistance.

(a) An employee who receives a specific notice of separation under this part must be given information concerning the right to reemployment consideration and career transition assistance under subparts B (Reemployment Priority List), F and G (Career Transition Assistance Programs) of part 330 of this chapter. The employee must also be given a form to authorize, at his or her option, the release of his or her resume and other relevant employment information for employment referral to State Dislocated Worker Units and potential public or private sector employers. The employee must also be given information concerning how to apply both for unemployment insurance through the appropriate State program and benefits available under the State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act, and an estimate of severance pay (if eligible).

* * * * *

18. Section 351.804 is revised to read as follows:

§ 351.804 Expiration of notice.

(a) A notice expires when followed by the action specified, or by an action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action.

(b) An agency may not take the action before the effective date in the notice; instead, the agency may cancel the reduction in force notice and issue a new notice subject to this subpart.

19. Section 351.805 is revised to read as follows:

§ 351.805 New notice required.

(a) An employee is entitled to a written notice of, as appropriate, at least 60 or 120 full days if the agency decides to take an action more severe than first specified.

(b) An agency must give a employee an amended written notice if the reduction in force is changed to a later date. A reduction in force action taken after the date specified in the notice given to the employee is not invalid for that reason, except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for a reduction in force action as a result of the change in dates.

(c) An agency must give an employee an amended written notice and allow the employee to decide whether to accept a better offer of assignment under subpart G of this part that becomes available before or on the effective date of the reduction in force. The agency must give the employee the amended notice regardless of whether the employee has accepted or rejected a previous offer of assignment, provided that the employee has not voluntarily separated from his or her official position.

PART 430—PERFORMANCE MANAGEMENT

20. The authority citation for part 430 continues to read as follows:

Authority: 5 U.S.C. chapter 43.

21. In § 430.201, paragraph (c) is added to read as follows:

§ 430.201 In General.

* * * * *

(c) *Equivalent ratings of record.* (1) If an agency has administratively adopted and applied the procedures of this subpart to evaluate the performance of its employees, the ratings of record resulting from that evaluation are considered ratings of record for reduction in force purposes.

(2) Other performance evaluations given while an employee is not covered by the provisions of this subpart are considered ratings of record for reduction in force purposes when the performance evaluation—

(i) Was issued as an officially designated evaluation under the employing agency's performance evaluation system,

(ii) Was derived from the appraisal of performance against expectations that are established and communicated in advance and are work related, and

(iii) identified whether the employee performed acceptably.

(3) When the performance evaluation does not include a summary level designator and pattern comparable to those established at § 430.208(d), the agency may identify a level and pattern based on information related to the appraisal process.

22. In § 430.203. the definitions of *Critical element, Performance rating,* and *Rating of record* are revised to read as follows:

§ 430.203 Definitions.

* * * * *

Critical element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level.

* * * * *

Performance rating means the written, or otherwise recorded, appraisal of performance compared to the performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for the minimum period. A performance rating may include the assignment of a summary level within a pattern (as specified in § 430.208(d)).

* * * * *

Rating of record means the performance rating prepared at the end of an appraisal period for performance of agency assigned duties over the entire period and the assignment of a summary level within a pattern (as specified in § 430.208(d)) or in accordance with § 531.404(a)(1) of this chapter. These constitute official ratings of record referenced in this chapter.

23. In § 430.206, paragraphs (a)(2) and (b)(4) are revised, paragraphs (b)(6) and (b)(7) are redesignated as paragraphs (b)(7) and (b)(8) respectively, and a new paragraph (b)(6) is added to read as follows:

§ 430.206 Planning performance.

(a) * * *

(2) Each program shall specify a single length of time as its appraisal period. The appraisal period generally shall be 12 months so that employees are provided a rating of record on an annual basis. A program's appraisal period may be longer when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.

(b) * * *

(4) Each performance plan shall include all elements which are used in deriving and assigning a summary level, including at least one critical element and any non-critical element(s).

* * * * *

(6) A performance plan established under an appraisal program that uses only two summary levels (pattern A as specified in § 430.208(d)(1)) shall not include non-critical elements.

* * * * *

24. In § 430.208, the introductory text to paragraph (d)(2) is revised, paragraph (d)(4) is revised, and a new paragraph (d)(5) is added to read as follows:

§ 430.208 Rating performance.

* * * * *

(d) * * *

(2) Within any of the patterns shown in paragraph (d)(1) of this section, summary levels shall comply with the following requirements:

* * * * *

(4) The designation of a summary level and its pattern shall be used to provide consistency in describing ratings of record and as a reference point for applying other related regulations, including, but not limited to, assigning additional retention service credit under § 351.504 of this chapter.

(5) Under the provisions of § 351.504(f) of this chapter, the number of years additional retention service credit established for a summary level of a rating of record shall be applied in a uniform and consistent manner within a competitive area in any given reduction in force, but the number of years may vary:

(i) In different reductions in force;

(ii) In different competitive areas; and

(iii) In different summary level patterns within the same competitive area.

* * * * *

PART 531—PAY UNDER THE GENERAL SCHEDULE

25. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR 1991 Comp., p. 316;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336;

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682;

Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

26. In § 531.409, paragraphs (c)(1), (c)(2)(i), and (c)(2)(ii) are revised to read as follows:

§ 531.409 Acceptable level of competence determinations.

* * * * *

(c) *Delay in determination.* (1) An acceptable level of competence determination shall be delayed when, and only when, either of the following applies:

(i) An employee has not had the minimum period of time established at § 430.207(a) of this chapter to demonstrate acceptable performance because he or she has not been informed of the specific requirements for performance at an acceptable level of competence in his or her current position, and the employee has not been given a performance rating in any position within the minimum period of time (as established at § 430.207(a) of this chapter) before the end of the waiting period; or

(ii) An employee is reduced in grade because of unacceptable performance to a position in which he or she is eligible for a within-grade increase or will become eligible within the minimum period as established at § 430.207(a) of this chapter.

(2) * * *

(i) The employee shall be informed that his or her determination is postponed and the appraisal period extended and shall be told of the specific requirements for performance at an acceptable level of competence.

(ii) An acceptable level of competence determination shall then be made based on the employee's rating of record completed at the end of the extended appraisal period.

* * * * *

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FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–0960]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board is publishing for comment proposed revisions to Regulation Z. The revisions implement an amendment to the Truth in Lending Act contained in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 affecting the disclosure of a fifteen-year historical example of rates and payments. The amendment applies to variable-rate loans with a term exceeding one year and secured by the consumer's principal dwelling. The amendment allows creditors either to disclose a fifteen-year historical example or to give a statement that the periodic payment may substantially increase or decrease together with a maximum interest rate and payment based on a $10,000 loan.

DATES: Comments must be received on or before February 28, 1997.

ADDRESSES: Comments should refer to Docket No. R–0960, and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551. Comments also may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, or to the security control room at all other times. The mail room and the security control room are accessible from the courtyard on 20th Street, N.W. (between Constitution Avenue and C Street) at any time. Comments will be available for inspection in Room MP–500 of the Martin Building between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board's rules regarding the availability of information.

FOR FURTHER INFORMATION CONTACT: Kyung H. Cho-Miller, Staff Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) *only*, contact Dorothea Thompson at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Truth in Lending Act (TILA) (15 U.S.C. 1601 *et seq.*) is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The act requires creditors to disclose the cost of credit as a dollar amount (the finance charge) and as an annual percentage rate (the APR). Uniformity in creditors' disclosures is intended to assist consumers in comparison shopping. The TILA requires additional disclosures for loans secured by a consumer's home and permits consumers to rescind certain transactions that involve their principal dwelling. The act is implemented by the Board's Regulation Z (12 CFR Part 226).

The credit transactions covered by TILA and Regulation Z fall into two categories—open- or closed-end credit transactions. Open-end credit is defined as a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge that may be computed from time to time on the outstanding unpaid balance, for example, credit extended by means of a credit card (§ 226.2(a)(20)). Closed-end credit is defined as any credit arrangement that does not fall within the definition of open-end credit (§ 226.2(a)(10)). A mortgage loan with a definite maturity date is an example of closed-end credit.

II. Proposed Regulatory Provisions

Under Regulation Z, the timing and number of disclosures required for variable-rate loans vary depending on the term and security for the loan. For all variable-rate loans, disclosures are generally provided once—prior to consummation. However, if the loan exceeds a term of one year and is secured by the consumer's principal dwelling, creditors are required to provide disclosures at three different times—when an application is received (or when a nonrefundable fee is paid, whichever occurs earlier), prior to consummation, and subsequent to consummation when certain rate or payment changes occur. (*See* Regulation Z, 12 CFR 226.17(b), 18(f), 19, and 20(c).)

Disclosures provided at application for a variable-rate mortgage include the Board-prescribed *Consumer Handbook on Adjustable Rate Mortgages* (or a suitable substitute) and a loan program disclosure for each variable-rate program the consumer is interested in. The loan program disclosure consists of twelve separate items as they apply to a variable-rate program, including information such as the identification of the index or formula to be used for adjustments and a fifteen-year historical example of how changes in the index values or formula used to compute interest rates would have affected the interest rates and payments on a $10,000 loan.

On September 30, 1996, the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. L. 104–208, 110 Stat. 3009) (1996 amendment) amended the TILA by providing creditors the option to give a statement that the periodic payments may increase or decrease substantially together with the maximum interest rate and payment amount for a $10,000 loan in lieu of the fifteen-year historical example.

The Board proposes to implement the TILA amendment as discussed below.

III. Section-by-Section Analysis

Subpart A—General

Section 226.19—Certain Residential Mortgage Transactions

19(b) Certain variable-rate transactions. Section 226.19(b) requires the historical example disclosure for loans exceeding a term of one year that are secured by a consumer's principal dwelling and where the APR may increase after consummation (such as when the rate is tied to an index). The 1996 amendment does not explicitly limit application of the alternative disclosure to loans that exceed a term of one year. The Board believes, however, that the amendment was intended to apply only to loans where the fifteen-year historical example is currently required, namely loans that exceed one year. Accordingly, the Board proposes to apply the alternative disclosure option to variable-rate loans with a term greater than one year and secured by the consumer's principal dwelling.

The 1996 amendment uses the term ''residential mortgage transactions,'' a