CODE OF FEDERAL REGULATIONS

Title 12
Banks and Banking

Part 1100 to End

Revised as of January 1, 2022

Containing a codification of documents
of general applicability and future effect

As of January 1, 2022

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 12 CFR 1101.1 *refers to title 12, part 1101, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

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The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 2022), consult the ''List of CFR Sections Affected (LSA),'' which is issued monthly, and the ''Cumulative List of Parts Affected,'' which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

PAST PROVISIONS OF THE CODE

Provisions of the Code that are no longer in force and effect as of the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on any given date in the past by using the appropriate List of CFR Sections Affected (LSA). For the convenience of the reader, a ''List of CFR Sections Affected'' is published at the end of each CFR volume. For changes to the Code prior to the LSA listings at the end of the volume, consult previous annual editions of the LSA. For changes to the Code prior to 2001, consult the List of CFR Sections Affected compilations, published for 1949-1963, 1964-1972, 1973-1985, and 1986-2000.

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The term ''[Reserved]'' is used as a place holder within the Code of Federal Regulations. An agency may add regulatory information at a ''[Reserved]'' location at any time. Occasionally ''[Reserved]'' is used editorially to indicate that a portion of the CFR was left vacant and not dropped in error.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001, or call 202-741-6010.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Authorities and Rules. A list of CFR titles, chapters, subchapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of ''Title 3—The President'' is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the ''Contents'' entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

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OLIVER A. POTTS,
Director,
Office of the Federal Register
January 1, 2022

THIS TITLE

Title 12—BANKS AND BANKING is composed of ten volumes. The parts in these volumes are arranged in the following order: Parts 1–199, 200–219, 220–229, 230–299, 300–346, 347–599, 600–899, 900–1025, 1026–1099, and 1100–end. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2022.

For this volume, Michele Bugenhagen was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 12—Banks and Banking

(This book contains part 1100 to end)

CHAPTER XI—FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

PART 1100 [RESERVED]

PART 1101—DESCRIPTION OF OFFICE, PROCEDURES, PUBLIC INFORMATION

Sec.

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 3307.

SOURCE: 45 FR 46794, July 11, 1980, unless otherwise noted.

§ 1101.1 Scope and purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, with respect to the Federal Financial Institutions Examination Council (Council), and establishes related information disclosure procedures.

§ 1101.2 Authority and functions.

(a) The Council was established by the Federal Financial Institutions Examination Council Act of 1978 (Act), 12 U.S.C. 3301–3308. It is composed of the Comptroller of the Currency; the Chairman of the Federal Deposit Insurance Corporation; a Governor of the Board of Governors of the Federal Reserve System; the Chairman of the Federal Home Loan Bank Board; and the Chairman of the National Credit Union Administration Board.

(b) The statutory functions of the Council are set out at 12 U.S.C. 3305. In summary, the mission of the Council is to promote consistency and progress in federal examination and supervision of financial institutions and their affiliates. The Council is empowered to prescribe uniform principles, standards, and reporting forms and systems; make recommendations in the interest of uniformity; and conduct examiner schools open to personnel of the agencies represented on the Council and employees of state financial institutions supervisory agencies.

§ 1101.3 Organization and methods of operation.

(a) Statutory requirements relating to the Council's organization are stated in 12 U.S.C. 3303.

(b) *Council staff.* Administrative support and substantive coordination for Council activities are provided by a small staff detailed on a full-time basis from the five member agencies. The Executive Secretary and Deputy Executive Secretary of the Council supervise this staff.

(c) *Agency Liaison Group, Task Forces and Legal Advisory Group.* Most staff support in the substantive areas of the Council's duties is provided by interagency task forces and the Council's Legal Advisory Group (LAG). These task forces and the LAG are responsible for securing the services, as needed, of staff experts from the five agencies; supervising research and other investigative work for the Council; and preparing reports and recommendations for the Council. The Agency Liaison Group (ALG) is responsible for the overall coordination of the respective agencies' staff contributions to Council business. The ALG, the task forces, and the LAG are each composed of Council member agency staff serving the Council on a part-time basis.

(d) *State Liaison Committee.* Under 12 U.S.C. 3306, the Council has established a State Liaison Committee, composed of five representatives of state financial institutions supervisory agencies.

(e) *Council address.* Council offices are located at 3501 Fairfax Drive, Room B–7081a, Arlington, VA, 22226–3550.

[45 FR 46794, July 11, 1980, as amended at 53 FR 7341, Mar. 8, 1988; 75 FR 71014, Nov. 22, 2010]

§ 1101.4 Disclosure of information, policies, and records.

(a) *Statements of policy published in the Federal Register or available for public inspection in an electronic format; indices.* (1) Under 5 U.S.C. 552(a)(1), the Council publishes general rules, policies and interpretations in the FEDERAL REGISTER.

(2) Under 5 U.S.C. 552(a)(2), policies and interpretations adopted by the Council, including instructions to Council staff affecting members of the

public are available for public inspection in an electronic format at the office of the Executive Secretary of the Council, 3501 Fairfax Drive, Room B–7081a, Arlington, VA, 22226–3550, during regular business hours. Policies and interpretations of the Council may be withheld from disclosure under the principles stated in paragraph (b)(1) of this section.

(3) Copies of all records, regardless of form or format, are available for public inspection in an electronic format if they:

(i) Have been released to any person under paragraph (b) of this section; and

(ii)(A) Because of the nature of their subject matter, the Council determines that they have become or are likely to become the subject of subsequent requests for substantially the same records; or

(B) They have been requested three or more times.

(4) An index of the records referred to in paragraphs (a)(1) through (3) of this section is available for public inspection in an electronic format.

(b) *Other records of the Council available to the public upon request; procedures*—(1) *General rule and exemptions.* Under 5 U.S.C. 552(a)(3), all other records of the Council are available to the public upon request, except to the extent exempted from disclosure as provided in 5 U.S.C. 552(b) and described in this paragraph (b)(1), or if disclosure is prohibited by law. Unless specifically authorized by the Council, or as set forth in paragraph (b)(2) of this section, the following records, and portions thereof, are not available to the public:

(i) A record, or portion thereof, which is specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which is, in fact, properly classified pursuant to such Executive Order.

(ii) A record, or portion thereof, relating solely to the internal personnel rules and practices of an agency.

(iii) A record, or portion thereof, specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(iv) A record, or portion thereof, containing trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(v) An intra-agency or interagency memorandum or letter that would not be routinely available by law to a private party in litigation, including, but not limited to, memoranda, reports, and other documents prepared by the personnel of the Council or its constituent agencies, and records of deliberations of the Council and discussions of meetings of the Council, any Council Committee, or Council staff, that are not subject to 5 U.S.C. 552b (the Government in the Sunshine Act). In applying this exemption, the Council will not withhold records based on the deliberative process privilege if the records were created 25 years or more before the date on which the records were requested.

(vi) A personnel, medical, or similar record, including a financial record, or any portion thereof, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(vii) Records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7), including records relating to a proceeding by a financial institution's State or Federal regulatory agency for the issuance of a cease-anddesist order, or order of suspension or removal, or assessment of a civil money penalty and the granting, withholding, or revocation of any approval, permission, or authority.

(viii) A record, or portion thereof, containing, relating to, or derived from an examination, operating, or condition report prepared by, or on behalf of, or for the use of any State or Federal agency directly or indirectly responsible for the regulation or supervision of financial institutions.

(ix) A record, or portion thereof, which contains or is related to geological and geophysical information and data, including maps, concerning wells.

(2) *Discretionary release of exempt information.* Notwithstanding the applicability of an exemption, the Council will only withhold records requested under this paragraph (b) if the Council reasonably foresees that disclosure would harm an interest protected by an exemption listed in 5 U.S.C. 552(b) and described in paragraph (b)(1) of this section. In addition, whenever the Council determines that full disclosure of a requested record is not possible, the Council will consider whether partial disclosure is possible and will take reasonable steps necessary to segregate and release the nonexempt portion of a record. The Council or the Council's designee may elect, under the circumstances of a particular request, to disclose all or a portion of any requested record where permitted by law. Such disclosure has no precedential significance.

(3) *Procedure for records request*–(i) *Initial request.* Requests for records shall be submitted in writing to the Executive Secretary of the Council:

(A) By sending a letter to: FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B–708la, Arlington, VA, 22226–3550. Both the mailing envelope and the request should be marked ''Freedom of Information Request,'' ''FOIA Request,'' or the like; or

(B) By facsimile clearly marked ''Freedom of Information Act Request,'' ''FOIA Request,'' or the like to the Executive Secretary at (703) 562–6446; or

(C) By email to the address provided on the FFIEC's World Wide Web page, found at: *http://www.ffiec.gov*. Requests must reasonably describe the records sought.

(ii) *Contents of request.* All requests should contain the following information:

(A) The name and mailing address of the requester, an electronic mail address, if available, and the telephone number at which the requester may be reached during normal business hours;

(B) A statement as to whether the information is intended for commercial use, and whether the requester is an educational or noncommercial scientific institution, or news media representative; and

(C) A statement agreeing to pay all applicable fees, or a statement identifying any desired fee limitation, or a request for a waiver or reduction of fees that satisfies paragraph (b)(5)(ii)(H) of this section.

(iii) *Defective requests.* The Council need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this section. The Executive Secretary may return a defective request specifying the deficiency. The requester may submit a corrected request, which will be treated as an initial request.

(iv) *Expedited processing.* (A) Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the Executive Secretary has determined to expedite the response, the Executive Secretary shall process the request as soon as practicable. To show a compelling need for expedited processing, the requester shall provide a statement demonstrating that:

(*1*) Failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(*2*) The requester is primarily engaged in information dissemination as a main professional occupation or activity, and there is urgency to inform the public of the government activity involved in the request.

(B) The requester's statement must be certified to be true and correct to the best of the person's knowledge and belief and explain in detail the basis for requesting expedited processing.

(C) The formality of the certification required to obtain expedited treatment may be waived by the Executive Secretary as a matter of administrative discretion.

(v) *Response to initial requests.* (A) Except where the Executive Secretary has determined to expedite the processing of a request, the Executive Secretary will respond by mail or electronic mail to all properly submitted initial requests within 20 working days of receipt. The time for response may be extended up to 10 additional working

days in unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), where the Council has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. In addition, where the extension of the 20-day time limit exceeds 10 working days, as described by the FOIA, the requester shall be provided with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or provided an opportunity to arrange an alternative time frame for processing the request or a modified request. To aid the requester, the Council's FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Council. The Council's FOIA Public Liaison's contact information is available at *http://www.ffiec.gov/foia.htm*. The requester may also seek dispute resolution services from the Office of Government Information Services.

(B) In response to a request that reasonably describes the records sought and otherwise satisfies the requirements of this section, a search shall be conducted of records in existence and maintained by the Council on the date of receipt of the request, and a review made of any responsive information located. The Executive Secretary shall notify the requester of:

(*1*) The Executive Secretary's determination of the response to the request;

(*2*) The reasons for the determination;

(*3*) The right of the requester to seek assistance from the Council's FOIA Public Liaison; and

(*4*) When an adverse determination is made (including a determination that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; the requested record is not readily reproducible in the form or format sought by the requester; a fee waiver request or other fee categorization matter is denied; and a request for expedited processing is denied), the Executive Secretary will advise the requester in writing of that determination and will further advise the requester:

(*i*) If the denial is in part or in whole;

(*ii*) The name and title of each person responsible for the denial (when other than the person signing the notification);

(*iii*) The exemptions relied on for the denial;

(*iv*) The right of the requester to appeal any adverse determination to the Chairman of the Council within 90 days following the date of issuance of the notification, as specified in paragraph (b)(3)(vi) of this section; and

(*v*) The right of the requester to seek dispute resolution services from the Council's FOIA Public Liaison or the Office of Government Information Services.

(vi) *Appeals of responses to initial requests*. A requester may appeal any adverse determination in writing, within 90 days of the date of issuance of the adverse determination. Appeals should refer to the date and tracking number of the original request and the date of the Council's initial ruling. Appeals should include an explanation of the basis for the appeal. Appeals shall be submitted to the Chairman of the Council:

(A) By sending a letter to: FFIEC, Attn: Executive Secretary, 3501 Fairfax Drive, Room B–7081a, Arlington, VA, 22226–3550. Both the mailing envelope and the request should be marked ''Freedom of Information Act Appeal,'' ''FOIA Appeal,'' or the like; or

(B) By facsimile clearly marked ''Freedom of Information Act Appeal,'' ''FOIA Appeal,'' or the like to the Executive Secretary at (703) 562–6446; or

(C) By email with the subject line marked ''Freedom of Information Act Appeal,'' ''FOIA Appeal,'' or the like to *FOIA@ffiec.gov*.

(vii) *Council response to appeals*. The Chairman of the Council, or another member designated by the Chairman, will respond to all properly submitted appeals within 20 working days of actual receipt of the appeal by the Executive Secretary. The time for response may be extended up to 10 additional working days, as provided in 5 U.S.C. 552(a)(6)(B), or for other periods by

agreement between the requester and the Chairman or the Chairman's designee.

(4) *Procedure for access to records if request is granted.* (i) When a request for access to records is granted, in whole or in part, a copy of the records to be disclosed will be promptly delivered to the requester or made available for inspection in an electronic format, whichever was requested. Inspection of records, or duplication and delivery of copies of records, will be arranged so as not to interfere with their use by the Council and other users of the records.

(ii) When delivery to the requester is to be made, copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the Executive Secretary deems it appropriate to send the documents by another means.

(iii) The Council shall provide a copy of the record in any form or format requested if the record is readily reproducible by the Council in that form or format, but the Council need not provide more than one copy of any record to a requester.

(iv) By arrangement with the requester, the Executive Secretary may elect to send the responsive records electronically if a substantial portion of the records is in electronic format. If the information requested is subject to disclosure under the Privacy Act of 1974, 5 U.S.C. 552a, it will not be sent by electronic means unless reasonable security measures can be established.

(5) *Fees for document search, review, and duplication; waiver and reduction of fee*—(i) *Definitions*—(A) *Direct costs* means those expenditures which the Council actually incurs in searching for, duplicating, and reviewing documents to respond to a FOIA request.

(B) *Search* means all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming.

(C) *Duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audiovisual records, or machine readable records (*e.g.*, magnetic tape or computer disk).

(D) *Review* means the process of examining documents located in response to a request that is for a commercial use (*see* paragraph (b)(5)(i)(E) of this section) to determine whether any portion of any document located is permitted to be withheld and processing such documents for disclosure.

(E) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a request falls within this category, the Executive Secretary will determine the use to which a requester will put the records requested and seek additional information as the Executive Secretary deems necessary.

(F) *Educational institution* means a preschool, an elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(G) *Noncommercial scientific institution* means an institution that is not operated on a ''commercial'' basis as that term is referenced in paragraph (b)(5)(i)(E) of this section, and which is operated solely for the purposes of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(H) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph (b)(5)(i)(H), the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase

by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Council may also consider the past publication record of the requester in making such a determination.

(ii) *Fees to be charged.* The Council will charge fees that recoup the full allowable direct costs it incurs, except that the charging of search and/or duplication fees is subject to the restrictions of paragraph (b)(5)(ii)(G) of this section. The Council may contract with the private sector to locate, reproduce, and/or disseminate records. Provided, however, that the Council has ensured that the ultimate cost to the requester is no greater than it would be if the Council performed these tasks. Fees are subject to change as costs change. In no case will the Council contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

(A) *Manual searches and review.* The Council will charge fees at the following rates for manual searches for and review of records:

(*1*) If search/review is done by clerical staff, the hourly rate for GS–7, step 5, plus 16 percent of the rate to cover benefits;

(*2*) If search/review is done by professional staff, the hourly rate for GS–13, step 5, plus 16 percent of the rate to cover benefits.

(B) *Computer searches.* The Council will charge fees at the hourly rate for GS–13, step 5, plus 16 percent of the rate to cover benefits, plus the hourly cost of operating the computer for computer searches for records.

(C) *Duplication of records.* (*1*) The per-page fee for paper copy reproduction of a document is $.25;

(*2*) The fee for records generated by computer is the hourly rate for the computer operator (at GS–7, step 5, plus 16 percent for benefits if clerical staff, and GS–13, step 5, plus 16 percent for benefits if professional staff) plus the cost of materials (computer paper, tapes, disks, labels, etc.).

(*3*) If any other method of duplication is used, the Council will charge the actual direct cost of duplicating the records.

(D) *Hourly rates.* If search, duplication and/or review is provided by personnel of member agencies of the Council, fees will reflect their actual hourly rates, plus 16 percent for benefits.

(E) *Fees to exceed $25.* If the Council estimates that duplication and/or search fees are likely to exceed $25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. In the case of such notification by the Council, the requester will then have the opportunity to confer with the Council's FOIA Public Liaison with the object of reformulating the request to meet his/her needs at a lower cost.

(F) *Other services.* Complying with requests for special services such as certifying records as true copies or mailing records by express mail is entirely at the discretion of the Council. The Council will recover the full costs of providing such services to the extent it elects to provide them.

(G) *Restriction on assessing fees.* (*1*) The Council will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(*2*)(*i*) If the Council fails to comply with the time limits specified in the FOIA in which to respond to a request, the Council will not charge search fees, or, in the case of a requester described in paragraph (b)(5)(iii)(B) of this section, will not charge duplication fees, except as described in paragraphs (b)(5)(ii)(G)(*2*)(*ii*) through (*iv*) of this section.

(*ii*) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and the Council provided a timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

(*iii*) If the Council has determined that unusual circumstances apply (as the term is defined in the FOIA) and more than 5,000 pages are necessary to respond to the request, the Council may charge search fees, or, in the case of requesters described in paragraph (b)(5)(iii)(B) of this section, may charge duplication fees, if the following steps are taken: The Council provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and The Council discussed with the requester via written mail, email message, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Council may charge all applicable fees incurred in the processing of the request.

(*iv*) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(H) *Waiving or reducing fees.* As part of the initial request for records, a requester may ask that the Council waive or reduce fees if disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Council and is not primarily in the commercial interest of the requester. The initial request for records must also state the justification for a waiver or reduction of fees. Determinations as to a waiver or reduction of fees will be made by the Executive Secretary of the Council and the requester will be notified in writing of his/her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph (b)(5)(ii)(H) may be appealed to the Chairman of the Council pursuant to the procedure set forth in paragraph (b)(3)(vi) of this section.

(iii) *Categories of requesters*—(A) *Commercial use requester*s. The Council will assess fees for commercial use requesters sufficient to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents.

(B) *News media, educational and noncommercial scientific institution requesters.* Requesters who are representatives of the news media, educational and noncommercial scientific institution requesters. The Council shall provide documents to requesters in these categories for the cost of reproduction alone, excluding fees for the first 100 pages.

(C) *All other requesters.* The Council shall charge requesters who do not fit into any of the categories in paragraphs (b)(5)(iii)(A) and (B) of this section fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without a fee.

(D) *Description of records.* All requesters must specifically describe records sought.

(iv) *Interest on unpaid fees.* The Council may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.

(v) *Fees for unsuccessful search and review.* The Council may assess fees for time spent searching and reviewing, even if it fails to locate the records or if records located are determined to be exempt from disclosure.

(vi) *Aggregating requests.* A requester(s) may not file multiple requests each seeking portions of a document or documents, solely in order to avoid payment of fees. If this is done, the Council may aggregate any such requests and charge accordingly. In no case will the Council aggregate multiple requests on unrelated subjects from the same requester.

(vii) *Advance payment of fees.* The Council will not require a requester to make an assurance of payment or an advance payment unless:

(A) The Council estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250. The Council will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(B) A requester has previously failed to pay a fee charged in a timely fashion. The Council may require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (b)(5)(iv) of this section or demonstrate that he/she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or a pending request from that requester.

(C) When the Council acts under paragraph (b)(5)(vii)(A) or (B) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (*i.e.*, 20 working days from receipt of initial requests, plus permissible extensions of these time limits) will begin only after the Council has received the fee payments described.

(6) *Records of another agency.* If a requested record originated with or incorporates the information of another State or Federal agency or department, upon receipt of a request for the record the Council will promptly inform the requester of this circumstance and immediately shall forward the request to the originating agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

[82 FR 30726, July 3, 2017]

§ 1101.5 Testimony and production of documents in response to subpoena, order, etc.

No person shall testify, in court or otherwise, as a result of activities on behalf of the Council without prior written authorization from the Council. This section shall not restrict the authority of a Council member to testify before Congress on matters within his or her official responsibilities as a Council member. No person shall furnish documents reflecting information of the Council in compliance with a subpoena, order, or otherwise, without prior written authorization from the Council. The Council may authorize testimony or production of documents after the litigant (or the litigant's attorney) submits an affidavit to the Council setting forth the interest of the litigant and the testimony or documents desired. Authorization to testify or produce documents is limited to authority expressly granted by the Council. When the Council has not authorized testimony or production of documents, the individual to whom the subpoena or order has been directed will appear in court and respectfully state that he or she is unable to comply further with the subpoena or order by reason of this section.

PART 1102—APPRAISER REGULATION

Subpart A—Temporary Waiver Requests

Sec.

Subpart B—Rules of Practice for Proceedings

Subpart C—Rules Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Appraisal Subcommittee

Subpart D—Description of Office, Procedures, Public Information

Subpart E—Collection and Transmission of Appraisal Management Company (AMC) Registry Fees

AUTHORITY: 12 U.S.C. 3348(a), 3332, 3335, 3338 (a)(4)(B), 3348(c), 5 U.S.C. 552a, 553(e); Executive Order 12600, 52 FR 23781 (3 CFR, 1987 Comp., p. 235).

EDITORIAL NOTE: Nomenclature changes to part appear at 83 FR 43739, Aug. 28, 2018.

Subpart A—Temporary Waiver Requests

AUTHORITY: 12 U.S.C. 3348(b).

SOURCE: 57 FR 10982, Apr. 1, 1992, unless otherwise noted.

§ 1102.1 Authority, purpose and scope.

(a) *Authority.* This subpart is issued under section 1119(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. § 3348(b)).

(b) *Purpose and scope.* This subpart prescribes rules of practice and procedure governing temporary waiver proceedings under Section 1119(b) of title XI of FIRREA (12 U.S.C. 3348(b)). These procedures apply whenever a State appraiser regulatory agency requests the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (''ASC'') for a waiver of any requirement relating to certification or licensing of a person to perform appraisals under title XI of FIRREA. They also apply whenever the ASC, based on sufficient, credible information or requests received from other persons or entities, initiates a temporary waiver proceeding.

§ 1102.2 Requirements for requests.

A request will not be deemed received by the ASC unless it fully and accurately sets out:

(a) If the requester is a State Appraiser Regulatory Agency, a written, duly authorized determination by the State Appraiser Regulatory Agency that there is a scarcity of State licensed or State certified appraisers leading to significant delays in obtaining appraisals in federally related transactions. The scarcity can relate to the entire State or to particular geographical or political subdivisions. In the absence of such a written determination, a State Appraiser Regulatory Agency must ask the ASC for such a determination;

(b) The requirement or requirements of State law from which relief is being sought;

(c) A description of all significant problems currently being encountered in efforts to comply with title XI;

(d) The nature of the scarcity of certified or licensed appraisers (including supporting documentation);

(e) The extent of the delays anticipated or experienced in obtaining the services of certified or licensed appraisers (including supporting documentation);

(f) The reasons why the requester believes that the requirement or requirements are causing the scarcity of certified or licensed appraisers and the service delays; and

(g) A specific plan for expeditiously alleviating the scarcity and the service delays.

§ 1102.3 Other requests and information submissions.

The federal financial institutions regulatory agencies and the Resolution Trust Corporation, their respective regulated financial institutions, and other persons or institutions with a demonstrable interest in appraiser regulation, may ask the ASC for a determination under §1102.2(a) of this subpart, and may ask that the ASC exercise its discretionary authority to initiate a temporary waiver proceeding. Such regulated financial institutions and other persons or institutions do not need to comply with §1102.2(g) of this subpart, but are strongly encouraged to include meaningful suggestions and recommendations for remedying the situation. A copy of the request or informational submission shall be forwarded promptly to the State Appraiser Regulatory Agency. The ASC shall consider these submissions and requests in exercising its authority to initiate a temporary waiver procedure. When the ASC initiates a temporary waiver proceeding, these documents shall correspond to a received request under §1102.4 of this subpart.

§ 1102.4 Notice and comment.

The ASC shall publish promptly in the FEDERAL REGISTER a notice respecting:

(a) The received request; or

(b) The ASC order initiating a temporary waiver proceeding. The notice or initiation order shall contain a concise general statement of the nature and basis for the action and shall give interested persons 30 calendar days from its publication in which to submit written data, views and arguments.

§ 1102.5 Subcommittee determination.

Within 45 calendar days of the date of the publication of the notice or initiation order in the FEDERAL REGISTER, the ASC, by order, shall either grant or deny a waiver in whole, in part, and upon specified terms and conditions, including provisions for waiver termination. Such order shall respond to comments received from interested members of the public and shall provide the reasons for the ASC's finding. The order shall be published promptly in the FEDERAL REGISTER, which, in the case of an approval order, shall be after Federal Financial Institution Examination Council concurrence. Upon the ASC's determination that an emergency exists, the ASC may issue an interim approval order simultaneously with its action under §1120.4 of this subpart. Any ASC approval order shall be effective only upon Federal Financial Institution Examination Council concurrence.

§ 1102.6 Waiver extension.

The ASC may initiate an extension of temporary waiver relief and shall follow §§1102.4, 1102.5 and 1102.7 of this subpart. A State Appraiser Regulatory Agency also may request an extension of temporary waiver relief by forwarding an additional written request to the ASC. A request for an extension from State Appraiser Regulatory Agency shall be subject to all the requirements of this subpart.

§ 1102.7 Waiver termination.

The ASC at any time may terminate a waiver order on the finding that:

(a) The significant delays in obtaining the services of certified or licensed appraisers no longer exist; or

(b) The terms and conditions of the waiver order are not being satisfied. The ASC shall publish a finding of waiver termination promptly in the FEDERAL REGISTER, giving interested persons no less than 30 calendar days from publication in which to submit written data, views and arguments. In the absence of further ASC action to the contrary, the finding of waiver termination automatically shall become

final 21 calendar days after the close of the comment period.

Subpart B—Rules of Practice for Proceedings

AUTHORITY: 12 U.S.C. 3332, 3335, 3347, and 3348(c).

SOURCE: 57 FR 31650, July 17, 1992, unless otherwise noted.

§ 1102.20 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued under sections 1103, 1106, 1118 and 1119(c) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3332, 3335, 3347, and 3348(c)).

(b) *Purpose and scope.* This subpart prescribes rules of practice and procedure governing non-recognition proceedings under section 1118 of title XI (12 U.S.C. 3347); and other proceedings necessary to carry out the purposes of title XI under section 1119(c) of title XI (12 U.S.C. 3348(c)).

[57 FR 31650, July 17, 1992, as amended at 57 FR 35004, Aug. 7, 1992]

§ 1102.21 Definitions.

As used in this subpart:

(a) *Subcommittee* or *ASC* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, as established under section 1011 of title XI (12 U.S.C. 3310).

(b) *Party* means the ASC or a person, agency or other entity named as a party, including, when appropriate, persons appearing in the proceeding under § 1102.22 of this subpart.

(c) *Respondent* means any party other than the ASC.

(d) *Secretary* means the Secretary of the ASC under its Rules of Operation.

§ 1102.22 Appearance and practice before the Subcommittee.

(a) *By attorneys and notice of appearance.* Any person who is a member in good standing of the bar of the highest court of any State or of the District of Columbia, or of any possession, territory, or commonwealth of the United States, may represent parties before the ASC upon filing with the Secretary a written notice of appearance stating that he or she is currently qualified as provided in this paragraph and is authorized to represent the particular party on whose behalf he or she acts.

(b) *By non-attorneys.* An individual may appear on his or her own behalf. A member of a partnership may represent the partnership, and an officer, director or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority. The partner, officer, director or employee must file with the Secretary a written statement that he or she has been duly authorized by the partnership, government unit, agency, institution, corporation or authority to act on its behalf. The ASC may require the representative to attach to the statement appropriate supporting documentation, such as a corporate resolution.

(c) *Conduct during proceedings.* All participants in a proceeding shall conduct themselves with dignity and in an orderly and ethical manner. The attorney or other representative of a party shall make every effort to restrain a client from improper conduct in connection with a proceeding. Improper language or conduct, refusal to comply with directions, use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct constitute grounds for immediate exclusion from the proceeding at the direction of the ASC.

§ 1102.23 Formal requirements as to papers filed.

(a) *Form.* All papers filed under this subpart must be double-spaced and printed or typewritten on 8½″ × 11″ paper. All copies shall be clear and legible.

(b) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the ASC and of the filing party, the title and/or docket number of the proceeding and the subject of the particular paper.

(c) *Party names, signatures, certificates of service.* All papers filed must set forth the name, address and telephone number of the attorney or party making the filing, must be signed by the attorney or party, and must be accompanied by a certification setting forth

when and how service has been made on all other parties.

(d) *Copies.* Unless otherwise specifically provided in the notice of proceeding or by the ASC during the proceeding, an original and one copy of all documents and papers shall be furnished to the Secretary.

§ 1102.24 Filing requirements.

(a) *Filing.* All papers filed with the ASC in any proceeding shall be filed with the Secretary, Appraisal Subcommittee, 1325 G Street NW, Suite 500, Washington, DC 20005.

(b) *Manner of filing.* Unless otherwise specified by the ASC, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery; and

(3) Mailing the papers by first class, registered, or certified mail.

[57 FR 31650, July 17, 1992, as amended at 69 FR 2501, Jan. 16, 2004]

§ 1102.25 Service.

(a) *Methods; appearing party.* A serving party, who has made an appearance under §1102.22 of this subpart, shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery; and

(3) Mailing the papers by first class, registered, or certified mail.

(b) *Methods; non-appearing party.* If a party has not appeared in the proceeding in accordance with §1102.22 of this subpart, the ASC or any other party shall make service by any of the following methods:

(1) By personal service;

(2) By delivery to a person of suitable age and discretion at the party's last known address;

(3) By registered or certified mail addressed to the party's last known address; or

(4) By any other manner reasonably calculated to give actual notice.

(c) *By the Subcommittee.* All papers required to be served by the ASC shall be served by the Secretary unless some other person shall be designated for such purpose by the ASC.

(d) *By the respondent.* All papers filed in a proceeding under this subpart shall be served by a respondent on the Secretary and each party's attorney, or, if any party is not so represented, then upon such party. Such service may be made by any of the appropriate methods specified in paragraphs (a) and (b) of this section.

§ 1102.26 When papers are deemed filed or served.

(a) *Effectiveness.* Filing and service are deemed effective:

(1) For personal service or same-day commercial courier delivery, upon actual delivery; and

(2) For overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in, or delivery to, an appropriate point of collection.

(b) *Modification.* The effective times for filing and service in paragraph (a) of this section may be modified by the ASC in the case of filing or by agreement of the parties in the case of service.

§ 1102.27 Computing time.

(a) *General rule.* In computing any period of time prescribed or allowed by this subpart, the date of the act, event or default from which the designated period of time begins to run is not included. The last day so computed is included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall not be included in the computation.

(b) *For service and filing responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time periods are calculated as follows:

(1) If service is made by first class, registered or certified mail, add three days to the prescribed period; and

(2) If service is made by express mail or overnight delivery service, add one day to the prescribed period.

§ 1102.28 Documents and exhibits in proceedings public.

Unless and until otherwise ordered by the ASC or unless otherwise provided by statute or by ASC regulation, all documents, papers and exhibits filed in connection with any proceeding, other than those that may be withheld from disclosure under applicable law, shall be placed by the Secretary in the proceeding's public file and will be available for public inspection and copying at the address set out in § 1102.24 of this subpart.

§ 1102.29 Conduct of proceedings.

(a) *In general.* Unless otherwise provided in the notice of proceedings, all proceedings under this subpart shall be conducted as hereinafter provided.

(b) *Written submissions.* All aspects of the proceeding shall be conducted by written submissions only, with the exception of oral presentations allowed under § 1102.36 of this subpart.

(c) *Disqualification.* A Subcommittee member who deems himself or herself disqualified may at any time withdraw. Upon receipt of a timely and sufficient affidavit of personal bias or disqualification of such member, the ASC will rule on the matter as a part of the record and decision in the case.

(d) *User of ASC staff.* Appropriate members of the ASC's staff who are not engaged in the performance of investigative or prosecuting functions in the proceeding may advise and assist the ASC in the consideration of the case and in the preparation of appropriate documents for its disposition.

(e) *Authority of Subcommittee Chairperson.* The Chairperson of the ASC, in consultation with other members of the ASC whenever appropriate, shall have complete charge of the proceeding and shall have the duty to conduct it in a fair and impartial manner and to take all necessary action to avoid delay in the disposition of proceedings in accordance with this subpart.

(f) *Conferences.* (1) The ASC may on its own initiative or at the request of any party, direct all parties or counsel to meet with one or more duly authorized ASC members or staff at a specified time and place, or to submit to the ASC or its designee, suggestions in writing for the purpose of considering any or all of the following:

(i) Scheduling of matters, including a timetable for the information-gathering phase of the proceeding;

(ii) Simplification and clarification of the issues;

(iii) Stipulations and admissions of fact and of the content and authenticity of documents;

(iv) Matters of which official notice will be taken; and

(v) Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of persons submitting affidavits or other documents and exhibits which may be introduced into the public file of the proceeding.

(2) Such conferences will not be recorded, but the Secretary shall place in the proceeding's public file a memorandum summarizing the results of the conference and shall provide a copy of the memorandum to each party. The memorandum shall control the subsequent course of the proceedings, unless the ASC for good cause shown by one or more parties to the conference, modifies those results and instructs the Secretary to place an amendatory memorandum to that effect in the public file.

(g) *Changes or extensions of time and changes of place of proceeding.* The ASC, in connection with initiating a specific proceedings under § 1102.32 of this subpart, may instruct the Secretary to publish in the FEDERAL REGISTER time limits different from those specified in this subpart, and may, on its own initiative or for good cause shown, issue an exemption changing the place of the proceeding or extending any time limit prescribed by this subpart, including the date for ending the information-gathering phase of the proceeding.

(h) *Call for further briefs, memoranda, statements; reopening of matters.* The ASC may call for the production of further information upon any issue, the submission of briefs, memoranda and statements (together with written responses), and, upon appropriate notice, may reopen any aspect of the proceeding at any time prior to a decision on the matter.

[57 FR 31650, July 17, 1992, as amended at 57 FR 35004, Aug. 7, 1992]

§ 1102.30 Rules of evidence.

(a) *In general.* (1) Except as is otherwise set forth in this section, relevant, material and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted under this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may be deemed or ruled admissible in a proceeding conducted under this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Stipulations.* Any party may stipulate in writing as to any relevant matters of fact, law, or the authenticity of any relevant documents. The Secretary shall place such stipulations in the public file, and they shall be binding on the parties.

(c) *Official notice.* Every matter officially noticed by the ASC shall appear in the public file, unless the ASC determines that the matter must be withheld from public disclosure under applicable Federal law.

§ 1102.31 Burden of proof.

The ultimate burden of proof shall be on the respondent. The burden of going forward with a *prima facie* case shall be on the ASC.

§ 1102.32 Notice of Intention to Commence a Proceeding.

The ASC shall instruct the Secretary or other designated officer acting for the ASC to publish in the FEDERAL REGISTER a Notice of Intention To Commence A Proceeding (Notice of Intention). The Notice of Intention shall be served upon the party or parties to the proceeding and shall commence at the time of service. The Notice of Intention shall state the legal authority and jurisdiction under which the proceeding is to be held; shall contain, or incorporate by appropriate reference, a specific statement of the matters of fact or law constituting the grounds for the proceeding; and shall state a date no sooner than 25 days after service of the Notice of Intention is made for termination of the information-gathering phase of the proceeding. The Notice of Intention also must contain a bold-faced warning respecting the effect of a failure to file a Rebuttal or Notice Not To Contest under § 1102.33(d) of this subpart. The ASC may amend a Notice of Intention in any manner and to the extent consistent with provisions of applicable law.

§ 1102.33 Rebuttal or Notice Not To Contest.

(a) *When required.* A party to the proceeding may file either a Rebuttal or a Notice Not to Contest the statements contained in the Notice of Intention or any amendment thereto with the Secretary within 15 days after being served with the Notice of Intention or an amendment to such Notice. The Secretary shall place the Rebuttal or the Notice Not To Contest in the public file.

(b) *Requirements of Rebuttal; effect of failure to deny.* A Rebuttal filed under this section shall specifically admit, deny or state that the party does not have sufficient information to admit or deny each statement in the Notice of Intention. A statement of lack of information shall have the effect of a denial. Any statement not denied shall be deemed to be admitted. When a party intends to deny only a part or a qualification of a statement, the party shall admit so much of it as is true and shall deny only the remainder.

(c) *Notice Not To Contest.* A party filing a Notice Not To Contest the statement of fact set forth in the Notice of Intention shall constitute a waiver of the party's opportunity to rebut the facts alleged, and together with the Notice of Intention and any referenced documents, will provide a record basis on which the ASC shall decide the matter. The filing of a Notice Not To Contest shall not constitute a waiver of the right of such party to a judicial review of the ASC's decision, findings and conclusions.

(d) *Effect of failure to file Rebuttal or Notice Not To Contest.* Failure of a party to file a response required by this section within the time provided shall constitute a waiver of the party's opportunity to rebut and to contest the statements in the Notice of Intention

and shall constitute authorization for the ASC to find the facts to be as presented in the Notice of Intention and to file with the Secretary a decision containing such findings and appropriate conclusions. The ASC, for good cause shown, will permit the filing of a Rebuttal after the prescribed time.

§ 1102.34 Briefs, memoranda and statements.

(a) *By the parties.* Until the end of the information-gathering phase of the proceeding, any party may file with the Secretary a written brief, memorandum or other statement providing factual data and policy and legal arguments regarding the matters set out in the Notice of Intention. The filing party shall simultaneously serve other parties to the proceeding with a copy of the document. No later than ten days after such service, any party may file with the Secretary a written response to the document and must simultaneously serve a copy thereof on the other parties to the proceeding. The Secretary will receive documents and responses and will place them in the public file.

(b) *By interested persons, in non-recognition proceedings.* Until the end of the information-gathering phase of a proceeding under section 1118 of FIRREA (12 U.S.C. 3347), any person with a demonstrable, direct interest in the outcome of the proceeding may file with the Secretary a written brief, memorandum or other statement providing factual data and policy and legal arguments regarding the matters set out in the Notice of Intention. The ASC's Chairperson or his or her designee may not accept any such written brief, memorandum or other statement if the submitting person cannot demonstrate a direct interest in the outcome of the proceeding. Upon acceptance of the written brief, memorandum or other statement, the Secretary shall make copies of the document and forward one copy thereof to each party to the proceeding. No later than ten days after such service, any party may file with the Secretary a written response to the document and must simultaneously serve one copy thereof on the other parties to the proceeding. The Secretary will place a copy of such briefs, memoranda, statements and responses in the public file.

§ 1102.35 Opportunity for informal settlement.

Any party may at any time submit to the Secretary, for consideration by the Subcommittee, written offers or proposals for settlement of a proceeding, without prejudice to the rights of the parties. No offer or proposal shall be included in the proceeding's public file over the objection of any party to such proceeding. This paragraph shall not preclude settlement of any proceeding by the filing of a Notice Not To Contest as provided in §1102.33(c) or by the submission of the case to the ASC on a stipulation of facts.

§ 1102.36 Oral presentations.

(a) *In general.* A party does not have a right to an oral presentation. Under this section, a party's request to make an oral presentation may be denied if such a denial is appropriate and reasonable under the circumstances. An oral presentation shall be considered as an opportunity to offer, emphasize and clarify the facts, policies and laws concerning the proceeding.

(b) *Method and time of request.* Between the commencement of the proceeding and ten days before the end of the information-gathering phase, any party to the proceeding may file with the Secretary a letter requesting that the Secretary schedule an opportunity for the party to give an oral presentation to the ASC. That letter shall include the reasons why an oral presentation is necessary.

(c) *ASC processing.* The Secretary must promptly forward the letter request to the Chairman of the ASC. The Chairman, after informally contacting other ASC members and the ASC's senior staff for their views, will instruct the Secretary to forward a letter to the party either: Scheduling a date and time for the oral presentation and specifying the allowable duration of the presentation; or declining the request and providing the reasons therefor. The party's letter request and the ASC's response will be included in the proceeding's public file.

(d) *Procedure on presentation day.* On the appropriate date and time, the

party or his or her attorney (if any) will make the oral presentation before the ASC. Any ASC member may ask the party or the attorney, as the case may be, pertinent questions relating to the content of the oral presentation. Oral presentations will not be recorded or otherwise transcribed. The Secretary must enter promptly into the proceeding's public file a memorandum summarizing the subjects discussed during the oral presentation.

§ 1102.37 Decision of the Subcommittee and judicial review.

At a reasonable time after the end of the information-gathering phase of the proceeding, but not exceeding 35 days, the ASC shall issue a final decision, containing specified terms and conditions as it deems appropriate, in the matter and shall cause the decision to be published promptly in the FEDERAL REGISTER. The final decision shall be effective on issuance. The Secretary shall serve the decision upon the parties promptly, shall place it in the proceeding's public file and shall furnish it to such other persons as the ASC may direct. Pursuant to the provisions of chapter 7 of title 5 of the U.S. Code and section 1118(c)(3) of title XI of FIRREA (12 U.S.C. 3348(c)(3)), a final decision of the ASC is a prerequisite to seeking judicial review.

§ 1102.38 Compliance activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of information by the ASC, or otherwise, it appears that a person has violated, is violating or is about to violate title XI of FIRREA or the rules or regulations thereunder, the ASC staff may commence an informal, preliminary inquiry into the matter. If, upon such inquiry, it appears that one or more allegations relate to possible violations of regulations administered by another agency or instrumentality of the Federal Government, then the matter shall be referred to that agency or instrumentality for appropriate action. The ASC, pursuant to its responsibilities under section 1103(a)(2) of title XI (12 U.S.C. 3332(a)(2)) and section 1119(c) of title XI (12 U.S.C. 3348)), shall monitor the matter. If, upon inquiry, it appears that one or more allegations are within the ASC's jurisdiction, then the ASC, in its discretion, may determine to commence a formal investigation respecting the matter and shall instruct the Secretary to create a public file for the formal investigation. The Secretary shall place in that file a memorandum naming the person or persons subject to the investigation and the statutory basis for the investigation.

(b) Unless otherwise instructed by the ASC or required by law, the Secretary shall ensure that all other papers, documents and materials gathered or submitted in connection with the investigation are non-public and for ASC use only.

(c) Persons who become involved in preliminary inquiries or formal investigations may, on their own initiative, submit a written statement to the Secretary setting forth their interests, positions or views regarding the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them and the amount of time that may be available for preparing and submitting such a statement prior to the presentation of a staff recommendation to the ASC. Upon the commencement of a formal investigation or a proceeding under this subpart, the Secretary shall place any such statement in the appropriate public file.

(d) In instances where the staff has concluded its inquiry of a particular matter and has determined that it will not recommend the commencement of a formal investigation or a proceeding under this subpart against a person, the staff shall advise the person that its inquiry has been terminated. Such advice, if given, must in no way be construed as indicating that the person has been exonerated or that no action may ultimately result from the staff's inquiry into the particular matter.

§ 1102.39 Duty to cooperate.

In the course of the investigations and proceedings, the ASC (and its staff, with appropriate authorization) must

provide parties or persons ample opportunity to work out problems by consent, by settlement, or in some other manner.

Subpart C—Rules Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Appraisal Subcommittee

AUTHORITY: Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896; 12 U.S.C. 552a, as amended.

SOURCE: 57 FR 36357, Aug. 13, 1992, unless otherwise noted.

§ 1102.100 Authority, purpose and scope.

(a) This subpart is issued under the Privacy Act of 1974, Public Law 93–579, 88 Stat. 1896; 12 U.S.C. 552a, as amended.

(b) The Privacy Act of 1974 is based, in part, on the finding by Congress that ''in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.'' To achieve this objective, the Act generally provides that Federal agencies must advise an individual upon request whether records maintained by the agency in a system of records pertain to the individual and must grant the individual access to such records. The Act further provides that individuals may request amendments to records pertaining to them that are maintained by the agency, and that the agency shall either grant the requested amendments or set forth fully its reasons for refusing to do so.

(c) The Appraisal Subcommittee of the Federal Financial Institutions Examination Council (ASC), pursuant to subsection (f) of the Privacy Act, adopts the following rules and procedures to implement the provisions of the Act summarized above and other provisions of the Act. These rules and procedures are applicable to all requests for information and access or amendment to records pertaining to an individual that are contained in any system of records that is maintained by the ASC.

§ 1102.101 Definitions.

The following definitions shall apply for purposes of this subpart:

(a) The terms *individual*, *maintain*, *record*, *system of records*, and *routine use* are defined for purposes of these rules as they are defined in 5 U.S.C. 552a(a)(2), (a)(3), (a)(4), (a)(5) and (a)(7).

(b) *ASC* or *Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(c) *Privacy Act Officer* means the ASC's Associate Director for Administration or such other ASC staff officer, other than the Executive Director, duly designated by the ASC's Executive Director.

§ 1102.102 Times, places and requirements for requests pertaining to individual records in a record system and for the identification of individuals making requests for access to records pertaining to them.

(a) *Place to make request.* Any request by an individual to be advised whether any system of records maintained by the ASC and named by the individual contains a record pertaining to him or her, or any request by an individual for access to a record pertaining to him or her that is contained in a system of records maintained by the ASC, shall be submitted in person at the ASC between 9 a.m. and 4:30 p.m., Monday through Friday, which is located at 1325 G Street NW, Suite 500, Washington, DC 20005, or by mail addressed to: Privacy Act Officer, ASC, 1325 G Street NW, Suite 500, Washington, DC 20005. All requests will be required to be put in writing and signed by the individual making the request. In the case of requests for access that are made by mail, the envelope should be clearly marked ''Privacy Act Request.''

(1) *Information to be included in requests.* Each request by an individual concerning whether the ASC maintains in a system of records a record that pertains to the individual, or for access to any record pertaining to the individual that is maintained by the ASC in a system of records, shall include such information as will assist the ASC in identifying those records as to which

the individual is seeking information or access. Where practicable, the individual should identify the system of records that is the subject of his or her request by reference to the ASC's notices of systems of records, which are published in the FEDERAL REGISTER, as required by section (e)(4) of the Privacy Act, 5 U.S.C. 552a(e)(4). Where a system of records is compiled on the basis of a specific identification scheme, the individual should include in his or her request the identification number or other identifier assigned to the individual. In the event the individual does not know that number or identifier, the individual shall provide other information, including his or her full name, address, date of birth and subject matter of the record, to aid in processing his or her request. If additional information is required before a request can be processed, the individual shall be so advised.

(2) *Verification of identity*. When the fact of the existence of a record is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, or when a record as to which access has been requested is not required to be disclosed under that Act, the individual seeking the information or requesting access to the record shall be required to verify his or her identity before access will be granted or information given. For this purpose, individuals shall appear at the ASC located at 1325 G Street NW, Suite 500, Washington, DC 20005, between 9 a.m. to 4:30 p.m., Monday through Friday. The ASC's Office is not open on Saturdays, Sundays or Federal holidays.

(3) *Methods for verifying identity—appearance in person*. For the purpose of verifying identity, an individual seeking information regarding pertinent records or access to those records shall furnish documentation that may reasonably be relied on to establish the individual's identity. Such documentation might include a valid birth certificate, driver's license, employee or military identification card, and medicare card.

(4) *Method for verifying identity—by mail*. Where an individual cannot appear at the ASC's Office for the purpose of verifying identity, the individual shall submit, along with the request for information or access, a signed and notarized statement attesting to his or her identity. Where access is being sought, the sworn statement shall include a representation that the records being sought pertain to the individual and a stipulation that the individual is aware that knowingly and willfully requesting or obtaining records pertaining to an individual from the ASC under false pretenses is a criminal offense.

(5) *Additional procedures for verifying identity*. When it appears appropriate to the Privacy Act Officer, other arrangements may be made for the verification of identity as are reasonable under the circumstances and appear to be effective to prevent unauthorized disclosure of, or access to, individual records.

(b) *Acknowledgement of requests for information pertaining to individual records in a record system or for access to individual records*. (1) Except where an immediate acknowledgement is given for requests made in person, the receipt of a request for information pertaining to individual records in a record system will be acknowledged within 10 days, excluding Saturdays, Sundays and Federal holidays. Requests will be processed as promptly as possible and a response to such requests will be given within 30 days (excluding Saturdays, Sundays, and Federal holidays) unless, within the 30 day period and for cause shown, the individual making the request is notified in writing that a longer period is necessary.

[57 FR 36357, Aug. 13, 1992, as amended at 69 FR 2501, Jan. 16, 2004; 75 FR 36270, June 25, 2010]

§ 1102.103 Disclosure of requested records.

(a) *Initial review*. Requests by individuals for access to records pertaining to them will be referred to the ASC's Privacy Act Officer, who initially will determine whether access will be granted.

(b) *Grant of request for access*. (1) If it is determined that a request for access to records pertaining to an individual will be granted, the individual will be advised by mail that access will be given at the ASC or a copy of the requested record will be provided by mail if the individual shall so indicate.

Where the individual requests that copies of the record be mailed to or her or requests copies of a record upon reviewing it at the ASC, the individual shall pay the cost of making requested copies, as set forth in § 1102.109 of this subpart.

(2) In granting access to an individual to a record pertaining to him or her, the ASC staff shall take steps to prevent the unauthorized disclosure of information pertaining to other individuals.

(c) *Denial of request for access.* If it is determined that access will not be granted, the individual making the request will be notified of that fact and given the reasons why access is being denied. The individual also will be advised of his or her right to seek review by the Executive Director of the initial decision to deny access, in accordance with the procedures set forth in § 1102.107 of this subpart.

(d) *Time for acting on requests for access.* Access to a record pertaining to an individual normally will be granted or denied within 30 days (excluding Saturdays, Sundays, and Federal holidays) after the receipt of the request for access, unless the individual making the request is notified in writing within the 30 day period that, for good cause shown, a longer time is required. In such cases, the individual making the request shall be informed in writing of the difficulties encountered and an indication shall be given as to when it is anticipated that access may be granted or denied.

(e) *Authorization to allow designated person to review and discuss records pertaining to another individual.* An individual, who is granted access to records pertaining to him or her and who appears at the ASC Office to review the records, may be accompanied by another person of his or her choosing. Where the records as to which access has been granted are not required to be disclosed under provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, the individual requesting the records, before being granted access, shall execute a written statement, signed by him or her, specifically authorizing the latter individual to review and discuss the records. If such authorization has not been given as described, the person who has accompanied the individual making the request will be excluded from any review or discussion of the records.

(f) *Exclusion for certain records.* Nothing contained in these rules shall allow an individual access to any information compiled in reasonable anticipation of an administrative judicial or civil action or proceeding.

§ 1102.104 Special procedure: Medical records.

(a) *Statement of physician or mental health professional.* When an individual requests access to records pertaining to the individual that include medical and/or psychological information, the ASC, if it deems it necessary under the particular circumstances, may require the individual to submit with the request a signed statement by the individual's physician or a mental health professional indicating that, in his or her opinion, disclosure of the requested records or information directly to the individual will not have an adverse effect on the individual.

(b) *Designation of physician or mental health professional to receive records.* If the ASC believes, in good faith, that disclosure of medical and/or psychological information, directly to an individual could have an adverse effect on that individual, the individual may be asked to designate in writing a physician or mental health professional to whom the individual would like the records to be disclosed, and disclosure that otherwise would be made to the individual will instead be made to the designated physician or mental health professional.

§ 1102.105 Requests for amendment of records.

(a) *Place to make requests.* A request by an individual to amend records pertaining to him or her may be made in person during normal business hours at the ASC located at 1325 G Street NW, Suite 500, Washington, DC 20005, or by mail addressed to the Privacy Act Officer, ASC, 1325 G Street NW, Suite 500, Washington, DC 20005.

(1) *Information to be included in requests.* Each request to amend an ASC record shall reasonably describe the

record sought to be amended. Such description should include, for example, relevant names, dates and subject matter to permit the record to be located among the records maintained by the ASC. An individual who has requested that a record pertaining to the individual be amended will be advised promptly if the record cannot be located on the basis of the description given and that further identifying information is necessary before the request can be processed. An initial evaluation of a request presented in person will be made immediately to ensure that the request is complete and to indicate what, if any, additional information will be required. Verification of the individual's identity as set forth in §1102.102(a) (2), (3), (4) and (5) may also be required.

(2) *Basis for amendment.* An individual requesting an amendment to a record pertaining to the individual shall specify the substance of the amendment and set forth facts and provide such materials that would support his or her contention that the record as maintained by the ASC is not accurate, timely or complete, or that the record is not necessary and relevant to accomplish a statutory purpose of the ASC as authorized by law or by Executive Order of the President.

(b) *Acknowledgement of requests for amendment.* Receipt of a request to amend a record pertaining to an individual normally will be acknowledged in writing within 10 days after such request has been received, excluding Saturdays, Sundays and Federal holidays. When a request to amend is made in person, the individual making the request will be given a written acknowledgement when the request is presented. The acknowledgement will describe the request received and indicate when it is anticipated that action will be taken on the request. No acknowledgement will be sent when the request for amendment will be reviewed, and an initial decision made, within the 10 day period after such request has been received.

[57 FR 36357, Aug. 13, 1992, as amended at 69 FR 2501, Jan. 16, 2004; 75 FR 36270, June 25, 2010]

§1102.106 Review of requests for amendment.

(a) *Initial review.* As in the case of requests for access, requests by individuals for amendment to records pertaining to them will be referred to the ASC's Privacy Act Officer for an initial determination.

(b) *Standards to be applied in reviewing requests.* In reviewing requests to amend records, the Privacy Act Officer will be guided by the criteria set forth in 5 U.S.C. 552(e) (1) and (5), *i.e.*, that records maintained by the ASC shall contain only such information as is necessary and relevant to accomplish a statutory purpose of the ASC as required by statute or Executive Order of the President and that such information also be accurate, timely, relevant and complete. These criteria will be applied whether the request is to add material to a record or to delete information from a record.

(c) *Time for acting on requests.* Initial review of a request by an individual to amend a record shall be completed as promptly as is reasonably possible and normally within 30 days (excluding Saturdays, Sundays, and Federal holidays) from the date the request was received, unless unusual circumstances preclude completion of review within that time. If the anticipated completion date indicated in the acknowledgement cannot be met, the individual requesting the amendment will be advised in writing of the delay and the reasons therefor, and also advised when action is expected to be completed.

(d) *Grant of requests to amend records.* If a request to amend a record is granted in whole or in part, the Privacy Act Officer will:

(1) Advise the individual making the request in writing of the extent to which it has been granted;

(2) Amend the record accordingly; and

(3) Where an accounting of disclosures of the record has been kept pursuant to 5 U.S.C. 552a(c), advise all previous recipients of the record of the fact that the record has been amended and the substance of the amendment.

(e) *Denial of requests to amend records.* If an individual's request to amend a record pertaining to him is denied in

whole or in part, the Privacy Act Officer will:

(1) Promptly advise the individual making the request in writing of the extent to which the request has been denied;

(2) State the reasons for the denial of the request;

(3) Describe the procedures established by the ASC to obtain further review within the ASC of the request to amend, including the name and address of the person to whom the appeal is to be addressed; and

(4) Inform the individual that the Privacy Act Officer will provide information and assistance to the individual in perfecting an appeal of the initial decision.

§ 1102.107 Appeal of initial adverse agency determination regarding access or amendment.

(a) *Administrative review.* Any person who has been notified pursuant to §1102.103(c) that a request for access to records pertaining to him or her has been denied in whole or in part, or pursuant to §1102.106(e) of this subpart that a request for amendment has been denied in whole or in part, or who has received no response to a request for access or to amend within 30 days (excluding Saturdays, Sundays and Federal holidays) after the request was received by the ASC's staff (or within such extended period as may be permitted in accordance with §§1102.103(d) and 1102.106(c) of this subpart), may appeal the adverse determination or failure to respond by applying for an order of the Executive Director determining and directing that access to the record be granted or that the record be amended in accordance with his or her request.

(1) The application shall be in writing and shall describe the record in issue and set forth the proposed amendment and the reasons therefor.

(2) The application shall be delivered to the ASC, 1325 G Street NW, Suite 500, Washington, DC 20005, or by mail addressed to the Privacy Act Officer, ASC, 1325 G Street NW, Suite 500, Washington, DC 20005.

(3) The applicant may state such facts and cite such legal or other authorities in support of the application.

(4) The Executive Director will make a determination with respect to any appeal within 30 days after the receipt of such appeal (excluding Saturdays, Sundays, and Federal holidays), unless for good cause shown, the Executive Director shall extend that period. If such an extension is made, the individual who is appealing shall be advised in writing of the extension, the reasons therefor, and the anticipated date when the appeal will be decided.

(5) In considering an appeal from a denial of a request to amend a record, the Executive Director shall apply the same standards as set forth in §1102.106(b).

(6) If the Executive Director concludes that access should be granted, the Executive Director shall issue an order granting access and instructing the Privacy Act Officer to comply with §1102.103(b).

(7) If the Executive Director concludes that the request to amend the record should be granted in whole or in part, the Executive Director shall issue an order granting the requested amendment in whole or in part and instructing the Privacy Act Officer to comply with the requirements of §1102.106(d) of this subpart, to the extent applicable.

(8) If the Executive Director affirms the initial decision denying access, the Executive Director shall issue an order denying access and advising the individual seeking access of:

(i) The order;

(ii) The reasons for denying access; and

(iii) The individual's right to obtain judicial review of the decision pursuant to 5 U.S.C. 552a(g)(1)(B).

(9) If the Executive Director determines that the decision of the Privacy Act Officer denying a request to amend a record should be upheld, the Executive Director shall issue an order denying the request and the individual shall be advised of:

(i) The order refusing to amend the record and the reasons therefor;

(ii) The individual's right to file a concise statement setting forth his or her disagreement with the Executive Director's decision not to amend the record;

(iii) The procedures for filing such a statement of disagreement with the Executive Director;

(iv) The fact that any such statement of disagreement will be made available to anyone to whom the record is disclosed, together with, if the Executive Director deems it appropriate, a brief statement setting forth the Executive Director's reasons for refusing to amend;

(v) The fact that prior recipients of the record in issue will be provided with the statement of disagreement and the Executive Director's statement, if any, to the extent that an accounting of such disclosures has been maintained pursuant to 5 U.S.C. 552a(c); and

(vi) The individual's right to seek judicial review of the Executive Director's refusal to amend, pursuant to 5 U.S.C. 552a(g)(1)(A).

(b) *Statement of disagreement.* As noted in paragraph (a)(9)(ii) of this section, an individual may file with the Executive Director a statement setting forth his or her disagreement with the Executive Director's denial of his or her request to amend a record.

(1) Such statement of disagreement shall be delivered to the ASC, 1325 G Street NW, Suite 500, Washington, DC 20005, within 30 days after receipt by the individual of the Executive Director's order denying the amendment, excluding Saturdays, Sundays and Federal holidays. For good cause shown, this period can be extended for a reasonable time.

(2) Such statement of disagreement shall concisely state the basis for the individual's disagreement. Unduly lengthy or irrelevant materials will be returned to the individual by the Executive Director for appropriate revisions before they become a permanent part of the individual's record.

(3) The record about which a statement of disagreement has been filed will clearly note which part of the record is disputed and the Executive Director will provide copies of the statement of disagreement and, if the Executive Director deems it appropriate, provide a concise statement of his or her reasons for refusing to amend the record, to persons or other agencies to whom the record has been or will be disclosed.

[57 FR 36357, Aug. 13, 1992, as amended at 69 FR 2501, Jan. 16, 2004; 75 FR 36270, June 25, 2010]

§ 1102.108 General provisions.

(a) *Extensions of time.* Pursuant to §§ 1102.103(b), 1102.104(d), 1102.109(c) and 1102.109(a)(4) of this subpart, the time within which a request for information, access or amendment by an individual with respect to records maintained by the ASC that pertain to him or her normally would be processed may be extended for good cause shown or because of unusual circumstances. As used in these rules, *good cause* and *unusual circumstances* shall include, but only to the extent reasonably necessary to the proper processing of a particular request:

(1) The need to search for and collect the requested records from establishments that are separate from the ASC. Some records of the ASC may be stored in Federal Records Centers in accordance with law—including many of the documents that have been on file with the ASC for more than 2 years—and cannot be made available promptly. Any person who has requested for personal examination a record stored at the Federal Records Center will be notified when the record will be made available.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which may be demanded in a single request. While every reasonable effort will be made to comply fully with each request as promptly as possible on a first-come, first-served basis, work done to search for, collect and appropriately examine records in response to a request for a large number of records will be contingent upon the availability of processing personnel in accordance with an equitable allocation of time to all members of the public who have requested or wish to request records.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or

more components within the ASC having substantial subject-matter interest herein.

(b) *Effective date of action.* Whenever it is provided in this subpart that an acknowledgement or response to a request will be given by specific times, deposit in the mails of such acknowledgement or response by that time, addressed to the person making the request, will be deemed full compliance.

(c) *Records in use by a member of the ASC or its staff.* Although every effort will be made to make a record in use by a member of the ASC or its staff available when requested, it may occasionally be necessary to delay making such a record available when doing so at the time the request is made would seriously interfere with the work of the ASC or its staff.

(d) *Missing or lost records.* Any person who has requested a record or a copy of a record pertaining to him or her will be notified if the record sought cannot be found. If the person so requests, he or she will be notified if the record subsequently is found.

(e) *Oral requests; misdirected written requests*—(1) *Telephone and other oral requests.* Before responding to any request by an individual for information concerning whether records maintained by the ASC in a system of records pertain to the individual or to any request for access to records by an individual, such request must be in writing and signed by the individual making the request. The Executive Director will not entertain any appeal from an alleged denial of failure to comply with an oral request. Any person who has made an oral request for information or access to records who believes that the request has been improperly denied should resubmit the request in appropriate written form to obtain proper consideration and, if need be, administrative review.

(2) *Misdirected written requests.* The ASC cannot assure that a timely or satisfactory response will be given to written requests for information, access or amendment by an individual with respect to records pertaining to him or her that are directed to the ASC other than in a manner prescribed in §§ 1102.103(a), 1102.106(a), 1102.108(a)(2), and 1102.110 of this subpart. Any staff member who receives a written request for information, access or amendment should promptly forward the request to the Privacy Act Officer. Misdirected requests for records will be considered to have been received by the ASC only when they have been actually received by the Privacy Act Officer in cases under § 1102.108(a)(2). The Executive Director will not entertain any appeal from an alleged denial or failure to comply with a misdirected request, unless it is clearly shown that the request was in fact received by the Privacy Act Officer.

§ 1102.109 Fees.

(a) There will be no charge assessed to the individual for the ASC's expense involved in searching for or reviewing the record. Copies of the ASC's records will be provided by a commercial copier at rates established by a contract between the copier and the ASC or by the ASC at the rates in § 1101.4(b)(5)(ii) of 12 CFR part 1101.

(b) *Waiver or reduction of fees.* Whenever the Executive Director of the ASC determines that good cause exists to grant a request for reduction or waiver of fees for copying documents, he or she may reduce or waive any such fees.

§ 1102.110 Penalties.

Title 18 U.S.C. 1001 makes it a criminal offense, subject to a maximum fine of $10,000, or imprisonment for not more than 5 years or both, to knowingly and willingly make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States. 5 U.S.C. 552a(i) makes it a misdemeanor punishable by a fine of not more than $5,000 for any person knowingly and willfully to request or obtain any record concerning an individual from the ASC under false pretenses. 5 U.S.C. 552a(i) (1) and (2) provide criminal penalties for certain violations of the Privacy Act by officers and employees of the ASC.

Subpart D—Description of Office, Procedures, Public Information

AUTHORITY: 5 U.S.C. 552, 553(e); and Executive Order 12600, 52 FR 23781 (3 CFR, 1987 Comp., p. 235).

SOURCE: 57 FR 60724, Dec. 22, 1992, unless otherwise noted.

§ 1102.300 Purpose and scope.

This part sets forth the basic policies of the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (''ASC'') regarding information it maintains and the procedures for obtaining access to such information. This part does not apply to the Federal Financial Institutions Examination Council. Section 1102.301 sets forth definitions applicable to this part 1102, subpart D. Section 1102.302 describes the ASC's statutory authority and functions. Section 1102.303 describes the ASC's organization and methods of operation. Section 1102.304 describes the types of information and documents typically published in the FEDERAL REGISTER. Section 1102.305 explains how to access public records maintained on the ASC's World Wide Web site and at the ASC's office and describes the categories of records generally found there. Section 1102.306 implements the Freedom of Information Act (''FOIA'') (5 U.S.C. 552). Section 1102.307 authorizes the discretionary disclosure of exempt records under certain limited circumstances. Section 1102.308 provides anyone with the right to petition the ASC to issue, amend, and repeal rules of general application. Section 1102.309 sets out the ASC's confidential treatment procedures. Section 1102.310 outlines procedures for serving a subpoena or other legal process to obtain information maintained by the ASC.

[64 FR 72496, Dec. 28, 1999]

§ 1102.301 Definitions.

For purposes of this subpart:

(a) *ASC* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(b) *Commercial use request* means a request from, or on behalf of, a requester who seeks records for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a request falls within this category, the ASC will determine the use to which a requester will put the records requested and seek additional information as it deems necessary.

(c) *Direct costs* means those expenditures the ASC actually incurs in searching for, duplicating, and, in the case of commercial requesters, reviewing records in response to a request for records.

(d) *Disclose or disclosure* mean to give access to a record, whether by producing the written record or by oral discussion of its contents. Where the ASC member or employee authorized to release ASC documents makes a determination that furnishing copies of the documents is necessary, these words include the furnishing of copies of documents or records.

(e) *Duplication* means the process of making a copy of a record necessary to respond to a request for records or for inspection of original records that contain exempt material or that cannot otherwise be directly inspected. Such copies can take the form of paper copy, microfilm, audiovisual records, or machine readable records (*e.g.*, magnetic tape or computer disk).

(f) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(g) *Field review* includes, but is not limited to, formal and informal investigations of potential irregularities occurring at State appraiser regulatory agencies involving suspected violations of Federal or State civil or criminal laws, as well as such other investigations as may conducted pursuant to law.

(h) *Non-commercial scientific institution* means an institution that is not operated on a commercial basis as that term is defined in paragraph (b) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(i) *Record* includes records, files, documents, reports correspondence, books, and accounts, or any portion thereof,

in any form the ASC regularly maintains them.

(j) *Representative of the news media* means any person primarily engaged in gathering news for, or a free-lance journalist who can demonstrate a reasonable expectation of having his or her work product published or broadcast by, an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the general public.

(k) *Review* means the process of examining documents located in a response to a request that is for a commercial use to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, *e.g,* doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(l) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within records. Searches may be done manually and/or by computer using existing programming.

(m) *State appraiser regulatory agency* includes, but is not limited to, any board, commission, individual or other entity that is authorized by State law to license, certify, and supervise the activities or persons authorized to perform appraisals in connections with federally related transactions and real estate related financial transactions that require the services of a State licensed or certified appraiser.

[64 FR 72496, Dec. 28, 1999]

§ 1102.302 ASC authority and functions.

(a) *Authority*. The ASC was established on August 9, 1989, pursuant to title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (''FIRREA''), 12 U.S.C. 3331 and 3310 through 3351. title XI is intended ''to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.'' 12 U.S.C. 3331.

(b) *Functions*. The ASC's statutory functions are generally set out in 12 U.S.C. 3332. In summary, the ASC must:

(1) Monitor the requirements established by the States for the certification and licensing of individuals who are qualified to perform appraisals in connection with federally related transactions, including a code of professional responsibility;

(2) Monitor the requirements of the Federal financial institutions regulatory agency and Resolution Trust Corporation with respect to appraisal standards for federally related transactions and determinations as to which federally related transactions require the services of a State certified appraiser and which require the services of a State licensed appraiser;

(3) Monitor and review the practices, procedures, activities and organizational structure of the Appraisal Foundation; and

(4) Maintain a national registry of State certified and licensed appraisers eligible to perform appraisals in federally related transactions.

§ 1102.303 Organization and methods of operation.

(a) *Statutory and other guidelines*. Statutory requirements relating to the ASC's organization are stated in 12 U.S.C. 3310, 3333 and 3334. The ASC has adopted and published Rules of Operation guiding its administration, meetings and procedures. These Rules of Operation were published at 56 FR 28561 (June 21, 1991) and 56 FR 33451 (July 22, 1991).

(b) *ASC members and staff*. The ASC is composed of six members, each being designated by the head of their respective agencies: the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union Administration, Office of Thrift Supervision, and the

Department of Housing and Urban Development. Administrative support and substantive program, policy, and legal guidance for ASC activities are provided by a small, full-time, professional staff supervised by an Executive Director.

(c) *FFIEC.* title XI placed the ASC within FFIEC as a separate, appropriated agency of the United States Government with specific statutory responsibilities under Federal law.

(d) *ASD Address* ASC offices are located at 1325 G Street NW, Suite 500, Washington, DC 20005.

[57 FR 60724, Dec. 22, 1992, as amended at 64 FR 72497, Dec. 28, 1999]

§ 1102.304 Federal Register publication.

The ASC publishes the following information in the FEDERAL REGISTER for the guidance of the public:

(a) Description of its organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or re nests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the ASC;

(e) Every amendment, revision or repeal of the foregoing; and

(f) General notices of proposed rulemaking.

[64 FR 72497, Dec. 28, 1999]

§ 1102.305 Publicly available records.

(a) *Records available on the ASCs World Wide Web site*—(1) Discretionary release of documents. The ASC encourages the public to explore the wealth of resources available on the ASC's Internet World Wide Web site, located at: *http://www.asc.gov*. The ASC has elected to publish a broad range to materials on its Web site.

(2) *Documents required to be made available via computer telecommunications.* (i) The following types of documents created on or after November 1, 1996, and required to be made available through computer telecommunications, may be found on the ASC's Internet World Wide Web site located at: *http://www.asc.gov:*

(A) Final opinions, including concurring and dissenting opinions, as well as final orders, made in the adjudication of cases;

(B) Statements of policy and interpretations adopted by the ASC that are not published in the FEDERAL REGISTER;

(C) Administrative staff manuals and instructions to staff that affect a member of the public;

(D) Copies of all records (regardless of form or format), such as correspondence relating to field reviews or other regulatory subjects, released to any person under §1102.306 that, because of the nature of their subject matter, the ASC has determined are likely to be the subject of subsequent requests;

(E) A general index of the records referred to in paragraph (a)(2)(i)(D) of this section.

(ii) To the extent permitted by law, the ASC may delete identifying details when it makes available or publishes any records. If reduction is necessary, the ASC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction.

(b) *Types of written communications.* The following types of written communications shall be subject to paragraph (a) of this section:

(1) The ASC's annual report to Congress;

(2) All final opinions and orders made in the adjudication of cases;

(3) All statements of general policy not published in the FEDERAL REGISTER.

(4) Requests for the ASC or its staff to provide interpretive advice with respect to the meaning or application of

any statute administered by the ASC or any rule or regulation adopted thereunder and any ASC responses thereto;

(5) Requests for a statement that, on the basis of the facts presented in such a request, the ASC would not take any enforcement action pertaining to the facts as represented and any ASC responses thereto: and

(6) Correspondence between the ASC and a State appraiser regulatory agency arising out of the ASC's field review of the State agency's appraiser regulatory program.

(c) *Applicable fees.* (1) If applicable, fees for furnishing records under this section are as set forth in §1102.306(e).

(2) Information on the ASC's World Wide Web site is available to the public without charge. If, however, information available on the ASC's World Wide Web site is provided pursuant to a Freedom of Information Act request processed under g 1102.306 then fees apply and will be assessed pursuant to §1102.306(e).

[59 FR 1902, Jan. 13, 1994, as amended at 64 FR 72497, Dec. 28, 1999]

§1102.306 Procedures for requesting records.

(a) *Making a request for records.* (1) The request shall be submitted in writing to the Executive Director:

(i) By facsimile clearly marked ''Freedom of Information Act Request'' to (202) 293–6251;

(ii) By letter to the Executive Director marked ''Freedom of Information Act Request''; 1325 G Street NW, Suite 500, Washington, DC 20005; or

(iii) By sending Internet e-mail to the Executive Director marked ''Freedom of Information Act Request'' at his or her e-mail address listed on the ASC's World Wide Web site.

(2) The request shall contain the following information:

(i) The name and address of the requester, an electronic mail address, if available, and the telephone number at which the requester may be reached during normal business hours;

(ii) Whether the requester is an educational institution, non-commercial scientific institution, or news media representative;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying a maximum fee that is acceptable to the requester, or a request for a waiver or reduction of fees that satisfies paragraph (e)(1)(x) of this section; and

(iv) The preferred form and format of any responsive information requested, if other than paper copies.

(3) A request for identifiable records shall reasonably describe the records in a way that enables the ASC's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any ASC operations.

(b) *Defective requests.* The ASC need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this subpart. The ASC may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

(c) *Processing requests*—(1) *Receipt of requests.* Upon receipt of any request that satisfies paragraph (a) of this section, the Executive Director shall assign the request to the appropriate processing track pursuant to this section. The date of receipt for any request, including one that is addressed incorrectly or that is referred by another agency, is the date the Executive Director actually receives the request.

(2) *Expedited processing.* (i) Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the ASC has determined to expedite the response, the ASC shall process the request as soon as practicable. To show a compelling need for expedited processing, the requester shall provide a statement demonstrating that:

(A) The failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) The requester can establish that it is primarily engaged in information dissemination as its main professional

occupation or activity, and there is urgency to inform the public of the government activity involved in the re request; and

(C) The requester's statement must be certified to be true and correct to the best of the person's knowledge and belief and explain in detail the basis for requesting expedited processing.

(ii) The formality of the certification required to obtain expedited treatment may be waived by the Executive Director as a matter of administrative discretion.

(3) A requester seeking expedited processing will be notified whether expedited processing has been granted within ten (10) working days of the receipt of the request. If the request for expedited processing is denied, the requester may file an appeal pursuant to the procedures set forth in paragraph (g) of this section, and the ASC shall respond to the appeal within ten (10) working days after receipt of the appeal.

(4) *Priority of responses.* Consistent with sound administrative process, the ASC processes requests in the order they are received. However, in the ASC's discretion, or upon a court order in a matter to which the ASC is a party, a particular request may be processed out of turn.

(5) *Notification.* (i) The time for response to requests will be twenty (20) working days except:

(A) In the case of expedited treatment under paragraph (c)(2) of this section;

(B) Where the running of such time is suspended for the calculation of a cost estimate for the requester if the ASC determines that the processing of the request may exceed the requester's maximum fee provision or if the charges are likely to exceed $250 as provided for in paragraph (e)(1)(iv) of this section;

(C) Where the running of such time is suspended for the payment of fees pursuant to the paragraph (c)(5)(i)(B) and (e)(1) of this section; or

(D) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B) and further described in paragraph (c)(5)(iii) of this section.

(ii) In unusual circumstances as referred to in paragraph (c)(5)(i)(D) of this section, the time limit may be extended for a period of:

(A) Ten (10) working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or

(B) Such alternative time period as agreed to by the requester or as reasonably determined by the ASC when the ASC notifies the requester that the request cannot be processed in the specified time limit.

(iii) Unusual circumstances may arise when:

(A) The records are in facilities that are not located at the ASC's Washington office;

(B) The records requested are voluminous or are not in close proximity to one another; or

(C) There is a need to consult with another agency or among two or more components of the ASC having a substantial interest in the determination.

(6) *Response to request.* In response to a request that satisfies the requirements of paragraph (a) of this section, a search shall be conducted of records maintained by the ASC in existence on the date of receipt of the request, and a review made of any responsive information located. To the extent permitted by law, the ASC may redact identifying details when it makes available or publishes any records. If redaction is appropriate, the ASC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction. The ASC shall notify the requester of:

(i) The ASC's determination of the request;

(ii) The reasons for the determination;

(iii) If the response is a denial of an initial request or if any information is withheld, the ASC will advise the requester in writing:

(A) If the denial is in part or in whole;

(B) The name and title of each person responsible for the denial (when other than the person signing the notification);

(C) The exemptions relied on for the denial; and

(D) The right of the requester to appeal the denial to the Chairman of the ASC within 30 business days following receipt of the notification, as specified in paragraph (h) of this section.

(d) *Providing responsive records.* (1) Copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the ASC or makes other acceptable arrangements, or the ASC deems it appropriate to send the documents by another means.

(2) The ASC shall provide a copy of the record in any form or format requested if the record is readily reproducible by the ASC in that form or format, but the ASC need not provide more than one copy of any record to a requester.

(3) By arrangement with the requester, the ASC may elect to send the responsive records electronically if a substantial portion of the request is in electronic format. If the information requested is made pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, it will not be sent by electronic means unless reasonable security measures can be provided.

(e) *Fees*—(1) *General rules.* (i) Persons requesting records of the ASC shall be charged for the direct costs of search, duplication, and review as set forth in paragraphs (e)(2) and (e)(3) of this section, unless such costs are less than the ASC's cost of processing the requester's remittance.

(ii) Requesters will be charged for search and review costs even if responsive records are not located or, if located, are determined to be exempt from disclosure.

(iii) Multiple requests seeking similar or related records from the same requester or group of requesters will be aggregated for the purposes of this section.

(iv) If the ASC determines that the estimated costs of search, duplication, or review of requested records will exceed the dollar amount specified in the request, or if no dollar amount is specified, the ASC will advise the requester of the estimated costs. The requester must agree in writing to pay the costs of search, duplication, and review prior to the ASC initiating any records search.

(v) If the ASC estimates that its search, duplication, and review costs will exceed $250, the requester must pay an amount equal to 20 percent of the estimated costs prior to the ASC initiating any records search.

(vi) The ASC ordinarily will collect all applicable fees under the final invoice before releasing copies of requested records to the requester.

(vii) The ASC may require any requester who has previously failed to pay charges under this section within 30 calendar days of mailing of the invoice to pay in advance the total estimated costs of search, duplication, and review. The ASC also may require a requester who has any charges outstanding in excess of 30 calendar days following mailing of the invoice to pay the full amount due, or demonstrate that the fee has been paid in full, prior to the ASC initiating any additional records search.

(viii) The ASC may begin assessing interest charges on unpaid bills on the 31st day following the day on which the invoice was sent. Interest will be at the rate prescribed in §3717 of title 31 of the United States Code and will accrue from the date of the invoice.

(ix) The time limit for the ASC to respond to a request will not begin to run until the ASC has received the requester's written agreement under paragraph (e)(1)(iv) of this section, and advance payment under paragraph (e)(1)(v) or (vii) of this section, or payment of outstanding charges under paragraph (e)(1)(vii) or (viii) of this section.

(x) As part of the initial request, a requester may ask that the ASC waive or reduce fees if disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Determinations as to a waiver or reduction of fees will be made by the Executive Director (or designee), and the requester will be notified in writing of

his or her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph may be appealed to the ASC's Chairman pursuant to the procedure set forth in paragraph (g) of this section.

(2) *Chargeable fees by category of requester.* (i) Commercial use requesters shall be charged search, duplication, and review costs.

(ii) Educational institutions, noncommercial scientific institutions, and news media representatives shall be charged duplication costs, except for the first 100 pages.

(iii) Requesters not described in paragraph (e)(2)(i) or (ii) of this section shall be charged the full reasonable direct cost of search and duplication, except for the first two hours of search time and first 100 pages of duplication.

(3) *Fee schedule.* The dollar amount of fees which the ASC may charge to records requesters will be established by the Executive Director. The ASC may charge fees that recoup the full allowable direct costs it incurs. Fees are subject to change as costs change. The fee schedule will be published periodically on the ASC's Internet World Wide Web site (*http://www.asc.gov*) and will be effective on the date of publication. Copies of the fee schedule may be obtained by request at no charge by contacting the Executive Director by letter, Internet email or facsimile.

(i) *Manual searches for records.* The ASC will charge for manual searches for records at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs.

(ii) *Computer searches for records.* The fee for searches of computerized records is the actual direct cost of the search, including computer time, computer runs, and the operator's time apportioned to the search multiplied by the operator's basic rate of pay plus 16 percent to cover employee benefit costs.

(iii) *Duplication of records.* (A) The per-page fee for paper copy reproduction of documents is $.25.

(B) For other methods of reproduction or duplication, the ASC will charge the actual direct costs of reproducing or duplicating the documents, including each involved employee's basic rate of pay plus 16 percent to cover employee benefit costs.

(iv) *Review of records.* The ASC will charge commercial use requesters for the review of records at the time of processing the initial request to determine whether they are exempt from mandatory disclosure at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs. The ASC will not charge at the administrative appeal level for review of an exemption already applied. When records or portions of records are withheld in full under an exemption which is subsequently determined not to apply, the ASC may charge for a subsequent review to determine the applicability of other exemptions not previously considered.

(v) *Other services.* Complying with requests for special services, other than a readily produced electronic form or format, is at the ASC's discretion. The ASC may recover the full costs of providing such services to the requester.

(4) *Use of contractors.* The ASC may contact with independent contractors to locate, reproduce, and/or disseminate records; provided, however, that the ASC has determined that the ultimate cost to the requester will be no greater than it would be if the ASC performed these tasks itself. In no case will the ASC contract our responsibilities which FOIA provides that the ASC alone may discharge, such as determining the applicability of an exemption or whether to waive or reduce fees.

(f) *Exempt information.* A request for records may be denied if the requested record contains information that falls into one or more of the following categories.[1] If the requested record contains both exempt and nonexempt information, the nonexempt portions,

[1] Classification of a record as exempt from disclosure under the provisions of this paragraph (f) shall not be construed as authority to withhold the record if it is otherwise subject to disclosure under the Privacy Act of 1974 (5 U.S.C. 552a) or other Federal statute, any applicable regulation of ASC or any other Federal agency having jurisdiction thereof, or any directive or order of any court of competent jurisdiction.

which may reasonable be segregated from the exempt portions, will be released to the requester. If redaction is necessary, the ASC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction. The categories of exempt records are as follows:

(1) Records that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Records related solely to the internal personnel rules and practices of the ASC;

(3) Records specifically exempted from disclosure by statute, provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;

(5) Interagency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the ASC;

(6) Personnel, medical, and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trail or an impartial adjudication;

(ii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished records on a confidential basis;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the ASC or any agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(g) *Appeals.* (1) Appeals should be addressed to the Executive Director; ASC; 1325 G Street NW, Suite 500, Washington, DC 20005.

(2) A person whose initial request for records under this section, or whose request for a waiver of fees under paragraph (e)(1)(x) of this section, has been denied, either in part or in whole, has the right to appeal the denial to the ASC's Chairman (or designee) within 30 business days after receipt of notification of the denial. Appeals of denials of initial requests or for a waiver of fees must be in writing and include any additional information relevant to consideration of the appeal.

(3) Except in the case of an appeal for expedited treatment under paragraph (c)(3) of this section, the ASC will notify the appellant in writing within 20 business days after receipt of the appeal and will state:

(i) Whether it is granted or denied in whole or in part;

(ii) The name and title of each person responsible for the denial (if other than the person signing the notification);

(iii) The exemptions relied upon for the denial in the case of initial requests for records; and

(iv) The right to judicial review of the denial under the FOIA.

(4) If a requester is appealing for denial of expedited treatment, the ASC will notify the appellant within ten business days after receipt of the appeal of the ASC's disposition.

(5) Complete payment of any outstanding fee invoice will be required before an appeal is processed.

(h) *Records of another agency.* If a requested record is the property of another Federal agency or department, and that agency or department, either in writing or by regulation, expressly retains ownership of such record, upon receipt of a request for the record the ASC will promptly inform the requester of this ownership and immediately shall forward the request to the proprietary agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

[64 FR 72497, Dec. 28, 1999; 65 FR 31960, May 19, 2000, as amended at 69 FR 2501, Jan. 16, 2004]

§ 1102.307 Disclosure of exempt records.

(a) *Disclosure prohibited.* Except as provided in paragraph (b) of this section or by 12 CFR part 1102, subpart C, no person shall disclose or permit the disclosure of any exempt records, or information contained therein, to any persons other than those officers, directors, employees, or agents of the ASC or a State appraiser regulatory agency who has a need for such records in the performance of their official duties. In any instance in which any person has possession, custody or control of ASC exempt records or information contained therein, all copies of such records shall remain the property of the ASC and under no circumstances shall any person, entity or agency disclose or make public in any manner the exempt records or information without written authorization from the Executive Director, after consultation with the ASC General Counsel.

(b) *Disclosure authorized.* Exempt records or information of the ASC may be disclosed only in accordance with the conditions and requirements set forth in this paragraph (b). Requests for discretionary disclosure of exempt records of information pursuant to this paragraph (b) may be submitted directly to the Executive Director. Such administrative request must clearly state that it seeks discretionary disclosure of exempt records, clearly identify the records sought, provide sufficient information for the ASC to evaluate whether there is good cause for disclosure, and meet all other conditions set forth in paragraph (b)(1) through (3) of this section. Authority to disclose or authorize disclosure of exempt records of the ASC is delegated to the Executive Director, after consultation with the ASC General Counsel.

(1) *Disclosure by Executive Director.* (i) The Executive Director, or designee, may disclose or authorize the disclosure of any exempt record in response to a valid judicial subpoena, court order, or other legal process, and authorize any current or former member, officer, employee, agent of the ASC, or third party, to appear and testify regarding an exempt record or any information obtained in the performance of such person's official duties, at any administrative or judicial hearing or proceeding where such person has been served with a valid subpoena, court order, or other legal process requiring him or her to testify. The Executive Director shall consider the relevancy of such exempt records or testimony to the ligation, and the interests of justice, in determining whether to disclose such records or testimony. Third parties seeking disclosure of exempt records or testimony in litigation to which the ASC is not a party shall submit a request for discretionary disclosure directly to the Executive Director. Such requests shall specify the information sought with reasonable particularity and shall be accompanied by a statement with supporting documentation showing in detail the relevance of such exempt information to the litigation, justifying good cause for disclosure, and a commitment to be bound by a protective order. Failure to exhaust such administration request prior to service of a subpoena or other legal process may, in the Executive Director's discretion, serve as a basis for objection to such subpoena or legal process.

(ii) The Executive Director, or designee, may in his or her discretion and for good cause, disclose or authorize

disclosure of any exempt record or testimony by a current or former member, officer, employee, agent of the ASC, or third party, sought in connection with any civil or criminal hearing, proceeding or investigation without the service of a judicial subpoena, or other legal process requiring such disclosure or testimony. If he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Where the Executive Director or designee authorizes a current or former member, officer, director, empl9oyee or agent of the ASC to testify or disclose exempt records pursuant to this paragraph (b)(1), he or she may, in his or her discretion, limit the authorization to so much of the record or testimony as is relevant to the issues at such hearing, proceeding or investigation, and he or she shall give authorization only upon fulfillment of such conditions as he or she deems necessary and practicable to protect the confidential nature of such records or testimony.

(2) *Authorization for disclosure by the Chairman of the ASC.* Except where expressly prohibited by law, the Chairman of the ASC may, in his or her discretion, authorize the disclosure of any ASC records. Except where disclosure is required by law, the Chairman may direct any current or former member, officer, director, employee or agent of the ASC to refuse to disclose any record or to give testimony if the Chairman determines, in his or her discretion, that refusal to permit such disclosure is in the public interest.

(3) *Limitations on disclosure.* All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Further, nothing in paragrah (b) of this section shall be construed as restricting, in any manner, the authority of the ASC, the Chairman of the ASC, the Executive Director, the ASC General Counsel, or their designees, in their discretion and in light of the facts and circumstances attendant in any given case, to require conditions upon, and to limit, the form, manner, and extent of any disclosure permitted by this section. Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.

[64 FR 72500, Dec. 28, 1999]

§ 1102.308 Right to petition for issuance, amendment and repeal of rules of general application.

Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition for those purposes with the Executive Director of the ASC. The petition shall include a statement setting forth the text or substance of any proposed rule or amendment desired or shall specify the rule for which repeal is desired. The petitioner also shall state the nature of his or her interest and the reasons for seeking ASC action. The Executive Director shall acknowledge receipt of the petition within ten business days of receipt. As soon as reasonably practicable, the ASC shall consider the petition and related staff recommendations and shall take such action as it deems appropriate. The Executive Director shall notify the petitioner in writing of the ASC action within ten business days of the action.

[59 FR 1902, Jan. 13, 1994. Redesignated at 64 FR 72497, Dec. 28, 1999]

§ 1102.309 Confidential treatment procedures.

(a) *In general.* Any submitter of written information to the ASC who desires that some or all of his or her submission be afforded confidential treatment under 5 U.S.C. 552(b)(4) (*i.e.*, trade secrets and commercial or financial information obtained from a person and privileged or confidential) shall file a request for confidential treatment with the Executive Director of the ASC at the time the written information is submitted to the ASC or within ten business days thereafter. Nothing in this section limits the authority of the ASC and its staff to make determinations regarding access to documents under this subpart.

(b) *Form of request.* A request for confidential treatment shall be submitted in a separate letter or memorandum conspicuously entitled, ''Request for Confidential Treatment.'' Each request shall state in reasonable detail the facts and arguments supporting the request and its legal justification. If the submitter had been required by the ASC to provide the particular information, conclusory statements that the information would be useful to competitors or would impair sales or similar statements generally will not be considered sufficient to justify confidential treatment. When the submitter had voluntarily provided the particular information to the ASC, the submitter must specifically identify the documents or information which are of a kind the submitter would not customarily make available to the public.

(c) *Designation and separation of confidential material.* Submitters shall clearly designate all information considered confidential and shall clearly separate such information from other non-confidential information, whenever possible.

(d) *ASC action on request.* A request for confidential treatment of information will be considered only in connection with a request for access to the information under FOIA as implemented by this subpart. Upon the receipt of a request for access, the Executive Director or his or her designee (''ASC Officer'') as soon as possible shall provide the submitter with a written notice describing the request and shall provide the submitter with a reasonable opportunity, no longer than ten business days, to submit written objections to disclosure of the information. Notice may be given orally, and such notice shall be promptly confirmed in writing. The ASC Officer may provide a submitter with a notice if the submitter did not request confidential treatment of the requested information. If the ASC required the submitter to provide the requested information, the ASC Officer would need substantial reason to believe that disclosure of the requested information would result in substantial competitive harm to the submitter. If the submitter provided the information voluntarily to the ASC, the ASC officer would need to believe that the information is of a kind the submitter would not customarily make available to the public. The ASC Officer similarly shall notify the person seeking disclosure of the information under FOIA of the existence of a request for confidential treatment. These notice requirements need not be followed if the ASC Officer determines under this subpart that the information should not be disclosed; the information has been published or has been officially made available to the public; disclosure of the information is required by law (other than FOIA); or the submitter's request for confidential treatment appears obviously frivolous, in such instance the submitter shall be given written notice of the determination to disclose the information at least five business days prior to release. The ASC Officer shall carefully consider the issues involved, and if disclosure of the requested information is warranted, a written notice, containing a brief description of why the submitter's objections were not sustained, must be forwarded to the submitter within ten business days. The time for response may be extended up to ten additional business days, as provided in 5 U.S.C. 552(a)(6)(B), or for other periods by agreement between the requester and the ASC Officer. This notice shall be provided to the submitter at least five business days prior to release of the requested information.

(e) *Notice of lawsuit.* The ASC Officer shall notify a submitter of any filing of any suit against the ASC pursuant to 5 U.S.C. 552 to compel disclosure of documents or information covered by the submitter's request for confidential treatment within ten business days of service of the suit. The ASC Officer also shall notify the requester of the documents or information of any suit filed by the submitter against the ASC to enjoin their disclosure within ten business days of service of the suit.

[59 FR 1902, Jan. 13, 1994. Redesignated at 64 FR 72497, Dec. 28, 1999]

§ 1102.310 Service of process.

(a) *Service.* Any subpoena or other legal process to obtain information maintained by the ASC shall be duly issued by a court having jurisdiction over the ASC, and served upon the

Chairman ASC; 1325 G Street NW, Suite 500, Washington, DC 20005. Where the ASC is named as a party, service of process shall be made pursuant to the Federal Rules of Civil Procedure upon the Chairman at the above address. The Chairman shall immediately forward any subpoena, court order or legal process to the General Counsel. If consistent with the terms of the subpoena, court order or legal process, the ASC may require the payment of fees, in accordance with the fee schedule referred to in §1102.306(e) prior to the release of any records requested pursuant to any subpoena or other legal process.

(b) *Notification by person served.* If any current or former member, officer, employee or agent of the ASC, or any other person who has custody of records belonging to the ASC, is served with a subpoena, court order, or other process requiring that person's attendance as a witness concerning any matter related to official duties, or the production of any exempt record of the ASC, such person shall promptly advise the Executive Director of such service, the testimony and records described in the subpoena, and all relevant facts that may assist the Executive Director, in consultation with the ASC General Counsel, in determining whether the individual in question should be authorized to testify or the records should be produced. Such person also should inform the court or tribunal that issued the process and the attorney for the party upon whose application the process was issued, if known, of the substance of this section.

(c) *Appearance by person served.* Absent the written authorization of the Executive Director or designee to disclose the requested information, any current or former member, officer, employee, or agent of the ASC, and any other person having custody of records of the ASC, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully decline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

[64 FR 72501, Dec. 28, 1999]

Subpart E—Collection and Transmission of Appraisal Management Company (AMC) Registry Fees

SOURCE: 82 FR 44501, Sept. 25, 2017, unless otherwise noted.

§ 1102.400 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Appraisal Subcommittee (ASC) under sections 1106 and 1109 (a)(4)(B) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Title XI), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub. L. 111–203, 124 Stat. 1376 (2010)), 12 U.S.C. 3335, 3338 (a)(4)(B)).

(b) *Purpose.* The purpose of this subpart is to implement section 1109 (a)(4)(B) of Title XI, 12 U.S.C. 3338.

(c) *Scope.* This subpart applies to States that elect to register and supervise appraisal management companies pursuant to 12 U.S.C. 3346 and 3353, and the regulations promulgated thereunder.

§ 1102.401 Definitions.

For purposes of this subpart:

(a) *AMC Registry* means the national registry maintained by the ASC of those AMCs that meet the Federal definition of AMC, as defined in 12 U.S.C. 3350(11), are registered by a State or are Federally regulated, and have paid the annual AMC registry fee.

(b) AMC Rule means the interagency final rule on minimum requirements for AMCs. (12 CFR 34.210–34.216; 12 CFR 225.190–225.196; 12 CFR 323.8–323.14; 12 CFR 1222.20–1222.26).

(c) *ASC* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council established under section 1102 (12 U.S.C. 3310) as it amended the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. 3301 *et seq.*) by adding section 1011.

(d) *Performed an appraisal* means the appraisal service requested of an appraiser by the AMC was provided to the AMC.

(e) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the United States Virgin Islands, and American Samoa.

(f) *Other terms*. Definitions of: *Appraisal management company (AMC); appraisal management services; appraisal panel; consumer credit; covered transaction; dwelling; Federally regulated AMC* are incorporated from the AMC Rule by reference.

§ 1102.402 Establishing the annual AMC registry fee.

The annual AMC registry fee to be applied by States that elect to register and supervise AMCs is established as follows:

(a) In the case of an AMC that has been in existence for more than a year, $25 multiplied by the number of appraisers who have performed an appraisal for the AMC in connection with a covered transaction in such State during the previous year; and

(b) In the case of an AMC that has not been in existence for more than a year, $25 multiplied by the number of appraisers who have performed an appraisal for the AMC in connection with a covered transaction in such State since the AMC commenced doing business.

§ 1102.403 Collection and transmission of annual AMC registry fees.

(a) *Collection of annual AMC registry fees*. States that elect to register and supervise AMCs pursuant to the AMC Rule shall collect an annual registry fee as established in §1102.402 from AMCs eligible to be on the AMC Registry.

(b) *Transmission of annual AMC registry fee*. States that elect to register and supervise AMCs pursuant to the AMC Rule shall transmit AMC registry fees as established in §1102.402 to the ASC on an annual basis. States may align a one-year period with any 12-month period, which may, or may not, be based on the calendar year. Only those AMCs whose registry fees have been transmitted to the ASC will be eligible to be on the AMC Registry.

PARTS 1103–1199 [RESERVED]

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

SUBCHAPTER A—ORGANIZATION AND OPERATIONS

SUBCHAPTER B—ENTITY REGULATIONS

Federal Housing Finance Agency

SUBCHAPTER A—ORGANIZATION AND OPERATIONS

PART 1200—ORGANIZATION AND FUNCTIONS

Sec.

AUTHORITY: 5 U.S.C. 552, 12 U.S.C. 4512, 12 U.S.C. 4526, 44 U.S.C. 3506.

SOURCE: 77 FR 73264, Dec. 10, 2012, unless otherwise noted.

§ 1200.1 Federal Housing Finance Agency.

(a) *Scope and authority*. The Federal Housing Finance Agency (FHFA) is an independent agency of the Federal Government. Division A of the Housing and Economic Recovery Act of 2008, Public Law 110–289, 122 Stat. 2654, titled the Federal Housing Finance Regulatory Reform Act of 2008, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act) and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) to establish FHFA. FHFA administers the Safety and Soundness Act and the regulated entities' authorizing statutes: the Federal Home Loan Bank Act, the Federal National Mortgage Association Charter Act, and the Federal Home Loan Mortgage Corporation Act. FHFA is responsible for the supervision and regulation of the Federal National Mortgage Corporation (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), (together, Enterprises), the Federal Home Loan Banks (Banks) (collectively, the ''regulated entities''), and the Office of Finance (OF). FHFA is charged with ensuring that the regulated entities: Operate in a safe and sound manner, including maintaining adequate capital and internal controls; foster liquid, efficient, competitive, and resilient national housing finance markets; comply with the Safety and Soundness Act and their respective authorizing statutes, and rules, regulations and orders issued under the Safety and Soundness Act and the authorizing statutes; and carry out their respective statutory missions through activities and operations that are authorized and consistent with the Safety and Soundness Act, their respective authorizing statutes, and the public interest. FHFA's costs and expenses are funded by annual assessments paid by the regulated entities. FHFA is headed by a director, who is appointed by the President and confirmed by the Senate for a five-year term.

(b) *Location*. FHFA's headquarters is located at 400 Seventh Street SW., Washington, DC 20219. FHFA's official hours of business are 8:00 a.m.–5 p.m. (Eastern Time), Monday through Friday, excluding Federal holidays.

[77 FR 73264, Dec. 10, 2012, as amended at 80 FR 80233, Dec. 24, 2015]

§ 1200.2 Organization of the Federal Housing Finance Agency.

(a) *Director*. The Director is responsible for overseeing the prudential operations of each regulated entity, and for ensuring that each regulated entity: Operates in a safe and sound manner; operates and acts to foster liquid, efficient, competitive, and resilient national housing financing markets; complies with the Safety and Soundness Act, its authorizing statute, and rules, regulations, guidelines, and orders issued under those statutes; carries out its mission only through activities that are authorized by statute; and acts and operates consistent with the public interest. The Director may delegate to FHFA officers and employees any of the functions, powers, and duties of the Director as the Director considers appropriate. The Director manages FHFA, including through authorities delegated to FHFA officers and employees.

(b) *Deputy Director of the Division of Enterprise Regulation*. The Deputy Director is responsible for managing FHFA's program of prudential supervision of the Enterprises. The Deputy

Director provides management oversight, direction, and support for all examination activity involving the Enterprises, the development of supervision findings, and preparation of the annual reports of examination. The Deputy Director provides support and advice to the Director and other senior executives and represents the division on significant and emerging supervisory issues and development of FHFA supervisory policy, and has such other responsibilities as the Director may prescribe.

(c) *Deputy Director of the Division of Housing Mission and Goals.* The Deputy Director is responsible for FHFA policy development and analysis, oversight of housing and regulatory policy, and oversight of the mission and goals of the Enterprises. The Deputy Director oversees and coordinates FHFA activities regarding data analysis, market surveillance, policy development, policy research and analysis affecting housing finance and financial markets, and policy analysis and research in support of FHFA's mission and the Director's responsibilities as a member of the Federal Housing Finance Oversight board, the Financial Stability Oversight Board, and the Financial Stability Oversight Council, and has such other responsibilities as the Director may prescribe.

(d) *Deputy Director of the Division of Federal Home Loan Bank Regulation.* The Deputy Director is responsible for managing FHFA's program of prudential supervision of the Banks and the OF. The Deputy Director provides management oversight, direction and support for all examination activity involving the Banks, the development of supervision findings, and preparation of the annual reports of examination. The Deputy Director provides support and advice to the Director and other senior executives and represents the division on significant and emerging supervisory issues and development of FHFA supervisory policy, and has such other responsibilities as the Director may prescribe.

(e) *Offices and functions*—(1) *Office of the Director.* The Office of the Director supports the activities of the Director and includes Offices as the Director may create within the Office of the Director.

(2) *Division of Enterprise Regulation.* The division supports and implements the responsibilities of the Deputy Director described in paragraph (b) of this section. The division oversees and directs all Enterprise supervisory activities, develops examination findings, prepares reports of examination, and prepares the sections of the Annual Report to Congress that describe the condition and performance of each Enterprise. The division monitors and assesses the financial condition and performance of the Enterprises. By means of annual examinations and a continuous on-site presence, the division monitors and assesses the amount of risk each Enterprise assumes, the quality of risk management, and compliance with regulations.

(3) *Division of Housing Mission and Goals.* The division supports and implements the responsibilities of the Deputy Director described in paragraph (c) of this section. In support of FHFA's mission and the Director's responsibilities as a member of the Federal Housing Finance Oversight Board, the Financial Stability Oversight Board, and the Financial Stability Oversight Committee, the division also oversees and coordinates FHFA activities that involve certain data analysis, and analysis affecting housing finance and financial markets.

(4) *Division of Federal Home Loan Bank Regulation.* The division supports and implements the responsibilities of the Deputy Director described in paragraph (d) of this section, including overseeing and directing all Bank supervisory activities, developing examination findings, preparing reports of examination, and preparing the sections of the annual report to Congress that describe the condition and performance of the Banks. The division monitors and assesses the financial condition and performance of the Banks and the OF and monitors and assesses their compliance with regulations, the amount of risk they assume, and the quality of their risk management through annual on-site examinations, periodic visits, and ongoing offsite monitoring and analysis.

(5) *Office of Inspector General.* The office is headed by a presidentially appointed and Senate-confirmed Inspector General who serves under the general supervision of the Director. The office carries out activities and responsibilities established in the Inspector General Act of 1978.

(6) *Office of General Counsel.* The office advises and supports the Director and FHFA staff on legal matters related to the functions, activities, and operations of FHFA and the regulated entities; it supports supervision functions, development and promulgation of regulations and orders, and enforcement actions. The office manages the Freedom of Information, Privacy Act and ethics programs. The Designated Agency Ethics Official advises, counsels, and trains FHFA employees on ethical standards and conflicts of interest, and manages the agency's financial disclosure program.

(7) *Office of the Ombudsman.* The office is responsible for considering complaints and appeals from the regulated entities, the OF and any person that has a business relationship with a regulated entity or the OF concerning any matter relating to FHFA's regulation and supervision of that entity or the OF.

(8) *Office of Minority and Women Inclusion.* The office is responsible for all matters of FHFA relating to diversity in management, employment, and business activities, and for supervising the diversity requirements applicable to the regulated entities and the OF.

(f) *Other Offices and Departments.* The Director may from time to time establish or terminate Offices and Divisions of the agency as the Director deems necessary or appropriate to carry out FHFA's mission. The Director may establish Offices and positions as the Director deems necessary and appropriate to support the operations of a federal agency, such as a Deputy Director for one or more specified areas of responsibility, a Chief Operating Officer, a Chief Financial Officer, an Office of Information Technology, and such other offices, departments, and positions as are necessary and appropriate or may be required by statute.

(g) *Additional information.* Current information on the organization of FHFA may be obtained by mail from the Office of Congressional Affairs and Communications, 400 Seventh Street, SW., Washington, DC 20219. Such information, as well as other FHFA information, also may be obtained electronically by accessing FHFA's Web site located at *www.FHFA.gov.*

[77 FR 73264, Dec. 10, 2012, as amended at 80 FR 45599, July 31, 2015; 80 FR 80233, Dec. 24, 2015]

§ 1200.3 Official logo and seal.

This section describes and displays the logo adopted by the Director as the official symbol representing FHFA. It is displayed on correspondence, selected documents, and signage. The logo serves as the official seal to certify and authenticate official documents of the agency.

(a) *Description.* The logo is a disc consisting of three polygons each drawn in a manner resembling a silhouette of a pitched roof house and with distinctive eaves under its roof. Each polygon is placed one in front of the other, two of which are diminished in size from the polygon behind it. Placed in the center of the smallest polygon is the acronym for the organization, ''FHFA.'' The polygons are encircled by a designation scroll having a solid background and containing the words ''FEDERAL HOUSING FINANCE AGENCY'' in capital letters with serifs, with two mullets on the extreme left and right of the scroll. Upon approval by the Director, FHFA may employ variations of the color or shading of its logo and seal for specified purposes; these will be available for reference on the agency Web site at *www.fhfa.gov.*

(b) *Display.* FHFA's official logo and seal appears below:

[77 FR 73264, Dec. 10, 2012, as amended at 80 FR 45599, July 31, 2015]

§ 1200.4 OMB control numbers assigned under the Paperwork Reduction Act.

(a) Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3531) and the implementing regulations of the Office of Management and Budget (OMB) (5 CFR part 1320), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

(b) OMB has approved the collections of information contained in FHFA's regulations and has assigned each collection a control number. The following table displays the sections of FHFA's regulations (both those located in this chapter and those promulgated by the former Federal Housing Finance Board that appear in chapter IX of this title) containing collections of information, along with the applicable OMB control numbers and the expirations dates for those control numbers:

12 CFR part or section where identified and described	OMB control No.	Expiration date
1222.22	2590–0013	07/31/2018
1222.23	2590–0013	07/31/2018
1222.24	2590–0013	07/31/2018
1222.25	2590–0013	07/31/2018
1222.26	2590–0013	07/31/2018
1223.23	2590–0014	07/31/2018
1261.7	2590–0006	02/28/2021
1261.12	2590–0006	02/28/2021
1261.14	2590–0006	02/28/2021
1263.2	2590–0003	03/31/2020
1263.4	2590–0003	03/31/2020
1263.5	2590–0003	03/31/2020
1263.6	2590–0003	03/31/2020
1263.7	2590–0003	03/31/2020
1263.8	2590–0003	03/31/2020
1263.9	2590–0003	03/31/2020
1263.11	2590–0003	03/31/2020
1263.12	2590–0003	03/31/2020
1263.13	2590–0003	03/31/2020
1263.14	2590–0003	03/31/2020
1263.15	2590–0003	03/31/2020
1263.16	2590–0003	03/31/2020
1263.17	2590–0003	03/31/2020
1263.18	2590–0003	03/31/2020
1263.19	2590–0003	03/31/2020
1263.24	2590–0003	03/31/2020
1263.26	2590–0003	03/31/2020
1263.31	2590–0003	03/31/2020
1264.4	2590–0001	12/31/2018

12 CFR part or section where identified and described	OMB control No.	Expiration date
1264.5	2590–0001	12/31/2018
1264.6	2590–0001	12/31/2018
1266.17	2590–0001	12/31/2018
1268.7	2590–0008	02/29/2016
1277.22	2590–0002	04/30/2020
1277.28	2590–0002	04/30/2020
1290.2	2590–0005	03/31/2020
1290.3	2590–0005	03/31/2020
1290.4	2590–0005	03/31/2020
1290.5	2590–0005	03/31/2020
1291.5	2590–0007	03/31/2020
1291.6	2590–0007	03/31/2020
1291.7	2590–0007	03/31/2020
1291.8	2590–0007	03/31/2020
1291.9	2590–0007	03/31/2020

[81 FR 76294, Nov. 2, 2016, as amended at 83 FR 39325, Aug. 9, 2018]

PART 1201—GENERAL DEFINITIONS APPLYING TO ALL FEDERAL HOUSING FINANCE AGENCY REGULATIONS

AUTHORITY: 12 U.S.C. 4511(b), 4513(a), 4513(b).

SOURCE: 78 FR 2322, Jan. 11, 2013, unless otherwise noted.

§ 1201.1 Definitions.

As used throughout this chapter, the following basic terms relating to the Federal Housing Finance Agency, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Banks, the Office of Finance, and related entities have the meanings set forth below, unless otherwise indicated in a particular subchapter, part, section, or paragraph:

1934 Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Acquired member assets or *AMA* means assets acquired in accordance with, and satisfying the applicable requirements of, part 1268 of this chapter.

Advance means a loan from a Bank that is:

(1) Provided pursuant to a written agreement;

(2) Supported by a note or other written evidence of the borrower's obligation; and

(3) Fully secured by collateral in accordance with the Bank Act and part 1266 of this chapter.

Affordable Housing Program or AHP means the Affordable Housing Program that each Bank is required to establish pursuant to section 10(j) of the Bank Act (12 U.S.C. 1430(j)) and part 1291 of this chapter.

Appropriate Federal banking agency has the meaning set forth in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) and, for federally-insured credit unions, means the NCUA.

Appropriate state regulator means any state officer, agency, supervisor or other entity that has regulatory authority over, or is empowered to institute enforcement action against, a particular institution.

Authorizing Statutes means the Federal National Mortgage Association Charter Act, the Federal Home Loan Mortgage Corporation Act, and the Federal Home Loan Bank Act.

Bank, written in title case, means a Federal Home Loan Bank established under section 12 of the Bank Act (12 U.S.C. 1432).

Bank Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 *et seq.*).

Bank System means the Federal Home Loan Bank System, consisting of all of the Banks and the Office of Finance.

Capital plan means the capital structure plan required for each Bank by section 6(b) of the Bank Act, as amended (12 U.S.C. 1426(b)).

CIP means the Community Investment Program, an advance program under CICA required to be offered pursuant to section 10(i) of the Bank Act (12 U.S.C. 1430(i)).

Community Investment Cash Advance or CICA means any advance made through a program offered by a Bank under section 10 of the Bank Act (12 U.S.C. 1430) and parts 1291 and 1292 of this chapter to provide funding for targeted community lending and affordable housing, including advances made under a Bank's Rural Development Funding (RDF) program, offered under section 10(j)(10) of the Bank Act (12 U.S.C. 1430(j)(10)); a Bank's Urban Development Funding (UDF) program, offered under section 10(j)(10) of the Bank Act (12 U.S.C. 1430(j)(10)); a Bank's Affordable Housing Program (AHP), offered under section 10(j) of the Bank Act (12 U.S.C. 1430(j)); a Bank's Community Investment Program (CIP), offered under section 10(i) of the Bank Act (12 U.S.C. 1430(i)); or any other program offered by a Bank that meets the requirements of part 1292 of this chapter.

Community lending means providing financing for economic development projects for targeted beneficiaries, and, for community financial institutions (as defined in §1263.1 of this chapter), purchasing or funding small business loans, small farm loans, small agribusiness loans, or community development loans (as defined in §1266.1 of this chapter).

Consolidated obligation or CO means any bond, debenture, or note on which the Banks are jointly and severally liable and which was issued under section 11 of the Bank Act (12 U.S.C. 1431) and any implementing regulations, whether or not such instrument was originally issued jointly by the Banks or by the Federal Housing Finance Board on behalf of the Banks.

Data Reporting Manual or DRM means a manual issued by FHFA and amended from time to time containing reporting requirements for the Regulated Entities.

Director, written in title case, means the Director of FHFA or his or her designee.

Enterprise means Fannie Mae and Freddie Mac (collectively, Enterprises) and any affiliate thereof.

Excess stock means that amount of a Bank's capital stock owned by a member or other institution in excess of that member's or other institution's minimum investment in capital stock required under the Bank's capital plan, the Bank Act, or FHFA's regulations, as applicable.

Fannie Mae means the Federal National Mortgage Association and any affiliate thereof.

FDIC means the Federal Deposit Insurance Corporation.

FHFA means the Federal Housing Finance Agency established by Section 1311(a) of the Safety and Soundness Act. (12 U.S.C. 4511(a)).

Financing Corporation or FICO means the Financing Corporation established and supervised by the Director under section 21 of the Bank Act (12 U.S.C. 1441) and part 1271 of this chapter.

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

Freddie Mac means the Federal Home Loan Mortgage Corporation and any affiliate thereof.

Generally Accepted Accounting Principles or GAAP means accounting principles generally accepted in the United States.

Ginnie Mae means the Government National Mortgage Association.

GLB Act means the Gramm-Leach-Bliley Act (Pub. L. 106–102 (1999)).

HERA means the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, 122 Stat. 2654.

Housing associate means an entity that has been approved as a housing associate pursuant to part 1264 of this chapter.

HUD means the United States Department of Housing and Urban Development.

Member means an institution that has been approved for membership in a Bank and has purchased capital stock in the Bank in accordance with §§1263.20 or 1263.24(b) of this chapter.

NCUA means the National Credit Union Administration.

NRSRO means a credit rating organization registered with the SEC as a nationally recognized statistical rating organization by the Securities and Exchange Commission.

OCC means the Office of the Comptroller of the Currency.

Office of Finance or OF means the Office of Finance, a joint office of the Banks established under part 1273 of this chapter and referenced in the

Bank Act and the Safety and Soundness Act.

President, when referring to an officer of a Bank only, means a Bank's principal executive officer.

Regulated Entity means the Federal Home Loan Mortgage Corporation and any affiliate thereof, the Federal National Mortgage Association and any affiliate thereof, and any Federal Home Loan Bank.

Resolution Funding Corporation or REFCORP means the Resolution Funding Corporation established by section 21B of the Bank Act (12 U.S.C. 1441b).

Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*).

SBIC means a small business investment company formed pursuant to section 301 of the Small Business Investment Act (15 U.S.C. 681).

SEC means the United States Securities and Exchange Commission.

State means a state of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, the District of Columbia, Guam, Puerto Rico, or the United States Virgin Islands.

[78 FR 2322, Jan. 11, 2013, as amended at 79 FR 64665, Oct. 31, 2014; 81 FR 76295, Nov. 2, 2016; 81 FR 91688, Dec. 19, 2016]

PART 1202—FREEDOM OF INFORMATION ACT

Sec.

AUTHORITY: Pub. L. 110–289, 122 Stat. 2654; 5 U.S.C. 301, 552; 12 U.S.C. 4526; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O. 13392, 70 FR 75373–75377, 3 CFR, 2006 Comp., p. 216–200.

SOURCE: 82 FR 13745, Mar. 15, 2017, unless otherwise noted.

§ 1202.1 Why did FHFA issue this part?

The Federal Housing Finance Agency (FHFA) issued this regulation to comply with the Freedom of Information Act (FOIA) (5 U.S.C. 552).

(a) The Freedom of Information Act (FOIA) (5 U.S.C. 552), is a Federal law that requires the Federal Government to disclose certain Federal Government records to the public.

(b) This part explains the rules that the FHFA will follow when processing and responding to requests for records under the FOIA. It also explains what you must do to request records from FHFA under the FOIA. You should read this part together with the FOIA, which explains in more detail your rights and the records FHFA may release to you.

(c) If you want to request information about yourself that is contained in a system of records maintained by FHFA, you may do so under the Privacy Act of 1974, as amended (5 U.S.C. 552a). This is considered a first-party or Privacy Act request under the Privacy Act, and you must file your request following FHFA's Privacy Act regulation at part 1204 of this title. If you file a request for information about yourself, FHFA will process your request under both the FOIA and Privacy Act in order to give you the greatest degree of access to any responsive material.

(d) Notwithstanding the FOIA and this part, FHFA may routinely publish or disclose to the public information without following these procedures.

§ 1202.2 What do the terms in this part mean?

Some of the terms you need to understand while reading this regulation are—

Aggregating means combing multiple requests for documents that could reasonably have been the subject of a single request and which occur within a 30-day period, by a single requester or by a group of requesters acting in concert that would otherwise involve unusual circumstances.

Appeals Officer or FOIA Appeals Officer means a person designated by FHFA who processes appeals of denied FOIA requests for FHFA records.

Chief FOIA Officer means the designated high-level official within FHFA (FHFA–OIG does not have a separate Chief FOIA Officer) who has overall responsibility for the agency's FOIA program and compliance with the FOIA.

Confidential commercial information means records provided to the Federal Government by a submitter that contain material exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

Days, unless stated as ''calendar days,'' are working days and do not include Saturdays, Sundays, and Federal holidays. If the last day of any period prescribed herein falls on a Saturday, Sunday, or Federal holiday, the last day of the period will be the next working day that is not a Saturday, Sunday, or Federal holiday.

Direct costs means the expenses, including contract services and retrieving documents from at a Federal records center operated by the National Archives and Records Administration, incurred by FHFA, in searching for, reviewing and/or duplicating records to respond to a request for information. In the case of a commercial use request, the term also means those expenditures FHFA actually incurs in reviewing records to respond to the request. Direct costs include the cost of the time of the employee performing the work, the cost of any computer searches, and the cost of operating duplication equipment. Direct costs do not include overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

Duplication means reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Employee, for the purposes of this regulation, means any person holding an appointment to a position of employment with FHFA, or any person who formerly held such an appointment; any conservator appointed by FHFA; or any agent or independent contractor acting on behalf of FHFA, even though the appointment or contract has terminated.

Fee Waiver means the waiver or reduction of fees if the requester can demonstrate that certain statutory standards are met.

FHFA means each separate component designated by the agency as a primary organizational unit that is responsible for processing FOIA requests, as specified in Appendices A and B to this part. FHFA has two components: Federal Housing Finance Agency Headquarters (FHFA–HQ) and FHFA Office of Inspector General (FHFA–OIG).

FOIA Officer, FOIA Official and Chief FOIA Officer are persons designated by FHFA to process and respond to requests for FHFA records under the FOIA.

FOIA Public Liaison is a person designated by FHFA who is responsible for assisting requesters with their requests.

Proactive disclosure means records that are required by the FOIA to be made publicly available, as well as additional records identified as being of interest to the public that are appropriate for public disclosure, and for posting and indexing such records.

Readily reproducible means that the requested record or records exist in electronic format and can be downloaded or transferred intact to a computer disk, tape, or another electronic medium with equipment and software currently in use by FHFA.

Record means information or documentary material FHFA maintains in any form or format, including electronic, which FHFA—

(1) Created or received under Federal law or in connection with the transaction of public business;

(2) Preserved or determined is appropriate for preservation as evidence of

operations or activities of FHFA, or because of the value of the information it contains; and

(3) Controls at the time it receives a request under the FOIA.

Regulated entities means the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, and the Federal Home Loan Banks.

Requester means any person seeking access to FHFA records under the FOIA. A requester falls into one of three categories for the purpose of determining what fees may be charged. The *three* categories are—

(1) *Commercial*—A request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. A decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information;

(2) *Noncommercial*—Three distinct subcategories—

(i) *Educational institution*—Any school that operates a program of scholarly research. A requester in this fee category must show that the request is authorized by, and is made under the auspices of, an educational institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. To fall with this fee category, the request must serve the scholarly research goals of the institution rather than an individual research goal. A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request would qualify as part of this fee category;

(ii) *Noncommercial scientific institution*—An institution that is not operated on a ''commercial'' basis, as defined in this section and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A request in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use; or

(iii) *Representative of the news media*—Any person or entity that publishes or broadcasts news to the public, actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public; and

(3) *Other*—All requesters who do not fall within either of the preceding two categories.

Requester Service Centers serve as the primary contacts for a requester when the requester has questions, is seeking information about how the FOIA works, or to check the status of their request.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under §1202.8(f) of this part.

Search means the process of looking for and retrieving records or information responsive to a request, whether manually or by electronic means. Search time includes a page-by-page or line-by-line identification of information within a record and the reasonable efforts expanded to locate and retrieve information from electronic records.

Submitter means any person or entity providing confidential information to the Federal Government. The term ''submitter'' includes, but is not limited to corporations, state governments, and foreign governments.

Unusual circumstances means the need to—

(1) Search for and collect records from agencies, offices, facilities, or locations that are separate from the office processing the request;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records in order to process a single request; or

(3) Consult with another agency or among two or more components of the FHFA that have a substantial interest in the determination of a request.

Vaughn index means an itemized index, used in litigation, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5683, Feb. 9, 2018]

§ 1202.3 What information can I obtain through the FOIA?

(a) *General.* You may request that FHFA disclose to you its records on a subject of interest to you. The FOIA only requires the disclosure of records. It does not require FHFA to create compilations of information or to provide narrative responses to questions or queries.

(b) *Proactive disclosure.* FHFA will make available for public inspection and copying in its electronic reading room the following records:

(1) Final opinions or orders made in the adjudication of cases;

(2) Statements of policy and interpretation adopted by FHFA that are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect a member of the public and are not exempt from disclosure under the FOIA;

(4) Copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3), that because of the nature of their subject matter, FHFA determines have become or are likely to become the subject of subsequent requests for substantially the same records, or that have been requested 3 or more times; and

(5) A general index of the records referred to in paragraph (b)(4) of this section.

(c) *Reading rooms.* FHFA maintains an electronic reading room. FHFA will ensure that its reading room is reviewed and updated on an ongoing basis. See the Appendices to this part for location and contact information for FHFA–HQ and FHFA–OIG respective reading rooms.

§ 1202.4 What information is exempt from disclosure?

(a) *General.* Unless the Director of FHFA or his or her designee, or any regulation or statute specifically authorizes disclosure, FHFA will not release records if it reasonably foresees that disclosure would harm an interest protected by one or more of the following—

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and in fact is properly classified pursuant to such Executive Order;

(2) Related solely to FHFA's internal personnel rules and practices;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552a), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Contained in inter-agency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with FHFA; provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(6) Contained in personnel, medical or similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution or an entity that is regulated and examined by FHFA that furnished information on a confidential basis, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) *Redacted portion.* If a requested record contains exempt information and information that can be disclosed and the portions can reasonably be segregated from each other, the disclosable portion of the record will be released to the requester after FHFA redacts the exempt portions. If it is technically feasible, FHFA will indicate the amount of the information redacted at the place in the record where the redaction is made and include a notation identifying the exemption that was applied, unless including that indication would harm an interest protected by an exemption.

(c) *Exempt and redacted material.* FHFA is not required to and will not provide a Vaughn index during the administrative stage of processing your FOIA request.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5683, Feb. 9, 2018]

§ 1202.5 How do I request information from FHFA under the FOIA?

(a) *Where to send your request.* FHFA has a decentralized system for processing FOIA requests, made up of two components. To make a request for FHFA records, the FOIA request must be in writing. A requester must write directly to the FOIA office of the component that maintains the records being sought. The Appendices to this part contain the respective location and contact information for submitting a FOIA request for each FHFA component.

(b) *Provide your name and address.* Your request must include your full name, your address and, if different, the address at which the component is to notify you about your request, a telephone number at which you can be reached during normal business hours, and an electronic mail address, if any.

(c) *Request is under the FOIA.* Your request must have a statement identifying it as being made under the FOIA.

(d) *Your FOIA status.* Your request should include a statement specifically identifying your status as a ''commercial use'' requester, an ''educational institution'' requester, a ''non-commercial scientific institution'' requester, or a ''representative of the news media'' for the purposes of the fee provisions of the FOIA.

(e) *Describing the records you request.* You must describe the records that you seek in enough detail to enable FHFA to search for and locate the records with a reasonable amount of effort. Your request must include as much specific information as possible that you know about each record in your request, such as the date, title, name, author, recipient, subject matter, file designations, or the description of the record.

(f) *How you want the records produced to you.* Your request may state in what form or format you want FHFA to furnish the releasable records, *e.g.*, hardcopy, or electronic.

(g) *Agreement to pay fees.* In your FOIA request you must acknowledge

that you are aware of the applicable fees charged under § 1202.11, and specify an amount, if any, you are willing to pay without consultation. Your inability to pay a fee does not justify granting a fee waiver. The fact that FHFA withholds all responsive documents or does not locate any documents responsive to your request, does not mean that you are not responsible for paying applicable fees. Your FOIA request will not be considered received by FHFA until your acknowledgement of the applicable fees, in writing, is received. FHFA will notify a requester of any fees above $25.00.

(h) *Valid requests.* FHFA will only process valid requests. A valid request must meet all the requirements of this part.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5683, Feb. 9, 2018]

§ 1202.6 What if my request does not have all the information FHFA requires?

If FHFA determines that your request does not reasonably describe the records you seek, cannot be processed for reasons related to fees, or lacks required information, you will be informed in writing why your request cannot be processed. You will be given 15 calendar days to meet all requirements. If you are notified that your request cannot be processed for the reasons cited herein, your request will be placed on hold and will not be considered as being received by FHFA for the purpose of processing your request under this part.

(a) If you respond with all the necessary information, FHFA will process this response as a new request and the time period for FHFA to respond to your request will start from the date the additional information is actually received by FHFA.

(b) If you do not respond or provide additional information within the time period allowed, or if the additional information you provide is still incomplete or insufficient, FHFA will consider your request closed and will notify you that it will not be processed.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5683, Feb. 9, 2018]

§ 1202.7 How will FHFA respond to my FOIA request?

(a) *Authority to grant or deny requests.* The FOIA Officer, FOIA Official, and the Chief FOIA Officer are authorized to grant or deny any request for FHFA records.

(b) *Designated standard ''cut-off'' date for searches.* In determining which records are responsive to a request, FHFA will include only records in its possession as of the date the FOIA request is received.

(c) *Multi-Track request processing.* FHFA uses a multi-track system to process FOIA requests. This means that a FOIA request is processed based on its complexity. When FHFA receives your request, it is assigned to a Standard Track or Complex Track. FHFA will notify you if your request is assigned to the Complex Track as described in paragraph (h) of this section.

(1) *Standard Track.* FHFA assigns FOIA requests that are routine and require little or no search time, review, or analysis to the Standard Track. FHFA responds to these requests in the order in which they are received and normally responds within 20 days after receipt. If FHFA determines while processing your Standard Track request, that it is more appropriately a Complex Track request, it will be reassigned to the Complex Track and you will be notified as described in paragraph (h) of this section.

(2) *Complex Track.* (i) FHFA assigns requests that are non-routine to the Complex Track. Complex Track requests are those to which FHFA determines that the request and/or response may—

(A) Be voluminous;

(B) Involve two or more FHFA components or units;

(C) Require consultation with other agencies or entities;

(D) Require searches of archived documents;

(E) Seek confidential commercial information as described in § 1202.8 of this part;

(F) Require an unusually high level of effort to search for, review and/or duplicate records; or

(G) Cause undue disruption to the day-to-day activities of FHFA in regulating and supervising the regulated

entities or in carrying out its statutory responsibilities.

(ii) FHFA will respond to Complex Track requests as soon as reasonably possible, regardless of the date of receipt.

(d) *Referrals to other agencies.* If you submit a FOIA request that seeks records originating in another Federal Government agency, FHFA will refer those records, as applicable, to the other agency for a direct response. FHFA will provide you notice of the referral, what records were referred, and the name of the other agency and relevant contact information.

(e) *Consultation with other agencies.* When records originate with FHFA, but contain within them information of interest to another agency, FHFA will consult with the other agency(ies) prior to making a determination on your request.

(f) *Responses to FOIA requests.* FHFA will respond to your request by granting or denying it in full, or by granting and denying it in part. The response will be in writing. In determining which records are responsive to your request, FHFA will conduct a search for records in its possession as of the date of your request.

(1) *Requests that are granted.* If FHFA grants your request, the response will include the requested records or details about how FHFA will provide them to you and the amount of any fees charged.

(2) *Requests that are denied, or granted and denied in part.* If FHFA denies your request in whole or in part because a requested record does not exist or cannot be located, is not readily reproducible in the form or format you sought, is not subject to the FOIA, or is exempt from disclosure, the written response will include the requested releasable records, if any, the amount of any fees charged, the reasons for denial, and a notice and description of your right to file an administrative appeal under §1202.9. FHFA will not provide you with a Vaughn index during the administrative stage of processing your request.

(g) *Format and delivery of disclosed records.* If FHFA grants, in whole or in part, your request for disclosure of records under the FOIA, the records may be made available to you in the form or format you requested, if they are readily reproducible in that form or format. The records will be sent to the address you provided by regular U.S. mail or by electronic mail unless alternate arrangements are made by mutual agreement, such as your agreement to pay express or expedited delivery service fees, or to pick up records at FHFA offices.

(h) *Extensions of time.* (1) In unusual circumstances, FHFA may extend the statutory time limit in paragraph (c)(1) of this section for no more than 10 days and notify you of—

(i) The reason for the extension; and

(ii) The date on which the determination is expected.

(2) When a request requires more than 30 days to process, FHFA will make available its FOIA Public Liaison or other FOIA contact to assist you in modifying or reformulating your request. If the request cannot be modified or reformulated, FHFA will notify you regarding an alternative time period for processing the request. FHFA will also notify you of the availability of the Office of Government Information Services to provide dispute resolution service.

(3) For the purpose of satisfying unusual circumstances under the FOIA, FHFA may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. FHFA will not aggregate multiple requests that involve unrelated matters.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5683, Feb. 9, 2018]

§1202.8 If the requested records contain confidential commercial information, what procedures will FHFA follow?

(a) *General.* FHFA will not disclose confidential commercial information in response to your FOIA request except as described in this section.

(b) *Designation of confidential commercial information.* Submitters of commercial information must use good-faith efforts to designate, by appropriate markings or written request, either at

the time of submission or at a reasonable time thereafter, those portions of the information they deem to be protected under 5 U.S.C. 552(b)(4) and §1202.4(a)(4) of this part. Any such designation will expire 10 years after the records are submitted to the Federal Government, unless the submitter requests, and provides reasonable justification for a designation period of longer duration.

(c) *Pre-Disclosure Notification.* Except as provided in paragraph (e) of this section, if your FOIA request encompasses confidential commercial information, FHFA will, prior to disclosure of the information and to the extent permitted by law, provide prompt written notice to a submitter that confidential commercial information was requested when—

(1) The submitter has in good faith designated the information as confidential commercial information protected from disclosure under 5 U.S.C. 552(b)(4) and §1202.4(a)(4) of this part; or

(2) FHFA has reason to believe that the request seeks confidential commercial information, the disclosure of which may result in substantial competitive harm to the submitter.

(d) *Content of Pre-Disclosure Notification.* When FHFA sends a Pre-Disclosure Notification to a submitter, it will contain—

(1) A description of the commercial information requested or copies of the records or portions thereof containing the business information; and

(2) An opportunity to object to disclosure within 10 days or such other time period that FHFA may allow by providing to FHFA a detailed written statement demonstrating all reasons the submitter opposes disclosure.

(e) *Exceptions to Pre-Disclosure Notification.* FHFA is not required to send a Pre-Disclosure Notification if—

(1) FHFA determines that information should not be disclosed;

(2) The information has been published lawfully or has been made officially available to the public;

(3) Disclosure of the information is required by law, other than the FOIA;

(4) The information requested is not designated by the submitter as confidential commercial information pursuant to this section, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(5) The submitter's designation, under paragraph (b) of this section, appears on its face to be frivolous; except that FHFA will provide the submitter with written notice of any final decision to disclose the designated confidential commercial information within a reasonable number of days prior to a specified disclosure date.

(f) *Submitter's objection to disclosure.* A submitter may object to disclosure within 10 days after the date of the Pre-Disclosure Notification, or such other time period that FHFA may allow, by delivering to FHFA a written statement demonstrating all grounds on which it opposes disclosure, and all reasons supporting its contention that the information should not be disclosed. The submitter's objection must contain a certification by the submitter, or an officer or authorized representative of the submitter, that the grounds and reasons presented are true and correct to the best of the submitter's knowledge. The submitter's objection may itself be subject to disclosure under the FOIA.

(g) *Notice of Intent to disclose information.* FHFA will carefully consider all grounds and reasons provided by a submitter objecting to disclosure. If FHFA decides to disclose the information over the submitter's objection, the submitter will be provided with a written Notice of Intent to disclose at least 10 days before the date of disclosure. The written Notice of Intent will contain—

(1) A statement of the reasons why the information will be disclosed;

(2) A description of the information to be disclosed; and

(3) A specific disclosure date.

(h) *Notice to requester.* FHFA will give a requester whose request encompasses confidential commercial information—

(1) A written notice that the request encompasses confidential commercial information that may be exempt from disclosure under 5 U.S.C. 552(b)(4) and §1202.4(a)(4) of this part and that the submitter of the information has been given a Pre-Disclosure Notification with the opportunity to comment on the proposed disclosure of the information; and

(2) A written notice that a Notice of Intent to disclose has been provided to the submitter, and that the submitter has 10 days, or such other time period that FHFA may allow, to respond.

(i) *Notice of FOIA lawsuit.* FHFA will promptly notify the submitter whenever a requester files suit seeking to compel disclosure of the submitter's confidential commercial information. FHFA will promptly notify the requester whenever a submitter files suit seeking to prevent disclosure of information.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5684, Feb. 9, 2018]

§ 1202.9 How do I appeal a response denying my FOIA request?

(a) *Right of appeal.* If FHFA denied your request in whole or in part, you may appeal the denial by writing directly to the appropriate FHFA component specified in the Appendices to this part.

(b) *Timing, form, content, and receipt of an appeal.* Your written appeal must be postmarked or submitted within 90 calendar days of the date of the decision by FHFA denying, in whole or in part, your request. Your appeal must include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments you believe support disclosure of the requested record(s). FHFA will not consider an improperly addressed appeal to have been received for the purposes of the 20-day time period of paragraph (d) of this section until it is actually received by the correct FHFA component.

(c) *Extensions of time to appeal.* If you need more time to file your appeal, you may request, in writing, an extension of time of no more than 10 calendar days in which to file your appeal, but only if your request is made within the original 90-calendar day time period for filing the appeal. Granting such an extension is in the sole discretion of the designated component Appeals Officer.

(d) *Final action on appeal.* FHFA's determination on your appeal will be in writing, signed by the designated component Appeals Officer, and sent to you within 20 days after the appeal is received, or by the last day of the last extension under paragraph (e) of this section. The determination of an appeal is the final action of FHFA on a FOIA request. A determination may—

(1) Affirm, in whole or in part, the initial denial of the request and may include a brief statement of the reason or reasons for the decision, including each FOIA exemption relied upon;

(2) Reverse, in whole or in part, the denial of a request in whole or in part, and require the request to be processed promptly in accordance with the decision; or

(3) Remand a request to FHFA, as appropriate, for re-processing.

(e) *Notice of delayed determinations on appeal.* If FHFA cannot send a final determination on your appeal within the 20-day time limit, the designated component Appeals Officer will continue to process the appeal and upon expiration of the time limit, will inform you of the reason(s) for the delay and the date on which a determination may be expected.

(f) *Judicial review.* If the denial of your request for records is upheld in whole or in part, or if a determination on your appeal has not been sent at the end of the 20-day period in paragraph (d) of this section, or the last extension thereof, you may seek judicial review under 5 U.S.C. 552(a)(4). Before seeking review by a court of FHFA's adverse determination, a requester generally must first submit a timely administrative appeal.

(g) *Additional resource.* To aid the requester, the FOIA Public Liaison is available and will assist in the resolution of any disputes. Also, the National Archives and Records Administration (NARA), Office of Government Information Services (OGIS) offers non-compulsory, non-binding services to resolve FOIA disputes. If you need information regarding the OGIS and/or the services it offers, please contact OGIS directly at Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740–6001; email: *ogis@nara.gov;* phone: (202) 741–5770; toll-free: 1 (877) 684–6448;

or facsimile at (202) 741–5769. This information is provided as a public service only.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5684, Feb. 9, 2018]

§ 1202.10 Will FHFA expedite my request or appeal?

(a) *Request for expedited processing.* You may request, in writing, expedited processing of an initial request or of an appeal. FHFA may grant expedited processing, and give your request or appeal priority if your request for expedited processing demonstrates a compelling need by establishing one or more of the following—

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) An urgency to inform the public about an actual or alleged Federal Government activity if you are a person primarily engaged in disseminating information;

(3) The loss of substantial due process or rights;

(4) A matter of widespread and exceptional media interest in which there exists possible questions about the Federal Government's integrity, affecting public confidence; or

(5) Humanitarian need.

(b) *Certification of compelling need.* Your request for expedited processing must include a statement certifying that the reason(s) you present demonstrate a compelling need are true and correct to the best of your knowledge.

(c) *Determination on request.* FHFA will notify you within 10 calendar days of receipt of your request whether expedited processing has been granted. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision under §1202.9 of this part will be acted on expeditiously.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5684, Feb. 9, 2018]

§ 1202.11 What will it cost to get the records I requested?

(a) *Assessment of fees, generally.* FHFA will assess you for fees covering the direct costs of responding to your request and costs for duplicating records, except as otherwise provided in a statute with respect to the determination of fees that may be assessed for disclosure, search time, or review of particular records.

(b) *Assessment of fees, categories of requesters.* The fees that FHFA may assess vary depending on the type of request or the type of requester you are—

(1) *Commercial use.* If you request records for a commercial use, the fees that FHFA may assess are limited to FHFA's operating costs incurred for document search, review, and duplication.

(2) *Educational institution, noncommercial scientific institution, or representative of the news media.* If you are not requesting records for commercial use and you are an educational institution or a noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the fees that may be assessed are limited to standard reasonable charges for duplication in excess of 100 pages or an electronic equivalent of 100 pages.

(3) *Other.* If neither paragraph (b)(1) nor paragraph (b)(2) of this section applies, the fees assessed are limited to the costs for document searching in excess of two hours and duplication in excess of 100 pages, or an electronic equivalent of 100 pages.

(c) *Fee schedule.* FHFA will charge fees for processing requests under the FOIA in accordance with the provisions of this section and OMB guidelines (basic pay plus 16 percent). There are three different groups of grades typically involved in processing FOIA requests: Personnel in grades EL–6 to EL–9; personnel in grades EL–10 to EL–13; and personnel EL–14 and above. FHFA's Web site, *www.fhfa.gov*, will contain current rates for search and review fees for each group. The rates will be updated as salaries change and will be determined by using the formula in this regulation. The formula is the sum of the mid-point of each grade divided

by the number of grades in each category divided by 2088 and then multiplied by 1.16.[1] Fees for searches of computerized records are based on the actual cost to FHFA. For requests that require the retrieval of records stored by FHFA at a Federal records center operated by the National Archives and Records Administration, FHFA will charge additional costs in accordance with the Transaction Billing Rate Schedule established by NARA.

(d) *Notice of anticipated fees in excess of $25.00.* When FHFA determines or estimates that the fees chargeable to you will exceed $25.00, you will be notified of the actual or estimated amount of fees you will incur, unless you earlier indicated your willingness to pay fees as high as those anticipated. When you are notified that the actual or estimated fees exceed $25.00, your request will be tolled until you agree to pay, in writing, the anticipated total fee.

(e) *Advance payment of fees.* FHFA may request that you pay estimated fees or a deposit in advance of responding to your request. If FHFA requests advance payment or a deposit, your request will be tolled by FHFA until the advance payment or deposit is received. FHFA may request advance payment or a deposit if—

(1) The fees are likely to exceed $250.00;

(2) You do not have a history of payment;

(3) You previously failed to pay a FOIA fee to FHFA in a timely fashion, *i.e.,* within 30 calendar days of the date of a billing; or

(4) You have an outstanding balance due from a prior request. FHFA will require you to pay the full amount owed plus any applicable interest, as provided in paragraph (f) of this section, or demonstrate that the fee owed has been paid, as well as payment of the full amount of anticipated fees before processing your request.

(f) *Interest.* FHFA may charge you interest on an unpaid bill starting on the 31st calendar day following the day on which the bill was sent. Once a fee payment has been received by FHFA, even if not processed, FHFA will stay the accrual of interest. Interest charges will be assessed at the rate prescribed by 31 U.S.C. 3717 and will accrue from the date of the billing.

(g) *FHFA assistance to reduce costs.* If FHFA notifies you of estimated fees exceeding $100.00 or requests advance payment or a deposit, you will have an opportunity to consult with FHFA FOIA staff to modify or reformulate your request to meet your needs at a lower cost.

(h) *Fee waiver requests.* You may request a fee waiver in accordance with the FOIA and this regulation. Requests for a waiver of fees must be made in writing and should be made at the time you submit your FOIA request. However, your fee waiver may be submitted at a later time so long as the underlying record request is pending or on administrative appeal. FHFA may grant your fee waiver request or a reduction of fees if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in your commercial interest. In submitting a fee waiver request, you must address the following six factors—

(1) Whether the subject of the requested records concerns the operations or activities of the Federal Government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated;

(2) Whether the disclosure is likely to contribute significantly to the public understanding of Federal Government operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested information must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding; and

[1] Example of the rate formula is as follows: For 2016, EL–6 to EL–9 is [($55,769 + $63,554 + $71,816 + $81,152)/4][1/2088 hours per year][1.16 OMB markup factor] = $37.82 per hour.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding. Your expertise in the subject area as well as your ability and intention to effectively convey information to the public must be considered. FHFA will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in your commercial interest. To determine whether disclosure of the requested information is primarily in your commercial interest FHFA will consider the following criteria:

(i) FHFA will determine whether you have any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. You will be given an opportunity to provide explanatory information regarding this consideration; and

(ii) If there is an identified commercial interest, FHFA will determine whether that is the primary interest furthered by the request.

(i) *Fee Waiver determination.* FHFA will notify you within 20 days of receipt of your request whether the fee waiver has been granted. Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records. For those records that do not satisfy the requirements for a waiver of fees, you may be charged for those records. When you have committed to pay fees and subsequently ask for a waiver of those fees and that waiver is denied, you must pay any costs incurred up to the date the fee waiver request was received. A request for fee waiver that is denied may only be appealed when a final decision has been made on the initial FOIA request.

(j) *Restrictions on charging fees.* (1) When FHFA determines that you are an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, FHFA will not charge search fees.

(2)(i) If FHFA fails to comply with the FOIA's time limits in which to respond to your request, FHFA will not charge search fees, or, in the instances of requests from requesters described in paragraph (j)(1) of this section, will not charge duplication fees, except as described in paragraphs (j)(2)(ii) through (iv) of this section.

(ii) If FHFA has determined that unusual circumstances as defined by the FOIA apply and FHFA has provided timely written notice to you in accordance with the FOIA, FHFA's failure to comply with the time limit will be excused for an additional 10 days.

(iii) If FHFA determines that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to your request, FHFA may charge search fees, or, in the case of a requester described in paragraph (j)(1) of this section, may charge duplication fees, if the following steps are taken. FHFA must have provided timely written notice of unusual circumstances to you in accordance with the FOIA and FHFA must have discussed with you via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how you could effectively limit the scope of your request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, FHFA may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) If you seek records for a commercial use, FHFA will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.00.

(k) *Additional resource.* The FOIA Public Liaison or other FOIA contact is available to assist you in modifying or reformulating a request to meet

your needs at a lower cost. FHFA will also notify you of the availability of OGIS to provide dispute resolution service.

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5684, Feb. 9, 2018]

§ 1202.12 Is there anything else I need to know about FOIA procedures?

This FOIA regulation does not and shall not be construed to create any right or to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA. This regulation only provides procedures for requesting records under the FOIA.

APPENDIX A TO PART 1202—FHFA HEADQUARTERS

1. This Appendix applies to the Federal Housing Finance Agency's Headquarters Office.

2. *Reading room.* FHFA Headquarters only maintains an electronic reading room. The electronic reading room is located on FHFA's public website at *http://www.fhfa.gov/AboutUs/FOIAPrivacy/Pages/Reading-Room.aspx*.

3. *Where to send your request.* You may make a request for FHFA Headquarters records by writing directly to the FOIA Office through electronic mail, U.S. mail, delivery service, or facsimile. The electronic mail address is: *foia@fhfa.gov*. For U.S. mail or delivery service, the mailing address is: FOIA Officer, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219. The facsimile number is: (202) 649–1073. When submitting your request, please mark electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''FOIA Request.'' FHFA's ''Freedom of Information Act Reference Guide,'' which is available on FHFA's Web site, provides additional information to assist you in making your request. You can find additional information on FHFA's FOIA program at *http://www.fhfa.gov/AboutUs/FOIAPrivacy/Pages/FOIA-Reference-Guide.aspx*.

4. *Right of appeal.* If FHFA Headquarters denied your request in whole or in part, you may appeal the denial by writing directly to the FOIA Appeals Officer through electronic mail, U.S. mail, delivery service, or facsimile. The electronic mail address is: *foia@fhfa.gov*. For U.S. mail or delivery service, the mailing address is: FOIA Appeals Officer, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219. The facsimile number is: (202) 649–1073. When submitting your appeal, please mark electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''FOIA Appeal.'' FHFA's ''Freedom of Information Act Reference Guide,'' which is available on FHFA's Web site, provides additional information to assist you in making your appeal. You can find additional information on FHFA's FOIA program at *http://www.fhfa.gov/AboutUs/FOIAPrivacy/Pages/FOIA-Reference-Guide.aspx*

[82 FR 13745, Mar. 15, 2017, as amended at 83 FR 5685, Feb. 9, 2018]

APPENDIX B TO PART 1202—FHFA OFFICE OF INSPECTOR GENERAL

This Appendix applies to the Federal Housing Finance Agency's Office of Inspector General (FHFA–OIG).

1. *Contact information for FOIA Officer.* You may contact the FOIA Officer at (202) 730–0399 or by email at *FOIA@fhfaoig.gov*. Hearing impaired users may utilize the Federal Relay Service (external link) by dialing 1(800) 877–8339. A Communications Assistant will dial the requested number and relay the conversation between a standard (voice) telephone user and text telephone (TTY).

2. *Information about the FHFA–OIG FOIA process.* You may find information about the FHFA–OIG FOIA process at *https://www.fhfaoig.gov/FOIA*.

3. *Reading room.* FHFA–OIG maintains an electronic reading room. The electronic reading room is located at *https://www.fhfaoig.gov/FOIA/ReadingRoom*.

4. *Where to send your request.* You may make a request for FHFA–OIG records by writing directly to the FOIA Office through electronic mail, U.S. mail, delivery service, or facsimile. The electronic mail address is: *FOIA@fhfaoig.gov*. For U.S. mail or delivery service, the mailing address is: Federal Housing Finance Agency Office of Inspector General, 400 Seventh Street SW., Third Floor, Washington, DC 20219, ATTN: Office of Inspector General—FOIA Officer. The facsimile number is: (202) 318–8602. When submitting your request, please mark electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''FOIA Request.''

5. *Right of appeal.* If FHFA–OIG denies your request in whole or in part, you may appeal the denial by writing directly to the FOIA Officer through electronic mail, U.S. mail, delivery service, or facsimile. The electronic mail address is: *FOIA@fhfaoig.gov*. For U.S. mail or delivery service, the mailing address is: Federal Housing Finance Agency, Office of Inspector General, 400 Seventh Street SW., Third Floor, Washington, DC 20219, ATTN: Office of Inspector General—FOIA Officer. The facsimile number is: (202) 318–8602. When

submitting your appeal, please mark electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''FOIA Appeal.''

PART 1203—EQUAL ACCESS TO JUSTICE ACT

Subpart A—General Provisions

Subpart B—Information Required From Applicants

Subpart C—Procedures for Filing and Consideration of the Application for Award

AUTHORITY: 12 U.S.C. 4526, 5 U.S.C. 504.

SOURCE: 75 FR 65219, Oct. 22, 2010, unless otherwise noted..

Subpart A—General Provisions

§ 1203.1 Purpose and scope.

(a) This part implements the Equal Access to Justice Act, 5 U.S.C. 504, by establishing procedures for the filing and consideration of applications for awards of fees and other expenses to eligible individuals and entities who are parties to adversary adjudications before FHFA.

(b) This part applies to the award of fees and other expenses in connection with adversary adjudications before FHFA. However, if a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to 28 U.S.C. 2412(d)(3).

§ 1203.2 Definitions.

As used in this part:

Adjudicative officer means the official who presided at the underlying adversary adjudication, without regard to whether the official is designated as a hearing examiner, administrative law judge, administrative judge, or otherwise.

Adversary adjudication means an administrative proceeding conducted by FHFA under 5 U.S.C. 554 in which the position of FHFA or any other agency of the United States is represented by counsel or otherwise, including but not limited to an adjudication conducted under the Safety and Soundness Act, as amended, and any implementing regulations. Any issue as to whether an administrative proceeding is an adversary adjudication for purposes of this part will be an issue for resolution in the proceeding on the application for award.

Affiliate means an individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the party, or any corporation or other entity of which the party directly or indirectly owns or controls a majority of the voting shares or other interest, unless the adjudicative officer determines that it would be unjust and contrary to the purpose of the Equal Access to Justice Act in light of the actual relationship between the affiliated entities to consider them to be affiliates for purposes of this part.

Agency counsel means the attorney or attorneys designated by the General Counsel of FHFA to represent FHFA in an adversary adjudication covered by this part.

Demand of FHFA means the express demand of FHFA that led to the adversary adjudication, but does not include a recitation by FHFA of the maximum statutory penalty when accompanied

by an express demand for a lesser amount.

Director means the Director of the Federal Housing Finance Agency.

Fees and other expenses means reasonable attorney or agent fees, the reasonable expenses of expert witnesses, and the reasonable cost of any study, analysis, engineering report, or test, which the agency finds necessary for the preparation of the eligible party's case.

FHFA means the Federal Housing Finance Agency.

Final disposition date means the date on which a decision or order disposing of the merits of the adversary adjudication or any other complete resolution of the adversary adjudication, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

Party means an individual, partnership, corporation, association, or public or private organization that is named or admitted as a party, that is admitted as a party for limited purposes, or that is properly seeking and entitled as of right to be admitted as a party in an adversary adjudication.

Position of FHFA means the position taken by FHFA in the adversary adjudication, including the action or failure to act by FHFA upon which the adversary adjudication was based.

§ 1203.3 Eligible parties.

(a) To be eligible for an award of fees and other expenses under the Equal Access to Justice Act, the applicant must show that it meets all conditions of eligibility set out in this paragraph and has complied with all the requirements in subpart B of this part. The applicant must also be a party to the adversary adjudication for which it seeks an award.

(b) To be eligible for an award of fees and other expenses for prevailing parties, a party must be one of the following:

(1) An individual who has a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interest, and not more than 500 employees; however, a party who owns an unincorporated business will be considered to be an ''individual'' rather than the ''sole owner of an unincorporated business'' if the issues on which the party prevails are related primarily to personal interests rather than to business interests;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization that has a net worth of not more than $7 million and not more than 500 employees; or

(6) For the purposes of an application filed pursuant to 5 U.S.C. 504(a)(4), a small entity as defined in 5 U.S.C. 601.

(c) For purposes of eligibility under this section:

(1) The employees of a party must include all persons who regularly perform services for remuneration for the party, under the party's direction and control. Part-time employees must be included on a proportional basis.

(2) The net worth and number of employees of the party and its affiliates must be aggregated to determine eligibility.

(3) The net worth and number of employees of a party will be determined as of the date the underlying adversary adjudication was initiated.

(4) A party that participates in an adversary adjudication primarily on behalf of one or more entities that would be ineligible for an award is not itself eligible for an award.

§ 1203.4 Standards for awards.

(a) An eligible party that files an application for award of fees and other expenses in accordance with this part will receive an award of fees and other expenses related to defending against a demand of FHFA if the demand was in excess of the decision in the underlying adversary adjudication and was unreasonable when compared with the decision under the facts and circumstances

of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or unless special circumstances make an award unjust. The burden of proof that the demand of FHFA was substantially in excess of the decision and is unreasonable when compared with the decision is on the eligible party.

(b) An eligible party that submits an application for award in accordance with this part will receive an award of fees and other expenses incurred in connection with an adversary adjudication in which it prevailed or in a significant and discrete substantive portion of the adversary adjudication in which it prevailed, unless the position of FHFA in the adversary adjudication was substantially justified or special circumstances make an award unjust. FHFA has the burden of proof to show that its position was substantially justified and may do so by showing that its position was reasonable in law and in fact.

§ 1203.5 Allowable fees and expenses.

(a) Awards of fees and other expenses will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the party. However, except as provided in §1203.6, an award for the fee of an attorney or agent may not exceed $125 per hour and an award to compensate an expert witness may not exceed the highest rate at which FHFA pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or expert witness as a separate item if he or she ordinarily charges clients separately for such expenses.

(b) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer will consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fees for similar services; or, if the attorney, agent, or expert witness is an employee of the eligible party, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the eligible party;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication; and

(5) Such other factors as may bear on the value of the services provided.

(c) In determining the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party, the adjudicative officer will consider the prevailing rate for similar services in the community in which the services were performed.

(d) Fees and other expenses incurred before the date on which an adversary adjudication was initiated will be awarded only if the eligible party can demonstrate that they were reasonably incurred in preparation for the adversary adjudication.

§ 1203.6 Rulemaking on maximum rate for fees.

If warranted by an increase in the cost of living or by special circumstances, FHFA may adopt regulations providing for an award of attorney or agent fees at a rate higher than $125 per hour in adversary adjudications covered by this part. Special circumstances include the limited availability of attorneys or agents who are qualified to handle certain types of adversary adjudications. FHFA will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

§ 1203.7 Awards against other agencies.

If another agency of the United States participates in an adversary adjudication before FHFA and takes a position that was not substantially justified, the award or appropriate portion of the award to an eligible party that prevailed over that agency will be made against that agency.

§§ 1203.8–1203.9 [Reserved]

Subpart B—Information Required From Applicants

§ 1203.10 Contents of the application for award.

(a) An application for award of fees and other expenses under either § 1203.4(a) and § 1203.4(b) must:

(1) Identify the applicant and the adversary adjudication for which an award is sought;

(2) State the amount of fees and other expenses for which an award is sought;

(3) Provide the statements and documentation required by paragraph (b) or (c) of this section and § 1203.12 and any additional information required by the adjudicative officer; and

(4) Be signed by the applicant or an authorized officer or attorney of the applicant and contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) An application for award under § 1203.4(a) must show that the demand of FHFA was substantially in excess of, and was unreasonable when compared to, the decision in the underlying adversary adjudication under the facts and circumstances of the case. It must also show that the applicant is a small entity as defined in 5 U.S.C. 601.

(c) An application for award under § 1203.4(b) must:

(1) Show that the applicant has prevailed in a significant and discrete substantive portion of the underlying adversary adjudication and identify the position of FHFA in the adversary adjudication that the applicant alleges was not substantially justified;

(2) State the number of employees of the applicant and describe briefly the type and purposes of its organization or business (if the applicant is not an individual);

(3) State that the net worth of the applicant does not exceed $2 million, if the applicant is an individual; or for all other applicants, state that the net worth of the applicant and its affiliates, if any, does not exceed $7 million; and

(4) Include one of the following:

(i) A detailed exhibit showing the net worth (net worth exhibit) of the applicant and its affiliates, if any, when the underlying adversary adjudication was initiated. The net worth exhibit may be in any form convenient to the applicant as long as the net worth exhibit provides full disclosure of the assets and liabilities of the applicant and its affiliates, if any, and is sufficient to determine whether the applicant qualifies as an eligible party;

(ii) A copy of a ruling by the Internal Revenue Service that shows that the applicant qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3); or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the belief that the applicant qualifies under such section; or

(iii) A statement that the applicant is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a).

§ 1203.11 Confidentiality of net worth exhibit.

Unless otherwise ordered by the Director, or required by law, the statement of net worth will be for the confidential use of the adjudicative officer, the Director, and agency counsel.

§ 1203.12 Documentation for fees and expenses.

(a) The application for award must be accompanied by full and itemized documentation of the fees and other expenses for which an award is sought. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other documentation for any fees or expenses claimed.

(b) A separate itemized statement must be submitted for each entity or individual whose services are covered by the application. Each itemized statement must include:

(1) The hours spent by each entity or individual;

(2) A description of the specific services performed and the rates at which each fee has been computed; and

(3) Any expenses for which reimbursement is sought, the total amount

claimed, and the total amount paid or payable by the applicant or by any other person or entity.

§§ 1203.13–1203.19 [Reserved]

Subpart C—Procedures for Filing and Consideration of the Application for Award

§ 1203.20 Filing and service of the application for award and related papers.

(a) An application for an award of fees and other expenses must be filed no later than 30 days after the final disposition of the underlying adversary adjudication.

(b) An application for award and other papers related to the proceedings on the application for award must be filed and served on all parties in the same manner as papers are filed and served in the underlying adversary adjudication, except as otherwise provided in this part.

(c) The computation of time for filing and service of the application of award and other papers must be computed in the same manner as in the underlying adversary adjudication.

§ 1203.21 Response to the application for award.

(a) Agency counsel must file a response within 30 days after service of an application for award of fees and other expenses except as provided in paragraphs (b) and (c) of this section. In the response, agency counsel must explain any objections to the award requested and identify the facts relied upon to support the objections. If any of the alleged facts are not already in the record of the underlying adversary adjudication, agency counsel must include with the response either supporting affidavits or a request for further proceedings under § 1203.25.

(b) If agency counsel and the applicant believe that the issues in the application for award can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement will extend the time for filing a response for an additional 30 days. Upon request by agency counsel and the applicant, the adjudicative officer may grant for good cause further time extensions.

(c) Agency counsel may request that the adjudicative officer extend the time period for filing a response. If agency counsel does not respond or otherwise does not contest or settle the application for award within the 30-day period or the extended time period, the adjudicative officer may make an award of fees and other expenses upon a satisfactory showing of entitlement by the applicant.

§ 1203.22 Reply to the response.

Within 15 days after service of a response, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the underlying adversary adjudication, the applicant must include with the reply either supporting affidavits or a request for further proceedings under § 1203.25.

§ 1203.23 Comments by other parties.

Any party to the underlying adversary adjudication other than the applicant and agency counsel may file comments on an application for award within 30 calendar days after it is served, or on a response within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1203.24 Settlement.

The applicant and agency counsel may agree on a proposed settlement of an award before the final decision on the application for award is made, either in connection with a settlement of the underlying adversary adjudication or after the underlying adversary adjudication has been concluded. If the eligible party and agency counsel agree on a proposed settlement of an award before an application for award has been filed, the application must be filed with the proposed settlement.

§ 1203.25 Further proceedings on the application for award.

(a) On request of either the applicant or agency counsel, on the adjudicative officer's own initiative, or as requested by the Director under § 1203.27, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidential hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application for award and will be conducted as promptly as possible. The issue as to whether the position of FHFA in the underlying adversary adjudication was substantially justified will be determined on the basis of the whole administrative record that was made in the underlying adversary adjudication.

(b) A request that the adjudicative officer order further proceedings under this section must specifically identify the information sought on the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

§ 1203.26 Decision of the adjudicative officer.

(a) The adjudicative officer must make the initial decision on the basis of the written record, except if further proceedings are ordered under § 1203.25.

(b) The adjudicative officer must issue a written initial decision on the application for award within 30 days after completion of proceedings on the application. The initial decision will become the final decision of FHFA after 30 days from the day it was issued, unless review is ordered under § 1203.27.

(c) In all initial decisions, the adjudicative officer must include findings and conclusions with respect to the applicant's eligibility and an explanation of the reasons for any difference between the amount requested by the applicant and the amount awarded. If the applicant has sought an award against more than one agency, the adjudicative officer must also include findings and conclusions with respect to the allocation of payment of any award made.

(d) In initial decisions on applications filed pursuant to § 1203.4(a), the adjudicative officer must include findings and conclusions as to whether FHFA made a demand that was substantially in excess of the decision in the underlying adversary adjudication and that was unreasonable when compared with that decision; and, if at issue, whether the applicant has committed a willful violation of the law or otherwise acted in bad faith, or whether special circumstances would make the award unjust.

(e) In decisions on applications filed pursuant to § 1203.4(b), the adjudicative officer must include written findings and conclusions as to whether the applicant is a prevailing party and whether the position of FHFA was substantially justified; and, if at issue, whether the applicant unduly protracted or delayed the underlying adversary adjudication or whether special circumstance make the award unjust.

§ 1203.27 Review by FHFA.

Within 30 days after the adjudicative officer issues an initial decision under § 1203.26, either the applicant or agency counsel may request the Director to review the initial decision of the adjudicative officer. The Director may also decide, at his or her discretion, to review the initial decision. If review is ordered, the Director must issue a final decision on the application for award or remand the application for award to the adjudicative officer for further proceedings under § 1203.25.

§ 1203.28 Judicial review.

Any party, other than the United States, that is dissatisfied with the final decision on an application for award of fees and expenses under this part may seek judicial review as provided in 5 U.S.C. 504(c)(2).

§ 1203.29 Payment of award.

To receive payment of an award of fees and other expenses granted under this part, the applicant must submit a copy of the final decision that grants the award and a certification that the applicant will not seek review of the decision in the United States courts to

the Director, Federal Housing Finance Agency, 400 7th Street SW., Washington, DC 20219. FHFA must pay the amount awarded to the applicant within 60 days of receipt of the submission of the copy of the final decision and the certification, unless judicial review of the award has been sought by any party to the proceedings.

[75 FR 65219, Oct. 22, 2010, as amended at 80 FR 80233, Dec. 24, 2015]

PART 1204—PRIVACY ACT IMPLEMENTATION

Sec.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 76 FR 51871, Aug. 19, 2011, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 1204 appear at 77 FR 4646, Jan. 31, 2012.

§ 1204.1 Why did FHFA issue this part?

The Federal Housing Finance Agency (FHFA) issued this part to—

(a) Implement the Privacy Act, a Federal law that helps protect private information about individuals that Federal agencies collect or maintain. You should read this part together with the Privacy Act, which provides additional information about records maintained on individuals;

(b) Establish rules that apply to all FHFA and FHFA Office of Inspector General (FHFA–OIG) maintained systems of records retrievable by an individual's name or other personal identifier;

(c) Describe procedures through which you may request access to records, request amendment or correction of those records, or request an accounting of disclosures of those records by FHFA or FHFA–OIG;

(d) Inform you, that when it is appropriate to do so, FHFA or FHFA–OIG automatically processes a Privacy Act request for access to records under both the Privacy Act and FOIA, following the rules contained in this part and in FHFA's Freedom of Information Act regulation at part 1202 of this title so that you will receive the maximum amount of information available to you by law;

(e) Notify you that this part does not entitle you to any service or to the disclosure of any record to which you are not entitled under the Privacy Act. It also does not, and may not be relied upon, to create any substantive or procedural right or benefit enforceable against FHFA or FHFA–OIG; and

(f) Notify you that this part applies to both FHFA and FHFA–OIG.

§ 1204.2 What do the terms in this part mean?

The following definitions apply to the terms used in this part—

Access means making a record available to a subject individual.

Amendment means any correction of, addition to, or deletion from a record.

Court means any entity conducting a legal proceeding.

Days, unless stated as ''calendar days,'' are working days and do not include Saturdays, Sundays, and federal holidays. If the last day of any period prescribed herein falls on a Saturday, Sunday, or federal holiday, the last day of the period will be the next working day that is not a Saturday, Sunday, or federal holiday.

FHFA means the Federal Housing Finance Agency and includes its predecessor agencies, the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB).

FHFA–OIG means the Office of Inspector General for FHFA.

FOIA means the Freedom of Information Act, as amended (5 U.S.C. 552).

Individual means a natural person who is either a citizen of the United

States of America or an alien lawfully admitted for permanent residence.

Maintain includes collect, use, disseminate, or control.

Privacy Act means the Privacy Act of 1974, as amended (5 U.S.C. 552a).

Privacy Act Appeals Officer means a person designated by the FHFA Director to process appeals of denials of requests for or seeking amendment of records maintained by FHFA under the Privacy Act. For appeals pertaining to records maintained by FHFA–OIG, *Privacy Act Appeals Officer* means a person designated by the FHFA Inspector General to process appeals of denials of requests for or seeking amendment of records maintained by FHFA–OIG under the Privacy Act.

Privacy Act Officer means a person designated by the FHFA Director who has primary responsibility for privacy and data protection policy and is authorized to process requests for or amendment of records maintained by FHFA under the Privacy Act. For requests pertaining to records maintained by FHFA–OIG, *Privacy Act Officer* means a person designated by the FHFA Inspector General to process requests for or amendment of records maintained by FHFA–OIG under the Privacy Act.

Record means any item, collection, or grouping of information about an individual that FHFA or FHFA–OIG maintains within a system of records, including, but not limited to, the individual's name, an identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or photograph.

Routine use means the purposes for which records and information contained in a system of records may be disclosed by FHFA or FHFA–OIG without the consent of the subject of the record. Routine uses for records are identified in each system of records notice. Routine use does not include disclosure that subsection (b) of the Privacy Act (5 U.S.C. 552a(b)) otherwise permits.

Senior Agency Official for Privacy means a person designated by the FHFA Director who has the authority and responsibility to oversee and supervise the FHFA privacy program and implementation of the Privacy Act.

System of Records means a group of records FHFA or FHFA–OIG maintains or controls from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Single records or groups of records that are not retrieved by a personal identifier are not part of a system of records.

System of Records Notice means a notice published in the FEDERAL REGISTER which announces the creation, deletion, or amendment of one or more system of records. System of records notices are also used to identify a system of records' routine uses.

§ 1204.3 How do I make a Privacy Act request?

(a) *What is a valid request?* In general, a Privacy Act request can be made on your own behalf for records or information about you. You can make a Privacy Act request on behalf of another individual as the parent or guardian of a minor, or as the guardian of someone determined by a court to be incompetent. You also may request access to another individual's record or information if you have that individual's written consent, unless other conditions of disclosure apply.

(b) *How and where do I make a request?* Your request must be in writing. Regardless of whether your request seeks records from FHFA, FHFA–OIG, or both, you may appear in person to submit your written request to the FHFA Privacy Act Officer, or send your written request to the FHFA Privacy Act Officer by electronic mail, mail, delivery service, or facsimile. The electronic mail address is: *privacy@fhfa.gov*. For mail or delivery service, the address is: FHFA Privacy Act Officer, Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20219. The facsimile number is (202) 649–1073. Requests for FHFA–OIG maintained records will be forwarded to FHFA–OIG for processing and direct response. You can help FHFA and FHFA–OIG process your request by marking electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''Privacy Act Request.'' FHFA's ''Privacy Act Reference

Guide,'' which is available on FHFA's Web site, *http://www.fhfa.gov*, provides additional information to assist you in making your request.

(c) *What must the request include?* You must describe the record that you want in enough detail to enable either the FHFA or FHFA–OIG Privacy Act Officer to locate the system of records containing it with a reasonable amount of effort. Include specific information about each record sought, such as the time period in which you believe it was compiled, the name or identifying number of each system of records in which you believe it is kept, and the date, title or name, author, recipient, or subject matter of the record. As a general rule, the more specific you are about the record that you want, the more likely FHFA or FHFA–OIG will be able to locate it in response to your request.

(d) *How do I request amendment or correction of a record?* If you are requesting an amendment or correction of any FHFA or FHFA–OIG record, identify each particular record in question and the system of records in which the record is located, describe the amendment or correction that you want, and state why you believe that the record is not accurate, relevant, timely, or complete. You may submit any documentation that you think would be helpful, including an annotated copy of the record.

(e) *How do I request for an accounting of disclosures?* If you are requesting an accounting of disclosures by FHFA or FHFA–OIG of a record to another person, organization, or Federal agency, you must identify each particular record in question. An accounting generally includes the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or Federal agency to which the disclosure was made, subject to § 1204.7.

(f) *Must I verify my identity?* Yes. When making requests under the Privacy Act, your request must verify your identity to protect your privacy or the privacy of the individual on whose behalf you are acting. If you make a Privacy Act request and you do not follow these identity verification procedures, FHFA or FHFA–OIG cannot and will not process your request.

(1) *How do I verify my identity?* To verify your identity, you must state your full name, current address, and date and place of birth. In order to help identify and locate the records you request, you also may, at your option, include your Social Security number. If you make your request in person and your identity is not known to either the FHFA or FHFA–OIG Privacy Act Officer, you must provide either two forms of unexpired identification with photographs issued by a federal, state, or local government agency or entity (*i.e.* passport, passport card, driver's license, ID card, etc.), or one form of unexpired identification with a photograph issued by a federal, state, or local government agency or entity (*i.e.* passport, passport card, driver's license, ID card, etc.) and a properly authenticated birth certificate. If you make your request by mail, your signature either must be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. You may fulfill this requirement by having your signature on your request letter witnessed by a notary or by including the following statement just before the signature on your request letter: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on [date]. [Signature].''

(2) *How do I verify parentage or guardianship?* If you make a Privacy Act request as the parent or guardian of a minor, or as the guardian of someone determined by a court to be incompetent, with respect to records or information about that individual, you must establish—

(i) The identity of the individual who is the subject of the record, by stating the individual's name, current address, date and place of birth, and, at your option, the Social Security number of the individual;

(ii) Your own identity, as required in paragraph (f)(1) of this section;

(iii) That you are the parent or guardian of the individual, which you may prove by providing a properly authenticated copy of the individual's

birth certificate showing your parentage or a properly authenticated court order establishing your guardianship; and

(iv) That you are acting on behalf of the individual in making the request.

[76 FR 51871, Aug. 19, 2011, as amended at 77 FR 4646, Jan. 31, 2012; 80 FR 80233, Dec. 24, 2015]

§ 1204.4 How will FHFA or FHFA–OIG respond to my Privacy Act request?

(a) *How will FHFA or FHFA–OIG locate the requested records?* FHFA or FHFA–OIG will search to determine if requested records exist in the system of records it owns or controls. You can find FHFA and FHFA–OIG system of records notices on our Web site at *http://www.fhfa.gov*. You can also find descriptions of OFHEO and FHFB system of records that have not yet been superseded on the FHFA Web site. A description of the system of records also is available in the ''Privacy Act Issuances'' compilation published by the Office of the Federal Register of the National Archives and Records Administration. You can access the ''Privacy Act Issuances'' compilation in most large reference and university libraries or electronically at the Government Printing Office Web site at: *http://www.gpoaccess.gov/privacyact/index.html*. You also can request a copy of FHFA or FHFA–OIG system of records from the Privacy Act Officer.

(b) *How long does FHFA or FHFA–OIG have to respond?* Either the FHFA or FHFA–OIG Privacy Act Officer generally will respond to your request in writing within 20 days after receiving it, if it meets the § 1204.3 requirements. For requests to amend a record, either the FHFA or FHFA–OIG Privacy Act Officer will respond within 10 days after receipt of the request to amend. FHFA or FHFA–OIG may extend the response time in unusual circumstances, such as when consultation is needed with another Federal agency (if that agency is subject to the Privacy Act) about a record or to retrieve a record shipped offsite for storage. If you submit your written request in person, either the FHFA or FHFA–OIG Privacy Act Officer may disclose records or information to you directly and create a written record of the grant of the request. If you are to be accompanied by another person when accessing your record or any information pertaining to you, FHFA or FHFA–OIG may require your written authorization before permitting access or discussing the record in the presence of the other person.

(c) *What will the FHFA or FHFA–OIG response include?* The written response will include a determination to grant or deny your request in whole or in part, a brief explanation of the reasons for the determination, and the amount of the fee charged, if any, under § 1204.6. If you are granted a request to access a record, FHFA or FHFA–OIG will make the record available to you. If you are granted a request to amend or correct a record, the response will describe any amendments or corrections made and advise you of your right to obtain a copy of the amended or corrected record.

(d) *What is an adverse determination?* An adverse determination is a determination on a Privacy Act request that—

(1) Withholds any requested record in whole or in part;

(2) Denies a request for an amendment or correction of a record in whole or in part;

(3) Declines to provide a requested accounting of disclosures;

(4) Advises that a requested record does not exist or cannot be located; or

(5) Finds what has been requested is not a record subject to the Privacy Act.

(e) *What will be stated in a response that includes an adverse determination?* If an adverse determination is made with respect to your request, either the FHFA or FHFA–OIG Privacy Act Officer's written response under this section will identify the person responsible for the adverse determination, state that the adverse determination is not a final action of FHFA or FHFA–OIG, and state that you may appeal the adverse determination under § 1204.5.

§ 1204.5 What if I am dissatisfied with the response to my Privacy Act request?

(a) *May I appeal the response?* You may appeal any adverse determination made in response to your Privacy Act

request. If you wish to seek review by a court of any adverse determination or denial of a request, you must first appeal it under this section.

(b) *How do I appeal the response?*—(1) You may appeal by submitting in writing, a statement of the reasons you believe the adverse determination should be overturned. FHFA or FHFA–OIG must receive your written appeal within 30 calendar days of the date of the adverse determination under §1204.4. Your written appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination (including the request number, if known) that you are appealing.

(2) If FHFA or FHFA–OIG denied your request in whole or in part, you may appeal the denial by writing directly to the FHFA Privacy Act Appeals Officer through electronic mail, mail, delivery service, or facsimile. The electronic mail address is: *privacy@fhfa.gov*. For mail or express mail, the address is: FHFA Privacy Act Appeals Officer, Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20219. The facsimile number is: (202) 649–1073. For appeals of FHFA–OIG denials, whether in whole or in part, the appeal must be clearly marked by adding ''FHFA–OIG'' after ''Privacy Act Appeal.'' All appeals from denials, in whole or part, made by FHFA–OIG will be forwarded to the FHFA–OIG Privacy Act Appeals Officer for processing and direct response. You can help FHFA and FHFA–OIG process your appeal by marking electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with ''Privacy Act Appeal.'' FHFA's ''Privacy Act Reference Guide,'' which is available on FHFA's Web site, *http://www.fhfa.gov*, provides additional information to assist you in making your appeal. FHFA or FHFA–OIG ordinarily will not act on an appeal if the Privacy Act request becomes a matter of litigation.

(3) If you need more time to file your appeal, you may request an extension of time of no more than ten (10) calendar days in which to file your appeal, but only if your request is made within the original 30-calendar day time period for filing the appeal. Granting an extension is in the sole discretion of either the FHFA or FHFA–OIG Privacy Act Appeals Officer.

(c) *Who has the authority to grant or deny appeals?* For appeals from the FHFA Privacy Act Officer, the FHFA Privacy Act Appeals Officer is authorized to act on your appeal. For appeals from the FHFA–OIG Privacy Act Officer, the FHFA–OIG Privacy Act Appeals Officer is authorized to act on your appeal.

(d) *When will FHFA or FHFA–OIG respond to my appeal?* FHFA or FHFA–OIG generally will respond to you in writing within 30 days of receipt of an appeal that meets the requirements of paragraph (b) of this section, unless for good cause shown, the FHFA or FHFA–OIG Privacy Act Appeals Officer extends the response time.

(e) *What will the FHFA or FHFA–OIG response include?* The written response will include the determination of either the FHFA or FHFA–OIG Privacy Act Appeals Officer, whether to grant or deny your appeal in whole or in part, a brief explanation of the reasons for the determination, and information about the Privacy Act provisions for court review of the determination.

(1) If your appeal concerns a request for access to records or information and the appeal determination grants your access, the records or information, if any, will be made available to you.

(2)(i) If your appeal concerns an amendment or correction of a record and the appeal determination grants your request for an amendment or correction, the response will describe any amendment or correction made to the record and advise you of your right to obtain a copy of the amended or corrected record under this part. FHFA or FHFA–OIG will notify all persons, organizations, or Federal agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. Whenever the record is subsequently disclosed, the record will be disclosed as amended or corrected.

(ii) If the response to your appeal denies your request for an amendment or correction to a record, the response

will advise you of your right to file a Statement of Disagreement under paragraph (f) of this section.

(f) *What is a Statement of Disagreement?*—(1) A Statement of Disagreement is a concise written statement in which you clearly identify each part of any record that you dispute and explain your reason(s) for disagreeing with either the FHFA or FHFA–OIG Privacy Act Appeals Officer's denial, in whole or in part, of your appeal requesting amendment or correction. Your Statement of Disagreement must be received by either the FHFA or FHFA–OIG Privacy Act Officer within 30 calendar days of either the FHFA or FHFA–OIG Privacy Act Appeals Officer's denial, in whole or in part, of your appeal concerning amendment or correction of a record. FHFA and FHFA–OIG will place your Statement of Disagreement in the system of records in which the disputed record is maintained. FHFA and FHFA–OIG may also append a concise statement of its reason(s) for denying the request for an amendment or correction of the record.

(2) FHFA and FHFA–OIG will notify all persons, organizations, and Federal agencies to which it previously disclosed the disputed record, if an accounting of that disclosure was made, that the record is disputed and provide your Statement of Disagreement and the FHFA or FHFA–OIG concise statement, if any. Whenever the disputed record is subsequently disclosed, a copy of your Statement of Disagreement and the FHFA or FHFA–OIG concise statement, if any, will also be disclosed.

[76 FR 51871, Aug. 19, 2011, as amended at 77 FR 4646, Jan. 31, 2012; 80 FR 80233, Dec. 24, 2015]

§ 1204.6 What does it cost to get records under the Privacy Act?

(a) *Must I agree to pay fees?* Your Privacy Act request is your agreement to pay all applicable fees, unless you specify a limit on the amount of fees you agree to pay. FHFA or FHFA–OIG will not exceed the specified limit without your written agreement.

(b) *How does FHFA or FHFA–OIG calculate fees?* FHFA and FHFA–OIG will charge a fee for duplication of a record under the Privacy Act in the same way it charges for duplication of records under FOIA in 12 CFR 1202.11. There are no fees to search for or review records.

§ 1204.7 Are there any exemptions from the Privacy Act?

(a) *What is a Privacy Act exemption?* The Privacy Act authorizes the Director and the FHFA Inspector General to exempt records or information in a system of records from some of the Privacy Act requirements, if the Director or the FHFA Inspector General, as appropriate, determines that the exemption is necessary.

(b) *How do I know if the records or information I want are exempt?*—(1) Each system of records notice will advise you if the Director or the FHFA Inspector General has determined records or information in records are exempt from Privacy Act requirements. If the Director or the FHFA Inspector General has claimed an exemption for a system of records, the system of records notice will identify the exemption and the provisions of the Privacy Act from which the system is exempt.

(2) Until superseded by FHFA or FHFA–OIG systems of records, the following OFHEO and FHFB systems of records are, under 5 U.S.C. 552a(k)(2) or (k)(5), exempt from the Privacy Act requirements of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f)—

(i) OFHEO–11 Litigation and Enforcement Information System; and

(ii) FHFB–5 Agency Personnel Investigative Records.

(c) *What exemptions potentially apply to FHFA–OIG records?* Unless the FHFA Inspector General, his or her designee, or a statute specifically authorizes disclosure, FHFA–OIG will not release records of matters that are subject to the following exemptions—

(1) To the extent that the systems of records entitled ''FHFA–OIG Audit Files Database,'' ''FHFA–OIG Investigative & Evaluative Files Database,'' ''FHFA–OIG Investigative & Evaluative MIS Database,'' ''FHFA–OIG Hotline Database,'' and ''FHFA–OIG Correspondence Database'' contain any information compiled by FHFA–OIG for the purpose of criminal law enforcement investigations, such information falls within the scope of exemption (j)(2) of the Privacy Act, 5 U.S.C.

552a(j)(2), and therefore these systems of records are exempt from the requirements of the following subsections of the Privacy Act to that extent, for the reasons stated in paragraphs (1)(i) through (vi) of this section.

(i) From 5 U.S.C. 552a(c)(3), because release of an accounting of disclosures to an individual who is the subject of an investigation or evaluation could reveal the nature and scope of the investigation or evaluation and could result in the altering or destruction of evidence, improper influencing of witnesses, and other evasive actions that could impede or compromise the investigation or evaluation.

(ii) From 5 U.S.C. 552a(d)(1), because release of investigative or evaluative records to an individual who is the subject of an investigation or evaluation could interfere with pending or prospective law enforcement proceedings, constitute an unwarranted invasion of the personal privacy of third parties, reveal the identity of confidential sources, or reveal sensitive investigative or evaluative techniques and procedures.

(iii) From 5 U.S.C. 552a(d)(2), because amendment or correction of investigative or evaluative records could interfere with pending or prospective law enforcement proceedings, or could impose an impossible administrative and investigative or evaluative burden by requiring FHFA–OIG to continuously retrograde its investigations or evaluations attempting to resolve questions of accuracy, relevance, timeliness, and completeness.

(iv) From 5 U.S.C. 552a(e)(1), because it is often impossible to determine relevance or necessity of information in the early stages of an investigation or evaluation. The value of such information is a question of judgment and timing; what appears relevant and necessary when collected may ultimately be evaluated and viewed as irrelevant and unnecessary to an investigation or evaluation. In addition, FHFA–OIG may obtain information concerning the violation of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, FHFA–OIG should retain this information because it may aid in establishing patterns of unlawful activity and provide leads for other law enforcement agencies. Further, in obtaining evidence during an investigation or evaluation, information may be provided to FHFA–OIG that relates to matters incidental to the main purpose of the investigation or evaluation, but which may be pertinent to the investigative or evaluative jurisdiction of another agency. Such information cannot readily be identified.

(v) From 5 U.S.C. 552a(e)(2), because in a law enforcement investigation or an evaluation it is usually counterproductive to collect information to the greatest extent practicable directly from the subject thereof. It is not always feasible to rely upon the subject of an investigation or evaluation as a source for information which may implicate him or her in illegal activities. In addition, collecting information directly from the subject could seriously compromise an investigation or evaluation by prematurely revealing its nature and scope, or could provide the subject with an opportunity to conceal criminal activities, or intimidate potential sources, in order to avoid apprehension.

(vi) From 5 U.S.C. 552a(e)(3), because providing such notice to the subject of an investigation or evaluation, or to other individual sources, could seriously compromise the investigation or evaluation by prematurely revealing its nature and scope, or could inhibit cooperation, permit the subject to evade apprehension, or cause interference with undercover activities.

(2) To the extent that the systems of records entitled ''FHFA–OIG Audit Files Database,'' ''FHFA–OIG Investigative & Evaluative Files Database,'' ''FHFA–OIG Investigative & Evaluative MIS Database,'' ''FHFA–OIG Hotline Database,'' and ''FHFA–OIG Correspondence Database,'' contain information compiled by FHFA–OIG for the purpose of criminal law enforcement investigations, such information falls within the scope of exemption (k)(2) of the Privacy Act, 5 U.S.C. 552a(k)(2), and therefore these systems of records are exempt from the requirements of the following subsections of the Privacy Act to that extent, for the reasons stated in paragraphs (c)(2)(i) through (iv) of this section.

(i) From 5 U.S.C. 552a(c)(3), because release of an accounting of disclosures to an individual who is the subject of an investigation or evaluation could reveal the nature and scope of the investigation or evaluation and could result in the altering or destruction of evidence, improper influencing of witnesses, and other evasive actions that could impede or compromise the investigation or evaluation.

(ii) From 5 U.S.C. 552a(d)(1), because release of investigative or evaluative records to an individual who is the subject of an investigation or evaluation could interfere with pending or prospective law enforcement proceedings, constitute an unwarranted invasion of the personal privacy of third parties, reveal the identity of confidential sources, or reveal sensitive investigative or evaluative techniques and procedures.

(iii) From 5 U.S.C. 552a(d)(2), because amendment or correction of investigative or evaluative records could interfere with pending or prospective law enforcement proceedings, or could impose an impossible administrative and investigative or evaluative burden by requiring FHFA–OIG to continuously retrograde its investigations or evaluations attempting to resolve questions of accuracy, relevance, timeliness, and completeness.

(iv) From 5 U.S.C. 552a(e)(1), because it is often impossible to determine relevance or necessity of information in the early stages of an investigation or evaluation. The value of such information is a question of judgment and timing; what appears relevant and necessary when collected may ultimately be evaluated and viewed as irrelevant and unnecessary to an investigation or evaluation. In addition, FHFA–OIG may obtain information concerning the violation of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, FHFA–OIG should retain this information because it may aid in establishing patterns of unlawful activity and provide leads for other law enforcement agencies. Further, in obtaining evidence during an investigation or evaluation, information may be provided to FHFA–OIG that relates to matters incidental to the main purpose of the investigation or evaluation but which may be pertinent to the investigative or evaluative jurisdiction of another agency. Such information cannot readily be identified.

(3) To the extent that the systems of records entitled ''FHFA–OIG Audit Files Database,'' ''FHFA–OIG Investigative & Evaluative Files Database,'' ''FHFA–OIG Investigative & Evaluative MIS Database,'' ''FHFA–OIG Hotline Database,'' and ''FHFA–OIG Correspondence Database'' contain any investigatory material compiled by FHFA–OIG for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, such information falls within the scope of exemption (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), and therefore these systems of records are exempt from the requirements of subsection (d)(1) of the Privacy Act to that extent, because release would reveal the identity of a source who furnished information to the Government under an express promise of confidentiality. Revealing the identity of a confidential source could impede future cooperation by sources, and could result in harassment or harm to such sources.

§ 1204.8 How are records secured?

(a) *What controls must FHFA and FHFA–OIG have in place?* FHFA and FHFA–OIG must establish administrative and physical controls to prevent unauthorized access to their systems of records, unauthorized or inadvertent disclosure of records, and physical damage to or destruction of records. The stringency of these controls corresponds to the sensitivity of the records that the controls protect. At a minimum, the administrative and physical controls must ensure that—

(1) Records are protected from public view;

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to them;

(3) Records are inaccessible to unauthorized persons outside of business hours; and

(4) Records are not disclosed to unauthorized persons or under unauthorized circumstances in either oral or written form.

(b) *Is access to records restricted?* Access to records is restricted to authorized employees who require access in order to perform their official duties.

§ 1204.9 Does FHFA or FHFA–OIG collect and use Social Security numbers?

FHFA and FHFA–OIG collect Social Security numbers only when it is necessary and authorized. At least annually, the FHFA Privacy Act Officer or the Senior Agency Official for Privacy will inform employees who are authorized to collect information that—

(a) Individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their Social Security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) They must inform individuals who are asked to provide their Social Security numbers—

(1) If providing a Social Security number is mandatory or voluntary;

(2) If any statutory or regulatory authority authorizes collection of a Social Security number; and

(3) The uses that will be made of the Social Security number.

§ 1204.10 What are FHFA and FHFA–OIG employee responsibilities under the Privacy Act?

At least annually, the FHFA Privacy Act Officer or the Senior Agency Official for Privacy will inform employees about the provisions of the Privacy Act, including the Privacy Act's civil liability and criminal penalty provisions. Unless otherwise permitted by law, an authorized FHFA or FHFA–OIG employee shall—

(a) Collect from individuals only information that is relevant and necessary to discharge FHFA or FHFA–OIG responsibilities;

(b) Collect information about an individual directly from that individual whenever practicable;

(c) Inform each individual from whom information is collected of—

(1) The legal authority to collect the information and whether providing it is mandatory or voluntary;

(2) The principal purpose for which FHFA or FHFA–OIG intends to use the information;

(3) The routine uses FHFA or FHFA–OIG may make of the information; and

(4) The effects on the individual, if any, of not providing the information.

(d) Ensure that the employee's office does not maintain a system of records without public notice and notify appropriate officials of the existence or development of any system of records that is not the subject of a current or planned public notice;

(e) Maintain all records that are used in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination;

(f) Except for disclosures made under FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely, and complete;

(g) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by FHFA or FHFA–OIG to persons, organizations, or Federal agencies;

(h) Maintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone; and

(i) Notify the appropriate official of any record that contains information that the Privacy Act does not permit FHFA or FHFA–OIG to maintain.

§ 1204.11 May FHFA–OIG obtain Privacy Act records from other Federal agencies for law enforcement purposes?

(a) The FHFA Inspector General is authorized under the Inspector General Act of 1978, as amended, to make written requests under 5 U.S.C. 552a(b)(7) for transfer of records maintained by other Federal agencies which are necessary to carry out an authorized law enforcement activity under the Inspector General Act of 1978, as amended.

(b) The FHFA Inspector General delegates the authority under paragraph

(a) of this section to the following FHFA–OIG officials—

(1) Principal Deputy Inspector General;

(2) Deputy Inspector General for Audits;

(3) Deputy Inspector General for Investigations;

(4) Deputy Inspector General for Evaluations; and

(5) Deputy Inspector General for Administration.

(c) The officials listed in paragraph (b) of this section may not further delegate or re-delegate the authority described in paragraph (a) of this section.

PART 1206—ASSESSMENTS

Sec.

AUTHORITY: 12 U.S.C. 4516.

SOURCE: 73 FR 56713, Sept. 30, 2008, unless otherwise noted.

§ 1206.1 Purpose.

This part sets forth the policy and procedures of the FHFA with respect to the establishment and collection of the assessments of the Regulated Entities under 12 U.S.C. 4516.

§ 1206.2 Definitions.

As used in this part:

Act means the Federal Housing Finance Regulatory Reform Act of 2008.

Adequately capitalized means the adequately capitalized capital classification under 12 U.S.C. 1364 and related regulations.

Director means the Director of the Federal Housing Finance Agency or his or her designee.

Enterprise means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and ''Enterprises'' means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Federal Home Loan Bank, or *Bank*, means a Federal Home Loan Bank established under section 12 of the Federal Home Loan Bank Act (12 U.S.C. 1432).

FHFA means the Federal Housing Finance Agency.

Minimum required regulatory capital means the highest amount of capital necessary for a Bank to comply with any of the capital requirements established by the Director and applicable to it.

Regulated Entity means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or any of the Federal Home Loan Banks.

Surplus funds means any amounts that are not obligated as of September 30 of the fiscal year for which the assessment was made.

Total exposure has the same meaning given to adjusted total assets in 12 CFR 1240.2.

Working capital fund means an account for amounts collected from the Regulated Entities to establish an operating reserve that is intended to provide for the payment of large or multiyear capital and operating expenditures, as well as unanticipated expenses.

[73 FR 56713, Sept. 30, 2008, as amended at 85 FR 82198, Dec. 17 2020]

§ 1206.3 Annual assessments.

(a) *Establishing assessments.* The Director shall establish annual assessments on the Regulated Entities in an amount sufficient to maintain a working capital fund and provide for the payment of the FHFA's costs and expenses, including, but not limited to:

(1) Expenses of any examinations under 12 U.S.C. 4517 and section 20 of the Federal Home Loan Bank Act (12 U.S.C. 1440);

(2) Expenses of obtaining any reviews and credit assessments under 12 U.S.C. 4519;

(3) Expenses of any enforcement activities under 12 U.S.C. 4635;

(4) Expenses of other FHFA litigation under 12 U.S.C. 4513;

(5) Expenses relating to the maintenance of the FHFA records relating to examinations and other reviews of the Regulated Entities;

(6) Such amounts in excess of actual expenses for any given year deemed

necessary to maintain a working capital fund;

(7) Expenses relating to monitoring and ensuring compliance with housing goals;

(8) Expenses relating to conducting reviews of new products;

(9) Expenses related to affordable housing and community programs;

(10) Other administrative expenses of the FHFA;

(11) Expenses related to preparing reports and studies;

(12) Expenses relating to the collection of data and development of systems to calculate the House Price Index (HPI) and the conforming loan limit;

(13) Amounts deemed necessary by the Director to wind up the affairs of the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board; and

(14) Expenses relating to other responsibilities of the FHFA under the Safety and Soundness Act, the Federal Home Loan Bank Act and the Act.

(b) *Allocating assessments.* The Director shall allocate the annual assessments as follows:

(1) *Enterprises.* Assessments collected from the Enterprises shall not exceed amounts sufficient to provide for payment of the costs and expenses relating to the Enterprises as determined by the Director. Each Enterprise shall pay a proportional share that bears the same ratio to the total portion of the annual assessment allocated to the Enterprises that the total exposure of each Enterprise bears to the total exposure of both Enterprises.

(2) *Federal Home Loan Banks.* Assessments collected from the Banks shall not exceed amounts sufficient to provide for payment of the costs and expenses relating to the Banks as determined by the Director. Each Bank shall pay a *pro rata* share of the annual assessments based on the ratio between its minimum required regulatory capital and the aggregate minimum required regulatory capital of every Bank.

(c) *Timing and amount of semiannual payment.* Each Regulated Entity shall pay on or before October 1 and April 1 an amount equal to one-half of its annual assessment.

(d) *Surplus funds.* Surplus funds shall be credited to the annual assessment by reducing the amount collected in the following semiannual period by the amount of the surplus funds. Surplus funds shall be allocated to all Regulated Entities in the same proportion in which they were collected, except as determined by the Director.

[73 FR 56713, Sept. 30, 2008, as amended at 83 FR 39326, Aug. 9, 2018]

§ 1206.4 Increased costs of regulation.

(a) *Increase for inadequate capitalization.* The Director may, at his or her discretion, increase the amount of a semiannual payment allocated to a Regulated Entity that is not classified as adequately capitalized to pay additional estimated costs of regulation of that Regulated Entity.

(b) *Increase for enforcement activities.* The Director may, at his or her discretion, adjust the amount of a semiannual payment allocated to a Regulated Entity to ensure that the Regulated Entity bears the estimated costs of enforcement activities under the Act related to that Regulated Entity.

(c) *Additional assessment for deficiencies.* At any time, the Director may make and collect from any Regulated Entity an assessment, payable immediately or through increased semiannual payments, to cover the estimated amount of any deficiency for the semiannual period as a result of increased costs of regulation of a Regulated Entity due to its classification as other than adequately capitalized, or as a result of enforcement activities related to that Regulated Entity. Any amount remaining from such additional assessment and the semiannual payments at the end of any semiannual period during which such an additional assessment is made shall be deducted *pro rata* (based upon the amount of the additional assessments) from the assessment for the following semiannual period for that Regulated Entity.

§ 1206.5 Working capital fund.

(a) *Assessments.* The Director shall establish and collect from the Regulated Entities such assessments he or she deems necessary to maintain a working capital fund.

(b) *Purposes.* Assessments collected to maintain the working capital fund shall be used to establish an operating reserve and to provide for the payment of large or multiyear capital and operating expenditures as well as unanticipated expenses.

(c) *Remittance of excess assessed funds.* At the end of each year for which an assessment under this section is made, the Director shall remit to each Regulated Entity any amount of assessed and collected funds in excess of the amount the Director deems necessary to maintain a working capital fund in the same proportions as paid under the most recent annual assessment.

§ 1206.6 Notice and review.

(a) *Written notice of budget.* The Director shall provide to each Regulated Entity written notice of the projected budget for the Agency for the upcoming fiscal year. Such notice shall be provided at least 30 days before the beginning of the applicable fiscal year.

(b) *Written notice of assessments.* The Director shall provide each Regulated Entity with written notice of assessments as follows:

(1) *Annual assessments.* The Director shall provide each Regulated Entity with written notice of the annual assessment and the semiannual payments to be collected under this part. Notice of the annual assessment and semiannual payments shall be provided before the start of the new fiscal year.

(2) *Immediate assessments.* The Director shall provide each Regulated Entity with written notice of any immediate assessments to be collected under §1206.4 of this chapter. Notice of any immediate assessment and the required payments shall be provided at such reasonable time as determined by the Director.

(3) *Changes to assessments.* The Director shall provide each Regulated Entity with written notice of any changes in the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

(c) *Request for review.* At the written request of a Regulated Entity, the Director, in his or her discretion, may review the calculation of the proportional share of the annual assessment, the semiannual payments, and any partial payments to be collected under this part. The determination of the Director upon such review is final. Except as provided by the Director, review by the Director does not suspend the requirement that the Regulated Entity make the semiannual payment or partial payment on or before the date it is due. Any adjustments determined appropriate shall be credited or otherwise addressed by the following year's assessment for that entity.

§ 1206.7 Delinquent payment.

The Director may assess interest and penalties on any delinquent semiannual payment or other payment assessed under this part in accordance with 31 U.S.C. 3717 (interest and penalty on claims) and part 1704 of this title (debt collection).

§ 1206.8 Enforcement of payment.

The Director may enforce the payment of any assessment under 12 U.S.C. 4631 (cease-and-desist proceedings), 12 U.S.C. 4632 (temporary cease-and-desist orders), and 12 U.S.C. 4626 (civil money penalties).

PART 1207—MINORITY AND WOMEN OUTREACH PROGRAM

Sec.

AUTHORITY: 12 U.S.C. 4520 and 4526; 12 U.S.C. 1833e; E.O. 11478.

SOURCE: 82 FR 14994, Mar. 24, 2017, unless otherwise noted.

§ 1207.1 Definitions.

The terms in this part have the same meaning as in FHFA's Minority and Women Inclusion Regulation at part 1223 of this chapter, as may be amended from time to time.

§ 1207.2 FHFA workforce diversity; Equal Employment Opportunity Program.

(a) *Responsibility.* FHFA's Office of Minority and Women Inclusion (OMWI)

shall have overall responsibility for diversity and inclusion in FHFA's employment practices.

(b) *General.* FHFA shall maintain an Equal Employment Opportunity (EEO) program consistent with the Equal Employment Opportunity Commission requirements for Federal agencies and Executive Order 11478.

(c) *Workforce diversity.* FHFA shall not discriminate in employment against any person because of race, color, religion, national origin, sex, age, genetic information, disability, sexual orientation, gender identity, or status as a parent.

(d) *Affirmative steps for workforce diversity.* FHFA shall take affirmative steps to seek diversity in its workforce, at all levels of the agency, in a manner consistent with applicable law. Such steps shall include:

(1) Recruiting at historically Black colleges and universities, Hispanic-serving institutions, women's colleges, and colleges that typically serve the individuals with disabilities and majority minority populations;

(2) Sponsoring and recruiting at job fairs in urban communities;

(3) Placing employment advertisements in media oriented toward minorities and women;

(4) Partnering with organizations that are focused on developing opportunities for minorities and women to place talented minorities and women in industry internships, summer employment, and full-time positions; and

(5) Where feasible, partnering with inner-city high schools, girls' high schools, and high schools with majority minority populations, to establish or enhance financial literacy and provide mentoring.

§ 1207.3 FHFA contracting and diversity and inclusion.

(a) *Responsibilities.* FHFA's Office of Minority and Women Inclusion (OMWI) shall have responsibility for diversity and inclusion in FHFA's contracting practices.

(b) *Outreach.* FHFA's policy is to promote diversity in its contracting process. FHFA shall establish a contractor outreach program intended to ensure that minority- and women-owned businesses are made aware of and given the opportunity to compete for contracts with FHFA. FHFA shall conduct outreach activities that may include, but are not limited to:

(1) Identifying contractors that are minority- and women-owned by obtaining lists and directories maintained by government agencies, trade groups, and other organizations;

(2) Advertising contract opportunities through media targeted to reach potential contractors that are minority- and women-owned; and

(3) Participating in events such as conventions, trade shows, seminars, professional meetings, and other gatherings intended to promote business opportunities for minority- and women-owned businesses.

(c) *Technical assistance.* FHFA shall provide technical assistance and guidance to facilitate the identification and solicitation of minority and women-owned businesses.

(d) *Monitoring.* FHFA's OMWI shall monitor that FHFA staff interfacing with the contracting community are knowledgeable about, and actively promoting, FHFA's Outreach program.

§ 1207.4 Limitations.

The regulations in this part do not, are not intended to, and should not be construed to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding, by any party against FHFA, the United States, its other departments, agencies, or entities, its officers, employees, or agents.

PART 1208—DEBT COLLECTION

Subpart A—General

Sec.

Subpart B—Salary Offset

AUTHORITY: 5 U.S.C. 5514; 12 U.S.C. 4526; 26 U.S.C. 6402(d); 31 U.S.C. 3701–3720D; 31 CFR 285.2; 31 CFR Chapter IX.

Subpart A—General

SOURCE: 75 FR 68958, Nov. 10, 2010, unless otherwise noted.

§ 1208.1 Authority and scope.

(a) *Authority*. FHFA issues this part 1208 under the authority of 5 U.S.C. 5514 and 31 U.S.C. 3701–3720D, and in conformity with the Federal Claims Collection Standards (FCCS) at 31 CFR chapter IX; the regulations on salary offset issued by the Office of Personnel Management (OPM) at 5 CFR part 550, subpart K; the regulations on tax refund offset issued by the United States Department of the Treasury (Treasury) at 31 CFR 285.2; and the regulations on administrative wage garnishment issued by Treasury at 31 CFR 285.11.

(b) *Scope*—(1) This part applies to debts that are owed to the Federal Government by Federal employees; other persons, organizations, or entities that are indebted to FHFA; and by Federal employees of FHFA who are indebted to other agencies, except for those debts listed in paragraph (b)(2) of this section.

(2) Subparts B and C of this part 1208 do not apply to—

(i) Debts or claims arising under the Internal Revenue Code (26 U.S.C. 1 *et seq.*), the Social Security Act (42 U.S.C. 301 *et seq.*) or the tariff laws of the United States;

(ii) Any case to which the Contract Disputes Act (41 U.S.C. 601 *et seq.*) applies;

(iii) Any case where collection of a debt is explicitly provided for or provided by another statute, *e.g.* travel advances under 5 U.S.C. 5705 and employee training expenses under 5 U.S.C.

4108, or, as provided for by title 11 of the United States Code, when the claims involve bankruptcy;

(iv) Any debt based in whole or in part on conduct in violation of the antitrust laws or involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim, unless the Department of Justice authorizes FHFA to handle the collection; or

(v) Claims between agencies.

(3) Nothing in this part precludes the compromise, suspension, or termination of collection actions, where appropriate, under standards implementing the Debt Collection Improvement Act (DCIA) (31 U.S.C. 3701 *et seq.*), the FCCS (31 CFR chapter IX) or the use of alternative dispute resolution methods if they are not inconsistent with applicable law and regulations.

(4) Nothing in this part precludes an employee from requesting waiver of an erroneous payment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or from questioning the amount or validity of a debt, in the manner set forth in this part.

§ 1208.2 Definitions.

The following terms apply to this part, unless defined otherwise elsewhere–

Administrative offset means an action, pursuant to 31 U.S.C. 3716, in which the Federal Government withholds funds payable to, or held by the Federal Government for a person, organization, or other entity in order to collect a debt from that person, organization, or other entity. Such funds include funds payable by the Federal Government on behalf of a State Government.

Agency means an executive department or agency; a military department; the United States Postal Service; the Postal Regulatory Commission; any nonappropriated fund instrumentality described in 5 U.S.C. 2105(c); the United States Senate; the United States House of Representatives; any court, court administrative office, or instrumentality in the judicial or legislative branches of the Government; or a Government corporation. If an agency under this definition is a component of an agency, the broader definition of agency may be used in applying the provisions of 5 U.S.C. 5514(b) (concerning the authority to prescribe regulations).

Centralized administrative offset means the mandatory referral to the Secretary of the Treasury by a creditor agency of a past due debt which is more than 180 days delinquent, for the purpose of collection under the Treasury's centralized offset program.

Certification means a written statement received by a paying agency from a creditor agency that requests the paying agency to institute salary offset of an employee, to the Financial Management Service (FMS) for offset or to the Secretary of the Treasury for centralized administrative offset, and specifies that required procedural protections have been afforded the debtor. Where the debtor requests a hearing on a claimed debt, the decision by a hearing official or administrative law judge constitutes a certification.

Claim or debt (used interchangeably in this part) means any amount of funds or property that has been determined by an agency official to be due the Federal Government by a person, organization, or entity, except another agency. It also means any amount of money, funds, or property owed by a person to a State, the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico. For purposes of this part, a debt owed to FHFA constitutes a debt owed to the Federal Government. A claim or debt includes:

(1) Funds owed on account of loans made, insured, or guaranteed by the Federal Government, including any deficiency or any difference between the price obtained by the Federal Government in the sale of a property and the amount owed to the Federal Government on a mortgage on the property;

(2) Unauthorized expenditures of agency funds;

(3) Overpayments, including payments disallowed by audits performed by the Inspector General of the agency administering the program;

(4) Any amount the Federal Government is authorized by statute to collect for the benefit of any person;

(5) The unpaid share of any non-Federal partner in a program involving a Federal payment, and a matching or cost-sharing payment by the non-Federal partner;

(6) Any fine or penalty assessed by an agency; and

(7) Other amounts of money or property owed to the Federal Government.

Compromise means the settlement or forgiveness of a debt under 31 U.S.C. 3711, in accordance with standards set forth in the FCCS and applicable Federal law.

Creditor agency means the agency to which the debt is owed, including a debt collection center when acting on behalf of a creditor agency in matters pertaining to the collection of a debt.

Debt See the definition of the terms ''Claim or debt'' of this section.

Debt collection center means the Department of the Treasury or any other agency or division designated by the Secretary of the Treasury with authority to collect debts on behalf of creditor agencies in accordance with 31 U.S.C. 3711(g).

Debtor means the person, organization, or entity owing money to the Federal Government.

Delinquent debt means a debt that has not been paid by the date specified in the agency's initial written demand for payment or applicable agreement or instrument (including a post-delinquency payment agreement) unless other satisfactory payment arrangements have been made.

Director means the Director of FHFA or Director's designee.

Disposable pay means that part of current basic pay, special pay, incentive pay, retired pay, or retainer pay (or in the case of an employee not entitled to basic pay, other authorized pay) remaining after the deduction of any amount required by law to be withheld (other than deductions to execute garnishment orders in accordance with 5 CFR parts 581 and 582). FHFA will apply the order of precedence contained in OPM guidance (PPM–2008–01; Order Of Precedence When Gross Pay Is Not Sufficient To Permit All Deductions), as follows—

(1) Retirement deductions for defined benefit plan (including Civil Service Retirement System, Federal Employees Retirement System, or other similar defined benefit plan);

(2) Social security (OASDI) tax;

(3) Medicare tax;

(4) Federal income tax;

(5) Basic health insurance premium (including Federal Employees Health Benefits premium, pre-tax or post-tax, or premium for similar benefit under another authority but not including amounts deducted for supplementary coverage);

(6) Basic life insurance premium (including Federal Employees' Group Life Insurance—FEGLI—Basic premium or premium for similar benefit under another authority);

(7) State income tax;

(8) Local income tax;

(9) Collection of debts owed to the U.S. Government (e.g., tax debt, salary overpayment, failure to withhold proper amount of deductions, advance of salary or travel expenses, etc.; debts which may or may not be delinquent; debts which may be collected through the Treasury's Financial Management Services Treasury Offset Program, an automated centralized debt collection program for collecting Federal debt from Federal payments):

(i) Continuous levy under the Federal Payment Levy Program (tax debt); and

(ii) Salary offsets (whether involuntary under 5 U.S.C. 5514 or similar authority or required by a voluntarily signed written agreement; if multiple debts are subject to salary offset, the order is based on when each offset commenced—with earliest commencing offset at the top of the order—unless there are special circumstances, as determined by the paying agency).

(10) Court-Ordered collection/debt:

(i) Child support (may include attorney and other fees as provided for in 5 CFR 581.102(d)). If there are multiple child support orders, the priority of orders is governed by 42 U.S.C. 666(b) and implementing regulations, as required by 42 U.S.C. 659(d)(2);

(ii) Alimony (may include attorney and other fees as provided for in 5 CFR 581.102(d)). If there are multiple alimony orders, they are prioritized on a first-come, first-served basis, as required by 42 U.S.C. 659(d)(3);

(iii) Bankruptcy; and

(iv) Commercial garnishments.

(11) Optional benefits:
(i) Health care/limited-expense health care flexible spending accounts (pre-tax benefit under FedFlex or equivalent cafeteria plan);
(ii) Dental (pre-tax benefit under FedFlex or equivalent cafeteria plan);
(iii) Vision (pre-tax benefit under FedFlex or equivalent cafeteria plan);
(iv) Health Savings Account (pre-tax benefit under FedFlex or equivalent cafeteria plan);
(v) Optional life insurance premiums (FEGLI optional benefits or similar benefits under other authority);
(vi) Long-term care insurance premiums;
(vii) Dependent-care flexible spending accounts (pre-tax benefit under FedFlex or equivalent cafeteria plan);
(viii) Thrift Savings Plan (TSP):
(A) Loan payments;
(B) Basic contributions; and
(C) Catch-up contributions; and
(ix) Other optional benefits.
(12) Other voluntary deductions/allotments:
(i) Military service deposits;
(ii) Professional associations;
(iii) Union dues;
(iv) Charities;
(v) Bonds;
(vi) Personal account allotments (*e.g.*, to savings or checking account); and
(vii) Additional voluntary deductions (on first-come, first-served basis); and
(13) IRS paper levies.

Employee means a current employee of FHFA or other agency, including a current member of the Armed Forces or a Reserve of the Armed Forces of the United States.

Federal Claims Collection Standards (FCCS) means standards published at 31 CFR chapter IX.

FHFA means the Federal Housing Finance Agency.

Garnishment means the process of withholding amounts from the disposable pay of a person employed outside the Federal Government, and the paying of those amounts to a creditor in satisfaction of a withholding order.

Hearing official means an individual who is responsible for conducting any hearing with respect to the existence or amount of a debt claimed and for rendering a final decision on the basis of such hearing. A hearing official may not be under the supervision or control of the Director of FHFA when FHFA is the creditor agency but may be an administrative law judge.

Notice of intent means a written notice of a creditor agency to a debtor that states that the debtor owes a debt to the creditor agency and apprises the debtor of the applicable procedural rights.

Notice of salary offset means a written notice from the paying agency to an employee after a certification has been issued by a creditor agency that informs the employee that salary offset will begin at the next officially established pay interval.

Paying agency means an agency of the Federal Government that employs the individual who owes a debt to an agency of the Federal Government and transmits payment requests in the form of certified payment vouchers, or other similar forms, to a disbursing official for disbursement. The same agency may be both the creditor agency and the paying agency.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deductions at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to FHFA or another agency as permitted or required by 5 U.S.C. 5584 or 8346(b), 10 U.S.C. 2774, 32 U.S.C. 716, or any other law.

Withholding order means any order for withholding or garnishment of pay issued by an agency, or judicial, or administrative body. For purposes of administrative wage garnishment, the terms ''wage garnishment order'' and ''garnishment order'' have the same meaning as ''withholding order.''

§ 1208.3 Referrals to the Department of the Treasury, collection services, and use of credit bureaus.

(a) *Referral of delinquent debts.* (1) FHFA shall transfer to the Secretary of the Department of the Treasury any past due, legally enforceable nontax debt that has been delinquent for a period of 180 days or more so that the

Secretary may take appropriate action to collect the debt or terminate collection action in accordance with 31 U.S.C. 3716, 5 U.S.C. 5514, 5 CFR 550.1108, 31 CFR part 285, and the FCCS.

(2) FHFA may transfer any past due, legally enforceable nontax debt that has been delinquent for less than a period of 180 days to a debt collection center for collection in accordance with 31 U.S.C. 3716, 5 U.S.C. 5514, 5 CFR 550.1108, 31 CFR part 285, and the FCCS.

(b) *Collection Services.* Section 13 of the Debt Collection Act (31 U.S.C. 3718) authorizes agencies to enter into contracts for collection services to recover debts owed the Federal Government. The Debt Collection Act requires that certain provisions be contained in such contracts, including:

(1) The agency retains the authority to resolve a dispute, including the authority to terminate a collection action or refer the matter to the Attorney General for civil remedies; and

(2) The contractor is subject to the Privacy Act of 1974, as it applies to private contractors, as well as subject to State and Federal laws governing debt collection practices.

(c) *Referrals to collection agencies.* (1) FHFA has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(a) and the FCCS (31 CFR 901.5).

(2) FHFA may use private collection agencies where it determines that their use is in the best interest of the Federal Government. Where FHFA determines that there is a need to contract for collection services, the contract will provide that:

(i) The authority to resolve disputes, compromise claims, suspend or terminate collection action, or refer the matter to the Department of Justice for litigation or to take any other action under this part will be retained by FHFA;

(ii) Contractors are subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(iii) The contractor is required to strictly account for all amounts collected;

(iv) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable FHFA to determine whether to pursue collection through litigation or to terminate collection; and

(v) The contractor must agree to provide any data in its files requested by FHFA upon returning the account to FHFA for subsequent referral to the Department of Justice for litigation.

§ 1208.4 Reporting delinquent debts to credit bureaus.

(a) FHFA may report delinquent debts to consumer reporting agencies (31 U.S.C. 3701(a)(3), 3711). Sixty calendar days prior to release of information to a consumer reporting agency, the debtor shall be notified, in writing, of the intent to disclose the existence of the debt to a consumer reporting agency. Such notice of intent may be a separate correspondence or included in correspondence demanding direct payment. The notice shall be in conformance with 31 U.S.C. 3711(e) and the FCCS. In the notice, FHFA shall provide the debtor with:

(1) An opportunity to inspect and copy agency records pertaining to the debt;

(2) An opportunity for an administrative review of the legal enforceability or past due status of the debt;

(3) An opportunity to enter into a repayment agreement on terms satisfactory to FHFA to prevent FHFA from reporting the debt as overdue to consumer reporting agencies, and provide deadlines and method for requesting this relief;

(4) An explanation of the rate of interest that will accrue on the debt, that all costs incurred to collect the debt will be charged to the debtor, the authority for assessing these costs, and the manner in which FHFA will calculate the amount of these costs;

(5) An explanation that FHFA will report the debt to the consumer reporting agencies to the detriment of the debtor's credit rating; and

(6) A description of the collection actions that the agency may take in the

future if those presently proposed actions do not result in repayment of the debt, including the filing of a lawsuit against the borrower by the agency and assignment of the debt for collection by offset against Federal income tax refunds or the filing of a lawsuit against the debtor by the Federal Government.

(b) The information that may be disclosed to the consumer reporting agency is limited to:

(1) The debtor's name, address, social security number or taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the claim; and

(3) FHFA program or activity under which the claim arose.

(c) *Subsequent reports.* FHFA may update its report to the credit bureau whenever it has knowledge of events that substantially change the status of the amount of liability.

(d) *Subsequent reports of delinquent debts.* Pursuant to 31 CFR 901.4, FHFA will report delinquent debt to the Department of Housing and Urban Development's Credit Alert Interactive Voice Response System (CAIVRS).

(e) *Privacy Act considerations.* A delinquent debt may not be reported under this section unless a notice issued pursuant to the Privacy Act, 5 U.S.C. 552a(e)(4), authorizes the disclosure of information about the debtor to a credit bureau or CAIVRS.

§§ 1208.5–1208.19 [Reserved]

Subpart B—Salary Offset

§ 1208.20 Authority and scope.

(a) *Authority.* FHFA may collect debts owed by employees to the Federal Government by means of salary offset under the authority of 5 U.S.C. 5514; 5 CFR part 550, subpart K; and this subpart B.

(b) *Scope.* (1) The procedures set forth in this subpart B apply to situations where FHFA is attempting to collect a debt by salary offset that is owed to it by an individual employed by FHFA or by another agency; or where FHFA employs an individual who owes a debt to another agency.

(2) The procedures set forth in this subpart B do not apply to:

(i) Any routine intra-agency adjustment of pay that is attributable to clerical or administrative error or delay in processing pay documents that have occurred within the four pay periods preceding the adjustment, or any adjustment to collect a debt amounting to $50 or less. However, at the time of any such adjustment, or as soon thereafter as possible, FHFA or its designated payroll agent shall provide the employee with a written notice of the nature and the amount of the adjustment and a point of contact for contesting such adjustment.

(ii) Any negative adjustment to pay that arises from an employee's election of coverage or a change in coverage under a Federal benefits program that requires periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, at the time such adjustment is made, FHFA or its payroll agent shall provide in the employee's earnings statement a clear and concise statement that informs the employee of the previous overpayment.

§ 1208.21 Notice requirements before salary offset where FHFA is the creditor agency.

(a) *Notice of Intent.* Deductions from an employee's salary may not be made unless FHFA provides the employee with a Notice of Intent at least 30 calendar days before the salary offset is initiated.

(b) *Contents of Notice of Intent.* The Notice of Intent shall advise the employee of the following:

(1) That FHFA has reviewed the records relating to the claim and has determined that the employee owes the debt;

(2) That FHFA intends to collect the debt by deductions from the employee's current disposable pay account;

(3) The amount of the debt and the facts giving rise to the debt;

(4) The frequency and amount of the intended deduction (stated as a fixed dollar amount or as a percentage of pay not to exceed 15 percent of disposable pay), and the intention to continue the deductions until the debt and

all accumulated interest are paid in full or otherwise resolved;

(5) The name, address, and telephone number of the person to whom the employee may propose a written alternative schedule for voluntary repayment, in lieu of salary offset. The employee shall include a justification for the alternative schedule in his or her proposal. If the terms of the alternative schedule are agreed upon by the employee and FHFA, the alternative written schedule shall be signed by both the employee and FHFA;

(6) An explanation of FHFA's policy concerning interest, penalties, and administrative costs, the date by which payment should be made to avoid such costs, and a statement that such assessments must be made unless excused in accordance with the FCCS;

(7) The employee's right to inspect and copy all records of FHFA pertaining to his or her debt that are not exempt from disclosure or to receive copies of such records if he or she is unable personally to inspect the records as the result of geographical or other constraints;

(8) The name, address, and telephone number of the FHFA employee to whom requests for access to records relating to the debt must be sent;

(9) The employee's right to a hearing conducted by an impartial hearing official with respect to the existence and amount of the debt claimed or the repayment schedule *i.e.*, the percentage of disposable pay to be deducted each pay period, so long as a request is filed by the employee as prescribed in §1208.23; the name and address of the office to which the request for a hearing should be sent; and the name, address, and telephone number of a person whom the employee may contact concerning procedures for requesting a hearing;

(10) The filing of a request for a hearing on or before the 30th calendar day following receipt of the Notice of Intent will stay the commencement of collection proceedings and a final decision on whether a hearing will be held (if a hearing is requested) or will be issued at the earliest practical date, but not later than 60 calendar days after the request for the hearing;

(11) FHFA shall initiate certification procedures to implement a salary offset unless the employee files a request for a hearing on or before the 30th calendar day following receipt of the Notice of Intent;

(12) Any knowingly false or frivolous statement, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, 31 U.S.C. 3729 through 3731, or under any other applicable statutory authority; or

(iii) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or under any other applicable statutory authority;

(13) That the employee also has the right to request waiver of overpayment pursuant to 5 U.S.C. 5584 and may exercise any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(14) Unless there are applicable contractual or statutory provisions to the contrary, amounts paid on or deducted from debts that are later waived or found not to be owed to the Federal Government shall be promptly refunded to the employee; and

(15) Proceedings with respect to the debt are governed by 5 U.S.C. 5514.

§1208.22 Review of FHFA records related to the debt.

(a) *Request for review.* An employee who desires to inspect or copy FHFA records related to a debt owed by the employee to FHFA must send a letter to the individual designated in the Notice of Intent requesting access to the relevant records. The letter must be received in the office of that individual within 15 calendar days after the employee's receipt of the Notice of Intent.

(b) *Review location and time.* In response to a timely request submitted by the employee, the employee shall be notified of the location and time when the employee may inspect and copy records related to his or her debt that are not exempt from disclosure. If the

employee is unable personally to inspect such records as the result of geographical or other constraints, FHFA shall arrange to send copies of such records to the employee. The debtor shall pay copying costs unless they are waived by FHFA. Copying costs shall be assessed pursuant to FHFA's Freedom of Information Act Regulation, 12 CFR part 1202.

§ 1208.23 Opportunity for a hearing where FHFA is the creditor agency.

(a) *Request for a hearing.* (1) *Time-period for submission.* An employee who requests a hearing on the existence or amount of the debt held by FHFA or on the salary-offset schedule proposed by FHFA, must send a written request to FHFA. The request for a hearing must be received by FHFA on or before the 30th calendar day following receipt by the employee of the Notice of Intent.

(2) *Failure to submit timely.* If the employee files a request for a hearing after the expiration of the 30th calendar day, the employee shall not be entitled to a hearing. However, FHFA may accept the request if the employee can show that the delay was the result of circumstances beyond his or her control or that he or she failed to receive actual notice of the filing deadline.

(3) *Contents of request.* The request for a hearing must be signed by the employee and must fully identify and explain with reasonable specificity all the facts, evidence, and witnesses, if any, that the employee believes support his or her position. The employee must also specify whether he or she requests an oral hearing. If an oral hearing is requested, the employee should explain why a hearing by examination of the documents without an oral hearing would not resolve the matter.

(4) *Failure to request a hearing.* The failure of an employee to request a hearing will be considered an admission by the employee that the debt exists in the amount specified in the Notice of Intent that was provided to the employee under § 1208.21(b).

(b) *Obtaining the services of a hearing official*—(1) *Debtor is not an FHFA employee.* When the debtor is not an FHFA employee and FHFA cannot provide a prompt and appropriate hearing before an administrative law judge or other hearing official, FHFA may request a hearing official from an agent of the paying agency, as designated in 5 CFR part 581, appendix A, or as otherwise designated by the paying agency. The paying agency must cooperate with FHFA to provide a hearing official, as required by the FCCS.

(2) *Debtor is an FHFA employee.* When the debtor is an FHFA employee, FHFA may contact any agent of another agency, as designated in 5 CFR part 581, appendix A, or as otherwise designated by the agency, to request a hearing official.

(c) *Procedure*—(1) *Notice of hearing.* After the employee requests a hearing, the hearing official shall notify the employee of the form of the hearing to be provided. If the hearing will be oral, the notice shall set forth the date, time, and location of the hearing, which must occur no more than 30 calendar days after the request is received, unless the employee requests that the hearing be delayed. If the hearing will be conducted by an examination of documents, the employee shall be notified within 30 calendar days that he or she should submit evidence and arguments in writing to the hearing official within 30 calendar days.

(2) *Oral hearing.* (i) An employee who requests an oral hearing shall be provided an oral hearing if the hearing official determines that the matter cannot be resolved by an examination of the documents alone, as for example, when an issue of credibility or veracity is involved. The oral hearing need not be an adversarial adjudication; and rules of evidence need not apply. Witnesses who testify in an oral hearing shall do so under oath or affirmation.

(ii) Oral hearings may take the form of, but are not limited to:

(A) Informal conferences with the hearing official in which the employee and agency representative are given full opportunity to present evidence, witnesses, and argument;

(B) Informal meetings in which the hearing examiner interviews the employee; or

(C) Formal written submissions followed by an opportunity for oral presentation.

(3) *Hearing by examination of documents.* If the hearing official determines that an oral hearing is not necessary, he or she shall make the determination based upon an examination of the documents.

(d) *Record.* The hearing official shall maintain a summary record of any hearing conducted under this section.

(e) *Decision.* (1) The hearing official shall issue a written opinion stating his or her decision, based upon all evidence and information developed during the hearing, as soon as practicable after the hearing, but not later than 60 calendar days after the date on which the request was received by FHFA, unless the hearing was delayed at the request of the employee, in which case the 60-day decision period shall be extended by the number of days by which the hearing was postponed.

(2) The decision of the hearing official shall be final and is considered to be an official certification regarding the existence and the amount of the debt for purposes of executing salary offset under 5 U.S.C. 5514. If the hearing official determines that a debt may not be collected by salary offset, but FHFA finds that the debt is still valid, FHFA may seek collection of the debt through other means in accordance with applicable law and regulations.

(f) *Content of decision.* The written decision shall include:

(1) A summary of the facts concerning the origin, nature, and amount of the debt;

(2) The hearing official's findings, analysis, and conclusions; and

(3) The terms of any repayment schedules, if applicable.

(g) *Failure to appear.* If, in the absence of good cause shown, such as illness, the employee or the representative of FHFA fails to appear, the hearing official shall proceed with the hearing as scheduled, and make his or her decision based upon the oral testimony presented and the documentation submitted by both parties. At the request of both parties, the hearing official may schedule a new hearing date. Both parties shall be given reasonable notice of the time and place of the new hearing.

§ 1208.24 Certification where FHFA is the creditor agency.

(a) *Issuance.* FHFA shall issue a certification in all cases where the hearing official determines that a debt exists or the employee admits the existence and amount of the debt, as for example, by failing to request a hearing.

(b) *Contents.* The certification must be in writing and state:

(1) That the employee owes the debt;

(2) The amount and basis of the debt;

(3) The date the Federal Government's right to collect the debt first accrued;

(4) The date the employee was notified of the debt, the action(s) taken pursuant to FHFA's regulations, and the dates such actions were taken;

(5) If the collection is to be made by lump-sum payment, the amount and date such payment will be collected;

(6) If the collection is to be made in installments through salary offset, the amount or percentage of disposable pay to be collected in each installment and, if FHFA wishes, the desired commencing date of the first installment, if a date other than the next officially established pay period; and

(7) A statement that FHFA's regulation on salary offset has been approved by OPM pursuant to 5 CFR part 550, subpart K.

§ 1208.25 Voluntary repayment agreements as alternative to salary offset where FHFA is the creditor agency.

(a) *Proposed repayment schedule.* In response to a Notice of Intent, an employee may propose to repay the debt voluntarily in lieu of salary offset by submitting a written proposed repayment schedule to FHFA. Any proposal under this section must be received by FHFA within 30 calendar days after receipt of the Notice of Intent.

(b) *Notification of decision.* In response to a timely proposal by the employee, FHFA shall notify the employee whether the employee's proposed repayment schedule is acceptable. FHFA has the discretion to accept, reject, or propose to the employee a modification of the proposed repayment schedule.

(1) If FHFA decides that the proposed repayment schedule is unacceptable, the employee shall have 30 calendar days from the date he or she received

notice of the decision in which to file a request for a hearing.

(2) If FHFA decides that the proposed repayment schedule is acceptable or the employee agrees to a modification proposed by FHFA, an agreement shall be put in writing and signed by both the employee and FHFA.

§ 1208.26 Special review where FHFA is the creditor agency.

(a) *Request for review.* (1) An employee subject to salary offset or a voluntary repayment agreement may, at any time, request a special review by FHFA of the amount of the salary offset or voluntary repayment, based on materially changed circumstances, including, but not limited to, catastrophic illness, divorce, death, or disability.

(2) The request for special review must include an alternative proposed offset or payment schedule and a detailed statement, with supporting documents, that shows why the current salary offset or payments result in extreme financial hardship to the employee and his or her spouse and dependents. The detailed statement must indicate:

(i) Income from all sources;

(ii) Assets;

(iii) Liabilities;

(iv) Number of dependents;

(v) Expenses for food, housing, clothing, and transportation;

(vi) Medical expenses; and

(vii) Exceptional expenses, if any.

(b) *Evaluation of request.* FHFA shall evaluate the statement and supporting documents and determine whether the original offset or repayment schedule imposes extreme financial hardship on the employee, for example, by preventing the employee from meeting essential subsistence expenses such as food, housing, clothing, transportation, and medical care. FHFA shall notify the employee in writing within 30 calendar days of such determination, including, if appropriate, a revised offset or payment schedule. If the special review results in a revised offset or repayment schedule, FHFA shall provide a new certification to the paying agency.

§ 1208.27 Notice of salary offset where FHFA is the paying agency.

(a) *Notice.* Upon issuance of a proper certification by FHFA (for debts owed to FHFA) or upon receipt of a proper certification from another creditor agency, FHFA shall send the employee a written notice of salary offset.

(b) *Content of notice.* Such written notice of salary offset shall advise the employee of the:

(1) Certification that has been issued by FHFA or received from another creditor agency;

(2) Amount of the debt and of the deductions to be made; and

(3) Date and pay period when the salary offset will begin.

(c) If FHFA is not the creditor agency, FHFA shall provide a copy of the notice of salary offset to the creditor agency and advise the creditor agency of the dollar amount to be offset and the pay period when the offset will begin.

§ 1208.28 Procedures for salary offset where FHFA is the paying agency.

(a) *Generally.* FHFA shall coordinate salary deductions under this section and shall determine the amount of an employee's disposable pay and the amount of the salary offset subject to the requirements in this section. Deductions shall begin the pay period following the issuance of the certification by FHFA or the receipt by FHFA of the certification from another agency, or as soon thereafter as possible.

(b) Upon issuance of a proper certification by FHFA for debts owed to FHFA, or upon receipt of a proper certification from a creditor agency, FHFA shall send the employee a written notice of salary offset. Such notice shall advise the employee:

(1) That certification has been issued by FHFA or received from another creditor agency;

(2) Of the amount of the debt and of the deductions to be made; and provided for in the certification, and

(3) Of the initiation of salary offset at the next officially established pay interval or as otherwise provided for in the certification.

(c) Where appropriate, FHFA shall provide a copy of the notice to the creditor agency and advise such agency

of the dollar amount to be offset and the pay period when the offset will begin.

(d) *Types of collection*—(1) *Lump-sum payment.* If the amount of the debt is equal to or less than 15 percent of the employee's disposable pay, such debt ordinarily will be collected in one lump-sum payment.

(2) *Installment deductions.* Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any pay period will not exceed 15 percent of the disposable pay from which the deduction is made unless the employee has agreed in writing to the deduction of a greater amount. The installment payment should normally be sufficient in size and frequency to liquidate the debt in no more than three years. Installment payments of less than $50 should be accepted only in the most unusual circumstances.

(3) *Lump-sum deductions from final check.* In order to liquidate a debt, a lump-sum deduction exceeding 15 percent of disposable pay may be made pursuant to 31 U.S.C. 3716 from any final salary payment due a former employee, whether the former employee was separated voluntarily or involuntarily.

(4) *Lump-sum deductions from other sources.* Whenever an employee subject to salary offset is separated from FHFA, and the balance of the debt cannot be liquidated by offset of the final salary check, FHFA may offset any later payments of any kind to the former employee to collect the balance of the debt pursuant to 31 U.S.C. 3716.

(e) *Multiple debts*—(1) Where two or more creditor agencies are seeking salary offset, or where two or more debts are owed to a single creditor agency, FHFA may, at its discretion, determine whether one or more debts should be offset simultaneously within the 15 percent limitation.

(2) In the event that a debt owed FHFA is certified while an employee is subject to salary offset to repay another agency, FHFA may, at its discretion, determine whether the debt to FHFA should be repaid before the debt to the other agency is repaid, repaid simultaneously with the other debt, or repaid after the debt to the other agency.

(3) A levy pursuant to the Internal Revenue Code of 1986 shall take precedence over other deductions under this section, as provided in 5 U.S.C. 5514(d).

§ 1208.29 Coordinating salary offset with other agencies.

(a) *Responsibility of FHFA as the creditor agency.* (1) FHFA shall be responsible for:

(i) Arranging for a hearing upon proper request by a Federal employee;

(ii) Preparing the Notice of Intent consistent with the requirements of § 1208.21;

(iii) Obtaining hearing officials from other agencies pursuant to § 1208.23(b); and

(iv) Ensuring that each certification of debt pursuant to § 1208.24(b) is sent to a paying agency.

(2) Upon completion of the procedures set forth in §§ 1208.24 through 1208.26, FHFA shall submit to the employee's paying agency, if applicable, a certified debt claim and an installment agreement or other instruction on the payment schedule.

(i) If the employee is in the process of separating from the Federal Government, FHFA shall submit its debt claim to the employee's paying agency for collection by lump-sum deduction from the employee's final check. The paying agency shall certify the total amount of its collection and furnish a copy of the certification to FHFA and to the employee.

(ii) If the employee is already separated and all payments due from his or her former paying agency have been paid, FHFA may, unless otherwise prohibited, request that money due and payable to the employee from the Federal Government, including payments from the Civil Service Retirement and Disability Fund (5 CFR 831.1801) or other similar funds, be administratively offset to collect the debt.

(iii) When an employee transfers to another paying agency, FHFA shall not repeat the procedures described in §§ 1208.24 through 1208.26. Upon receiving notice of the employee's transfer,

FHFA shall review the debt to ensure that collection is resumed by the new paying agency.

(b) *Responsibility of FHFA as the paying agency*—(1) *Complete claim.* When FHFA receives a certified claim from a creditor agency, the employee shall be given written notice of the certification, the date salary offset will begin, and the amount of the periodic deductions. Deductions shall be scheduled to begin at the next officially established pay interval or as otherwise provided for in the certification.

(2) *Incomplete claim.* When FHFA receives an incomplete certification of debt from a creditor agency, FHFA shall return the claim with notice that procedures under 5 U.S.C. 5514 and 5 CFR 550.1104 must be followed, and that a properly certified claim must be received before FHFA will take action to collect the debt from the employee's current pay account.

(3) *Review.* FHFA is not authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) *Employees who transfer from one paying agency to another agency.* If, after the creditor agency has submitted the debt claim to FHFA, the employee transfers to another agency before the debt is collected in full, FHFA must certify the total amount collected on the debt as required by 5 CFR 550.1109. One copy of the certification shall be furnished to the employee and one copy shall be sent to the creditor agency along with notice of the employee's transfer. If FHFA is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the requirements set forth herein and in 5 CFR part 550, subpart K, have been met. FHFA must submit a properly certified claim to the new payment agency before a collection can be made.

§ 1208.30 Interest, penalties, and administrative costs.

Where FHFA is the creditor agency, FHFA shall assess interest, penalties, and administrative costs pursuant to 31 U.S.C. 3717 and the FCCS, 31 CFR chapter IX.

§ 1208.31 Refunds.

(a) Where FHFA is the creditor agency, FHFA shall promptly refund any amount deducted under the authority of 5 U.S.C. 5514 when:

(1) FHFA receives notice that the debt has been waived or otherwise found not to be owing to the Federal Government; or

(2) An administrative or judicial order directs FHFA to make a refund.

(b) Unless required by law or contract, refunds under this section shall not bear interest.

§ 1208.32 Request from a creditor agency for the services of a hearing official.

(a) FHFA may provide qualified personnel to serve as hearing officials upon request of a creditor agency when:

(1) The debtor is employed by FHFA and the creditor agency cannot provide a prompt and appropriate hearing before a hearing official furnished pursuant to another lawful arrangement; or

(2) The debtor is employed by the creditor agency and that agency cannot arrange for a hearing official.

(b) Services provided by FHFA to creditor agencies under this section shall be provided on a fully reimbursable basis pursuant to 31 U.S.C. 1535, or other applicable authority.

§ 1208.33 Non-waiver of rights by payments.

A debtor's payment, whether voluntary or involuntary, of all or any portion of a debt being collected pursuant to this subpart B shall not be construed as a waiver of any rights that the debtor may have under any statute, regulation, or contract, except as otherwise provided by law or contract.

Subpart C—Administrative Offset

§ 1208.40 Authority and scope.

(a) The provisions of this subpart C apply to the collection of debts owed to the Federal Government arising from transactions with FHFA. Administrative offset is authorized under the Debt Collection Improvement Act of 1996 (DCIA). This subpart C is consistent with the Federal Claims Collection Standards (FCCS) on administrative offset issued by the Department of Justice.

(b) FHFA may collect a debt owed to the Federal Government from a person, organization, or other entity by administrative offset, pursuant to 31 U.S.C. 3716, where:

(1) The debt is certain in amount;

(2) Administrative offset is feasible, desirable, and not otherwise prohibited;

(3) The applicable statute of limitations has not expired; and

(4) Administrative offset is in the best interest of the Federal Government.

§ 1208.41 Collection.

(a) FHFA may collect a claim from a person, organization, or other entity by administrative offset of monies payable by the Federal Government only after:

(1) Providing the debtor with due process required under this part; and

(2) Providing the paying agency with written certification that the debtor owes the debt in the amount stated and that FHFA, as creditor agency, has complied with this part.

(b) Prior to initiating collection by administrative offset, FHFA should determine that the proposed offset is within the scope of this remedy, as set forth in 31 CFR 901.3(a). Administrative offset under 31 U.S.C. 3716 may not be used to collect debts more than 10 years after the Federal Government's right to collect the debt first accrued, except as otherwise provided by law. In addition, administrative offset may not be used when a statute explicitly prohibits its use to collect the claim or type of claim involved.

(c) Unless otherwise provided, debts or payments not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under common law, or any other applicable statutory authority.

§ 1208.42 Administrative offset prior to completion of procedures.

FHFA shall not be required to follow the procedures described in § 1208.43 where:

(a) Prior to the completion of the procedures described in § 1208.43, FHFA may effect administrative offset if failure to offset would substantially prejudice its ability to collect the debt, and if the time before the payment is to be made does not reasonably permit completion of the procedures described in § 1208.43. Such prior administrative offset shall be followed promptly by the completion of the procedures described in § 1208.43. Amounts recovered by administrative offset but later found not to be owed to FHFA shall be promptly refunded. This section applies only to administrative offset pursuant to 31 CFR 901.3(c), and does not apply when debts are referred to the Department of the Treasury for mandatory centralized administrative offset under 31 CFR 901.3(b)(1).

(b) The administrative offset is in the nature of a recoupment (*i.e.*, FHFA may offset a payment due to the debtor when both the payment due to the debtor and the debt owed to FHFA arose from the same transaction); or

(c) In the case of non-centralized administrative offsets, FHFA first learns of the existence of a debt due when there would be insufficient time to afford the debtor due process under these procedures before the paying agency makes payment to the debtor; in such cases, the Director shall give the debtor notice and an opportunity for review as soon as practical and shall refund any money ultimately found not to be due to the Federal Government.

§ 1208.43 Procedures.

Unless the procedures described in § 1208.42 are used, prior to collecting any debt by administrative offset or referring such claim to another agency for collection through administrative offset, FHFA shall provide the debtor with the following:

(a) Written notification of the nature and amount of the debt, the intention

of FHFA to collect the debt through administrative offset, and a statement of the rights of the debtor under this section;

(b) An opportunity to inspect and copy the records of FHFA related to the debt that are not exempt from disclosure;

(c) An opportunity for review within FHFA of the determination of indebtedness. Any request for review by the debtor shall be in writing and shall be submitted to FHFA within 30 calendar days of the date of the notice of the offset. FHFA may waive the time limits for requesting review for good cause shown by the debtor. FHFA shall provide the debtor with a reasonable opportunity for an oral hearing when:

(1) An applicable statute authorizes or requires FHFA to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or

(2) The debtor requests reconsideration of the debt and FHFA determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, as for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this subpart C is not required to be a formal evidentiary hearing, although FHFA shall document all significant matters discussed at the hearing. In those cases where an oral hearing is not required by this subpart C, FHFA shall make its determination on the request for waiver or reconsideration based upon a review of the written record; and

(d) An opportunity to enter into a written agreement for the voluntary repayment of the amount of the claim at the discretion of FHFA.

§ 1208.44 Interest, penalties, and administrative costs.

FHFA shall assess interest, penalties, and administrative costs on debts owed to the Federal Government, in accordance with 31 U.S.C. 3717 and the FCCS. FHFA may also assess interest and related charges on debts that are not subject to 31 U.S.C. 3717 and the FCCS to the extent authorized under the common law or other applicable statutory authority.

§ 1208.45 Refunds.

FHFA shall refund promptly those amounts recovered by administrative offset but later found not to be owed to the Federal Government. Unless required by law or contract, such refunds shall not bear interest.

§ 1208.46 No requirement for duplicate notice.

Where FHFA has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, FHFA is not required to duplicate such notice and review opportunities prior to initiating administrative offset.

§ 1208.47 Requests for administrative offset to other Federal agencies.

(a) FHFA may request that a debt owed to FHFA be collected by administrative offset against funds due and payable to a debtor by another agency.

(b) In requesting administrative offset, FHFA, as creditor, shall certify in writing to the agency holding funds of the debtor:

(1) That the debtor owes the debt;

(2) The amount and basis of the debt; and

(3) That FHFA has complied with the requirements of its own administrative offset regulations and the applicable provisions of the FCCS with respect to providing the debtor with due process, unless otherwise provided.

§ 1208.48 Requests for administrative offset from other Federal agencies.

(a) Any agency may request that funds due and payable to a debtor by FHFA be administratively offset in order to collect a debt owed to such agency by the debtor.

(b) FHFA shall initiate the requested administrative offset only upon:

(1) Receipt of written certification from the creditor agency that:

(i) The debtor owes the debt, including the amount and basis of the debt;

(ii) The agency has prescribed regulations for the exercise of administrative offset; and

(iii) The agency has complied with its own administrative offset regulations and with the applicable provisions of the FCCS, including providing any required hearing or review.

(2) A determination by FHFA that collection by administrative offset against funds payable by FHFA would be in the best interest of the Federal Government as determined by the facts and circumstances of the particular case and that such administrative offset would not otherwise be contrary to law.

§ 1208.49 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) *Request for administrative offset.* Unless otherwise prohibited by law, FHFA may request that monies that are due and payable to a debtor from the Civil Service Retirement and Disability Fund (Fund) be offset administratively in reasonable amounts in order to collect in one full payment or in a minimal number of payments debt owed to FHFA by the debtor. Such requests shall be made to the appropriate officials of OPM in accordance with such regulations as may be prescribed by FHFA or OPM.

(b) *Contents of certification.* When making a request for administrative offset under paragraph (a) of this section, FHFA shall provide OPM with a written certification that:

(1) The debtor owes FHFA a debt, including the amount of the debt;

(2) FHFA has complied with the applicable statutes, regulations, and procedures of OPM; and

(3) FHFA has complied with the requirements of the FCCS, including any required hearing or review.

(c) If FHFA decides to request administrative offset under paragraph (a) of this section, it shall make the request as soon as practicable after completion of the applicable procedures. This will satisfy any requirement that administrative offset be initiated prior to the expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least one year has elapsed since the administrative offset request was originally made, the debtor shall be permitted to offer a satisfactory repayment plan in lieu of administrative offset if he or she establishes that changed financial circumstances would render the administrative offset unjust.

(d) If FHFA collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, FHFA shall act promptly to modify or terminate its request for administrative offset under paragraph (a) of this section.

Subpart D—Tax Refund Offset

§ 1208.50 Authority and scope.

The provisions of 26 U.S.C. 6402(d) and 31 U.S.C. 3720A authorize the Secretary of the Treasury to offset a delinquent debt owed the Federal Government from the tax refund due a taxpayer when other collection efforts have failed to recover the amount due. In addition, FHFA is authorized to collect debts by means of administrative offset under 31 U.S.C. 3716 and, as part of the debt collection process, to notify the United States Department of Treasury's Financial Management Service of the amount of such debt for collection by tax refund offset.

§ 1208.51 Definitions.

The following terms apply to this subpart D—

Debt or claim means an amount of money, funds or property which has been determined by FHFA to be due to the Federal Government from any person, organization, or entity, except another Federal agency.

(1) A debt becomes eligible for tax refund offset procedures if:

(i) It cannot currently be collected pursuant to the salary offset procedures of 5 U.S.C. 5514(a)(1);

(ii) The debt is ineligible for administrative offset or cannot be collected currently by administrative offset; and

(iii) The requirements of this section are otherwise satisfied.

(2) All judgment debts are past due for purposes of this subpart D. Judgment debts remain past due until paid in full.

Debtor means a person who owes a debt or a claim. The term ''person'' includes any individual, organization or entity, except another Federal agency.

Dispute means a written statement supported by documentation or other evidence that all or part of an alleged debt is not past due or legally enforceable, that the amount is not the amount currently owed, that the outstanding debt has been satisfied, or in the case of a debt reduced to judgment, that the judgment has been satisfied or stayed.

Notice means the information sent to the debtor pursuant to §1208.53. The date of the notice is that date shown on the notice letter as its date of issuance.

Tax refund offset means withholding or reducing a tax refund payment by an amount necessary to satisfy a debt owed by the payee(s) of a tax refund payment.

Tax refund payment means any overpayment of Federal taxes to be refunded to the person making the overpayment after the Internal Revenue Service (IRS) makes the appropriate credits.

§ 1208.52 Procedures.

(a) *Referral to the Department of the Treasury.* (1) FHFA may refer any past due, legally enforceable nonjudgment debt of an individual, organization, or entity to the Department of the Treasury for tax refund offset if FHFA's or the referring agency's rights of action accrued more than three months but less than 10 years before the offset is made.

(2) Debts reduced to judgment may be referred at any time.

(3) Debts in amounts lower than $25 are not subject to referral.

(4) In the event that more than one debt is owed, the tax refund offset procedures shall be applied in the order in which the debts became past due.

(5) FHFA shall notify the Department of the Treasury of any change in the amount due promptly after receipt of payment or notice of other reductions.

(b) *Notice.* FHFA shall provide the debtor with written notice of its intent to offset before initiating the offset. Notice shall be mailed to the debtor at the current address of the debtor, as determined from information obtained from the Internal Revenue Service pursuant to 26 U.S.C. 6103(m)(2), (4), (5) or maintained by FHFA. The notice sent to the debtor shall state the amount of the debt and inform the debtor that:

(1) The debt is past due;

(2) FHFA intends to refer the debt to the Department of the Treasury for offset from tax refunds that may be due to the taxpayer;

(3) FHFA intends to provide information concerning the delinquent debt exceeding $100 to a consumer reporting bureau unless such debt has already been disclosed; and

(4) Before the debt is reported to a consumer reporting agency, if applicable, and referred to the Department of the Treasury for offset from tax refunds, the debtor has 65 calendar days from the date of notice to request a review under paragraph (d) of this section.

(c) *Report to consumer reporting agency.* If the debtor neither pays the amount due nor presents evidence that the amount is not past due or is satisfied or stayed, FHFA will report the debt to a consumer reporting agency at the end of the notice period, if applicable, and refer the debt to the Department of the Treasury for offset from the taxpayer's Federal tax refund. FHFA shall certify to the Department of the Treasury that reasonable efforts have been made by FHFA to obtain payment of such debt.

(d) *Request for review.* A debtor may request a review by FHFA if he or she believes that all or part of the debt is not past due or is not legally enforceable, or in the case of a judgment debt, that the debt has been stayed or the amount satisfied, as follows:

(1) The debtor must send a written request for review to FHFA at the address provided in the notice.

(2) The request must state the amount disputed and reasons why the debtor believes that the debt is not past due, is not legally enforceable, has been satisfied, or if a judgment debt, has been satisfied or stayed.

(3) The request must include any documents that the debtor wishes to be considered or state that additional information will be submitted within the time permitted.

(4) If the debtor wishes to inspect records establishing the nature and amount of the debt, the debtor must

make a written request to FHFA for an opportunity for such an inspection. The office holding the relevant records not exempt from disclosure shall make them available for inspection during normal business hours within one week from the date of receipt of the request.

(5) The request for review and any additional information submitted pursuant to the request must be received by FHFA at the address stated in the notice within 65 calendar days of the date of issuance of the notice.

(6) In reaching its decision, FHFA shall review the dispute and shall consider its records and any documentation and arguments submitted by the debtor. FHFA shall send a written notice of its decision to the debtor. There is no administrative appeal of this decision.

(7) If the evidence presented by the debtor is considered by a non-FHFA agent or other entities or persons acting on behalf of FHFA, the debtor shall be accorded at least 30 calendar days from the date the agent or other entity or person determines that all or part of the debt is past due and legally enforceable to request review by FHFA of any unresolved dispute.

(8) Any debt that previously has been reviewed pursuant to this section or any other section of this part, or that has been reduced to a judgment, may not be disputed except on the grounds of payments made or events occurring subsequent to the previous review or judgment.

(9) To the extent that a debt owed has not been established by judicial or administrative order, a debtor may dispute the existence or amount of the debt or the terms of repayment. With respect to debts established by a judicial or administrative order, FHFA review will be limited to issues concerning the payment or other discharge of the debt.

§ 1208.53 No requirement for duplicate notice.

Where FHFA has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, FHFA is not required to duplicate such notice and review opportunities prior to initiating tax refund offset.

§§ 1208.54–1208.59 [Reserved]

Subpart E—Administrative Wage Garnishment

§ 1208.60 Scope and purpose.

These administrative wage garnishment procedures are issued in compliance with 31 U.S.C. 3720D and 31 CFR 285.11(f). This subpart E provides procedures for FHFA to collect money from a debtor's disposable pay by means of administrative wage garnishment. The receipt of payments pursuant to this subpart E does not preclude FHFA from pursuing other debt collection remedies, including the offset of Federal payments. FHFA may pursue such debt collection remedies separately or in conjunction with administrative wage garnishment. This subpart E does not apply to the collection of delinquent debts from the wages of Federal employees from their Federal employment. Federal pay is subject to the Federal salary offset procedures set forth in 5 U.S.C. 5514 and other applicable laws.

§ 1208.61 Notice.

At least 30 days before the initiation of garnishment proceedings, FHFA will send, by first class mail to the debtor's last known address, a written notice informing the debtor of:

(a) The nature and amount of the debt;

(b) FHFA's intention to initiate proceedings to collect the debt through deductions from the debtor's pay until the debt and all accumulated interest penalties and administrative costs are paid in full;

(c) An explanation of the debtor's rights as set forth in § 1208.62(c); and

(d) The time frame within which the debtor may exercise these rights. FHFA shall retain a stamped copy of the notice indicating the date the notice was mailed.

§ 1208.62 Debtor's rights.

FHFA shall afford the debtor the opportunity:

(a) To inspect and copy records related to the debt;

(b) To enter into a written repayment agreement with FHFA, under terms agreeable to FHFA; and

(c) To the extent that a debt owed has not been established by judicial or administrative order, to request a hearing concerning the existence or amount of the debt or the terms of the repayment schedule. With respect to debts established by a judicial or administrative order, a debtor may request a hearing concerning the payment or other discharge of the debt. The debtor is not entitled to a hearing concerning the terms of the proposed repayment schedule if these terms have been established by written agreement.

§ 1208.63 Form of hearing.

(a) If the debtor submits a timely written request for a hearing as provided in § 1208.62(c), FHFA will afford the debtor a hearing, which at FHFA's option may be oral or written. FHFA will provide the debtor with a reasonable opportunity for an oral hearing when FHFA determines that the issues in dispute cannot be resolved by review of the documentary evidence, for example, when the validity of the claim turns on the issue of credibility or veracity.

(b) If FHFA determines that an oral hearing is appropriate, the time and location of the hearing shall be established by FHFA. An oral hearing may, at the debtor's option, be conducted either in person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of the agency.

(c) In cases when it is determined that an oral hearing is not required by this section, FHFA will accord the debtor a ''paper hearing,'' that is, FHFA will decide the issues in dispute based upon a review of the written record.

§ 1208.64 Effect of timely request.

If FHFA receives a debtor's written request for a hearing within 15 business days of the date FHFA mailed its notice of intent to seek garnishment, FHFA shall not issue a withholding order until the debtor has been provided the requested hearing, and a decision in accordance with § 1208.68 and § 1208.69 has been rendered.

§ 1208.65 Failure to timely request a hearing.

If FHFA receives a debtor's written request for a hearing after 15 business days of the date FHFA mailed its notice of intent to seek garnishment, FHFA shall provide a hearing to the debtor. However, FHFA will not delay issuance of a withholding order unless it determines that the untimely filing of the request was caused by factors over which the debtor had no control, or FHFA receives information that FHFA believes justifies a delay or cancellation of the withholding order.

§ 1208.66 Hearing official.

A hearing official may be any qualified individual, as determined by FHFA, including an administrative law judge.

§ 1208.67 Procedure.

After the debtor requests a hearing, the hearing official shall notify the debtor of:

(a) The date and time of a telephonic hearing;

(b) The date, time, and location of an in-person oral hearing; or

(c) The deadline for the submission of evidence for a written hearing.

§ 1208.68 Format of hearing.

FHFA will have the burden of proof to establish the existence or amount of the debt. Thereafter, if the debtor disputes the existence or amount of the debt, the debtor must prove by a preponderance of the evidence that no debt exists, or that the amount of the debt is incorrect. In addition, the debtor may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law. The hearing official shall maintain a record of any hearing held under this section. Hearings are not required to be formal, and evidence may be offered without regard to formal rules of evidence. Witnesses who testify in oral hearings shall do so under oath or affirmation.

§ 1208.69 Date of decision.

The hearing official shall issue a written opinion stating his or her decision as soon as practicable, but not later than 60 days after the date on which the request for such hearing was received by FHFA. If FHFA is unable to provide the debtor with a hearing and decision within 60 days after the receipt of the request for such hearing:

(a) FHFA may not issue a withholding order until the hearing is held and a decision rendered; or

(b) If FHFA had previously issued a withholding order to the debtor's employer, the withholding order will be suspended beginning on the 61st day after the date FHFA received the hearing request and continuing until a hearing is held and a decision is rendered.

§ 1208.70 Content of decision.

The written decision shall include:

(a) A summary of the facts presented;

(b) The hearing official's findings, analysis and conclusions; and

(c) The terms of any repayment schedule, if applicable.

§ 1208.71 Finality of agency action.

A decision by a hearing official shall become the final decision of FHFA for the purpose of judicial review under the Administrative Procedure Act.

§ 1208.72 Failure to appear.

In the absence of good cause shown, a debtor who fails to appear at a scheduled hearing will be deemed as not having timely filed a request for a hearing.

§ 1208.73 Wage garnishment order.

(a) Unless FHFA receives information that it believes justifies a delay or cancellation of the withholding order, FHFA will send by first class mail a withholding order to the debtor's employer within 30 calendar days after the debtor fails to make a timely request for a hearing (*i.e.*, within 15 business days after the mailing of the notice of FHFA's intent to seek garnishment) or, if a timely request for a hearing is made by the debtor, within 30 calendar days after a decision to issue a withholding order becomes final.

(b) The withholding order sent to the employer will be in the form prescribed by the Secretary of the Treasury, on FHFA's letterhead, and signed by the head of the agency or delegate. The order will contain all information necessary for the employer to comply with the withholding order, including the debtor's name, address, and social security number, as well as instructions for withholding and information as to where payments should be sent.

(c) FHFA will keep a stamped copy of the order indicating the date it was mailed.

§ 1208.74 Certification by employer.

Along with the withholding order, FHFA will send to the employer a certification in a form prescribed by the Secretary of the Treasury. The employer shall complete and return the certification to FHFA within the time frame prescribed in the instructions to the form. The certification will address matters such as information about the debtor's employment status and disposable pay available for withholding.

§ 1208.75 Amounts withheld.

(a) Upon receipt of the garnishment order issued under this section, the employer shall deduct from all disposable pay paid to the debtor during each pay period the amount of garnishment described in paragraphs (b) through (d) of this section.

(b) Subject to the provisions of paragraphs (c) and (d) of this section, the amount of garnishment shall be the lesser of:

(1) The amount indicated on the garnishment order up to 15 percent of the debtor's disposable pay; or

(2) The amount set forth in 15 U.S.C. 1673(a)(2). The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which the debtor's disposable pay exceeds an amount equivalent to thirty times the minimum wage.

(c) When a debtor's pay is subject to withholding orders with priority, the following shall apply:

(1) Unless otherwise provided by Federal law, withholding orders issued under this section shall be paid in the amounts set forth under paragraph (b) of this section and shall have priority over other withholding orders which

are served later in time. However, withholding orders for family support shall have priority over withholding orders issued under this section.

(2) If amounts are being withheld from a debtor's pay pursuant to a withholding order served on an employer before a withholding order issued pursuant to this section, or if a withholding order for family support is served on an employer at any time, the amounts withheld pursuant to the withholding order issued under this section shall be the lesser of:

(i) The amount calculated under paragraph (b) of this section; or

(ii) An amount equal to 25 percent of the debtor's disposable pay less the amount(s) withheld under the withholding order(s) with priority.

(3) If a debtor owes more than one debt to FHFA, FHFA may issue multiple withholding orders. The total amount garnished from the debtor's pay for such orders will not exceed the amount set forth in paragraph (b) of this section.

(d) An amount greater than that set forth in paragraphs (b) and (c) of this section may be withheld upon the written consent of the debtor.

(e) The employer shall promptly pay to FHFA all amounts withheld in accordance with the withholding order issued pursuant to this section.

(f) An employer shall not be required to vary its normal pay and disbursement cycles in order to comply with the withholding order.

(g) Any assignment or allotment by the employee of the employee's earnings shall be void to the extent it interferes with or prohibits execution of the withholding order under this section, except for any assignment or allotment made pursuant to a family support judgment or order.

(h) The employer shall withhold the appropriate amount from the debtor's wages for each pay period until the employer receives notification from FHFA to discontinue wage withholding. The garnishment order shall indicate a reasonable period of time within which the employer is required to commence wage withholding.

§ 1208.76 Exclusions from garnishment.

FHFA will not garnish the wages of a debtor it knows has been involuntarily separated from employment until the debtor has been re-employed continuously for at least 12 months. The debtor has the burden of informing FHFA of the circumstances surrounding an involuntary separation from employment.

§ 1208.77 Financial hardship.

(a) A debtor whose wages are subject to a wage withholding order under this section, may, at any time, request a review by FHFA of the amount garnished, based on materially changed circumstances such as disability, divorce, or catastrophic illness which result in financial hardship.

(b) A debtor requesting a review under this section shall submit the basis for claiming that the current amount of garnishment results in a financial hardship to the debtor, along with supporting documentation.

(c) If a financial hardship is found, FHFA will downwardly adjust, by an amount and for a period of time agreeable to FHFA, the amount garnished to reflect the debtor's financial condition. FHFA will notify the employer of any adjustments to the amounts to be withheld.

§ 1208.78 Ending garnishment.

(a) Once FHFA has fully recovered the amounts owed by the debtor, including interest, penalties, and administrative costs consistent with the Federal Claims Collection Standards, FHFA will send the debtor's employer notification to discontinue wage withholding.

(b) At least annually, FHFA will review its debtors' accounts to ensure that garnishment has been terminated for accounts that have been paid in full.

§ 1208.79 Prohibited actions by employer.

The Debt Collection Improvement Act of 1996 prohibits an employer from discharging, refusing to employ, or taking disciplinary action against the debtor due to the issuance of a withholding order under this subpart E.

§ 1208.80 Refunds.

(a) If a hearing official determines that a debt is not legally due and owing to the United States, FHFA shall promptly refund any amount collected by means of administrative wage garnishment.

(b) Unless required by Federal law or contract, refunds under this section shall not bear interest.

§ 1208.81 Right of action.

FHFA may sue any employer for any amount that the employer fails to withhold from wages owed and payable to its employee in accordance with this subpart E. However, a suit will not be filed before the termination of the collection action involving a particular debtor, unless earlier filing is necessary to avoid expiration of any applicable statute of limitations. For purposes of this subpart E, ''termination of the collection action'' occurs when the agency has terminated collection action in accordance with the FCCS or other applicable standards. In any event, termination of the collection action will have been deemed to occur if FHFA has not received any payments to satisfy the debt from the particular debtor whose wages were subject to garnishment, in whole or in part, for a period of one (1) year.

PART 1209—RULES OF PRACTICE AND PROCEDURE

Subpart A—Scope and Authority

Sec.

Subpart B—Enforcement Proceedings Under Sections 1371 Through 1379D of the Safety and Soundness Act

Subpart C—Rules of Practice and Procedure

Subpart D—Parties and Representational Practice Before the Federal Housing Finance Agency; Standards of Conduct

Subpart E—Civil Money Penalty Inflation Adjustments

Subpart F—Suspension or Removal of an Entity-Affiliated Party Charged With Felony

AUTHORITY: 5 U.S.C. 554, 556, 557, and 701 *et seq.;* 12 U.S.C. 1430c(d); 12 U.S.C. 4501, 4502, 4503, 4511, 4513, 4513b, 4517, 4526, 4566(c)(1) and (c)(7), 4581–4588, 4631–4641; and 28 U.S.C. 2461 note.

SOURCE: 76 FR 53607, Aug. 26, 2011, unless otherwise noted.

Subpart A—Scope and Authority

§ 1209.1 Scope.

(a) *Authority.* This part sets forth the Rules of Practice and Procedure for hearings on the record in administrative enforcement proceedings in accordance with the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, title XIII of the Housing and Community Development Act of 1992, Public Law 102–550, sections 1301 *et seq.*, codified at 12 U.S.C. 4501 *et seq.*, as amended (the ''Safety and Soundness Act''), as stated in §1209.4 of this part.[1]

(b) *Enforcement Proceedings.* Subpart B of this part (Enforcement Proceedings Under sections 1371 through 1379D of the Safety and Soundness Act) sets forth the statutory authority for enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641) (Enforcement Proceedings).

(c) *Rules of Practice and Procedure.* Subpart C of this part (Rules of Practice and Procedure) prescribes the general rules of practice and procedure applicable to adjudicatory proceedings that the Director is required by statute to conduct on the record after opportunity for a hearing under the Administrative Procedure Act, 5 U.S.C. 554, 556, and 557, under the following statutory provisions:

(1) Enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act, as amended (12 U.S.C. 4631 through 4641);

(2) Removal, prohibition, and civil money penalty proceedings for violations of post-employment restrictions imposed by applicable law;

(3) Proceedings under section 102 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a) to assess civil money penalties; and

(4) Enforcement proceedings under sections 1341 through 1348 of the Safety and Soundness Act, as amended (12 U.S.C. 4581 through 4588), and section 10C of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1430c), except where the Rules of Practice and Procedure in Subpart C are inconsistent with such statutory provisions, in which case the statutory provisions shall apply.

(d) *Representation and conduct.* Subpart D of this part (Parties and Representational Practice before the Federal Housing Finance Agency; Standards of Conduct) sets out the rules of representation and conduct that shall govern any appearance by any person, party, or representative of any person or party, before a presiding officer, the Director of FHFA, or a designated representative of the Director or FHFA staff, in any proceeding or matter pending before the Director.

(e) *Civil money penalty inflation adjustments.* Subpart E of this part (Civil Money Penalty Inflation Adjustments) sets out the requirements for the periodic adjustment of maximum civil money penalty amounts under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Inflation Adjustment Act) on a recurring four-year cycle.[2]

[1] As used in this part, the ''Safety and Soundness Act'' means the Federal Housing Enterprise Financial Safety and Soundness Act of 1992, as amended. *See* §1209.3. The Safety and Soundness Act was amended by the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, sections 1101 *et seq.*, 122 Stat. 2654 (July 30, 2008) (HERA). Specifically, sections 1151 through 1158 of HERA amended sections 1371 through 1379D of the Safety and Soundness Act, (codified at 12 U.S.C. 4631 through 4641) (hereafter, ''Enforcement Proceedings'').

[2] Public Law 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, title

(f) *Informal proceedings.* Subpart F of this part (Suspension or Removal of an Entity-Affiliated Party Charged with Felony) sets out the scope and procedures for the suspension or removal of an entity-affiliated party charged with a felony under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), which provides for an informal hearing before the Director.

[76 FR 53607, Aug. 26, 2011, as amended at 78 FR 37103, June 20, 2013]

§ 1209.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate; and

(c) Unless the context requires otherwise, a party's representative of record, if any, on behalf of that party, may take any action required to be taken by the party.

§ 1209.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

Adjudicatory proceeding means a proceeding conducted pursuant to these rules, on the record, and leading to the formulation of a final order other than a regulation.

Agency has the meaning defined in section 1303(2) of the Safety and Soundness Act (12 U.S.C. 4502(2)).

Associated with the regulated entity means, for purposes of section 1379 of the Safety and Soundness Act (12 U.S.C. 4637), any direct or indirect involvement or participation in the conduct of operations or business affairs of a regulated entity, including engaging in activities related to the operations or management of, providing advice or services to, consulting or contracting with, serving as agent for, or in any other way affecting the operations or business affairs of a regulated entity—with or without regard to—any direct or indirect payment, promise to make payment, or receipt of any compensation or thing of value, such as money, notes, stock, stock options, or other securities, or other benefit or remuneration of any kind, by or on behalf of the regulated entity, except any payment made pursuant to a retirement plan or deferred compensation plan, which is determined by the Director to be permissible under section 1318(e) of the Safety and Soundness Act (12 U.S.C. 4518(e)), or by reason of the death or disability of the party, in the form and manner commonly paid or provided to retirees of the regulated entity, unless such payment, compensation, or such benefit is promised or provided to or for the benefit of said party for the provision of services or other benefit to the regulated entity.

Authorizing statutes has the meaning defined in section 1303(3) of the Safety and Soundness Act (12 U.S.C. 4502(3)).

Bank Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 *et seq.*).

Board or Board of Directors means the board of directors of any Enterprise or Federal Home Loan Bank (Bank), as provided for in the respective authorizing statutes.

Decisional employee means any member of the Director's or the presiding officer's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the presiding officer, respectively, in preparing orders, recommended decisions, decisions, and other documents under subpart C of this part.

Director has the meaning defined in section 1303(9) of the Safety and Soundness Act (12 U.S.C. 4502(9)); except, as the context requires in this part, ''director'' may refer to a member of the Board of Directors or any Board committee of an Enterprise, a Federal Home Loan Bank, or the Office of Finance.

Enterprise has the meaning defined in section 1303(10) of the Safety and Soundness Act (12 U.S.C. 4502(10)).

Entity-affiliated party has the meaning defined in section 1303(11) of the Safety and Soundness Act (12 U.S.C. 4502(11)), and may include an executive officer, any director, or management of the Office of Finance, as applicable

III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Public Law 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293 (28 U.S.C. 2461 note).

under relevant provisions of the Safety and Soundness Act or FHFA regulations.

Executive officer has the meaning defined in section 1303(12) of the Safety and Soundness Act (12 U.S.C. 4502(12)), and may include an executive officer of the Office of Finance, as applicable under relevant provisions of the Safety and Soundness Act or FHFA regulations.

FHFA means the Federal Housing Finance Agency as defined in section 1303(2) of the Safety and Soundness Act (12 U.S.C. 4502(2)).

Notice of charges means the charging document served by FHFA to commence an enforcement proceeding under this part for the issuance of a cease and desist order; removal, suspension, or prohibition order; or an order to assess a civil money penalty, under 12 U.S.C. 4631 through 4641 and §1209.23. A ''notice of charges,'' as used or referred to as such in this part, is not an ''effective notice'' under section 1375(a) of the Safety and Soundness Act (12 U.S.C. 4635(a)).

Office of Finance has the meaning defined in section 1303(19) of the Safety and Soundness Act (12 U.S.C. 4502(19)).

Party means any person named as a respondent in any notice of charges, or FHFA, as the context requires in this part.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, regulated entity, entity-affiliated party, or other entity.

Presiding officer means an administrative law judge or any other person appointed by or at the request of the Director under applicable law to conduct an adjudicatory proceeding under this part.

Regulated entity has the meaning defined in section 1303(20) of the Safety and Soundness Act (12 U.S.C. 4502(20)).

Representative of record means an individual who is authorized to represent a person or is representing himself and who has filed a notice of appearance and otherwise has complied with the requirements under §1209.72. FHFA's representative of record may be referred to as FHFA counsel of record, agency counsel or enforcement counsel.

Respondent means any party that is the subject of a notice of charges under this part.

Safety and Soundness Act means title XIII of the Housing and Community Development Act of 1992, Public Law 102–550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*)

Violation has the meaning defined in section 1303(25) of the Safety and Soundness Act (12 U.S.C. 4502(25)).

Subpart B—Enforcement Proceedings Under Sections 1371 Through 1379D of the Safety and Soundness Act

§1209.4 Scope and authority.

The rules of practice and procedure set forth in Subpart C (Rules of Practice and Procedure) of this part shall be applicable to any hearing on the record conducted by FHFA in accordance with sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641), as follows:

(a) Cease-and-desist proceedings under sections 1371 and 1373 of the Safety and Soundness Act, (12 U.S.C. 4631, 4633);

(b) Civil money penalty assessment proceedings under sections 1373 and 1376 of the Safety and Soundness Act, (12 U.S.C. 4633, 4636); and

(c) Removal and prohibition proceedings under sections 1373 and 1377 of the Safety and Soundness Act, (12 U.S.C. 4633, 4636a), except removal proceedings under section 1377(h) of the Safety and Soundness Act, (12 U.S.C. 4636a(h)).

§1209.5 Cease and desist proceedings.

(a) *Cease and desist proceedings*—(1) *Authority*—(i) *In general.* As prescribed by section 1371(a) of the Safety and Soundness Act (12 U.S.C. 4631(a)), if in the opinion of the Director, a regulated entity or any entity-affiliated party is engaging or has engaged, or the Director has reasonable cause to believe that the regulated entity or any entity-affiliated party is about to engage, in an unsafe or unsound practice in

conducting the business of the regulated entity or the Office of Finance, or is violating or has violated, or the Director has reasonable cause to believe is about to violate, a law, rule, regulation, or order, or any condition imposed in writing by the Director in connection with the granting of any application or other request by the regulated entity or the Office of Finance or any written agreement entered into with the Director, the Director may issue and serve upon the regulated entity or entity-affiliated party a notice of charges (as described in §1209.23) to institute cease and desist proceedings, except with regard to the enforcement of any housing goal that must be addressed under sections 1341 and 1345 of the Safety and Soundness Act (12 U.S.C. 4581, 4585).

(ii) *Hearing on the record.* In accordance with section 1373 of the Safety and Soundness Act (12 U.S.C. 4633), a hearing on the record shall be held in the District of Columbia. Subpart C of this part shall govern the hearing procedures.

(iii) *Consent to order.* Unless the party served with a notice of charges shall appear at the hearing personally or through an authorized representative of record, the party shall be deemed to have consented to the issuance of the cease and desist order.

(2) *Unsatisfactory rating.* In accordance with section 1371(b) of the Safety and Soundness Act (12 U.S.C. 4631(b)), if a regulated entity receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the Director may deem the regulated entity to be engaging in an unsafe or unsound practice within the meaning of section 1371(a) of the Safety and Soundness Act (12 U.S.C. 4631(a)), if any such deficiency has not been corrected.

(3) *Order.* As provided by section 1371(c)(2) of the Safety and Soundness Act (12 U.S.C. 4631(c)(2)), if the Director finds on the record made at a hearing in accordance with section 1373 of the Safety and Soundness Act (12 U.S.C. 4633) that any practice or violation specified in the notice of charges has been established (or the regulated entity or entity-affiliated party consents pursuant to section 1373(a)(4) of the Safety and Soundness Act (12 U.S.C. 4633(a)(4)), the Director may issue and serve upon the regulated entity, executive officer, director, or entity-affiliated party, an order (as set forth in §1209.55) requiring such party to cease and desist from any such practice or violation and to take affirmative action to correct or remedy the conditions resulting from any such practice or violation.

(b) *Affirmative action to correct conditions resulting from violations or activities.* The authority to issue a cease and desist order or a temporary cease and desist order requiring a regulated entity, executive officer, director, or entity-affiliated party to take affirmative action to correct or remedy any condition resulting from any practice or violation with respect to which such cease and desist order or temporary cease and desist order is set forth in section 1371(a), (c)(2), and (d) of the Safety and Soundness Act (12 U.S.C. 4631(a), (c)(2), and (d)), and includes the authority to:

(1) Require the regulated entity or entity-affiliated party to make restitution, or to provide reimbursement, indemnification, or guarantee against loss, if—

(i) Such entity or party or finance facility was unjustly enriched in connection with such practice or violation, or

(ii) The violation or practice involved a reckless disregard for the law or any applicable regulations, or prior order of the Director;

(2) Require the regulated entity to seek restitution, or to obtain reimbursement, indemnification, or guarantee against loss; as

(3) Restrict asset or liability growth of the regulated entity;

(4) Require the regulated entity to obtain new capital;

(5) Require the regulated entity to dispose of any loan or asset involved;

(6) Require the regulated entity to rescind agreements or contracts;

(7) Require the regulated entity to employ qualified officers or employees (who may be subject to approval by the Director at the direction of the Director); and

(8) Require the regulated entity to take such other action, as the Director

determines appropriate, including limiting activities.

(c) *Authority to limit activities.* As provided by section 1371(e) of the Safety and Soundness Act (12 U.S.C. 4631(e)), the authority of the Director to issue a cease and desist order under section 1371 of the Safety and Soundness Act (12 U.S.C. 4631) or a temporary cease and desist order under section 1372 of the Safety and Soundness Act (12 U.S.C. 4632), includes the authority to place limitations on the activities or functions of the regulated entity or entity-affiliated party or any executive officer or director of the regulated entity or entity-affiliated party.

(d) *Effective date of order; judicial review*—(1) *Effective date.* The effective date of an order is as set forth in section 1371(f) of the Safety and Soundness Act (12 U.S.C. 4631(f)).

(2) *Judicial review.* Judicial review is governed by section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

§ 1209.6 Temporary cease and desist orders.

(a) *Temporary cease and desist orders*—(1) *Grounds for issuance.* The grounds for issuance of a temporary cease and desist order are set forth in section 1372(a) of the Safety and Soundness Act (12 U.S.C. 4632(a)). In accordance with section 1372(a) of the Safety and Soundness Act (12 U.S.C. 4632(a)), the Director may:

(i) Issue a temporary order requiring that regulated entity or entity-affiliated party to cease and desist from any violation or practice specified in the notice of charges; and

(ii) Require that regulated entity or entity-affiliated party to take affirmative action to prevent or remedy any insolvency, dissipation, condition, or prejudice, pending completion of the proceedings.

(2) *Additional requirements.* As provided by section 1372(a)(2) of the Safety and Soundness Act (12 U.S.C. 4632(a)(2)), an order issued under section 1372(a)(1) of the Safety and Soundness Act (12 U.S.C. 4632(a)(1)) may include any requirement authorized under section 1371(d) of the Safety and Soundness Act (12 U.S.C. 4631(d)).

(b) *Effective date of temporary order.* The effective date of a temporary order is as provided by section 1372(b) of the Safety and Soundness Act (12 U.S.C. 4632(b)). And, unless set aside, limited, or suspended by a court in proceedings pursuant to the judicial review provisions of section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), shall remain in effect and enforceable pending the completion of the proceedings pursuant to such notice of charges, and shall remain effective until the Director dismisses the charges specified in the notice or until superseded by a cease-and-desist order issued pursuant to section 1371 of the Safety and Soundness Act (12 U.S.C. 4631).

(c) *Incomplete or inaccurate records*—(1) *Temporary order.* As provided by section 1372(c) of the Safety and Soundness Act (12 U.S.C. 4632(c)), if a notice of charges served under section 1371(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4631(a), (b)), specifies on the basis of particular facts and circumstances that the books and records of the regulated entity served are so incomplete or inaccurate that the Director is unable, through the normal supervisory process, to determine the financial condition of the regulated entity or the details or the purpose of any transaction or transactions that may have a material effect on the financial condition of that regulated entity, the Director may issue a temporary order requiring:

(i) The cessation of any activity or practice that gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) Affirmative action to restore the books or records to a complete and accurate state.

(2) *Effective period.* Any temporary order issued under section 1372(c)(1) of the Safety and Soundness Act (12 U.S.C. 4632(c)(1)) shall become effective upon service, and remain in effect and enforceable unless set aside, limited, or suspended in accordance with section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), as provided by section 1372(c)(2) of the Safety and Soundness Act (12 U.S.C. 4632(c)(2)).

(d) *Judicial review.* Section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), authorizes a regulated

entity, executive officer, director, or entity-affiliated party that has been served with a temporary order pursuant to section 1372(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4632(a), (b)) to apply to the United States District Court for the District of Columbia within 10 days after service of the temporary order for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the temporary order, pending the completion of the administrative enforcement proceeding. The district court has jurisdiction to issue such injunction.

(e) *Enforcement of temporary order*. As provided by section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)), in the case of any violation, threatened violation, or failure to obey a temporary order issued pursuant to this section, the Director may bring an action in the United States District Court for the District of Columbia for an injunction to enforce a temporary order, and the district court is to issue such injunction upon a finding made in accordance with section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)).

§ 1209.7 Civil money penalties.

(a) *Civil money penalty proceedings*—(1) *In general*. Section 1376 of the Safety and Soundness Act (12 U.S.C. 4636) governs the imposition of civil money penalties. Upon written notice, which shall conform to the requirements of § 1209.23 of this part, and a hearing on the record to be conducted in accordance with subpart C of this part, the Director may impose a civil money penalty on any regulated entity or any entity-affiliated party as provided by section 1376 of the Safety and Soundness Act for any violation, practice, or breach addressed under sections 1371, 1372, or 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, 4636), except with regard to the enforcement of housing goals that are addressed separately under sections 1341 and 1345 of the Safety and Soundness Act (12 U.S.C. 4581, 4585).

(2) *Amount of penalty*—(i) *First Tier*. Section 1376(b)(1) of the Safety and Soundness Act (12 U.S.C. 4636(b)(1)) prescribes the civil penalty for violations as stated therein, in the amount of $10,000 for each day during which a violation continues.

(ii) *Second Tier*. Section 1376(b)(2) of the Safety and Soundness Act (12 U.S.C. 4636(b)(2)) provides that notwithstanding paragraph (b)(1) thereof, a regulated entity or entity-affiliated party shall forfeit and pay a civil penalty of not more than $50,000 for each day during which a violation, practice, or breach continues, if the regulated entity or entity-affiliated party commits any violation described in (b)(1) thereof, recklessly engages in an unsafe or unsound practice, or breaches any fiduciary duty, and the violation, practice, or breach is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss to the regulated entity; or results in pecuniary gain or other benefit to such party.

(iii) *Third Tier*. Section 1376(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636(b)(3)) provides that, notwithstanding paragraphs (b)(1) and (b)(2) thereof, any regulated entity or entity-affiliated party shall forfeit and pay a civil penalty, in accordance with section 1376(b)(4) of the Safety and Soundness Act (12 U.S.C. 4636(b)(4)), for each day during which such violation, practice, or breach continues, if such regulated entity or entity-affiliated party:

(A) Knowingly—

(*1*) Commits any violation described in any subparagraph of section 1376(b)(1) of the Safety and Soundness Act;

(*2*) Engages in any unsafe or unsound practice in conducting the affairs of the regulated entity; or

(*3*) Breaches any fiduciary duty; and

(B) Knowingly or recklessly causes a substantial loss to the regulated entity or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach.

(b) *Maximum amounts*—(1) *Maximum daily penalty*. Section 1376(b)(4) of the Safety and Soundness Act (12 U.S.C. 4636(b)(4)), prescribes the maximum daily amount of a civil penalty that may be assessed for any violation, practice, or breach pursuant to section 1376(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636(b)(3)), in the case of

any entity-affiliated party (not to exceed $2,000,000.00), and in the case of any regulated entity ($2,000,000.00).

(2) *Inflation Adjustment Act.* The maximum civil penalty amounts are subject to periodic adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), as provided in subpart E of this part.

(c) *Factors in determining amount of penalty.* In accordance with section 1376(c)(2) of the Safety and Soundness Act (12 U.S.C. 4636(c)(2)), in assessing civil money penalties on a regulated entity or an entity-affiliated party in amounts as provided in section 1376(b) of the Safety and Soundness Act (12 U.S.C. 4636(b)), the Director shall give consideration to such factors as:

(1) The gravity of the violation, practice, or breach;

(2) Any history of prior violations or supervisory actions, or any attempts at concealment;

(3) The effect of the penalty on the safety and soundness of the regulated entity or the Office of Finance;

(4) Any loss or risk of loss to the regulated entity or to the Office of Finance;

(5) Any benefits received or derived, whether directly or indirectly, by the respondent(s);

(6) Any injury to the public;

(7) Any deterrent effect on future violations, practices, or breaches;

(8) The financial capacity of the respondent(s), or any unusual circumstance(s) of hardship upon an executive officer, director, or other individual;

(9) The promptness, cost, and effectiveness of any effort to remedy or ameliorate the consequences of the violation, practice, or breach;

(10) The candor and cooperation, if any, of the respondent(s); and

(11) Any other factors the Director may determine by regulation to be appropriate.

(d) *Review of imposition of penalty.* Section 1376(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636(c)(3)) governs judicial review of a penalty order under section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

§ 1209.8 Removal and prohibition proceedings.

(a) *Removal and prohibition proceedings*—(1) *Authority to issue order.* As provided by section 1377(a)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(a)(1)), the Director may serve upon a party described in paragraph (a)(2) of this section, or any officer, director, or management of the Office of Finance, a notice of the intention of the Director to suspend or remove such party from office, or to prohibit any further participation by such party in any manner in the conduct of the affairs of the regulated entity or the Office of Finance.

(2) *Applicability.* As provided by section 1377(a)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(a)(2)), a party described in this paragraph is an entity-affiliated party or any officer, director, or management of the Office of Finance, if the Director determines that:

(i) That party, officer, or director has, directly or indirectly—

(A) Violated—

(1) Any law or regulation;

(2) Any cease and desist order that has become final;

(3) Any condition imposed in writing by the Director in connection with an application, notice, or other request by a regulated entity; or

(4) Any written agreement between such regulated entity and the Director;

(B) Engaged or participated in any unsafe or unsound practice in connection with any regulated entity or business institution; or

(C) Committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(ii) By reason of such violation, practice, or breach—

(A) Such regulated entity or business institution has suffered or likely will suffer financial loss or other damage; or

(B) Such party directly or indirectly received financial gain or other benefit; and

(iii) The violation, practice, or breach described in subparagraph (i) of this section—

(A) Involves personal dishonesty on the part of such party; or

(B) Demonstrates willful or continuing disregard by such party for the

safety or soundness of such regulated entity or business institution.

(3) *Applicability to business entities.* Under section 1377(f) of the Safety and Soundness Act (12 U.S.C. 4636a(f)), this remedy applies only to a person who is an individual, unless the Director specifically finds that it should apply to a corporation, firm, or other business entity.

(b) *Suspension order*—(1) *Suspension or prohibition authorized.* If the Director serves written notice under section 1377(a) of the Safety and Soundness Act (12 U.S.C. 4636a(a)) upon a party subject to that section, the Director may, by order, suspend or remove such party from office, or prohibit such party from further participation in any manner in the conduct of the affairs of the regulated entity or the Office of Finance, if the Director:

(i) Determines that such action is necessary for the protection of the regulated entity or the Office of Finance; and

(ii) Serves such party with written notice of the order.

(2) *Effective period.* The effective period of any order under section 1377(b)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(1)) is specified in section 1377(b)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(2)). An order of suspension shall become effective upon service and, absent a court-ordered stay, remains effective and enforceable until the date the Director dismisses the charges or the effective date of an order issued by the Director under section 1377(c)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(4),(5)).

(3) *Copy of order to be served on regulated entity.* In accordance with section 1377(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(3)), the Director will serve a copy of any order to suspend, remove, or prohibit participation in the conduct of the affairs on the Office of Finance or any regulated entity with which such party is affiliated at the time such order is issued.

(c) *Notice; hearing and order*—(1) *Written notice.* A notice of the intention of the Director to issue an order under sections 1377(a) and (c) of the Safety and Soundness Act, (12 U.S.C. 4636a(a), (c)), shall conform with §1209.23, and may include any such additional information as the Director may require.

(2) *Hearing.* A hearing on the record shall be held in the District of Columbia in accordance with sections 1373(a)(1) and 1377(c)(2) of the Safety and Soundness Act. *See* 12 U.S.C. 4633(a)(1), 4636a(c)(2).

(3) *Consent.* As provided by section 1377(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(3)), unless the party that is the subject of a notice delivered under paragraph (a) of this section appears in person or by a duly authorized representative of record, in the adjudicatory proceeding, such party shall be deemed to have consented to the issuance of an order under this section.

(4) *Issuance of order of suspension or removal.* As provided by section 1377(c)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(4)), the Director may issue an order under this part, as the Director may deem appropriate, if:

(i) A party is deemed to have consented to the issuance of an order under paragraph (d); or

(ii) Upon the record made at the hearing, the Director finds that any of the grounds specified in the notice have been established.

(5) *Effectiveness of order.* As provided by section 1377(c)(5) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(5)), any order issued and served upon a party in accordance with this section shall become effective at the expiration of 30 days after the date of service upon such party and any regulated entity or entity-affiliated party. An order issued upon consent under paragraph (c)(3) of this section, however, shall become effective at the time specified therein. Any such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Director or a reviewing court.

(d) *Prohibition of certain activities and industry-wide prohibition*—(1) *Prohibition of certain activities.* As provided by section 1377(d) of the Safety and Soundness Act (12 U.S.C. 4636a(d)), any person subject to an order issued under subpart B of this part shall not—

(i) Participate in any manner in the conduct of the affairs of any regulated entity or the Office of Finance;

(ii) Solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any regulated entity;

(iii) Violate any voting agreement previously approved by the Director; or

(iv) Vote for a director, or serve or act as an entity-affiliated party of a regulated entity or as an officer or director of the Office of Finance.

(2) *Industry-wide prohibition.* As provided by section 1377(e)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(1)), except as provided in section 1377(e)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(2)), any person who, pursuant to an order issued under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a), has been removed or suspended from office in a regulated entity or the Office of Finance, or prohibited from participating in the conduct of the affairs of a regulated entity or the Office of Finance, may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any regulated entity or the Office of Finance.

(3) *Relief from industry-wide prohibition at the discretion of the Director*—(i) *Relief from order.* As provided by section 1377(e)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(2)), if, on or after the date on which an order has been issued under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) that removes or suspends from office any party, or prohibits such party from participating in the conduct of the affairs of a regulated entity or the Office of Finance, such party receives the written consent of the Director, the order shall cease to apply to such party with respect to the regulated entity or the Office of Finance to the extent described in the written consent. Such written consent shall be on such terms and conditions as the Director therein may specify in his discretion. Any such consent shall be publicly disclosed.

(ii) *No private right of action; no final agency action.* Nothing in this paragraph shall be construed to require the Director to entertain or to provide such written consent, or to confer any rights to such consideration or consent upon any party, regulated entity, entity-affiliated party, or the Office of Finance. Additionally, whether the Director consents to relief from an outstanding order under this part is committed wholly to the discretion of the Director, and such determination shall not be a final agency action for purposes of seeking judicial review.

(4) *Violation of industry-wide prohibition.* As provided by section 1377(e)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(3)), any violation of section 1377(e)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(1)) by any person who is subject to an order issued under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)) (suspension or removal of entity-affiliated party charged with felony) shall be treated as a violation of the order.

(e) *Stay of suspension or prohibition of entity-affiliated party.* As provided by section 1377(g) of the Safety and Soundness Act (12 U.S.C. 4636a(g)), not later than 10 days after the date on which any entity-affiliated party has been suspended from office or prohibited from participation in the conduct of the affairs of a regulated entity, such party may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the headquarters of the regulated entity is located, for a stay of such suspension or prohibition pending the completion of the administrative enforcement proceeding pursuant to section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)). The court shall have jurisdiction to stay such suspension or prohibition, but such jurisdiction does not extend to the administrative enforcement proceeding.

§ 1209.9 Supervisory actions not affected.

As provided by section 1311(c) of the Safety and Soundness Act (12 U.S.C. 4511(c)), the authority of the Director to take action under subtitle A of the Safety and Soundness Act (12 U.S.C. 4611 *et seq.*) (*e.g.*, the appointment of a conservator or receiver for a regulated

entity; entering into a written agreement or pursuing an informal agreement with a regulated entity as the Director deems appropriate; and undertaking other such actions as may be applicable to undercapitalized, significantly undercapitalized or critically undercapitalized regulated entities), or to initiate enforcement proceedings under subtitle C of the Safety and Soundness Act (12 U.S.C. 4631 *et seq.*), shall not in any way limit the general supervisory or regulatory authority granted the Director under section 1311(b) of the Safety and Soundness Act (12 U.S.C. 4511(b)). The selection and form of regulatory or supervisory action under the Safety and Soundness Act is committed to the discretion of the Director, and the selection of one form of action or a combination of actions does not foreclose the Director from pursuing any other supervisory action authorized by law.

Subpart C—Rules of Practice and Procedure

§ 1209.10 Authority of the Director.

The Director may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of any act that could be done or ordered by the presiding officer.

§ 1209.11 Authority of the Presiding Officer.

(a) *General rule.* All proceedings governed by subpart C of this part shall be conducted consistent with the provisions of chapter 5 of title 5 of the United States Code. The presiding officer shall have complete charge of the adjudicative proceeding, conduct a fair and impartial hearing, avoid unnecessary delay, and assure that a complete record of the proceeding is made.

(b) *Powers.* The presiding officer shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section and 5 U.S.C. 556(c). The presiding officer is authorized to:

(1) *Control the proceedings.* (i) Upon reasonable notice to the parties, not earlier than 30 days or later than 60 days after service of a notice of charges under the Safety and Soundness Act, set a date, time, and place for an evidentiary hearing on the record, within the District of Columbia, as provided in section 1373 of the Safety and Soundness Act (12 U.S.C. 4633), in a scheduling order that may be issued in conjunction with the initial scheduling conference set under § 1209.36, or otherwise as the presiding officer finds in the best interest of justice, in accordance with this part; and

(ii) Upon reasonable notice to the parties, reset or change the date, time, or place (within the District of Columbia) of an evidentiary hearing;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to address legal or factual issues, or evidentiary matters materially relevant to the charges or allowable defenses; to regulate the timing and scope of discovery and rule on discovery plans; or otherwise to consider matters that may facilitate an effective, fair, and expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue and enforce subpoenas, subpoenas *duces tecum*, discovery and protective orders, as authorized by this part, and to revoke, quash, or modify such subpoenas issued by the presiding officer;

(6) Take and preserve testimony under oath;

(7) Rule on motions and other procedural matters appropriate in an adjudicatory proceeding, except that only the Director shall have the power to grant summary disposition or any motion to dismiss the proceeding or to make a final determination of the merits of the proceeding;

(8) Take all actions authorized under this part to regulate the scope, timing, and completion of discovery of any non-privileged documents that are materially relevant to the charges or allowable defenses;

(9) Regulate the course of the hearing and the conduct of representatives and parties;

(10) Examine witnesses;

(11) Receive materially relevant evidence, and rule upon the admissibility of evidence or exclude, limit, or otherwise rule on offers of proof;

(12) Upon motion of a party, take official notice of facts;

(13) Recuse himself upon his own motion or upon motion made by a party;

(14) Prepare and present to the Director a recommended decision as provided in this part;

(15) Establish time, place, and manner limitations on the attendance of the public and the media for any public hearing; and

(16) Do all other things necessary or appropriate to discharge the duties of a presiding officer.

§ 1209.12 Public hearings; closed hearings.

(a) *General rule.* As provided in section 1379B(b) of the Safety and Soundness Act (12 U.S.C. 4639(b)), all hearings shall be open to the public, except that the Director, in his discretion, may determine that holding an open hearing would be contrary to the public interest. The Director may make such determination *sua sponte* at any time by written notice to all parties, or as provided in paragraphs (b) and (c) of this section.

(b) *Motion for closed hearing.* Within 20 days of service of the notice of charges, any party may file with the presiding officer a motion for a private hearing and any party may file a pleading in reply to the motion. The presiding officer shall forward the motion and any reply, together with a recommended decision on the motion, to the Director, who shall make a final determination. Such motions and replies are governed by §1209.28 of this part. A determination under this section is committed to the discretion of the Director and is not a reviewable final agency action.

(c) *Filing documents under seal.* FHFA counsel of record, in his discretion, may file or require the filing of any document or part of a document under seal, if such counsel makes a written determination that disclosure of the document would be contrary to the public interest. The presiding officer shall issue an order to govern confidential information, and take all appropriate steps to preserve the confidentiality of such documents in whole or in part, including closing any portion of a hearing to the public or issuing a protective order under such terms as may be acceptable to FHFA counsel of record.

(d) *Procedures for closed hearing.* An evidentiary hearing, or any part thereof, that is closed for the purpose of offering into evidence testimony or documents filed under seal as provided in paragraph (c) of this section shall be conducted under procedures that may include: prior notification to the submitter of confidential information; provisions for sealing portions of the record, briefs, and decisions; *in camera* arguments, offers of proof, and testimony; and limitations on representatives of record or other participants, as the presiding officer may designate. Additionally, at such proceedings the presiding officer may make an opening statement as to the confidentiality and limitations and deliver an oath to the parties, representatives of record, or other approved participants as to the confidentiality of the proceedings.

§ 1209.13 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges by the Director shall be signed by at least one representative of record in his individual name and shall state that representative's business contact information, which shall include his address, electronic mail address, and telephone number; and the names, addresses and telephone numbers of all other representatives of record for the person making the filing or submission.

(b) *Effect of signature.* (1) By signing a document, a representative of record or party appearing *pro se* certifies that:

(i) The representative of record or party has read the filing or submission of record;

(ii) To the best of his knowledge, information and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or FHFA order or policy; and

(iii) The filing or submission of record is not made for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the presiding officer shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any representative or party shall constitute a certification that to the best of his knowledge, information, and belief, formed after reasonable inquiry, his statements are well-grounded in fact and are warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or FHFA order or policy, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or to needlessly increase litigation-related costs.

§ 1209.14 Ex parte communications.

(a) *Definition*—(1) *Ex parte* communication means any material oral or written communication relevant to an adjudication of the merits of any proceeding under this subpart that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside FHFA (including the person's representative of record); and

(ii) The presiding officer handling that proceeding, the Director, a decisional employee assigned to that proceeding, or any other person who is or may be reasonably expected to be involved in the decisional process.

(2) A communication that is procedural in that it does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding, does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time a notice of charges commencing a proceeding under this part is issued by the Director until the date that the Director issues his final decision pursuant to § 1209.55 of this part, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be made an *ex parte* communication with the Director or the presiding officer. The Director, presiding officer, or a decisional employee shall not knowingly make or cause to be made an *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by any person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All parties to the proceeding shall have an opportunity within 10 days of receipt of service of the *ex parte* communication to file responses thereto, and to recommend sanctions that they believe to be appropriate under the circumstances, in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or representative for a party who makes an *ex parte* communication, or who encourages or solicits another to make an *ex parte* communication, may be subject to any appropriate sanction or sanctions imposed by the Director or the presiding officer, including, but not limited to, exclusion from the proceedings, an adverse ruling on the issue that is the subject of the prohibited communication, or other appropriate and commensurate action(s).

(e) *Consultations by presiding officer.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the presiding officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice to and opportunity for all parties to participate.

(f) *Separation of functions.* An employee or agent engaged in the performance of any investigative or prosecuting function for FHFA in a case may not, in that or in a factually related case, participate or advise in the recommended decision, the Director's review under § 1209.55 of the recommended decision, or the Director's final determination on the merits

based upon his review of the recommended decision, except as a witness or counsel in the adjudicatory proceedings. This section shall not prohibit FHFA counsel of record from providing necessary and appropriate legal advice to the Director on supervisory (including information or legal advice as to settlement issues) or regulatory matters.

§ 1209.15 Filing of papers.

(a) *Filing*. All pleadings, motions, memoranda, and any other submissions or papers required to be filed in the proceeding shall be addressed to the presiding officer and filed with FHFA, 400 7th Street SW., Eighth Floor, Washington, DC 20219, in accordance with paragraphs (b) and (c) of this section.

(b) *Manner of filing*. Unless otherwise specified by the Director or the presiding officer, filing shall be accomplished by:

(1) *Overnight delivery*. Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the address stated above; or

(2) *U.S. Mail*. First class, registered, or certified mail via the U.S. Postal Service; and

(3) *Electronic media*. Transmission by electronic media shall be required by and upon any conditions specified by the Director or the presiding officer. FHFA shall provide a designated site for the electronic filing of all papers in a proceeding in accordance with any conditions specified by the presiding officer. All papers filed by electronic media shall be filed concurrently in a manner set out above and in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form*. To be filed, all papers must set forth the name, address, telephone number, and electronic mail address of the representative or party seeking to make the filing. Additionally, all such papers must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced on 8½ × 11-inch paper and must be clear, legible, and formatted as required by paragraph (c)(5) of this section.

(2) *Signature*. All papers filed must be dated and signed as provided in § 1209.13.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the FHFA caption, title and docket number of the proceeding, the name of the filing party, and the subject of the particular paper.

(4) *Number of copies*. Unless otherwise specified by the Director or the presiding officer, an original and one copy of all pleadings, motions and memoranda, or other such papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

(5) *Content format*. All papers filed shall be formatted in such program(s) (*e.g.*, MS WORD©, MS Excel©, or WordPerfect©) as the presiding officer or Director shall specify.

[76 FR 53607, Aug. 26, 2011, as amended at 80 FR 80233, Dec. 24, 2015]

§ 1209.16 Service of papers.

(a) Except as otherwise provided, a party filing papers or serving a subpoena shall serve a copy upon the representative of record for each party to the proceeding so represented, and upon any party who is not so represented, in accordance with the requirements of this section.

(b) Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the parties' respective street addresses; or

(3) First class, registered, or certified mail via the U.S. Postal Service; and

(4) For transmission by electronic media, each party shall promptly provide the presiding officer and all parties, in writing, an active electronic mail address where service will be accepted on behalf of such party. Any document transmitted via electronic mail for service on a party shall comply in all respects with the requirements of § 1209.15(c).

(5) Service of pleadings or other papers made by facsimile may not exceed a total page count of 30 pages. Any

paper served by facsimile transmission shall meet the requirements of §1209.15(c).

(6) Any party serving a pleading or other paper by electronic media under paragraph (4) of this section also shall concurrently serve that pleading or paper by one of the methods specified in paragraphs (1) through (5) of this section.

(c) *By the Director or the presiding officer.* (1) All papers required to be served by the Director or the presiding officer upon a party who has appeared in the proceeding in accordance with §1209.72 shall be served by the means specified in paragraph (b) of this section.

(2) If a notice of appearance has not been filed in the proceeding for a party in accordance with §1209.72, the Director or the presiding officer shall make service upon the party by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any State or the District of Columbia, or any commonwealth, possession, territory or other place subject to the jurisdiction of the United States, or on any person doing business in any State or the District of Columbia, or any commonwealth, possession, territory or other place subject to the jurisdiction of the United States, or on any person as otherwise permitted by law, is effective without regard to the place where the hearing is held.

(f) *Proof of service.* Proof of service of papers filed by a party shall be filed before action is taken thereon. The proof of service, which shall serve as prima facie evidence of the fact and date of service, shall show the date and manner of service and may be by written acknowledgment of service, by declaration of the person making service, or by certificate of a representative of record. However, failure to file proof of service contemporaneously with the papers shall not affect the validity of actual service. The presiding officer may allow the proof to be amended or supplied, unless to do so would result in material prejudice to a party.

§1209.17 Time computations.

(a) *General rule.* In computing any period of time prescribed or allowed under this part, the date of the act or event that commences the designated period of time is not included. Computations shall include the last day of the time period, unless the day falls on a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday or Federal holiday, the period of time shall run until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is 10 days or less, not including any additional time allowed for in paragraph

(c) of this section, intermediate Saturdays, Sundays and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing or service are deemed to be effective:

(i) In the case of personal service or same day reliable commercial delivery service, upon actual service;

(ii) In the case of U.S. Postal Service or reliable commercial overnight delivery service, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing; or

(iv) In the case of transmission by electronic media or facsimile, when the device through which the document was sent provides a reliable indicator that the document has been received by the opposing party, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Director or the presiding officer, or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice, pleading or paper, the applicable time limits shall be calculated as follows:

(1) If service was made by delivery to the U.S. Postal Service for longer than overnight delivery service by first class, registered, or certified mail, add three calendar days to the prescribed period for the responsive pleading or other filing.

(2) If service was personal, or was made by delivery to the U.S. Postal Service or any reliable commercial delivery service for overnight delivery, add one calendar-day to the prescribed period for the responsive pleading or other filing.

(3) If service was made by electronic media transmission or facsimile, add one calendar-day to the prescribed period for the responsive pleading or other filing—unless otherwise determined by the Director or the presiding officer *sua sponte,* or upon motion of a party in the case of filing or by prior agreement among the parties in the case of service.

§ 1209.18 Change of time limits.

Except as otherwise by law required, the presiding officer may extend any time limit that is prescribed above or in any notice or order issued in the proceedings. After the referral of the case to the Director pursuant to § 1209.53, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all nonmoving parties, or on the Director's or the presiding officer's own motion.

§ 1209.19 Witness fees and expenses.

Witnesses (other than parties) subpoenaed for testimony (or for a deposition in lieu of personal appearance at a hearing) shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage shall be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where FHFA is the party requesting the subpoena. FHFA shall not be required to pay any fees to or expenses of any witness who was not subpoenaed by FHFA.

§ 1209.20 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to FHFA's counsel of record written offers or proposals for settlement of a proceeding without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FHFA representative other than FHFA counsel of record. Submission of a written settlement offer does not provide a basis for adjourning, deferring or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 1209.21 Conduct of examination.

Nothing in this part limits or constrains in any manner any duty, authority, or right of FHFA to conduct or to continue any examination, investigation, inspection, or visitation of any regulated entity or entity-affiliated party.

§ 1209.22 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in subpart C of this part shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1209.23 Commencement of proceeding and contents of notice of charges.

Proceedings under subpart C of this part are commenced by the Director by the issuance of a notice of charges, as defined in §1209.3(p), that must be served upon a respondent. A notice of charges shall state all of the following:

(a) The legal authority for the proceeding and for FHFA's jurisdiction over the proceeding;

(b) A statement of the matters of fact or law showing that FHFA is entitled to relief;

(c) A proposed order or prayer for an order granting the requested relief;

(d) Information concerning the nature of the proceeding and pertinent procedural matters, including: the requirement that the hearing shall be held in the District of Columbia; the presiding officer will set the date and location for an evidentiary hearing in a scheduling order to be issued not less than 30 days or more than 60 days after service of the notice of charges; contact information for FHFA enforcement counsel and the presiding officer, if known; submission information for filings and appearances, the time within which to request a hearing, and citation to FHFA Rules of Practice and Procedure; and

(e) Information concerning proper filing of the answer, including the time within which to file the answer as required by law or regulation, a statement that the answer shall be filed with the presiding officer or with FHFA as specified therein, and the address for filing the answer (and request for a hearing, if applicable).

§ 1209.24 Answer.

(a) *Filing deadline.* Unless otherwise specified by the Director in the notice, respondent shall file an answer within 20 days of service of the notice of charges initiating the enforcement action.

(b) *Content of answer.* An answer must respond specifically to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice that is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of such respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, FHFA counsel of record may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the presiding officer shall file with the Director a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Director based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 1209.25 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within 10 days after service of the amended notice, whichever period is longer, unless the Director or presiding officer orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, or as the presiding officer may allow for good cause shown, such issues will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the presiding officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action. The presiding officer will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1209.26 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized representative of record constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the presiding officer shall file with the Director a recommended decision containing the Agency's findings and the relief sought in the notice.

§ 1209.27 Consolidation and severance of actions.

(a) *Consolidation.* On the motion of any party, or on the presiding officer's own motion, the presiding officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice. In the event of consolidation under this section, appropriate adjustment to the pre-hearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The presiding officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the presiding officer finds that undue prejudice or injustice to the moving party would result from not severing the proceeding and such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 1209.28 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the presiding officer. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record, unless the presiding officer directs that such motion be reduced to writing, in which case the motion will be subject to the requirements of this section.

(c) *Filing of motions.* Motions must be filed with the presiding officer and served on all parties; except that following the filing of a recommended decision, motions must be filed with the Director. Motions for pre-trial relief such as motions *in limine* or objections to offers of proof or experts shall be filed not less than 10 days prior to the date of the evidentiary hearing, except

as provided with the consent of the presiding officer for good cause shown.

(d) *Responses and replies.* (1) Except as otherwise provided herein, any party may file a written response to a non-dispositive motion within 10 days after service of any written motion, or within such other period of time as may be established by the presiding officer or the Director; and the moving party may file a written reply to a written response to a non-dispositive motion within five days after the service of the response, unless some other period is ordered by the presiding officer or the Director. The presiding officer shall not rule on any oral or written motion before each party with an interest in the motion has had an opportunity to respond as provided in this section.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed as consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory, or substantively repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 1209.34 and 1209.35 of this part.

§ 1209.29 Discovery.

(a) *General rule.* (1) *Limits on discovery.* Subject to the limitations set out in paragraphs (a)(2), (b), (d), and (e) of this section, a party to a proceeding under this part may obtain document discovery by serving upon any other party in the proceeding a written request to produce documents. For purposes of such requests, the term ''documents'' may be defined to include records, drawings, graphs, charts, photographs, recordings, or data stored in electronic form or other data compilations from which information can be obtained or translated, if necessary, by the parties through detection devices into reasonably usable form (*e.g.*, electronically stored information), as well as written material of all kinds.

(2) *Discovery plan.* (i) In the initial scheduling conference held in accordance with § 1209.36, or otherwise at the earliest practicable time, the presiding officer shall require the parties to confer in good faith to develop and submit a joint discovery plan for the timely, cost-effective management of document discovery (including, if applicable, electronically stored information). The discovery plan should provide for the coordination of similar discovery requests by multiple parties, if any, and specify how costs are to be apportioned among those parties. The discovery plan shall specify the form of electronic productions, if any. Documents are to be produced in accordance with the technical specifications described in the discovery plan.

(ii) Discovery in the proceeding may commence upon the approval of the discovery plan by the presiding officer. Thereafter, the presiding officer may interpret or modify the discovery plan for good cause shown or in his or her discretion due to changed circumstances.

(iii) Nothing in paragraph (a)(2) of this section shall be interpreted or deemed to require the production of documents that are privileged or not reasonably accessible because of undue burden or cost, or to require any document production otherwise inconsistent with the limitations on discovery set forth in this part.

(b) *Relevance and scope.* (1) A party may obtain document discovery regarding any matter not privileged that is materially relevant to the charges or allowable defenses raised in the pending proceeding.

(2) The scope of available discovery shall be limited in accordance with subpart C of this part. Any request for the production of documents that seeks to obtain privileged information or documents not materially relevant under paragraph (b)(1) of this section, or that is unreasonable, oppressive, excessive in scope, unduly burdensome, cumulative, or repetitive of any prior discovery requests, shall be denied or modified.

(3) A request for document discovery is unreasonable, oppressive, excessive in scope, or unduly burdensome—and shall be denied or modified—if, among other things, the request:

(i) Fails to specify justifiable limitations on the relevant subject matter,

time period covered, search parameters, or the geographic location(s) or data repositories to be searched;

(ii) Fails to identify documents with sufficient specificity;

(iii) Seeks material that is duplicative, cumulative, or obtainable from another source that is more accessible, cost-effective, or less burdensome;

(iv) Calls for the production of documents to be delivered to the requesting party or his or her designee and fails to provide a written agreement by the requestor to pay in advance for the costs of production in accordance with §1209.30, or otherwise fails to take into account costs associated with processing electronically stored information or any cost-sharing agreements between the parties;

(v) Fails to afford the responding party adequate time to respond; or

(vi) Fails to take into account retention policies or security protocols with respect to Federal information systems.

(c) *Forms of discovery*. Discovery shall be limited to requests for production of documents for inspection and copying. No other form of discovery shall be allowed. Discovery by use of interrogatories is not permitted. This paragraph shall not be interpreted to require the creation of a document.

(d) *Privileged matter*. (1) *Privileged documents are not discoverable*. (i) Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative process privilege, and any other privileges provided by the Constitution, any applicable act of Congress, or the principles of common law.

(ii) The parties may enter into a written agreement to permit a producing party to assert applicable privileges of a document even after its production and to request the return or destruction of privileged matter (claw back agreement). The parties shall file the claw back agreement with the presiding officer. To ensure the enforceability of the terms of any such claw back agreement, the presiding officer shall enter an order. Any party may petition the presiding officer for an order specifying claw back procedures for good cause shown.

(2) *No effect on examination authority*. The limitations on discoverable matter provided for in this part are not intended and shall not be construed to limit or otherwise affect the examination, regulatory or supervisory authority of FHFA.

(e) *Time limits*. All discovery matters, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the testimonial phase of the hearing. No exception to this discovery time limit shall be permitted, unless the presiding officer finds on the record that good cause exists for waiving the 20-day requirement of this paragraph.

(f) *Production*. Documents must be produced as they are kept in the usual course of business, or labeled and organized to correspond with the categories in the request, or otherwise produced in a manner determined by mutual agreement between the requesting party and the party or non-party to whom the request is directed in accordance with this part.

§1209.30 Request for document discovery from parties.

(a) *General rule*. Each request for the production of documents must conform to the requirements of this part.

(1) *Limitations*. Subject to applicable limitations on discovery in this part, a party may serve (requesting party) a request on another party (responding party) for the production of any nonprivileged, discoverable documents in the possession, custody, or control of the responding party. A requesting party shall serve a copy of any such document request on all other parties. Each request for the production of documents must, with reasonable particularity, identify or describe the documents to be produced, either by individual item or by category, with sufficient specificity to enable the responding party to respond consistent with the requirements of this part.

(2) *Discovery plan*. Document discovery under subpart C of this part shall be consistent with any discovery plan approved by the presiding officer under §1209.29.

(b) *Production and costs*—(1) *General rule.* Subject to the applicable limitations on discovery in this part and the discovery plan, the requesting party shall specify a reasonable time, place, and manner for the production of documents and the performance of any related acts. The responding party shall produce documents to the requesting party in a manner consistent with the discovery plan.

(2) *Costs.* All costs associated with document productions—including, without limitation, photocopying (as specified in paragraph (b)(4) of this section) or electronic processing (as specified in paragraph (b)(5) of this section)—shall be born by the requesting party, or otherwise in accordance with any discovery plan approved by the presiding officer that may require such costs be apportioned between parties, or as otherwise ordered by the presiding officer. If consistent with the discovery plan approved by the presiding officer, the responding party may require receipt of payment of any such document production costs in advance before any such production of responsive documents.

(3) *Organization.* Unless otherwise provided for in any discovery plan approved by the presiding officer under §1209.29 of this part, or by order of the presiding officer, documents must be produced as they are kept in the usual course of business or they shall be labeled and organized to correspond with the categories in the document request.

(4) *Photocopying charges.* Photocopying charges are to be set at the current rate per page imposed by FHFA under the fee schedule pursuant to §1202.11(c) of this part for requests for documents filed under the Freedom of Information Act, 5 U.S.C. 552.

(5) *Electronic processing.* In the event that any party seeks the production of electronically stored information (*i.e.*, information created, stored, communicated, or used in digital format requiring the use of computer hardware and software), the parties shall confer in good faith to resolve common discovery issues related to electronically stored information, such as preservation, search methodology, collection, and need for such information; the suitability of alternative means to obtain it; and the format of production. Consistent with the discovery plan approved by the presiding officer under §1209.29, costs associated with the processing of such electronic information (*i.e.,* imaging; scanning; conversion of ''native'' files to images that are viewable and searchable; indexing; coding; database or Web-based hosting; searches; branding of endorsements, such as ''confidential'' or document control numbering; privilege reviews; and copies of production discs) and delivery of any such document production, shall be born by the requesting party, apportioned among the parties, or as otherwise ordered by the presiding officer. Nothing in this part shall be deemed to require FHFA to produce privileged documents or any electronic records in violation of applicable Federal law or security protocols.

(c) *Obligation to update responses.* A party who has responded to a discovery request is not required to supplement the response, unless:

(1) The responding party learns that in some material respect the information disclosed is incomplete or incorrect, and

(2) The additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(d) *Motions to strike or limit discovery requests.* (1) Any party served with a document discovery request may object within 30 days of service of the request by filing a motion to strike or limit the request in accordance with the provisions of §1209.28 of this part. No other party may file an objection. If an objection is made only to a portion of an item or category in a request, the objection shall specify that portion. Any objections not made in accordance with this paragraph and §1209.28 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response in accordance with the provisions of §1209.28. A reply by the moving party, if any, shall be governed by §1209.28. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, all documents withheld on a claim of privilege must

be reasonably identified, together with a statement of the basis for the assertion of privilege on a privilege log. When similar documents that are protected by the government's deliberative process, investigative or examination privilege, the attorney work-product doctrine, or the attorney-client privilege are voluminous, such documents may be identified on the log by category instead of by individual document. The presiding officer has discretion to permit submission of a privilege log subsequent to the document production(s), which may occur on a rolling basis if agreed to by the parties in the discovery plan, and to determine whether an identification by category is sufficient to provide notice of withheld documents.

(f) *Motions to compel production.* (1) If a party withholds any document as privileged or fails to comply fully with a document discovery request, the requesting party may, within 10 days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of §1209.28 for the issuance of a subpoena compelling the production of any such document.

(2) The party who asserted the privilege or failed to comply with the request may, within five days of service of a motion for the issuance of a subpoena compelling production, file a written response to the motion. No other party may file a response.

(g) *Ruling on motions*—(1) *Appropriate protective orders.* After the time for filing a response to a motion to compel pursuant to this section has expired, the presiding officer shall rule promptly on any such motion. The presiding officer may deny, grant in part, or otherwise modify any request for the production of documents, if he determines that a discovery request, or any one or more of its terms, seeks to obtain the production of documents that are privileged or otherwise not within the scope of permissible discovery under §1209.29(b), and may issue appropriate protective orders, upon such conditions as justice may require.

(2) *No stay.* The pendency of a motion to strike or limit discovery, or to compel the production of any document, shall not stay or continue the proceeding, unless otherwise ordered by the presiding officer. Notwithstanding any other provision in this part, the presiding officer may not release, or order any party to produce, any document withheld on the basis of privilege, if the withholding party has stated to the presiding officer its intention to file with the Director a timely motion for interlocutory review of the presiding officer's privilege determination or order to produce the documents, until the Director has rendered a decision on the motion for interlocutory review.

(3) *Interlocutory review by the Director.* Interlocutory review of a privilege determination or document discovery subpoena of the presiding officer shall be in accordance with §1209.33. To the extent necessary to rule promptly on such matters, the Director may request that the presiding officer provide additional information from the record. As provided by §1209.33 of this part, a pending interlocutory review of a privilege determination or document discovery subpoena shall not stay the proceedings, unless otherwise ordered by the presiding officer or the Director.

(h) *Enforcement of document discovery subpoenas*—(1) *Authority.* If the presiding officer or Director issues a subpoena compelling production of documents by a party in a proceeding under this part, in the event of noncompliance with the subpoena and to the extent authorized by section 1379D(c)(1) of the Safety and Soundness Act (12 U.S.C. 4641(c)(1)), the Director or the subpoenaing party may apply to the appropriate United States district court for an order requiring compliance with the subpoena.

(2) *United States district court jurisdiction.* As provided by section 1379D(c)(2) of the Safety and Soundness Act (12 U.S.C. 4641(c)(2)), the appropriate United States district court has the jurisdiction and power to order and to require compliance with any discovery subpoena issued under this part.

(3) *No stay; sanctions.* The judicial enforcement of a discovery subpoena shall not operate as a stay of the proceedings, unless the presiding officer or the Director orders a stay of such duration as the presiding officer or Director

may find reasonable and in the best interest of the parties or as justice may require. A party's right to seek judicial enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the presiding officer or Director against a party who fails to produce or induces another to fail to produce subpoenaed documents.

§ 1209.31 Document discovery subpoenas to non-parties.

(a) *General rules*—(1) *Application for subpoena.* As provided under this part, any party may apply to the presiding officer for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain the proposed document subpoena, and a brief statement of facts demonstrating that the documents are materially relevant to the charges and issues presented in the proceeding and the reasonableness of the scope of the document request. The subpoenaing party shall specify a reasonable time, place, and manner for production in response to the subpoena, and state its unequivocal intention to pay for the production of the documents as provided in this part.

(2) *Service of subpoena.* A party shall apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 1209.30 of this part. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all other parties. Document subpoenas may be served in the District of Columbia, or any State, Territory, possession, or other place subject to the jurisdiction of the United States, or as otherwise provided by law.

(3) *Presiding officer's discretion.* The presiding officer shall issue promptly any document subpoena applied for under this section subject to the application conditions set forth in this section and his or her discretion. If the presiding officer determines that the application does not set forth a valid basis for the issuance of the requested document subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, unduly burdensome, or otherwise objectionable under § 1209.29(b), he may refuse to issue the requested document subpoena or may issue it in a modified form upon such additional conditions as may be determined by the presiding officer.

(b) *Motion to quash or modify*—(1) *Limited appearance.* Any non-party to a pending proceeding to whom a document subpoena is directed may enter a limited appearance, through a representative or on his or her own behalf, before the presiding officer to file with the presiding officer a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena.

(2) *Objections.* Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of any privileges, upon which a party could object to a discovery document request under § 1209.30 and during the same time limits during which such an objection could be filed.

(3) *Responses and replies.* The party who obtained the subpoena may respond to such motion within 10 days of service of the motion; the response shall be served on the non-party in accordance with this part. Absent express leave of the presiding officer, no other party may respond to the non-party's motion. The non-party may file a reply within five days of service of a response.

(4) *No stay.* A non-party's right to seek to quash or modify a document subpoena shall not stay the proceeding, or limit in any manner the sanctions that may be imposed by the presiding officer against a party who induces another to fail to produce any such subpoenaed documents. No party may rely upon the pendency of a non-party's motion to quash or modify a document subpoena to excuse performance of any action required of that party under this part.

(c) *Enforcing document subpoenas to non-parties*—(1) *Application for enforcement of subpoena.* If a non-party fails to comply with any subpoena issued pursuant to this section or with any order of the presiding officer that directs compliance with all or any portion of a document subpoena issued pursuant to this section, the subpoenaing party or

any other aggrieved party to the proceeding may, to the extent authorized by section 1379D(c) of the Safety and Soundness Act (12 U.S.C. 4641(c)), apply to an appropriate United States district court for an order requiring compliance with the subpoena.

(2) *No stay.* A party's right to seek district court enforcement of a nonparty document production subpoena under this section shall not automatically stay an enforcement proceeding under of the Safety and Soundness Act.

(3) *Sanctions.* A party's right to seek district court enforcement of a nonparty document subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces another to fail to comply with any subpoena issued under this section.

§ 1209.32 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may apply to the presiding officer in accordance with the procedures set forth in paragraph (a)(2) of this section for the issuance of a subpoena or subpoena *duces tecum* requiring attendance of the witness at a deposition for the purpose of preserving that witness's testimony. The presiding officer may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the testimonial phase of the hearing because of age, sickness, or infirmity, or will be otherwise unavailable;

(ii) The subpoenaing party did not cause or contribute to the unavailability of the witness for the hearing;

(iii) The witness has personal knowledge and the testimony is reasonably expected to be materially relevant to claims, defenses, or matters determined to be at issue in the proceeding; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed anywhere within the United States, or its Territories and possessions, in which that witness resides or has a regular place of employment or such other convenient place as the presiding officer shall fix.

(3) Subpoenas must be issued promptly upon request, unless the presiding officer determines that the request fails to set forth a valid basis under this section for its issuance. Before making a determination that there is no valid basis for issuing the subpoena, the presiding officer shall require a written response from the party requesting the subpoena or require attendance at a conference to determine whether there is a valid basis upon which to issue the requested subpoena.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the presiding officer orders otherwise, no deposition under this section shall be taken on fewer than 10 days' notice to the witness and all parties. Deposition subpoenas may be served anywhere within the United States or its Territories and possessions, or on any person doing business anywhere within the United States or its Territories and possessions, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the presiding officer under § 1209.28 of this part to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than 10 days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn and

each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for objection might have been avoided if the objection had been presented timely. All questions, answers, and objections must be recorded and transcribed. Videotaped depositions must be transcribed for the record; copies and transcriptions must be supplied to each party.

(2) Any party may move before the presiding officer for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence that, during the deposition, the witness has refused to submit.

(3) The deposition transcript must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or with any order of the presiding officer made upon motion under paragraph (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by section 1379D(c) of the Safety and Soundness Act (12 U.S.C. 4641(c)), apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the presiding officer has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the presiding officer on a party who fails to comply with or induces a failure to comply with a subpoena issued under this section.

§ 1209.33 Interlocutory review.

(a) *General rule.* The Director may review a ruling of the presiding officer prior to the certification of the record to the Director only in accordance with the procedures set forth in this section.

(b) *Scope of review.* The Director may exercise interlocutory review of a ruling of the presiding officer if the Director finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any motion for interlocutory review shall be filed by a party with the presiding officer within 10 days of his or her ruling. Upon the expiration of the time for filing all responses, the presiding officer shall refer the matter to the Director for final disposition. In referring the matter to the Director, the presiding officer may indicate agreement or disagreement with the asserted grounds for interlocutory review of the ruling in question.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Director under this section suspends or stays the proceeding unless otherwise ordered by the presiding officer or the Director.

§ 1209.34 Summary disposition.

(a) *In general.* The presiding officer shall recommend that the Director issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The movant is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that such party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 30 days after service of such motion or within such time period as allowed by the presiding officer, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of material facts as to which the movant contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the movant contends support its position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the movant. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the presiding officer may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the presiding officer shall determine whether the movant is entitled to summary disposition. If the presiding officer determines that summary disposition is warranted, the presiding officer shall submit a recommended decision to that effect to the Director, under §1209.53. If the presiding officer finds that the moving party is not entitled to summary disposition, the presiding officer shall make a ruling denying the motion.

§1209.35 Partial summary disposition.

If the presiding officer determines that a party is entitled to summary disposition as to certain claims only, he shall defer submitting a recommended decision to the Director as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the presiding officer has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§1209.36 Scheduling and pre-hearing conferences.

(a) *Scheduling conference.* After service of a notice of charges commencing a proceeding under this part, the presiding officer shall order the representative(s) of record for each party, and any party not so represented who is appearing *pro se*, to meet in person or to confer by telephone at a specified time within 30 days of service of such notice for the purpose of setting the time and place of the testimonial hearing on the record to be held within the District of Columbia and scheduling the course and conduct of the proceeding (the ''scheduling conference''). The identification of potential witnesses, the time for and manner of discovery, and the exchange of any pre-hearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials also may be determined at the scheduling conference.

(b) *Pre-hearing conferences.* The presiding officer may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct representatives for the parties to meet with (in person or by telephone) at a pre-hearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript*. The presiding officer, in his or her discretion, may require that a scheduling or pre-hearing conference be recorded by a court reporter. Any transcript of the conference and any materials filed, including orders, become part of the record of the proceeding. A party may obtain a copy of a transcript at such party's expense.

(d) *Scheduling or pre-hearing orders*. Within a reasonable time following the conclusion of the scheduling conference or any pre-hearing conference, the presiding officer shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 1209.37 Pre-hearing submissions.

(a) *General*. Within the time set by the presiding officer, but in no case later than 10 days before the start of the hearing, each party shall serve on every other party the serving party's:

(1) Pre-hearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness, and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply*. No witness may testify and no exhibit may be introduced at the hearing that is not listed in the pre-hearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1209.38 Hearing subpoenas.

(a) *Issuance*. (1) Upon application of a party to the presiding officer showing relevance and reasonableness of scope of the testimony or other evidence sought, the presiding officer may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at such hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any place within the United States or its territories and possessions, or as otherwise provided by law, at the designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of or during a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the presiding officer.

(3) The presiding officer shall promptly issue any hearing subpoena applied for under this section; except that, if the presiding officer determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena or may issue the subpoena in a modified form upon any conditions consistent with subpart C of this part. Upon issuance by the presiding officer, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify*. (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within 10 days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but no more than 10 days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the presiding officer that directs compliance with all or any portion of a hearing subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to §1209.31. A

party's right to seek court enforcement of a hearing subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

§§ 1209.39–1209.49 [Reserved]

§ 1209.50 Conduct of hearings.

(a) *General rules.* (1) *Conduct.* Hearings shall be conducted in accordance with chapter 5 of title 5 and other applicable law and so as to provide a fair and expeditious presentation of the relevant disputed issues. Except as limited by this subpart, each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* FHFA counsel of record shall present its case-in-chief first, unless otherwise ordered by the presiding officer or unless otherwise expressly specified by law or regulation. FHFA counsel of record shall be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to the order of presentation of their cases, but if they do not agree, the presiding officer shall fix the order.

(3) *Examination of witnesses.* Only one representative for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the presiding officer may permit more than one representative for the party presenting the witness to conduct the examination. A party may have one representative conduct the direct examination and another representative conduct re-direct examination of a witness, or may have one representative conduct the cross examination of a witness and another representative conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the presiding officer directs otherwise, all documents that the parties have stipulated as admissible shall be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing shall be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The presiding officer shall have authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the presiding officer's own motion.

§ 1209.51 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act (5 U.S.C. 552 *et seq.*) and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to subpart C of this part.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to subpart C of this part if such evidence is relevant, material, probative and reliable, and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact that may be judicially noticed by a United States district court and of any materially relevant information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the presiding officer or the Director shall appear on the record.

(3) If official notice is requested of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a)(1) of this section, any document, including a report of examination, oversight activity, inspection, or visitation prepared by FHFA or by

another Federal or State financial institution's regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the presiding officer's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear in the record.

(2) When an objection to a question or line of questioning is sustained, the examining representative of record may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness. The proffer may be by representation of the representative or by direct interrogation of the witness.

(3) The presiding officer shall retain rejected exhibits, adequately marked for identification, for the record and transmit such exhibits to the Director.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any document to be admitted into evidence. Such stipulations must be received in evidence at a hearing, are binding on the parties with respect to the matters stipulated, and shall be made part of the record.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing and that witness has testified in a deposition in accordance with § 1209.32, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the deposition the presiding officer may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition or related exhibits received in evidence at the hearing in accordance with this section shall constitute a part of the record.

§ 1209.52 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the presiding officer shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed with the presiding officer. Any party may file with the presiding officer proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the presiding officer, unless otherwise ordered by the presiding officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page and line references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

(3) A party is deemed to have waived any issue not raised in proposed findings or conclusions timely filed by that party.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings and conclusions and proposed order are due. Reply briefs shall be limited strictly to responding to new matters, issues, or arguments raised by another party in papers filed in the proceeding. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The presiding officer shall not order the filing by any party of any brief or reply brief supporting proposed findings and conclusions in advance of the other party's filing of its brief.

§ 1209.53 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under §1209.52(b), the presiding officer shall file with and certify to the Director, for decision, the record of the proceeding. The record must include the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order; all pre-hearing and hearing transcripts, exhibits and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The presiding officer shall serve upon each party the recommended decision, recommended findings and conclusions, and proposed order.

(b) *Filing of index.* At the same time the presiding officer files with and certifies to the Director, for final determination, the record of the proceeding, the presiding officer shall furnish to the Director a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the presiding officer in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 1209.54 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, recommended findings and conclusions, and proposed order under §1209.53, a party may file with the Director written exceptions to the presiding officer's recommended decision, recommended findings and conclusions, and proposed order; to the admission or exclusion of evidence; or to the failure of the presiding officer to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Director if the party taking exception had an opportunity to raise the same objection, issue, or argument before the presiding officer and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in or omissions from the presiding officer's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the presiding officer's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception. Exceptions and briefs in support shall not exceed a total of 30 pages, except by leave of the Director on motion.

(3) One reply brief may be submitted by each party opposing the exceptions within 10 days of service of exceptions and briefs in support of exceptions. Reply briefs shall not exceed 15 pages, except by leave of the Director on motion.

§ 1209.55 Review by Director.

(a) *Notice of submission to the Director.* When the Director determines that the record in the proceeding is complete, the Director shall serve notice upon the parties that the case has been submitted to the Director for final decision.

(b) *Oral argument before the Director.* Upon the initiative of the Director or on the written request of any party filed with the Director within the time for filing exceptions, the Director may order and hear oral argument on the

recommended findings, conclusions, decision and order of the presiding officer. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Director's final decision. Oral argument before the Director must be transcribed.

(c) *Director's final decision and order.* (1) Decisional employees may advise and assist the Director in the consideration and disposition of the case. The final decision of the Director will be based upon review of the entire record of the proceeding, except that the Director may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Director shall render a final decision and issue an appropriate order within 90 days after notification to the parties that the case has been submitted for final decision, unless the Director orders that the action or any aspect thereof be remanded to the presiding officer for further proceedings. Copies of the final decision including findings of fact and an appropriate order of the Director shall be served upon each party to the proceeding and as otherwise required by statute.

(3) The Director may modify, terminate, or set aside an order in accordance with section 1373(b)(2) of the Safety and Soundness Act (12 U.S.C. 4633(b)(2)).

§ 1209.56 Exhaustion of administrative remedies.

To exhaust administrative remedies as to any issue on which a party disagrees with the presiding officer's recommendations, a party must file exceptions with the Director under § 1209.54 of this part. A party must exhaust administrative remedies as a precondition to seeking judicial review of any final decision and order issued under this part.

§ 1209.57 Judicial review; no automatic stay.

(a) *Judicial review.* Judicial review of any final order of the Director shall be exclusively as provided by section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

(b) *No automatic stay.* Commencement of proceedings for judicial review of a final decision and order of the Director may not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director. The Director may, in his or her discretion and on such terms as he finds just, stay the effectiveness of all or any part of an order of the Director pending a final decision on a petition for review of that order.

§§ 1209.58–1209.69 [Reserved]

Subpart D—Parties and Representational Practice Before the Federal Housing Finance Agency; Standards of Conduct

§ 1209.70 Scope.

Subpart D of this part contains rules governing practice by parties or their representatives before FHFA. This subpart addresses the imposition of sanctions by the presiding officer or the Director against parties or their representatives in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension, or disbarment—against individuals who appear before FHFA in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to FHFA relating to a client's or other principal's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of FHFA are not subject to disciplinary proceedings under this subpart.

§ 1209.71 Definitions.

Practice before FHFA for the purposes of subpart D of this part, includes, but is not limited to, transacting any business with FHFA as counsel of record, representative, or agent for any other person, unless the Director orders otherwise. Practice before FHFA also includes the preparation of any statement, opinion, or other paper by a counsel, representative or agent that is filed with FHFA in any certification,

notification, application, report, or other document, with the consent of such counsel, representative, or agent. Practice before FHFA does not include work prepared for a regulated entity or entity-affiliated party solely at the request of such party for use in the ordinary course of its business.

§ 1209.72 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before FHFA or a presiding officer*—(1) *By attorneys.* A party may be represented by an attorney who is a member in good standing of the bar of the highest court of any State, commonwealth, possession or territory of the United States, or the District of Columbia, and who is not currently suspended or disbarred from practice before FHFA.

(2) *By non-attorneys.* An individual may appear on his or her own behalf, *pro se.* A member of a partnership may represent the partnership and a duly authorized officer, director, employee, or other agent of any corporation or other entity not specifically listed herein may represent such corporation or other entity; provided that such officer, director, employee, or other agent is not currently suspended or disbarred from practice before FHFA. A duly authorized officer or employee of any Government unit, agency, or authority may represent that unit, agency, or authority.

(b) *Notice of appearance.* Any person appearing in a representative capacity on behalf of a party, including FHFA, shall execute and file a notice of appearance with the presiding officer at or before the time such person submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the representative thereby agrees and represents that he is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the presiding officer, continue to accept service until a new representative has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis. Unless the representative filing the notice is an attorney, the notice of appearance shall also be executed by the person represented or, if the person is not an individual, by the chief executive officer, or duly authorized officer of that person.

§ 1209.73 Conflicts of interest.

(a) *Conflict of interest in representation.* No representative shall represent another person in an adjudicatory proceeding if it reasonably appears that such representation may be limited materially by that representative's responsibilities to a third person or by that representative's own interests. The presiding officer may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel or other representative represents two or more parties to an adjudicatory proceeding, or also represents a non-party on a matter relevant to an issue in the proceeding, that representative must certify in writing at the time of filing the notice of appearance required by § 1209.72 of this part as follows:

(1) That the representative has personally and fully discussed the possibility of conflicts of interest with each affected party and non-party; and

(2) That each affected party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 1209.74 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed during the course of any proceeding when any party or representative of record has

acted or failed to act in a manner required by applicable statute, regulation, or order, and that act or failure to act:

(1) Constitutes contemptuous conduct, which includes dilatory, obstructionist, egregious, contumacious, unethical, or other improper conduct at any phase of any proceeding, hearing, or appearance before a presiding officer or the Director;

(2) Has caused some other party material and substantive injury, including, but not limited to, incurring expenses including attorney's fees or experiencing prejudicial delay;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Has delayed the proceeding unduly.

(b) *Sanctions.* Sanctions that may be imposed include, but are not limited to, any one or more of the following:

(1) Issuing an order against a party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that may be just; or

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) The presiding officer, on the motion of any party, or on his or her own motion, and after such notice and responses as may be directed by the presiding officer, may impose any sanction authorized by this section. The presiding officer shall submit to the Director for final ruling any sanction that would result in a final order that terminates the case on the merits or is otherwise dispositive of the case.

(2) Except as provided in paragraph (d) of this section, no sanction authorized by this section, other than refusing to accept late papers, shall be imposed without prior notice to all parties and an opportunity for any representative or party against whom sanctions may be imposed to be heard. The presiding officer shall determine and direct the appropriate notice and form for such opportunity to be heard. The opportunity to be heard may be limited to an opportunity to respond verbally immediately after the act or inaction in question is noted by the presiding officer.

(3) For purposes of interlocutory review, motions for the imposition of sanctions by any party and the imposition of sanctions shall be treated the same as motions for any other ruling by the presiding officer.

(4) Nothing in this section shall be read to preclude the presiding officer or the Director from taking any other action or imposing any other restriction or sanction authorized by any applicable statute or regulation.

(d) *Sanctions for contemptuous conduct.* If, during the course of any proceeding, a presiding officer finds any representative or any individual representing themself to have engaged in contemptuous conduct, the presiding officer may summarily suspend that individual from participating in that or any related proceeding or impose any other appropriate sanction.

§ 1209.75 Censure, suspension, disbarment, and reinstatement.

(a) *Discretionary censure, suspension, and disbarment.* (1) The Director may censure any individual who practices or attempts to practice before FHFA or suspend or revoke the privilege to appear or practice before FHFA of such individual if, after notice of and opportunity for hearing in the matter, that individual is found by the Director—

(i) Not to possess the requisite qualifications or competence to represent others;

(ii) To be seriously lacking in character or integrity or to have engaged in material unethical or improper professional conduct;

(iii) To have caused unfair and material injury or prejudice to another party, such as prejudicial delay or unnecessary expenses including attorney's fees;

(iv) To have engaged in, or aided and abetted, a material and knowing violation of the Safety and Soundness Act,

the Federal Home Loan Mortgage Corporation Act, the Federal National Mortgage Association Charter Act, or the rules or regulations issued under those statutes, or any other applicable law or regulation;

(v) To have engaged in contemptuous conduct before FHFA;

(vi) With intent to defraud in any manner, to have willfully and knowingly deceived, misled, or threatened any client or prospective client; or

(vii) Within the last 10 years, to have been convicted of an offense involving moral turpitude, dishonesty, or breach of trust, if the conviction has not been reversed on appeal. A conviction within the meaning of this paragraph shall be deemed to have occurred when the convicting court enters its judgment or order, regardless of whether an appeal is pending or could be taken and includes a judgment or an order on a plea of *nolo contendere* or on consent, regardless of whether a violation is admitted in the consent.

(2) Suspension or revocation on the grounds set forth in paragraphs (a)(1)(ii) through (vii) of this section shall only be ordered upon a further finding that the individual's conduct or character was sufficiently egregious as to justify suspension or revocation. Suspension or disbarment under this paragraph shall continue until the applicant has been reinstated by the Director for good cause shown or until, in the case of a suspension, the suspension period has expired.

(3) If the final order against the respondent is for censure, the individual may be permitted to practice before FHFA, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in FHFA's files.

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any State, commonwealth, possession or territory of the United States, or the District of Columbia; any accountant or other licensed expert whose license to practice has been revoked in any State, commonwealth, possession or territory of the United States, or the District of Columbia; any person who has been and remains suspended or barred from practice by or before the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Board, the Farm Credit Administration, the Securities and Exchange Commission, or the Commodity Futures Trading Commission is also suspended automatically from appearing or practicing before FHFA. A disbarment or suspension within the meaning of this paragraph shall be deemed to have occurred when the disbarring or suspending agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken and regardless of whether a violation is admitted in the consent.

(2) A suspension or disbarment from practice before FHFA under paragraph (b)(1) of this section shall continue until the person suspended or disbarred is reinstated under paragraph (d)(2) of this section.

(c) *Notices to be filed.* (1) Any individual appearing or practicing before FHFA who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall file promptly with the Director a copy thereof, together with any related opinion or statement of the agency or tribunal involved.

(2) Any individual appearing or practicing before FHFA who is or within the last 10 years has been convicted of a felony or of a misdemeanor that resulted in a sentence of prison term or in a fine or restitution order totaling more than $5,000 promptly shall file a notice with the Director. The notice shall include a copy of the order imposing the sentence or fine, together with any related opinion or statement of the court involved.

(d) *Reinstatement.* (1) Unless otherwise ordered by the Director, an application for reinstatement for good cause may be made in writing by a person suspended or disbarred under paragraph (a)(1) of this section at any time more than three years after the effective

date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. An applicant for reinstatement hereunder may, in the Director's sole discretion, be afforded a hearing.

(2) An application for reinstatement for good cause by any person suspended or disbarred under paragraph (b)(1) of this section may be filed at any time, but not less than one year after the applicant's most recent application. An applicant for reinstatement for good cause hereunder may, in the Director's sole discretion, be afforded a hearing.

If, however, all the grounds for suspension or disbarment under paragraph (b)(1) of this section have been removed by a reversal of the order of suspension or disbarment or by termination of the underlying suspension or disbarment, any person suspended or disbarred under paragraph (b)(1) of this section may apply immediately for reinstatement and shall be reinstated by FHFA upon written application notifying FHFA that the grounds have been removed.

(e) *Conferences.* (1) *General rule.* The FHFA counsel of record may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, disbarment, or suspension, regardless of whether a proceeding for censure, disbarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(2) *Resignation or voluntary suspension.* In order to avoid the institution of or a decision in a disbarment or suspension proceeding, a person who practices before FHFA may consent to censure, suspension, or disbarment from practice. At the discretion of the Director, the individual may be censured, suspended, or disbarred in accordance with the consent offered.

(f) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under this part, except that in proceedings to terminate an existing FHFA suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with proof and that the Director may, in the Director's sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by FHFA be limited to written submissions. All hearings held under this section shall be closed to the public unless the Director, on the Director's own motion or upon the request of a party, otherwise directs.

§§ 1209.76–1209.79 [Reserved]

Subpart E—Civil Money Penalty Inflation Adjustments

§ 1209.80 Inflation adjustments.

The maximum amount of each civil money penalty within FHFA's jurisdiction, as set by the Safety and Soundness Act and thereafter adjusted in accordance with the Inflation Adjustment Act, is as follows:

U.S. Code citation	Description	New adjusted maximum penalty amount
12 U.S.C. 4636(b)(1)	First Tier	$12,023
12 U.S.C. 4636(b)(2)	Second Tier	60,115
12 U.S.C. 4636(b)(4)	Third Tier (Regulated Entity or Entity-Affiliated party)	2,404,608

[86 FR 7495, Jan. 29, 2021]

§ 1209.81 Applicability.

The inflation adjustments set out in § 1209.80 shall apply to civil money penalties assessed in accordance with the provisions of the Safety and Soundness Act, 12 U.S.C. 4636, and subparts B and C of this part, for violations occurring on or after January 15, 2021.

[86 FR 7496, Jan. 29, 2021]

§§ 1209.82–1209.99 [Reserved]

Subpart F—Suspension or Removal of an Entity-Affiliated Party Charged With Felony

§ 1209.100 Scope.

Subpart F of this part applies to informal hearings afforded to any entity-affiliated party who has been suspended, removed, or prohibited from further participation in the business affairs of a regulated entity by a notice or order issued by the Director under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)).

§ 1209.101 Suspension, removal, or prohibition.

(a) *Notice of suspension or prohibition.* (1) As provided by section 1377(h)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1)), if an entity-affiliated party is charged in any information, indictment, or complaint, with the commission of or participation in a crime that involves dishonesty or breach of trust that is punishable by imprisonment for more than one year under State or Federal law, the Director may, if continued service or participation by such party may pose a threat to the regulated entity or impair public confidence in the regulated entity, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of any regulated entity.

(2) In accordance with section 1377(h)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1)), the notice of suspension or prohibition is effective upon service. A copy of such notice will be served on the relevant regulated entity. The notice will state the basis for the suspension and the right of the party to request an informal hearing as provided in §1209.102. The suspension or prohibition is to remain in effect until the information, indictment, or complaint is finally disposed of, or until terminated by the Director, or otherwise as provided in paragraph (c) of this section.

(b) *Order of removal or prohibition.* As provided by section 1377(h)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(2)), at such time as a judgment of conviction is entered (or pretrial diversion or other plea bargain is agreed to) in connection with a crime as referred to above in paragraph (a) (the ''conviction''), and the conviction is no longer subject to appellate review, the Director may, if continued service or participation by such party may pose a threat to the regulated entity or impair public confidence in the regulated entity, issue an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the regulated entity without the prior written consent of the Director. A copy of such order will be served on the relevant regulated entity, at which time the entity-affiliated party shall immediately cease to be a director or officer of the regulated entity. The notice will state the basis for the removal or prohibition and the right of the party to request a hearing as provided in §1209.102.

(c) *Effective period.* Unless terminated by the Director, a notice of suspension or order of removal issued under section 1377(h)(1) or (2) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1), (2)) shall remain effective and outstanding until the completion of any informal hearing or appeal provided under section 1377(h)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(4)). The pendency of an informal hearing, if any, does not stay any notice of suspension or prohibition or order of removal or prohibition under subpart F of this part.

(d) *Effect of acquittal.* As provided by section 1377(h)(2)(B)(ii) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(2)(B)(ii)), a finding of not guilty or other disposition of the charge does not preclude the Director from instituting removal, suspension, or prohibition proceedings under section 1377(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4636a(a), (b)).

(e) *Preservation of authority.* Action by the Director under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), shall not be deemed as a predicate or a bar to any other regulatory, supervisory, or enforcement action under the Safety and Soundness Act.

§ 1209.102 Hearing on removal or suspension.

(a) *Hearing requests*—(1) *Deadline.* An entity-affiliated party served with a notice of suspension or prohibition or an order of removal or prohibition, within 30 days of service of such notice or order, may submit to the Director a written request to appear before the Director to show that his or her continued service or participation in the affairs of the regulated entity will not pose a threat to the interests of, or threaten to impair public confidence in, the Enterprises or the Banks. The request must be addressed to the Director and sent to the Federal Housing Finance Agency at 400 Seventh Street, SW., Eighth Floor, Washington, DC 20219, by:

(i) Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the address stated above; or

(ii) First class, registered, or certified mail via the U.S. Postal Service.

(2) *Waiver of appearance.* An entity-affiliated party may elect in writing to waive his or her right to appear to make a statement in person or through counsel and have the matter determined solely on the basis of his or her written submission.

(b) *Form and timing of hearing.* (1) *Informal hearing.* Hearings under subpart F of this part are not subject to the formal adjudication provisions of the Administrative Procedure Act (5 U.S.C. 554 through 557), and are not conducted under subpart C of this part.

(2) *Setting of the hearing.* Upon receipt of a timely request for a hearing, the Director will give written notice and set a date within 30 days for the entity-affiliated party to appear, personally, or through counsel, before the Director or his or her designee(s) to submit written materials (or, at the discretion of the Director, oral testimony and oral argument) to make the necessary showing under paragraph (a) of this section. The entity-affiliated party may submit a written request for additional time for the hearing to commence, without undue delay, and the Director may extend the hearing date for a specified time.

(3) *Oral testimony.* The Director or his or her designee, in his or her discretion, may deny, permit, or limit oral testimony in the hearing.

(c) *Conduct of the hearing*—(1) *Hearing officer.* A hearing under this section may be presided over by the Director or one or more designated FHFA employees, except that an officer designated by the Director (hearing officer) to conduct the hearing may not have been involved in an underlying criminal proceeding, a factually related proceeding, or an enforcement proceeding in a prosecutorial or investigative role. This provision does not preclude the Director otherwise from seeking information on the matters at issue from appropriate FHFA staff on an as needed basis consistent with § 1209.101(d)(2).

(2) *Submissions.* All submissions of the requestor and FHFA's counsel of record must be received by the Director or his or her designee no later than 10 days prior to the date set for the hearing. FHFA may respond in writing to the requestor's submission and serve the requestor (and any other interested party such as the regulated entity) not later than the date fixed by the hearing officer for submissions or other time period as the hearing officer may require.

(3) *Procedures.* (i) *Fact finding authority of the hearing officer.* The hearing officer shall determine all procedural matters under subpart F of this part, permit or limit the appearance of witnesses in accordance with paragraph (b)(3) of this section, and impose time limits as he or she deems reasonable. All oral statements, witness testimony, if permitted, and documents submitted that are found by the hearing officer to be materially relevant to the proceeding and not unduly repetitious may be considered. The hearing officer may question any person appearing in the proceeding, and may make any ruling reasonably necessary to ensure the full and fair presentation of evidence and to facilitate the efficient and effective operation of the proceeding.

(ii) *Statements to an officer.* Any oral or written statement made to the Director, a hearing officer, or any FHFA employee under subpart F of this part

is deemed to be a statement made to a Federal officer or agency within the meaning of 18 U.S.C. 1006.

(iii) *Oral testimony*. If either the requestor or FHFA counsel of record desires to present oral testimony to supplement the party's written submission he or she must make a request in writing to the hearing officer not later than 10 days prior to the hearing, as provided in paragraph (c)(2) of this section, or within a shorter time period as permitted by the hearing officer for good cause shown. The request should include the name of the individual(s), a statement generally descriptive of the expected testimony, and the reasons why such oral testimony is warranted. The hearing officer generally will not admit witnesses, absent a strong showing of specific and compelling need. Witnesses, if admitted, shall be sworn.

(iv) *Written materials*. Each party must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the hearing officer and serve copies on any other interested party (such as the affected regulated entity) not later than 10 days prior to commencement of the informal hearing, as provided in paragraph (c)(2), or within a shorter time period as permitted by the hearing officer for good cause shown.

(v) *Relief*. The purpose of the hearing is to determine whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the regulated entity will be continued, terminated, or otherwise modified, or whether the order removing such party from office or prohibiting the party from further participation in any manner in the conduct of the affairs of the regulated entity will be rescinded or otherwise modified.

(vi) *Ultimate question*. In deciding on any request for relief from a notice of suspension or prohibition, the hearing officer shall not consider the ultimate question of guilt or innocence with respect to the outstanding criminal charge(s). In deciding on a request for relief from a removal order, the hearing officer shall not consider challenges to or efforts to impeach the validity of the conviction. In either case, the hearing officer may consider facts that show the nature of the events on which the conviction or charges were based.

(4) *Record*. If warranted under the circumstances of the matter, the hearing officer may require that a transcript of the proceedings be prepared at the expense of the requesting party. The hearing officer may order the record be kept open for a reasonable time following the hearing, not to exceed five business days, to permit the filing of additional pertinent submissions for the record. Thereafter, no further submissions are to be admitted to the record, absent good cause shown.

[76 FR 53607, Aug. 26, 2011,, as amended at 80 FR 80233, Dec. 24, 2015]

§ 1209.103 Recommended and final decisions.

(a) *Recommended decision*—(1) *Written recommended decision of the hearing officer*. Not later than 20 days following the close of the hearing (or if the requestor waived a hearing, from the deadline for submission of the written materials), the hearing officer will serve a copy of the recommended decision on the parties to the proceeding. The recommended decision must include a summary of the findings, the parties' respective arguments, and support for the determination.

(2) *Five-day comment period*. Not later than five business days after receipt of the recommended decision, the parties shall submit written comments in response to the recommended decision, if any, to the hearing officer. The hearing officer shall not grant any extension of the stated time for responses to a recommended decision.

(3) *Recommended decision to be transmitted to the Director*. The hearing officer shall promptly forward the recommended decision, and written comments, if any, and the record to the Director for final determination.

(b) *Decision of the Director*. Within 60 days of the date of the hearing, or if the requestor waived a hearing the date fixed for the hearing, the Director will notify the entity-affiliated party in writing by registered mail of the disposition of his or her request for relief from the notice of suspension or prohibition or the order of removal or prohibition. The decision will state whether the suspension or prohibition will be

continued, terminated, or otherwise modified, or whether the order removing such party from any participation in the affairs of the regulated entity will be rescinded or otherwise modified. The decision will contain a brief statement of the basis for an adverse determination. The Director's decision is a final and non-appealable order.

(c) *Effect of notice or order.* A removal or prohibition by order shall remain in effect until terminated by the Director. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Director.

(d) *Reconsideration.* A suspended or removed entity-affiliated party subsequently may petition the Director to reconsider the final decision any time after the expiration of a 12-month period from the date of the decision, but no such request may be made within 12 months of a previous petition for reconsideration. An entity-affiliated party must submit a petition for reconsideration in writing; the petition shall state the specific grounds for relief from the notice of suspension or order or removal and be supported by a memorandum and any other documentation materially relevant to the request for reconsideration. No hearing will be held on a petition for reconsideration, and the Director will inform the requestor of the disposition of the reconsideration request in a timely manner. A decision on a request for reconsideration shall not constitute an appealable order.

PART 1211—PROCEDURES

Subpart A—Definitions

Sec.

Subpart B—Waivers, Approvals, Non-Objection Letters, and Regulatory Interpretations

AUTHORITY: 12 U.S.C. 4511(b), 4513(a), 4526.

SOURCE: 79 FR 64665, Oct. 31, 2014, unless otherwise noted.

Subpart A—Definitions

§ 1211.1 Definitions.

As used in this part:

Approval means a written statement issued to a regulated entity or the Office of Finance approving a transaction, activity, or item that requires FHFA approval under a statute, rule, regulation, policy, or order.

Non-Objection Letter means a written statement issued to a regulated entity or the Office of Finance providing that FHFA does not object to a proposed transaction or activity.

Regulatory Interpretation means a written interpretation issued by the FHFA General Counsel with respect to the application of a statute, rule, regulation, or order to a proposed transaction or activity.

Requester means an entity that has submitted an application for a Waiver or Approval or a request for a Non-Objection Letter or Regulatory Interpretation.

Waiver means a written statement issued by the Director to a regulated entity or the Office of Finance that waives a provision, restriction, or requirement of an FHFA rule, regulation, policy, or order, or a required submission of information, not otherwise required by law, in connection with a particular transaction or activity.

Subpart B—Waivers, Approvals, Non-Objection Letters, and Regulatory Interpretations

§ 1211.2 Waivers.

(a) *Authority.* The Director reserves the right, in his or her discretion and in connection with a particular transaction or activity, to waive any provision, restriction, or requirement of this chapter (or of any Office of Federal Housing Enterprise Oversight or Federal Housing Finance Board regulation), or any required submission of information, not otherwise required by law, if such Waiver is not inconsistent with the law and does not adversely affect any substantial existing rights, upon a determination that application

of the provision, restriction, or requirement would adversely affect achievement of the purposes of the Authorizing Statutes or the Safety and Soundness Act, or upon a requester's showing of good cause. The Director also reserves the right to modify, rescind, or supersede any previously issued Waiver, with such action being effective only on a prospective basis.

(b) *Application.* A regulated entity or the Office of Finance may apply for a Waiver in accordance with §1211.6.

§1211.3 Approvals.

(a) *Authority.* The Deputy Directors for Enterprise Regulation and for Federal Home Loan Bank Regulation, or their designees, may grant requests submitted by an Enterprise or by a Bank or the Office of Finance, respectively, seeking approval of any transaction, activity, or item that requires FHFA approval under any applicable statute, rule, regulation, policy, or order. The Director reserves the right to modify, rescind, or supersede an Approval, with such action being effective only on a prospective basis.

(b) *Requests.* A regulated entity or the Office of Finance may apply for an Approval in accordance with §1211.6, unless alternative application procedures are prescribed by the applicable statute, rule, regulation, policy, or order for the transaction, activity, or item at issue.

(c) *Reservation.* The Deputy Directors for Enterprise Regulation and for Federal Home Loan Bank Regulation, as appropriate, may, in their discretion, prescribe additional or alternative procedures for any application for approval of a transaction, activity, or item.

§1211.4 Non-Objection Letters.

(a) *Authority.* The Deputy Directors for Enterprise Regulation and for Federal Home Loan Bank Regulation, or their designees, may, in their discretion, issue to an Enterprise or to a Bank or the Office of Finance, respectively, a Non-Objection Letter stating that FHFA does not object to a proposed transaction or activity for supervisory, regulatory, or policy reasons. The Director reserves the right to modify, rescind, or supersede a Non-Objection Letter, with such action being effective only on a prospective basis.

(b) *Requests.* A regulated entity or the Office of Finance may request a Non-Objection Letter in accordance with §1211.6.

§1211.5 Regulatory Interpretations.

(a) *Authority.* The General Counsel may, in his or her discretion, issue a Regulatory Interpretation to a regulated entity or the Office of Finance, providing guidance with respect to the application of any applicable statute, rule, regulation, or order to a proposed transaction or activity. The Director reserves the right to modify, rescind, or supersede a Regulatory Interpretation, with such action being effective only on a prospective basis.

(b) *Requests.* A regulated entity or the Office of Finance may request a Regulatory Interpretation in accordance with §1211.6.

§1211.6 Submission requirements.

Applications for a Waiver or Approval and requests for a Non-Objection Letter or Regulatory Interpretation shall comply with the requirements of this section and shall pertain to regulatory matters relating to the Banks or Enterprises, and not to conservatorship matters.

(a) *Filing.* Each application or request shall be in writing. A Bank or the Office of Finance shall submit its filing to the Deputy Director for the Division of Federal Home Loan Bank Regulation, and an Enterprise shall submit its filing to the Deputy Director for Enterprise Regulation. Applications for regulatory interpretations shall be submitted also to the General Counsel.

(b) *Authorization.* An application for a Waiver or Approval and a request for a Non-Objection Letter or Regulatory Interpretation shall be signed by the principal executive officer or other authorized executive officer of the regulated entity or by the chairperson of the board of directors or authorized executive officer of the Office of Finance, as appropriate.

(c) *Information requirements.* Each application or request shall contain:

(1) The name of the requester, and the name, title, business address, telephone number, and business electronic

mail address, if any, of the official filing the application or request on its behalf;

(2) The name, business address, telephone number, and business electronic mail address, if any, of a contact person from whom FHFA staff may seek additional information if necessary;

(3) The section numbers of the particular provisions of the applicable statutes or rules, regulations, policies, or orders to which the application or request relates;

(4) Identification of the determination or relief requested, including any alternative relief requested if the primary relief is denied, and a clear statement of why such relief is needed;

(5) A statement of the particular facts and circumstances giving rise to the application or request and identifying all relevant legal and factual issues;

(6) References to all other relevant authorities that the regulated entity or Office of Finance believes should be considered in evaluating the application or request, including the Authorizing Statutes, Safety and Soundness Act, FHFA rules, regulations, policies, orders, judicial decisions, administrative decisions, relevant statutory interpretations, and policy statements;

(7) References to any Waivers, Non-Objection Letters, Approvals, or Regulatory Interpretations issued in the past in response to circumstances similar to those surrounding the request or application;

(8) For any application or request involving interpretation of the Authorizing Statutes, Safety and Soundness Act, or FHFA regulations, a reasoned opinion of counsel supporting the relief or interpretation sought and distinguishing any adverse authority;

(9) Any other non-duplicative, relevant supporting documentation; and

(10) A certification by a person with knowledge of the facts that the representations made in the application or request are accurate and complete. The following form of certification is sufficient for this purpose: ''I hereby certify that the statements contained in the submission are true and complete to the best of my knowledge. [Name and Title].''

(d) *Exceptions.* In any given matter or class of matters, the Director, the Deputy Director for Federal Home Loan Bank Regulation, the Deputy Director for Enterprise Regulation, or the General Counsel, as appropriate, may accept an application or request that does not comply with the requirements of this section, for supervisory reasons or administrative efficiency.

(e) *Withdrawal.* Once filed, an application or request may be withdrawn only upon written request, and only if FHFA has not yet acted on the application or request.

PART 1212—POST–EMPLOYMENT RESTRICTION FOR SENIOR EXAMINERS

Subpart A [Reserved]

Subpart B—Post-Employment Restriction for Senior Examiners

Sec.

AUTHORITY: 12 U.S.C. 4526, 12 U.S.C. 4517(e).

SOURCE: 74 FR 51075, Oct. 5, 2009, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Post-Employment Restriction for Senior Examiners

§ 1212.1 Purpose and scope.

This subpart sets forth a one-year post-employment restriction applicable to senior examiners of the Federal Housing Finance Agency (FHFA). This restriction is in addition to the post-employment restriction applicable to employees of FHFA under 12 U.S.C. 4523.

§ 1212.2 Definitions.

For purposes of subpart B of this part, the term:

Consultant means a person who works directly on matters for, or on behalf of, a regulated entity or the Office of Finance.

Director means the Director of FHFA or his or her designee.

Employee means an officer or employee of FHFA, including a special Government employee.

Federal Home Loan Bank or *Bank* means a Bank established under the Federal Home Loan Bank Act; the term ''Federal Home Loan Banks'' means, collectively, all the Federal Home Loan Banks.

Office of Finance means the Office of Finance of the Federal Home Loan Bank System, or any successor thereto.

Regulated entity means the Federal National Mortgage Association and any affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, any Federal Home Loan Bank; the term ''regulated entities'' means, collectively, the Federal National Mortgage Association and any affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, and the Federal Home Loan Banks.

Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Federal Housing Finance Regulatory Reform Act of 2008, Division A of the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, 122 Stat. 2654 (2008).

Senior examiner means an employee of FHFA who has been:

(1) Authorized by FHFA to conduct examinations or inspections on behalf of FHFA;

(2) Assigned continuing, broad and lead responsibility for examining a regulated entity or the Office of Finance; and

(3) Assigned responsibilities for examining, inspecting and supervising the regulated entity or the Office of Finance that—

(i) Represents a substantial portion of the employee's assigned responsibilities; and

(ii) Requires the employee to interact routinely with officers or employees of the regulated entity or the Office of Finance.

§ 1212.3 Post-employment restriction for senior examiners.

(a) *Prohibition.* An employee of FHFA who serves as the senior examiner of a regulated entity or the Office of Finance for two or more months during the last 12 months of his or her employment with FHFA may not, within one year after leaving the employment of FHFA, knowingly accept compensation as an employee, officer, director, or consultant from a regulated entity or the Office of Finance unless the Director grants a waiver pursuant to §1212.4.

(b) *Effective date.* The post-employment restriction in paragraph (a) of this section shall not apply to any officer or employee of FHFA or any former officer or employee of FHFA who ceased to be an officer or employee of FHFA before November 4, 2009.

§ 1212.4 Waiver.

At the written request of a senior examiner or former senior examiner, the Director may waive the post-employment restriction in §1212.3 if he or she certifies, in writing, and on a case-by-case basis, that granting a waiver of such restriction does not affect the integrity of the supervisory program of FHFA.

§ 1212.5 Penalties.

(a) *General.* A senior examiner who, after leaving the employment of FHFA, violates the restriction set forth in §1212.3 shall be subject to one or both of the following penalties—

(1) An order:

(i) Removing the individual from office at the regulated entity or the Office of Finance or prohibiting the individual from further participation in the affairs of the relevant regulated entity or the Office of Finance for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any regulated entity or the Office of Finance for a period of up to five years; and/or

(2) A civil money penalty of not more than $250,000.

(b) *Other penalties.* The penalties set forth in paragraph (a) of this section are not exclusive, and a senior examiner who violates the restrictions in

§ 1212.3 also may be subject to other administrative, civil, or criminal remedies or penalties as provided in law.

(c) *Procedural rights.* The procedures applicable to actions under paragraph (a) of this section are those provided in the Safety and Soundness Act under section 1376, in connection with the imposition of a civil money penalty; under section 1377, in connection with a removal and prohibition order (12 U.S.C. 4636 and 4636a, respectively); and under any regulations issued by FHFA implementing such procedures.

PART 1213—OFFICE OF THE OMBUDSMAN

Sec.

AUTHORITY: 12 U.S.C. 4511(b)(2), 4517(i), and 4526.

SOURCE: 76 FR 7481, Feb 10, 2011, unless otherwise noted.

§ 1213.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to establish within FHFA the Office of the Ombudsman (Office) under section 1317(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4517(i)), as amended, and to set forth the authorities and duties of the Ombudsman.

(b) *Scope.* (1) This part applies to complaints and appeals from any regulated entity and any person that has a business relationship with a regulated entity regarding any matter relating to the regulation and supervision of such regulated entity or the Office of Finance by FHFA.

(2) The establishment of the Office does not alter or limit any other right or procedure associated with appeals, complaints, or administrative matters submitted by a person regarding any matter relating to the regulation and supervision of a regulated entity or the Office of Finance under any other law or regulation.

§ 1213.2 Definitions.

For purposes of this part, the term:

Business relationship means any existing or potential interaction between a person and a regulated entity or the Office of Finance for the provision of goods or services. The term *business relationship* does not include any interaction between a mortgagor and a regulated entity that directly or indirectly owns, purchased, guarantees, or sold the mortgage.

Director means the Director of FHFA or his or her designee.

FHFA means the Federal Housing Finance Agency.

Office of Finance means the Office of Finance of the Federal Home Loan Bank System.

Person means an organization, business entity, or individual that has a business relationship with a regulated entity or the Office of Finance, or that represents the interests of a person that has a business relationship with a regulated entity or the Office of Finance. The term *person* does not include an individual borrower.

Regulated entity means the Federal National Mortgage Association and any affiliate, the Federal Home Loan Mortgage Corporation and any affiliate, and any Federal Home Loan Bank.

§ 1213.3 Authorities and duties of the Ombudsman.

(a) *General.* The Office shall be headed by an Ombudsman, who shall consider complaints and appeals from any regulated entity, the Office of Finance, and any person that has a business relationship with a regulated entity or the Office of Finance regarding any matter relating to the regulation and supervision of such regulated entity or the Office of Finance by FHFA. In considering any complaint or appeal under this part, the Ombudsman shall:

(1) Conduct inquiries and submit findings of fact and recommendations to the Director concerning resolution of the complaint or appeal, and

(2) Act as a facilitator or mediator to advance the resolution of the complaint or appeal.

(b) *Other duties.* The Ombudsman shall:

(1) Establish procedures for carrying out the functions of the Office,

(2) Establish and publish procedures for receiving and considering complaints and appeals, and

(3) Report annually to the Director on the activities of the Office, or more frequently, as determined by the Director.

§ 1213.4 Complaints and appeals from a regulated entity or the Office of Finance.

(a) *Complaints.* (1) *General.* Any regulated entity or the Office of Finance may submit a complaint in accordance with procedures established by the Ombudsman.

(2) *Matters subject to complaint.* A regulated entity or the Office of Finance may submit a complaint regarding any matter relating to the regulation and supervision of a regulated entity or the Office of Finance by FHFA that is not subject to appeal or in litigation, arbitration, or mediation. The Ombudsman may further define what matters are subject to complaint.

(b) *Appeals.* (1) *General.* Any regulated entity or the Office of Finance may submit an appeal in accordance with procedures established by the Ombudsman.

(2) *Matters subject to appeal.* A regulated entity or the Office of Finance may submit an appeal regarding any final, written regulatory or supervisory conclusion, decision, or examination rating by FHFA. The Ombudsman may further define what matters are subject to appeal.

(3) *Matters not subject to appeal.* Matters for which there is an existing avenue of appeal or for which there is another forum for appeal; non-final decisions or conclusions; and matters in ongoing litigation, arbitration, or mediation, unless there has been a breakdown in the process, may not be appealed. Matters not subject to appeal include, but are not limited to, appointments of conservators or receivers, preliminary examination conclusions, formal enforcement decisions, formal and informal rulemakings, Freedom of Information Act appeals, final FHFA decisions subject to judicial review, and matters within the jurisdiction of the FHFA Inspector General. The Ombudsman may further define what matters are not subject to appeal.

(4) *Effect of filing an appeal.* An appeal under this section does not excuse a regulated entity or the Office of Finance from complying with any regulatory or supervisory decision while the appeal is pending. However, the Director, upon consideration of a written request, may waive compliance with a regulatory or supervisory decision during the pendency of the appeal.

§ 1213.5 Complaints from a person.

(a) *General.* Any person that has a business relationship with a regulated entity or the Office of Finance may submit a complaint in accordance with procedures established by the Ombudsman.

(b) *Matters subject to complaint.* A person may submit a complaint regarding any matter relating to the regulation and supervision of a regulated entity or the Office of Finance by FHFA that is not a matter in litigation, arbitration, or mediation. The Ombudsman may further define what matters are subject to complaints.

§ 1213.6 No retaliation.

Neither FHFA nor any FHFA employee may retaliate against a regulated entity, the Office of Finance, or a person for submitting a complaint or appeal under this part. The Ombudsman shall receive and address claims of retaliation. Upon receiving a complaint, the Ombudsman, in coordination with the Inspector General, shall examine the basis of the alleged retaliation. Upon completion of the examination, the Ombudsman shall report the findings to the Director with recommendations, including a recommendation to take disciplinary action against any FHFA employee found to have retaliated.

§ 1213.7 Confidentiality.

The Ombudsman shall ensure that safeguards exist to preserve confidentiality. If a party requests that information and materials remain confidential, the Ombudsman shall not disclose the information or materials, without

approval of the party, except to appropriate reviewing or investigating officials, such as the Inspector General, or as required by law. However, the resolution of certain complaints (such as complaints of retaliation against a regulated entity or the Office of Finance) may not be possible if the identity of the party remains confidential. In such cases, the Ombudsman shall discuss with the party the circumstances limiting confidentiality.

PART 1214—AVAILABILITY OF NON-PUBLIC INFORMATION

Sec.

AUTHORITY: 5 U.S.C. 301, 552; 12 U.S.C. 4501, 4513, 4522, 4526, 4639.

SOURCE: 78 FR 39958, July 3, 2013, unless otherwise noted.

§ 1214.1 Definitions.

Confidential supervisory information means information prepared or received by FHFA that meets all of the following criteria:

(1) The information is not a document prepared by a regulated entity or the Office of Finance for its own business purposes that is in its possession;

(2) The information is exempt from the Freedom of Information Act, 5 U.S.C. 552 (1966); and

(3) The information—(i) Consists of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports, or

(ii) Is gathered by FHFA in the course of any investigation, suspicious activity report, cease-and-desist order, civil money penalty enforcement order, suspension, removal or prohibition order, or other supervisory or enforcement orders or actions taken under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Public Law 102–550, 122 Stat. 2654.

Disclosure means release or divulgence of information by any person to a person outside of FHFA.

FHFA employee means strictly for the purpose of this regulation, any person employed by FHFA, including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA, and any person employed by the FHFA Office of the Inspector General (FHFA–OIG), including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA–OIG.

Non-public information means information that FHFA has not made public that is created by, obtained by, or communicated to an FHFA employee in connection with the performance of official duties, regardless of who is in possession of the information. This includes confidential supervisory information as defined above. It does not include information or documents that FHFA has disclosed under the Freedom of Information Act (5 U.S.C. 552; 12 CFR part 1202), or Privacy Act of 1974 (5 U.S.C. 552a; 12 CFR part 1204). It also does not include specific information or documents that were previously disclosed to the public at large or information or documents that are customarily furnished to the public at large in the course of the performance of official FHFA duties, including but not limited to: Disclosures made by the Director pursuant to 24 CFR subpart F, and any FHFA successor rules; the annual report that FHFA submits to Congress pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*), press releases, FHFA blank forms, and materials published in the FEDERAL REGISTER.

Person means individual or business entity.

§ 1214.2 Purpose and scope.

(a) *Purpose.* The purpose of this part is to control the dissemination of non-public information, which includes confidential supervisory information, and maintain its controlled, sensitive, privileged, or proprietary nature, as appropriate.

(b) *Scope.* This part imposes a broad-based prohibition against unauthorized disclosure of any non-public information. This part does not supersede the regulations at 12 CFR part 1202 (governing disclosure under the Freedom of Information Act); 12 CFR part 1204

(governing disclosure under the Privacy Act); and the sections describing permitted disclosures in any FHFA rules on Federal Home Loan Bank Information Sharing or on the FHFA Public Use Database.

(c) These provisions also do not supersede or otherwise alter the rights or liabilities created by 5 U.S.C. 7211 (governing disclosures to Congress); 5 U.S.C. 2302(b)(8) (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); or 12 U.S.C. 3401 (governing disclosure of financial institution customer information).

§ 1214.3 General rule.

(a) *In general, Non-FHFA Employees.* The Director makes available to each regulated entity a copy of FHFA's report of examination of that regulated entity. The report of examination and all other confidential supervisory information is the property of FHFA and is provided to the regulated entity for its confidential internal use only. Under no circumstance shall any person in possession or control of confidential supervisory information make public or disclose, in any manner, the confidential supervisory information, or any portion of the contents thereof, except as authorized in writing by the Director.

(b) *In general, FHFA Employees.* Except as authorized in writing by the Director, no FHFA employee in possession or control of non-public information may disclose or permit the use or disclosure of such information in any manner or for any purpose.

(c) *Persons possessing confidential supervisory information.* All confidential supervisory information, for which the Director authorizes disclosure, remains the property of FHFA and may not be used or disclosed for any purpose other than that authorized under this part without the prior written permission of the Director.

(d) *No Waiver.* FHFA's disclosure of non-public information to any person does not constitute a waiver by FHFA of any privilege or FHFA's right to control, supervise, or impose limitations on, the subsequent use and disclosure of the non-public information.

(e) *Penalties, Confidential Supervisory Information.* Any person that discloses or uses confidential supervisory information except as authorized under this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. In addition to those penalties, FHFA, regulated entity, Office of Finance, affiliate (as defined in 12 U.S.C. 4502(20)), or entity-affiliated party (as defined in 12 U.S.C. 4502(11)) employees may be subject to appropriate administrative, enforcement, or disciplinary proceedings.

(f) *Penalties, Non-Public Information.* Any FHFA employee that discloses or uses non-public information except as authorized under this part may be subject to the penalties provided in 18 U.S.C. 641, other applicable laws, and appropriate administrative, enforcement, or disciplinary proceedings.

§ 1214.4 Exceptions.

(a) *FHFA Employees.* Current FHFA employees may disclose or permit the disclosure of non-public information to another FHFA employee or regulated entity or the Office of Finance, when necessary and appropriate, for the performance of their official duties.

(b) *Regulated Entity Agents and Consultants.* (1) When necessary and appropriate for regulated entity or Office of Finance business purposes, a regulated entity, the Office of Finance, or any director, officer, or employee thereof may disclose confidential supervisory information to any person currently engaged by the regulated entity or the Office of Finance, as officer, director, employee, attorney, auditor, or independent auditor (''regulated entity agents'').

(2) A regulated entity, the Office of Finance, or a director, officer, employee, or agent thereof, also may disclose confidential supervisory information to a consultant under this paragraph if the consultant is under a written contract to provide services to the regulated entity or the Office of Finance and the consultant has agreed in writing:

(i) To abide by the prohibition on the disclosure of confidential supervisory information contained in this section; and

(ii) That it will not use the confidential supervisory information for any purposes other than those stated in its contract to provide services to the regulated entity or the Office of Finance.

(c) *Law Enforcement Proceedings.* Notwithstanding the general prohibition of disclosure of non-public information, to the minimum extent required by the Inspector General Act, Public Law 95–452, 92 Stat. 1101 (1978), FHFA's Office of Inspector General is permitted under this section to disclose non-public FHFA information without Director approval.

(d) *Privilege.* FHFA retains all privilege claims for non-public information shared under §1214.4, including, but not limited to attorney-client, attorney-work product, deliberative process, and examination privileges.

PART 1215—PRODUCTION OF FHFA RECORDS, INFORMATION, AND EMPLOYEE TESTIMONY IN THIRD-PARTY LEGAL PROCEEDINGS

Sec.

AUTHORITY: 5 U.S.C. 301; 12 U.S.C. 4526.

SOURCE: 78 FR 39961, July 3, 2013, unless otherwise noted.

§ 1215.1 Scope and purpose.

(a) This regulation sets forth the policies and procedures that must be followed in order to compel an employee of the Federal Housing Finance Agency (FHFA) to produce records or information, or to provide testimony relating to the employee's official duties, in the context of a legal proceeding. Parties seeking records, information, or testimony must comply with these requirements when submitting demands or requests:

(b) FHFA intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving FHFA in controversial issues not related to its mission and functions;

(3) Maintain FHFA's impartiality;

(4) Protect employees from being compelled to serve as involuntary witnesses for wholly private interests, or as inappropriate expert witnesses regarding current law or the activities of FHFA; and

(5) Protect sensitive, confidential information and FHFA's deliberative processes.

(c) By providing these policies and procedures, FHFA does not waive the sovereign immunity of the United States.

(d) This part provides guidance for FHFA's internal operations. This part does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

(e) The production of records, information, or testimony pursuant to this part, does not constitute a waiver by FHFA of any privilege.

§ 1215.2 Applicability.

(a) This regulation applies to demands or requests for records, information, or testimony, in legal proceedings in which FHFA is not a named party.

(b) This regulation does not apply to:

(1) Demands or requests for an FHFA employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of FHFA;

(2) Requests for the release of non-exempt records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(3) Congressional demands or requests for records or testimony.

§ 1215.3 Definitions.

As used in this part:

Confidential supervisory information means information prepared or received by FHFA that meets all of the following criteria:

(1) The information is not a document prepared by a regulated entity or the Office of Finance for its own business purposes that is in its possession;

(2) The information is exempt from the Freedom of Information Act, 5 U.S.C. 552 (1966); and

(3) The information:

(i) Consists of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports, or

(ii) Is gathered by FHFA in the course of any investigation, suspicious activity report, cease-and-desist order, civil money penalty enforcement order, suspension, removal or prohibition order, or other supervisory or enforcement orders or actions taken under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, 12 U.S.C. 4501 *et seq*.

(4) The inclusion of the term ''confidential'' within the definition of ''confidential supervisory information'' is not intended to invoke the meaning of ''confidential,'' as that term is used in Executive Order No. 13526, December 29, 2009 (75 FR 707 (Jan. 5, 2010) (President's order on the classification of National Security Information). Confidential supervisory information is used in part 1215 to refer to the distinct category of information defined in §1215.3. FHFA used the word ''confidential'' within the label for this category of information simply to be consistent with the manner in which federal banking agencies refer to similar or identical types of information.

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production of records, information, or testimony that is issued in a legal proceeding.

Employee means:

(1) Any current or former officer or employee of FHFA or of FHFA–OIG;

(2) Any other individual hired through contractual agreement by or on behalf of FHFA who has performed or is performing services under such an agreement for FHFA; and

(3) Any individual who has served or is serving in any consulting or advisory capacity to FHFA, whether formal or informal.

Federal Home Loan Bank means a bank established under the authority of 12 U.S.C. 1423(a).

FHFA means the Federal Housing Finance Agency including the FHFA–OIG.

FHFA Counsel means an attorney in FHFA's Office of General Counsel.

General Counsel means FHFA's General Counsel or a person within FHFA's Office of General Counsel to whom the General Counsel has delegated responsibilities under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Produce means provide, disclose, expose, or grant access to.

Records or information means, regardless of the person or entity in possession:

(1) All documents and materials that are FHFA agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in FHFA files; and

(3) All other information or materials acquired by an FHFA employee in the performance of his or her official duties or because of his or her official status, including confidential supervisory information.

Regulated entity has the same meaning as set forth in 12 U.S.C. 4502(20). For this regulation's purposes, ''regulated entity'' also includes:

(1) The Office of Finance; and

(2) Any current or former director, officer, employee, contractor or agent of a regulated entity.

Request means any informal request, by whatever method, in connection with a legal proceeding, seeking production of records, information, or testimony that has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, and recorded interviews made by an individual about FHFA information in connection with a legal proceeding.

§ 1215.4 General prohibition.

(a) No employee may produce records or information, or provide any testimony related to the records or information, in response to any demand or request without prior written approval to do so from the Director or the Director's designee.

(b) Any person or entity that fails to comply with this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current employee also may be subject to administrative or disciplinary proceedings.

§ 1215.5 Delegation.

To the extent permissible by statute, the Director may delegate his or her authority under this part to any FHFA employee and the General Counsel may delegate his or her authority under this part to any FHFA Counsel.

§ 1215.6 Factors FHFA may consider.

The Director may grant an employee permission to testify regarding agency matters, and to produce records and information, in response to a demand or request. Among the relevant factors that the Director may consider in making this determination are whether:

(a) This part's purposes are met;

(b) FHFA has an interest in the decision that may be rendered in the legal proceeding;

(c) Approving the demand or request would assist or hinder FHFA in performing statutory duties or use FHFA resources;

(d) Production might assist or hinder employees in doing their work;

(e) The records, information, or testimony can be obtained from other sources. (Concerning testimony, ''other sources'' means a non-agency employee, or an agency employee other than the employee named).

(f) The demand or request is unduly burdensome or otherwise inappropriate under the rules of discovery or procedure governing the case or matter in which the demand or request arose;

(g) Production of the records, information, or testimony might violate or be inconsistent with a statute, Executive Order, regulation, or other legal authority;

(h) Production of the records, information, or testimony might reveal confidential or privileged information, trade secrets, or confidential commercial or financial information;

(i) Production of the records, information, or testimony might impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(j) Production of the records, information, or testimony might result in FHFA appearing to favor one litigant over another;

(k) The demand or request pertains to documents that were produced by another agency;

(l) The demand or request complies with all other applicable rules;

(m) The demand or request is sufficiently specific to be answered;

(n) The relevance of the records, information, or testimony to the purposes for which they are sought, and for which they may be used for substantive evidence;

(o) Production of the records, information, or employee testimony may implicate a substantial government interest; and

(p) Any other good cause.

§ 1215.7 Serving demands and submitting requests.

(a) All demands and requests must be in writing.

(b) Demands must be served and requests must be submitted to the FHFA General Counsel at the following address: General Counsel, Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20219.

(c) Demands must not be served upon, nor requests submitted to any regulated entity for records, information, or testimony regardless of whether the records, information, or testimony sought are in the possession of, or known by, the regulated entity. If a regulated entity receives a request or demand for records, information, or

testimony, the regulated entity must immediately notify the General Counsel and provide FHFA an opportunity to object to the demand or request before responding to the demand or request. Submitting a demand or request to a regulated entity may result in rejection of the demand or request under § 1215.9.

(d) If an employee receives a request or demand that is not properly routed through FHFA's General Counsel, as required under this section, the employee must promptly notify the General Counsel. An employee's failure to notify the General Counsel is grounds for discipline or other adverse action.

[78 FR 39961, July 3, 2013, as amended at 80 FR 80233, Dec. 24, 2015]

§ 1215.8 Timing and form of demands and requests.

(a) A party seeking records, information, or testimony must submit a request and receive a rejection before making a demand for records, information, or testimony.

(b) A demand or request to FHFA must include a detailed description of the basis for the demand or request and comply with the requirements in § 1215.7.

(c) Demands and requests must be submitted at least 60 days in advance of the date on which the records, information, or testimony is needed. Exceptions to this requirement may be granted upon a showing of compelling need.

(d) A demand or request for testimony also must include an estimate of the amount of time that the employee will need to devote to the process of testifying (including anticipated travel time and anticipated duration of round trip travel), plus a showing that no document or the testimony of non-agency persons, including retained experts, could suffice in lieu of the employee's testimony.

(e) Upon submitting a demand or request seeking employee testimony, the requesting party must notify all other parties to the legal proceeding.

(f) After receiving notice of a demand or request for testimony, but before the testimony occurs, a party to the legal proceeding who did not join in the demand or request and who wishes to question the witness beyond the scope of the testimony sought must submit a separate demand or request within 60 days of receiving the notice required under paragraph (e) of this section and must then comply with paragraph (c) of this section.

(g) Every demand or request must include the legal proceeding's caption and docket number, the forum; the name, address, phone number, State Bar number, and, if available, electronic mail address of counsel to all parties to the legal proceeding (in the case of *pro-se* parties, substitute the name, address, phone number, and electronic mail address of the *pro-se* party); and a statement of the demanding or requesting party's interest in the case. In addition, the demanding or requesting party must submit a clear and concise written statement that includes: a summary of the legal and factual issues in the proceeding and a detailed explanation as to how the records, information or testimony will contribute substantially to the resolution of one or more specially identified issues in the legal proceeding. A copy of the complaint or charging document may accompany—but must not be substituted for—the required statement.

§ 1215.9 Failure to meet this part's requirements.

FHFA may oppose any demand or request that does not meet the requirements set forth in this part.

§ 1215.10 Processing demands and requests.

(a) The Director will review every demand or request received and, in accordance with this regulation, determine whether, and under what conditions, to authorize an employee to produce records, information, or testimony.

(b) The Director will process demands and requests in the order in which they are received. The Director will ordinarily respond within 60 days from the date that the agency receives all information necessary to evaluate the demand or request. However, the time for response will depend upon the scope of the demand or request. The Director may respond outside of the 60-day period:

(1) Under exigent or unusual circumstances; or

(2) When FHFA must receive and process records or information in the possession, custody, or control of a third party.

(c) The Director may confer with counsel to parties to a legal proceeding about demands or requests made pursuant to this part. The conference may be *ex-parte*. Failure to confer in good faith, in order to enable the Director to make an informed determination, may justify rejection of the demand or request.

(d) The Director may rely on sources of information other than those provided by the demanding or requesting parties as bases for making a determination.

(e) The Director may grant a waiver of any requirement in this section to promote a significant interest of FHFA or the United States, or for other good cause.

§ 1215.11 FHFA determination.

(a) The Director makes FHFA's determinations regarding demands and requests.

(b) The Director will notify the demanding or requesting party of FHFA's determination, the reasons for the approval or rejection of the demand or request, and any conditions that the Director may impose on the release of records, information, or testimony.

§ 1215.12 Restrictions that apply to testimony.

(a) The Director may impose conditions or restrictions on testimony, including but not limited to limiting the scope of testimony or requiring the demanding or requesting party and other parties to the legal proceeding to agree that the testimony transcript will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The Director may also require a copy of the transcript of testimony to be provided to FHFA at the demanding or requesting party's expense.

(b) The Director may offer an employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the Director, the employee must not:

(1) Disclose confidential or privileged information; or

(2) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or FHFA's mission or functions. This provision does not apply to requests from the United States for expert or opinion testimony.

(d) The Director may assign FHFA Counsel to be present for an employee's testimony.

§ 1215.13 Restrictions that apply to records and information.

(a) The Director may impose conditions or restrictions on the release of records and information, including but not limited to requiring that parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access and further disclosure, or that parties take other appropriate steps to comply with applicable privacy requirements. The terms of a protective order or confidentiality agreement must be acceptable to the Director. In cases where protective orders or confidentiality agreements have already been executed, the Director may condition the release of records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the Director so determines, original agency records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their status as original records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

(c) The scope of permissible production is limited to that set forth in the prior, written authorization granted by the Director.

(d) If records or information are produced in connection with a legal proceeding, the demanding or requesting party must:

(1) Promptly notify all other parties to the legal proceeding that the records

or information are FHFA records or information and are subject to this part and any applicable confidentiality agreement or protective order;

(2) Provide copies of any confidentiality agreement or protective order to all other parties; and

(3) Retrieve the records or information from the court or other competent authority's file when the court or other competent authority no longer requires the records or information and certify that every party covered by a confidentiality agreement, protective order, or other privacy protection has destroyed all copies of the records or information.

§ 1215.14 Procedure in the event of an adverse FHFA determination.

(a) *Procedure for seeking reconsideration of FHFA's determination.* A demanding or requesting party seeking reconsideration of FHFA's rejection of a demand or request, or of any restrictions on receiving records, information, or testimony, may seek reconsideration of the rejection or restrictions as follows:

(1) *Notice of Intention to Petition for Reconsideration.* The aggrieved demanding or requesting party may seek reconsideration by filing a written Notice of Intention to Petition for Reconsideration (Notice) within 10 business days of the date of FHFA's determination. The Notice must identify the petitioner, the determination for which reconsideration is being petitioned, and any dates (such as deposition, hearing, or court dates) that are significant to petitioner. The Notice must be served in accordance with § 1215.7.

(2) *Petition for Reconsideration.* Within five business days of filing Notice, the petitioner must file a Petition for Reconsideration (Petition) in accordance with § 1215.7. The Petition must contain a clear and concise statement of the basis for the reconsideration with supporting authorities. Determinations about petitions for reconsideration are within the discretion of the FHFA Director, and are final.

(b) *Prerequisite to judicial review.* Pursuant to section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to FHFA for reconsideration of a final determination made under the authority of this part is a prerequisite to judicial review.

§ 1215.15 Conflicting court order.

Notwithstanding FHFA's rejection of a demand for records, information, or testimony, if a court or other competent authority orders an FHFA employee to comply with the demand, the employee must promptly notify FHFA's General Counsel of the order, and the employee must respectfully decline to comply, citing *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). An employee's failure to notify the General Counsel of a court or other authority's order is grounds for discipline or other adverse action.

§ 1215.16 Fees.

(a) The Director may condition the production of records, information, or an employee's appearance on advance payment of reasonable costs to FHFA, which may include but are not limited to those associated with employee search time, copying, computer usage, and certifications.

(b) Witness fees will include fees, expenses, and allowances prescribed by the rules applicable to the particular legal proceeding. If no fees are prescribed, FHFA will base fees on the rule of the federal district court closest to the location where the witness will appear. Such fees may include but are not limited to time for preparation, travel, and attendance at the legal proceeding.

§ 1215.17 Responses to demands served on nonemployees.

(a) FHFA confidential supervisory information is the property of FHFA, and is not to be disclosed to any person without the Director's prior written consent.

(b) If any person in possession of FHFA confidential supervisory information, is served with a demand in a legal proceeding directing that person to produce FHFA's confidential supervisory information or to testify with respect thereto, such person shall immediately notify the General Counsel of such service, of the testimony requested and confidential supervisory information described in the demand, and of all relevant facts. Such person

shall also object to the production of such confidential supervisory information on the basis that the confidential supervisory information is the property of FHFA and cannot be released without FHFA's consent and that production must be sought from FHFA following the procedures set forth in §§ 1215.7, 1215.8, and 1215.14 of this part.

§ 1215.18 Inspector General.

Notwithstanding the general prohibition of disclosure of records and information, to the minimum extent required by the Inspector General Act, Public Law 9–452 (1978), FHFA's Office of Inspector General is permitted under this section to disclose records and information and permit FHFA–OIG employee testimony without Director approval.

PART 1217—PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

AUTHORITY: 12 U.S.C. 4501; 12 U.S.C. 4526, 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812.

SOURCE: 81 FR 43034, July 1, 2016, unless otherwise noted.

§ 1217.1 Purpose and scope.

(a) *Purpose*. This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to FHFA or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted in accordance with the Administrative Procedure Act pursuant to part 1209, subpart C, of this chapter.

(b) *Scope*. This part applies only to persons who make, submit, or present or cause to be made, submitted, or presented false, fictitious, or fraudulent claims or written statements to FHFA or to those acting on its behalf in connection with FHFA employment matters and FHFA contracting activities. It does not apply to false claims or statements made in connection with matters or activities related to FHFA's supervisory, regulatory, enforcement, conservatorship, or receivership responsibilities, as other civil and administrative actions available to FHFA to redress fraud in such areas provide for remedies that are equal to or exceed those available through this part.

§ 1217.2 Definitions.

As used in this part:

Ability to pay is determined based on a review of the respondent's resources available both currently and prospectively, from which FHFA could ultimately recover the total penalty, and as appropriate, assessment, which may be predicted based on historical evidence.

Assessment means a monetary penalty that is in addition to a civil penalty and may be imposed if FHFA has made any payment, transferred property, or provided services for a claim that is determined to be in violation of paragraph (a)(1) of § 1217.3. An assessment may not exceed an amount that is twice the amount of the claim or portion of the claim determined to be in violation of paragraph (a)(1) of § 1217.3. A civil penalty other than an assessment may be imposed whether or not FHFA has made a payment, transferred property, or provided services in response to the false claim or statement.

Benefit means anything of value, including, but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, or status.

Claim means any request, demand, or submission:

(1) Made to FHFA for property, services, or money (including money representing benefits);

(2) Made to a recipient of property, services, or money from FHFA or to a party to a contract with FHFA:

(i) For property or services, if FHFA:

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing benefits) if the United States:

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to FHFA, which has the effect of decreasing an obligation to pay or account for property, services, or money.

Investigating official means the FHFA Inspector General, or an officer or employee of the FHFA Office of Inspector General designated by the FHFA Inspector General.

Knows or has reason to know. (1) For purposes of establishing liability under 31 U.S.C. 3802 and this part, means that a person, with respect to a claim or statement:

(i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(iii) Acts in reckless disregard of the truth or falsity of the claim or statement.

(2) No proof of specific intent to defraud is required for purposes of establishing liability under 31 U.S.C. 3802 or this part.

Makes a claim or statement includes making, presenting, or submitting the claim or statement and causing the claim or statement to be made, presented, or submitted.

Notice means the charging document served by FHFA to commence an administrative proceeding to impose a civil penalty and, if appropriate, an assessment under chapter 38 of subtitle III of title 31, U.S.C., and this part.

Person means any individual, partnership, corporation, association, or private organization.

Presiding officer means an administrative law judge appointed under 5 U.S.C. 3105 or detailed to FHFA under 5 U.S.C. 3344.

Reasonable prospect of collecting an appropriate amount of penalties and assessments is determined based on a generalized analysis made by the reviewing official, based on the limited information available in the report of investigation for purposes of determining whether the allocation of FHFA's resources to any particular action is appropriate.

Report of investigation means a report containing the findings and conclusions of an investigation under chapter 38 of subtitle III of title 31, U.S.C., by the investigating official, as described in §1217.4.

Respondent means any person alleged to be liable for a civil penalty or assessment under §1217.3.

Reviewing official means the General Counsel of FHFA, as so designated by the Director pursuant to 31 U.S.C. 3801(a)(8)(A).

Statement means, unless the context indicates otherwise, any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for) a contract with, or a bid or proposal for a contract with, or benefit from, FHFA or any State, political subdivision of a State, or other party, if FHFA provides any portion of the money or property under such contract or benefit, or if FHFA will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such benefit.

§1217.3 Basis for civil penalties and assessments.

(a) *False, fictitious or fraudulent claims.* (1) A civil penalty of not more than $11,803 may be imposed upon a person who makes a claim to FHFA for property, services, or money where the

person knows or has reason to know that the claim:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by a written statement that:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Omits a material fact and, as a result of the omission, is false, fictitious, or fraudulent, where the person making, presenting, or submitting such statement has a duty to include such material fact; or

(iii) Is for payment for the provision of property or services to FHFA which the person has not provided as claimed.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim for purposes of this part.

(3) A claim shall be considered made to FHFA, a recipient, or party when the claim is actually made to an agent, fiscal intermediary, or other entity, acting for or on behalf of FHFA, the recipient, or the party.

(4) Each claim for property, services, or money is subject to a civil penalty, without regard to whether the property, services, or money actually is delivered or paid.

(5) There is no liability under this part if the amount of money or value of property or services claimed exceeds $150,000 as to each claim that a person submits. For purposes of this paragraph (a), a group of claims submitted simultaneously as part of a single transaction shall be considered a single claim.

(6) If the FHFA has made any payment, transferred property, or provided services for a claim, then FHFA may make an assessment against a person found liable in an amount of up to twice the amount of the claim or portion of the claim that is determined to be in violation of paragraph (a)(1) of this section. This assessment is in addition to the amount of any civil penalty imposed.

(b) *False, fictitious or fraudulent statements.* (1) A civil penalty of up to $11,803 may be imposed upon a person who makes a written statement to FHFA with respect to a claim, contract, bid or proposal for a contract, or benefit from FHFA that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Omits a material fact and is false, fictitious, or fraudulent as a result of such omission, where the person making, presenting, or submitting such statement has a duty to include such material fact; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to FHFA when the statement is actually made to an agent, fiscal intermediary, or other entity acting for or on behalf of FHFA.

(c) *Joint and several liability.* A civil penalty or assessment may be imposed jointly and severally if more than one person is determined to be liable.

[81 FR 43034, July 1, 2016, as amended at 83 FR 43968, Aug. 29, 2018; 84 FR 9704, Mar. 18, 2019; 85 FR 4905, Jan. 28, 2020; 86 FR 7496, Jan. 29, 2021]

§ 1217.4 Investigation.

(a) *General.* FHFA may initiate an action under chapter 38 of subtitle III of title 31, U.S.C., and this part against a respondent only upon an investigation by the investigating official.

(b) *Subpoena.* Pursuant to 31 U.S.C. 3804(a), the investigating official may require by subpoena the production of records and other documents. The subpoena shall state the authority under which it is issued, identify the records sought, and name the person designated to receive the records. The recipient of the subpoena shall provide a certification that the documents sought have been produced, that the documents are not available and the reasons they are not available, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(c) *Investigation report.* If the investigating official concludes that an action under chapter 38 of subtitle III of title 31, U.S.C., and this part may be warranted, the investigating official shall prepare a report containing the

findings and conclusions of the investigation, including:

(1) A description of the claim or statement at issue;

(2) The evidence supporting the allegations;

(3) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1217.3; and

(4) Any exculpatory or mitigating circumstances that may relate to the claim or statement.

(d) *Referrals to the Attorney General.* The investigating official may refer allegations directly to the Department of Justice for civil relief under other applicable law, as appropriate, or may defer or postpone submitting a report to the reviewing official to avoid interference with a criminal investigation or prosecution.

§ 1217.5 Request for approval by the Department of Justice.

(a) *General.* If the reviewing official determines that the report of investigation supports an action under this part, the reviewing official must submit a written request to the Department of Justice for approval to issue a notice under § 1217.6.

(b) *Content of request.* A request under this section shall include:

(1) A description of the claim or statement at issue;

(2) The evidence supporting the allegations;

(3) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1217.3;

(4) Any exculpatory or mitigating circumstances that may relate to the claim or statement; and

(5) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Determining there is a reasonable prospect of collecting an appropriate amount of penalties and assessments is separate from determining ability to pay, and may not be considered in determining the amount of any penalty or assessment in any particular case.

§ 1217.6 Notice.

(a) *Commencement of action; notice.* Upon obtaining approval from the Department of Justice, the reviewing official may commence an action to establish liability of the respondent under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*) and this part. To commence an action, the reviewing official must issue a notice to the respondent of the allegations of liability against the respondent. The notice shall be mailed, by registered or certified mail, or shall be delivered through such other means by which delivery may be confirmed.

(b) *Notice contents.* The notice required under this section shall include:

(1) The allegations of liability against the respondent, including the statutory basis for liability, the claim or statement at issue, and the reasons why liability arises from that claim or statement;

(2) A statement that the required approval to issue the notice was received from the Department of Justice;

(3) The amount of the penalty and, if applicable, any assessment for which the respondent may be held liable;

(4) A statement that the respondent may request a hearing by submitting a written response to the notice;

(5) The addresses to which a response must be sent in accordance with § 1209.15 of this chapter;

(6) A statement that failure to submit an answer within 30 days of receipt of the notice may result in the imposition of the maximum amount of penalties and assessments sought, without right of appeal;

(7) A statement that the respondent must preserve and maintain all documents and data, including electronically stored data, within the possession or control of the respondent that may relate to the allegations; and

(8) A copy of this part 1217 and part 1209, subpart C of this chapter.

(c) *Obligation to preserve documents.* Upon the issuance of a notice under this section, FHFA and the respondent shall each preserve and maintain all documents and data, including electronically stored data, within their respective possession or control that may relate to the allegations in the complaint.

§ 1217.7 Response.

(a) *General.* (1) To obtain a hearing, the respondent must file a written response to a notice under § 1217.6:

(i) In accordance with § 1209.24 of this chapter; and

(ii) Not later than 30 days after the date of service of the notice.

(2) A timely filed response to a notice under § 1217.6 shall be deemed to be a request for a hearing.

(3) A response to a notice under § 1217.6 must include:

(i) The admission or denial of each allegation of liability made in the notice;

(ii) Any defense on which the respondent intends to rely;

(iii) Any reasons why the penalty and, if appropriate, any assessment should be less than the amount set forth in the notice; and

(iv) The name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) *Failure to respond.* If no response to a notice under this part is timely submitted, FHFA may file a motion for default judgment in accordance with § 1209.24(c) of this part.

§ 1217.8 Statute of limitations.

The statute of limitations for commencing a hearing under this part shall be tolled:

(a) If the hearing is commenced in accordance with 31 U.S.C. 3803(d)(2)(B) within 6 years after the date on which the claim or statement is made; or

(b) If the parties agree to such tolling.

§ 1217.9 Hearings.

(a) *General.* Hearings under this part shall be conducted in accordance with the procedures in subpart C of part 1209 of this chapter, governing actions in accordance with subchapter II of chapter 5, U.S.C. (commonly known as the Administrative Procedure Act).

(b) *Factors to consider in determining amount of penalties and assessments.* In determining an appropriate amount of any civil penalty and, if appropriate, any assessment, the presiding officer and, upon appeal, the Director or designee thereof, shall consider and state in his or her opinion any mitigating or aggravating circumstances. The amount of penalties and assessments imposed shall be based on the presiding officer's and the Director's or designee's consideration of evidence in support of one or more of the following factors:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the respondent's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the actual loss to FHFA as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;

(6) The relationship of the civil penalties to the amount of the loss to FHFA;

(7) The potential or actual impact of the misconduct upon public health or safety or public confidence in the management of FHFA programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the respondent has engaged in a pattern of the same or similar misconduct;

(9) Whether the respondent attempted to conceal the misconduct;

(10) The degree to which the respondent has involved others in the misconduct or in concealing it;

(11) If the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;

(12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;

(13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;

(15) Whether the respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt

dishonestly with the Government of the United States or of a State, directly or indirectly;

(16) The need to deter the respondent and others from engaging in the same or similar misconduct;

(17) The respondent's ability to pay; and

(18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

(c) *Stays ordered by the Department of Justice.* If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General notifies the Director in writing that continuation of FHFA's action may adversely affect any pending or potential criminal or civil action related to the claim or statement at issue, the presiding officer or the Director shall stay the FHFA action immediately. The FHFA action may be resumed only upon receipt of the written authorization of the Attorney General.

§ 1217.10 Settlements.

(a) *General.* The reviewing official, on behalf of FHFA, and the respondent may enter into a settlement agreement under § 1209.20 of this chapter at any time prior to the issuing of a notice of final decision under § 1209.55 of this chapter.

(b) *Failure to comply.* Failure of the respondent to comply with a settlement agreement shall be sufficient cause for resuming an action under this part, or for any other judicial or administrative action.

SUBCHAPTER B—ENTITY REGULATIONS

PART 1221—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES

Sec.

AUTHORITY: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), 12 U.S.C. 4513 and 12 U.S.C. 4526(a).

SOURCE: 80 FR 74913, Nov. 30, 2015, unless otherwise noted.

§ 1221.1 Authority, purpose, scope, exemptions and compliance dates.

(a) *Authority*. This part is issued by FHFA under section 4s(e) of the Commodity Exchange Act (7 U.S.C. 6s(e)), section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)), 12 U.S.C. 4513 and 12 U.S.C. 4526(a)).

(b) *Purpose*. Section 4(s) of the Commodity Exchange Act (7 U.S.C. 6s) and section 15F of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10) require FHFA to establish capital and margin requirements for any regulated entity that is registered as a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant with respect to all non-cleared swaps and non-cleared security-based swaps. This regulation implements section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act of 1934 by defining terms used in the statute and related terms, establishing capital and margin requirements, and explaining the statute's requirements.

(c) *Scope*. This part establishes minimum capital and margin requirements for each covered swap entity subject to this part with respect to all non-cleared swaps and non-cleared security-based swaps. This part applies to any non-cleared swap or non-cleared security-based swap entered into by a covered swap entity on or after the related compliance date set forth in paragraph (e) of this section. Nothing in this part is intended to prevent a covered swap entity from collecting margin in amounts greater than are required under this part.

(d) *Exemptions*—(1) *Swaps*. The requirements of this part (except for §45.12) shall not apply to a non-cleared swap if the counterparty:

(i) Qualifies for an exception from clearing under section 2(h)(7)(A) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(A)) and implementing regulations;

(ii) Qualifies for an exemption from clearing under a rule, regulation, or order that the Commodity Futures Trading Commission issued pursuant to its authority under section 4(c)(1) of the Commodity Exchange Act of 1936 (7 U.S.C. 6(c)(1)) concerning cooperative entities that would otherwise be subject to the requirements of section 2(h)(1)(A) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(1)(A)); or

(iii) Satisfies the criteria in section 2(h)(7)(D) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(D)) and implementing regulations.

(2) *Security-based swaps*. The requirements of this part (except for §1221.12) shall not apply to a non-cleared security-based swap if the counterparty:

(i) Qualifies for an exception from clearing under section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(1)) and implementing regulations; or

(ii) Satisfies the criteria in section 3C(g)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations.

(e) *Compliance dates.* Covered swap entities shall comply with the minimum margin requirements of this part on or before the following dates for non-cleared swaps and non-cleared security-based swaps entered into on or after the following dates:

(1) September 1, 2016 with respect to the requirements in §1221.3 for initial margin and §1221.4 for variation margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2016 that exceeds $3 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(1)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(2) March 1, 2017 with respect to the requirements in §1221.4 for variation margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

(3) September 1, 2017 with respect to the requirements in §1221.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2017 that exceeds $2.25 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(3)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(4) September 1, 2018 with respect to the requirements in §1221.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2018 that exceeds $1.5 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(4)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(5) September 1, 2019 with respect to the requirements in §1221.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2019 that exceeds $0.75 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(5)(i) and (ii) of this section, an entity shall count the average

daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(6) September 1, 2021 with respect to requirements in §1221.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2021 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2022 with respect to requirements in §1221.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

(f) Once a covered swap entity must comply with the margin requirements for non-cleared swaps and non-cleared security-based swaps with respect to a particular counterparty based on the compliance dates in paragraph (e) of this section, the covered swap entity shall remain subject to the requirements of this part with respect to that counterparty.

(g)(1) If a covered swap entity's counterparty changes its status such that a non-cleared swap or non-cleared security-based swap with that counterparty becomes subject to stricter margin requirements under this part (such as if the counterparty's status changes from a financial end user without material swaps exposure to a financial end user with material swaps exposure), then the covered swap entity shall comply with the stricter margin requirements for any non-cleared swap or non-cleared security-based swap entered into with that counterparty after the counterparty changes its status.

(2) If a covered swap entity's counterparty changes its status such that a non-cleared swap or non-cleared security-based swap with that counterparty becomes subject to less strict margin requirements under this part (such as if the counterparty's status changes from a financial end user with material swaps exposure to a financial end user without material swaps exposure), then the covered swap entity may comply with the less strict margin requirements for any non-cleared swap or non-cleared security-based swap entered into with that counterparty after the counterparty changes its status as well as for any outstanding non-cleared swap or non-cleared security-based swap entered into after the applicable compliance date in paragraph (e) of this section and before the counterparty changed its status.

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part

252 subpart I, or 12 CFR part 382, as applicable;

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii) of this section, and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraphs (h)(2)(i) and (ii) of this section;

(iii) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: The payment amount calculation methods, the maturity date, or the notional amount of the swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) of this section transpires; and

(vi) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii) of this section; or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), the Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not have a longer maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and

their counterparties. Portfolio compression under this paragraph (h)(3)(iii) is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swap[s] or non-cleared security-based swaps resulting from the portfolio compression may not have a longer maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

[80 FR 74913, 74914, Nov. 13, 2015, as amended at 83 FR 50813, Oct. 10, 2018; 84 FR 9950, Mar. 19, 2019; 85 FR 39470, 39778, July 1, 2020]

§ 1221.2 Definitions.

Affiliate. A company is an affiliate of another company if:

(1) Either company consolidates the other on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) Both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards;

(3) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied; or

(4) FHFA has determined that a company is an affiliate of another company, based on the FHFA's conclusion that either company provides significant support to, or is materially subject to the risks or losses of, the other company.

Bank holding company has the meaning specified in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

Broker has the meaning specified in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

Business day means any day other than a Saturday, Sunday, or legal holiday.

Clearing agency has the meaning specified in section 3(a)(23) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(23)).

Company means a corporation, partnership, limited liability company, business trust, special purpose entity, association, or similar organization.

Counterparty means, with respect to any non-cleared swap or non-cleared security-based swap to which a person is a party, each other party to such non-cleared swap or non-cleared security-based swap.

Covered swap entity means any regulated entity that is a swap entity or any other entity that FHFA determines.

Cross-currency swap means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another

currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

Currency of settlement means a currency in which a party has agreed to discharge payment obligations related to a non-cleared swap, a non-cleared security-based swap, a group of non-cleared swaps, or a group of non-cleared security-based swaps subject to a master agreement at the regularly occurring dates on which such payments are due in the ordinary course.

Day of execution means the calendar day at the time the parties enter into a non-cleared swap or non-cleared security-based swap, provided:

(1) If each party is in a different calendar day at the time the parties enter into the non-cleared swap or non-cleared security-based swap, the day of execution is deemed the latter of the two dates; and

(2) If a non-cleared swap or non-cleared security-based swap is:

(i) Entered into after 4:00 p.m. in the location of a party; or

(ii) Entered into on a day that is not a business day in the location of a party, then the non-cleared swap or non-cleared security-based swap is deemed to have been entered into on the immediately succeeding day that is a business day for both parties, and both parties shall determine the day of execution with reference to that business day.

Dealer has the meaning specified in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)).

Depository institution has the meaning specified in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

Derivatives clearing organization has the meaning specified in section 1a(15) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(15)).

Eligible collateral means collateral described in §1221.6.

Eligible master netting agreement means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of

the defaulter is a net creditor under the agreement); and

(4) A covered swap entity that relies on the agreement for purposes of calculating the margin required by this part must:

(i) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(A) The agreement meets the requirements of paragraph (2) of this definition; and

(B) In the event of a legal challenge (including one resulting from default or from receivership, conservatorship, insolvency, liquidation, or similar proceeding), the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(ii) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition.

Financial end user means:

(1) Any counterparty that is not a swap entity and that is:

(i) A bank holding company or an affiliate thereof; a savings and loan holding company; a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution; a foreign bank; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) & (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001 *et seq.*, that is regulated by the Farm Credit Administration;

(vi) A securities holding company; a broker or dealer; an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(vii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(viii) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in section 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act

of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(ix) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(x) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(xi) An entity, person or arrangement that is, or holds itself out as being, an entity, person, or arrangement that raises money from investors, accepts money from clients, or uses its own money primarily for the purpose of investing or trading or facilitating the investing or trading in loans, securities, swaps, funds or other assets for resale or other disposition or otherwise trading in loans, securities, swaps, funds or other assets; or

(xii) An entity that would be a financial end user described in paragraph (1) of this definition or a swap entity, if it were organized under the laws of the United States or any State thereof.

(2) The term ''financial end user'' does not include any counterparty that is:

(i) A sovereign entity;

(ii) A multilateral development bank;

(iii) The Bank for International Settlements;

(iv) An entity that is exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(C)(iii)) and implementing regulations; or

(v) An affiliate that qualifies for the exemption from clearing pursuant to section 2(h)(7)(D) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(D)) or section 3C(g)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations.

Foreign bank means an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States.

Foreign exchange forward has the meaning specified in section 1a(24) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(24)).

Foreign exchange swap has the meaning specified in section 1a(25) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(25)).

Initial margin means the collateral as calculated in accordance with §1221.8 that is posted or collected in connection with a non-cleared swap or non-cleared security-based swap.

Initial margin collection amount means:

(1) In the case of a covered swap entity that does not use an initial margin model, the amount of initial margin with respect to a non-cleared swap or non-cleared security-based swap that is required under appendix A of this part; and

(2) In the case of a covered swap entity that uses an initial margin model pursuant to §1221.8, the amount of initial margin with respect to a non-cleared swap or non-cleared security-based swap that is required under the initial margin model.

Initial margin model means an internal risk management model that:

(1) Has been developed and designed to identify an appropriate, risk-based amount of initial margin that the covered swap entity must collect with respect to one or more non-cleared swaps or non-cleared security-based swaps to which the covered swap entity is a party; and

(2) Has been approved by FHFA pursuant to §1221.8.

Initial margin threshold amount means an aggregate credit exposure of $50 million resulting from all non-cleared swaps and non-cleared security-based swaps between a covered swap entity and its affiliates, and a counterparty and its affiliates. For purposes of this calculation, an entity shall not count a swap or security-based swap that is exempt pursuant to §1221.1(d).

Major currency means:

(1) United States Dollar (USD);

(2) Canadian Dollar (CAD);

(3) Euro (EUR);
(4) United Kingdom Pound (GBP);
(5) Japanese Yen (JPY);
(6) Swiss Franc (CHF);
(7) New Zealand Dollar (NZD);
(8) Australian Dollar (AUD);
(9) Swedish Kronor (SEK);
(10) Danish Kroner (DKK);
(11) Norwegian Krone (NOK); or
(12) Any other currency as determined by FHFA.

Margin means initial margin and variation margin.

Market intermediary means a securities holding company; a broker or dealer; a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28)); a swap dealer as defined in section 1a(49) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(49)); or a security-based swap dealer as defined in section 3(a)(71) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(71)).

Material swaps exposure for an entity means that an entity and its affiliates have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, and August of the previous calendar year that exceeds $8 billion, where such amount is calculated only for business days. An entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time. For purposes of this calculation, an entity shall not count a swap or security-based swap that is exempt pursuant to § 1221.1(d).

Multilateral development bank means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member or which FHFA determines poses comparable credit risk.

Non-cleared swap means a swap that is not cleared by a derivatives clearing organization registered with the Commodity Futures Trading Commission pursuant to section 5b(a) of the Commodity Exchange Act of 1936 (7 U.S.C. 7a–1(a)) or by a clearing organization that the Commodity Futures Trading Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Commodity Exchange Act of 1936 (7 U.S.C. 7a–1(h)).

Non-cleared security-based swap means a security-based swap that is not, directly or indirectly, submitted to and cleared by a clearing agency registered with the U.S. Securities and Exchange Commission pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) or by a clearing agency that the U.S. Securities and Exchange Commission has exempted from registration by rule or order pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1).

Prudential regulator has the meaning specified in section 1a(39) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(39)).

Regulated entity means any regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)).

Savings and loan holding company has the meaning specified in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)).

Securities holding company has the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a).

Security-based swap has the meaning specified in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)).

Sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

State means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

Subsidiary. A company is a subsidiary of another company if:

(1) The company is consolidated by the other company on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) of this definition would have occurred if such principles or standards had applied; or

(3) FHFA has determined that the company is a subsidiary of another company, based on FHFA's conclusion that either company provides significant support to, or is materially subject to the risks of loss of, the other company.

Swap has the meaning specified in section 1a(47) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(47)).

Swap entity means a person that is registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or a person that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

U.S. Government-sponsored enterprise means an entity established or chartered by the U.S. government to serve public purposes specified by federal statute but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government.

Variation margin means collateral provided by one party to its counterparty to meet the performance of its obligations under one or more non-cleared swaps or non-cleared security-based swaps between the parties as a result of a change in value of such obligations since the last time such collateral was provided.

Variation margin amount means the cumulative mark-to-market change in value to a covered swap entity of a non-cleared swap or non-cleared security-based swap, as measured from the date it is entered into (or, in the case of a non-cleared swap or non-cleared security-based swap that has a positive or negative value to a covered swap entity on the date it is entered into, such positive or negative value plus any cumulative mark-to-market change in value to the covered swap entity of a non-cleared swap or non-cleared security-based swap after such date), less the value of all variation margin previously collected, plus the value of all variation margin previously posted with respect to such non-cleared swap or non-cleared security-based swap.

[80 FR 74913, 74914, Nov. 30, 2015, as amended at 83 FR 50813, Oct. 10, 2018]

§ 1221.3 Initial margin.

(a) *Collection of margin*. A covered swap entity shall collect initial margin with respect to any non-cleared swap or non-cleared security-based swap from a counterparty that is a financial end user with material swaps exposure or that is a swap entity in an amount that is no less than the greater of:

(1) Zero; or

(2) The initial margin collection amount for such non-cleared swap or non-cleared security-based swap *less* the initial margin threshold amount (not including any portion of the initial margin threshold amount already applied by the covered swap entity or its affiliates to other non-cleared swaps or non-cleared security-based swaps with the counterparty or its affiliates), as applicable.

(b) *Posting of margin*. A covered swap entity shall post initial margin with respect to any non-cleared swap or non-cleared security-based swap to a counterparty that is a financial end user with material swaps exposure. Such initial margin shall be in an amount at least as large as the covered swap entity would be required to collect under paragraph (a) of this section if it were in the place of the counterparty.

(c) *Timing.* A covered swap entity shall comply with the initial margin requirements described in paragraphs (a) and (b) of this section on each business day, for a period beginning on or before the business day following the day of execution and ending on the date the non-cleared swap or non-cleared security-based swap terminates or expires.

(d) *Other counterparties.* A covered swap entity is not required to collect or post initial margin with respect to any non-cleared swap or non-cleared security-based swap described in §1221.1(d). For any other non-cleared swap or non-cleared security-based swap between a covered swap entity and a counterparty that is neither a financial end user with a material swaps exposure nor a swap entity, the covered swap entity shall collect initial margin at such times and in such forms and such amounts (if any), that the covered swap entity determines appropriately addresses the credit risk posed by the counterparty and the risks of such non-cleared swap or non-cleared security-based swap.

§1221.4 Variation margin.

(a) *General.* After the date on which a covered swap entity enters into a non-cleared swap or non-cleared security-based swap with a swap entity or financial end user, the covered swap entity shall collect variation margin equal to the variation margin amount from the counterparty to such non-cleared swap or non-cleared security-based swap when the amount is positive and post variation margin equal to the variation margin amount to the counterparty to such non-cleared swap or non-cleared security-based swap when the amount is negative.

(b) *Timing.* A covered swap entity shall comply with the variation margin requirements described in paragraph (a) of this section on each business day, for a period beginning on or before the business day following the day of execution and ending on the date the non-cleared swap or non-cleared security based swap terminates or expires.

(c) *Other counterparties.* A covered swap entity is not required to collect or post variation margin with respect to any non-cleared swap or non-cleared security-based swap described in §1221.1(d). For any other non-cleared swap or non-cleared security-based swap between a covered swap entity and a counterparty that is neither a financial end user nor a swap entity, the covered swap entity shall collect variation margin at such times and in such forms and such amounts (if any), that the covered swap entity determines appropriately addresses the credit risk posed by the counterparty and the risks of such non-cleared swap or non-cleared security-based swap.

§1221.5 Netting arrangements, minimum transfer amount, and satisfaction of collecting and posting requirements.

(a) *Netting arrangements.* (1) For purposes of calculating and complying with the initial margin requirements of §.3 using an initial margin model as described in §1221.8, or with the variation margin requirements of §1221.4, a covered swap entity may net non-cleared swaps or non-cleared security-based swaps in accordance with this subsection.

(2) To the extent that one or more non-cleared swaps or non-cleared security-based swaps are executed pursuant to an eligible master netting agreement between a covered swap entity and its counterparty that is a swap entity or financial end user, a covered swap entity may calculate and comply with the applicable requirements of this part on an aggregate net basis with respect to all non-cleared swaps and non-cleared security-based swaps governed by such agreement, subject to paragraph (a)(3) of this section.

(3)(i) Except as permitted in paragraph (a)(3)(ii) of this section, if an eligible master netting agreement covers non-cleared swaps and non-cleared security-based swaps entered into on or after the applicable compliance date set forth in §1221.1(e) or (g), all the non-cleared swaps and non-cleared security-based swaps covered by that agreement are subject to the requirements of this part and included in the aggregate netting portfolio for the purposes of calculating and complying with the margin requirements of this part.

(ii) An eligible master netting agreement may identify one or more separate netting portfolios that independently meet the requirements in paragraph (1) of the definition of ''Eligible master netting agreement'' in §1221.2 and to which collection and posting of margin applies on an aggregate net basis separate from and exclusive of any other non-cleared swaps or non-cleared security-based swaps covered by the eligible master netting agreement. Any such netting portfolio that contains any non-cleared swap or non-cleared security-based swap entered into on or after the applicable compliance date set forth in §1221.1(e) or (g) is subject to the requirements of this part. Any such netting portfolio that contains only non-cleared swaps or non-cleared security-based swaps entered into before the applicable compliance date is not subject to the requirements of this part.

(4) If a covered swap entity cannot conclude after sufficient legal review with a well-founded basis that the netting agreement described in this section meets the definition of eligible master netting agreement set forth in §1221.2, the covered swap entity must treat the non-cleared swaps and non-cleared security based swaps covered by the agreement on a gross basis for the purposes of calculating and complying with the requirements of this part to collect margin, but the covered swap entity may net those non-cleared swaps and non-cleared security-based swaps in accordance with paragraphs (a)(1) through (3) of this section for the purposes of calculating and complying with the requirements of this part to post margin.

(b) *Minimum transfer amount.* Notwithstanding §1221.3 or §1221.4, a covered swap entity is not required to collect or post margin pursuant to this part with respect to a particular counterparty unless and until the combined amount of initial margin and variation margin that is required pursuant to this part to be collected or posted and that has not yet been collected or posted with respect to the counterparty is greater than $500,000.

(c) *Satisfaction of collecting and posting requirements.* A covered swap entity shall not be deemed to have violated its obligation to collect or post margin from or to a counterparty under §1221.3, §1221.4, or §1221.6(e) if:

(1) The counterparty has refused or otherwise failed to provide or accept the required margin to or from the covered swap entity; and

(2) The covered swap entity has:

(i) Made the necessary efforts to collect or post the required margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, or has otherwise demonstrated upon request to the satisfaction of FHFA that it has made appropriate efforts to collect or post the required margin; or

(ii) Commenced termination of the non-cleared swap or non-cleared security-based swap with the counterparty promptly following the applicable cure period and notification requirements.

§1221.6 Eligible collateral.

(a) *Non-cleared swaps and non-cleared security-based swaps with a swap entity.* For a non-cleared swap or non-cleared security-based swap with a swap entity, a covered swap entity shall collect initial margin and variation margin required pursuant to this part solely in the form of the following types of collateral:

(1) Immediately available cash funds that are denominated in:

(i) U.S. dollars or another major currency; or

(ii) The currency of settlement for the non-cleared swap or non-cleared security-based swap;

(2) With respect to initial margin only:

(i) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury;

(ii) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the United States government;

(iii) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity

that is assigned no higher than a 20 percent risk weight under 12 CFR part 324;

(iv) A publicly traded debt security issued by, or an asset-backed security fully guaranteed as to the payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities;

(v) A publicly traded debt security that meets the definition of ''Investment quality'' in §1267.1 of this chapter and is issued by a U.S. Government-sponsored enterprise not operating with capital support or another form of direct financial assistance from the U.S. government, and is not an asset-backed security;

(vi) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank;

(vii) A security solely in the form of:

(A) Publicly traded debt not otherwise described in paragraph (a)(2) of this section that meets the definition of ''Investment quality'' in §1267.1 of this chapter and is not an asset-backed security;

(B) Publicly traded common equity that is included in:

(*1*) The Standard & Poor's Composite 1500 Index or any other similar index of liquid and readily marketable equity securities as determined by FHFA; or

(*2*) An index that a covered swap entity's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction;

(viii) Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the fund, if:

(A) The fund's investments are limited to the following:

(*1*) Securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or

(*2*) Securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under 12 CFR part 324, and immediately-available cash funds denominated in the same currency; and

(B) Assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee; or

(ix) Gold.

(b) *Non-cleared swaps and non-cleared security-based swaps with a financial end user*. For a non-cleared swap or non-cleared security-based swap with a financial end user, a covered swap entity shall collect and post initial margin and variation margin required pursuant to this part solely in the form of the following types of collateral:

(1) Immediately available cash funds that are denominated in:

(i) U.S. dollars or another major currency; or

(ii) The currency of settlement for the non-cleared swap or non-cleared security-based swap;

(2) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury;

(3) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the United States government;

(4) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under 12 CFR part 324;

(5) A publicly traded debt security issued by, or an asset-backed security fully guaranteed as to the payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities;

(6) A publicly traded debt security that meets the definition of ''Investment quality'' in §1267.1 of this chapter and is issued by a U.S. Government-sponsored enterprise not operating with capital support or another form of direct financial assistance from the U.S. government, and is not an asset-backed security;

(7) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank;

(8) A security solely in the form of:

(i) Publicly traded debt not otherwise described in this paragraph (b) that meets the definition of ''Investment quality'' in §1267.1 of this chapter and is not an asset-backed security;

(ii) Publicly traded common equity that is included in:

(A) The Standard & Poor's Composite 1500 Index or any other similar index of liquid and readily marketable equity securities as determined by FHFA; or

(B) An index that a covered swap entity's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction;

(9) Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the fund, if:

(i) The fund's investments are limited to the following:

(A) Securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or

(B) Securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under 12 CFR part 324, and immediately-available cash funds denominated in the same currency; and

(ii) Assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee; or

(10) Gold.

(c)(1) The value of any eligible collateral collected or posted to satisfy margin requirements pursuant to this part is subject to the sum of the following discounts, as applicable:

(i) An 8 percent discount for variation margin collateral denominated in a currency that is not the currency of settlement for the non-cleared swap or non-cleared security-based swap, except for immediately available cash funds denominated in U.S. dollars or another major currency;

(ii) An 8 percent discount for initial margin collateral denominated in a currency that is not the currency of settlement for the non-cleared swap or non-cleared security-based swap, except for eligible types of collateral denominated in a single termination currency designated as payable to the non-posting counterparty as part of the eligible master netting agreement; and

(iii) For variation and initial margin non-cash collateral, the discounts described in appendix B of this part.

(2) The value of variation margin or initial margin collateral is computed

as the product of the cash or market value of the eligible collateral asset times one minus the applicable discounts pursuant to paragraph (c)(1) of this section expressed in percentage terms. The total value of all variation margin or initial margin collateral is calculated as the sum of those values for each eligible collateral asset.

(d) Notwithstanding paragraphs (a) and (b) of this section, eligible collateral for initial margin and variation margin required by this part does not include a security issued by:

(1) The party or an affiliate of the party pledging such collateral;

(2) A bank holding company, a savings and loan holding company, a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153, a foreign bank, a depository institution, a market intermediary, a company that would be any of the foregoing if it were organized under the laws of the United States or any State, or an affiliate of any of the foregoing institutions; or

(3) A nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323).

(e) A covered swap entity shall monitor the market value and eligibility of all collateral collected and posted to satisfy the minimum initial margin and minimum variation margin requirements of this part. To the extent that the market value of such collateral has declined, the covered swap entity shall promptly collect or post such additional eligible collateral as is necessary to maintain compliance with the margin requirements of this part. To the extent that the collateral is no longer eligible, the covered swap entity shall promptly collect or post sufficient eligible replacement collateral to comply with the margin requirements of this part.

(f) A covered swap entity may collect or post initial margin and variation margin that is required by §1221.3(d) or §1221.4(c) or that is not required pursuant to this part in any form of collateral.

[80 FR 74914, Nov. 30, 2015]

§1221.7 Segregation of collateral.

(a) A covered swap entity that posts any collateral other than for variation margin with respect to a non-cleared swap or a non-cleared security-based swap shall require that all funds or other property other than variation margin provided by the covered swap entity be held by one or more custodians that are not the covered swap entity or counterparty and not affiliates of the covered swap entity or the counterparty.

(b) A covered swap entity that collects initial margin required by §1221.3(a) with respect to a non-cleared swap or a non-cleared security-based swap shall require that such initial margin be held by one or more custodians that are not the covered swap entity or counterparty and not affiliates of the covered swap entity or the counterparty.

(c) For purposes of paragraphs (a) and (b) of this section, the custodian must act pursuant to a custody agreement that:

(1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian, except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in §1221.6(a)(2) or (b), such asset is held in compliance with this §1221.7, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and

(2) Is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions, including in the event of bankruptcy, insolvency, or a similar proceeding.

(d) Notwithstanding paragraph (c)(1) of this section, a custody agreement may permit the posting party to substitute or direct any reinvestment of posted collateral held by the custodian, provided that, with respect to collateral collected by a covered swap entity pursuant to §1221.3(a) or posted by a covered swap entity pursuant to

§1221.3(b), the agreement requires the posting party to:

(1) Substitute only funds or other property that would qualify as eligible collateral under §1221.6, and for which the amount net of applicable discounts described in appendix B of this part would be sufficient to meet the requirements of §1221.3; and

(2) Direct reinvestment of funds only in assets that would qualify as eligible collateral under §1221.6, and for which the amount net of applicable discounts described in appendix B of this part would be sufficient to meet the requirements of §1221.3.

§1221.8 Initial margin models and standardized amounts.

(a) *Standardized amounts.* Unless a covered swap entity's initial margin model conforms to the requirements of this section, the covered swap entity shall calculate the amount of initial margin required to be collected or posted for one or more non-cleared swaps or non-cleared security-based swaps with a given counterparty pursuant to §1221.3 on a daily basis pursuant to appendix A of this part.

(b) *Use of initial margin models.* A covered swap entity may calculate the amount of initial margin required to be collected or posted for one or more non-cleared swaps or non-cleared security-based swaps with a given counterparty pursuant to §1221.3 on a daily basis using an initial margin model only if the initial margin model meets the requirements of this section.

(c) *Requirements for initial margin model.* (1) A covered swap entity must obtain the prior written approval of FHFA before using any initial margin model to calculate the initial margin required in this part.

(2) A covered swap entity must demonstrate that the initial margin model satisfies all of the requirements of this section on an ongoing basis.

(3) A covered swap entity must notify FHFA in writing 60 days prior to:

(i) Extending the use of an initial margin model that FHFA has approved under this section to an additional product type;

(ii) Making any change to any initial margin model approved by FHFA under this section that would result in a material change in the covered swap entity's assessment of initial margin requirements; or

(iii) Making any material change to modeling assumptions used by the initial margin model.

(4) FHFA may rescind its approval of the use of any initial margin model, in whole or in part, or may impose additional conditions or requirements if FHFA determines, in its sole discretion, that the initial margin model no longer complies with this section.

(d) *Quantitative requirements.* (1) The covered swap entity's initial margin model must calculate an amount of initial margin that is equal to the potential future exposure of the non-cleared swap, non-cleared security-based swap or netting portfolio of non-cleared swaps or non-cleared security-based swaps covered by an eligible master netting agreement. Potential future exposure is an estimate of the one-tailed 99 percent confidence interval for an increase in the value of the non-cleared swap, non-cleared security-based swap or netting portfolio of non-cleared swaps or non-cleared security-based swaps due to an instantaneous price shock that is equivalent to a movement in all material underlying risk factors, including prices, rates, and spreads, over a holding period equal to the shorter of ten business days or the maturity of the non-cleared swap, non-cleared security-based swap or netting portfolio.

(2) All data used to calibrate the initial margin model must be based on an equally weighted historical observation period of at least one year and not more than five years and must incorporate a period of significant financial stress for each broad asset class that is appropriate to the non-cleared swaps and non-cleared security-based swaps to which the initial margin model is applied.

(3) The covered swap entity's initial margin model must use risk factors sufficient to measure all material price risks inherent in the transactions for which initial margin is being calculated. The risk categories must include, but should not be limited to, foreign exchange or interest rate risk, credit risk, equity risk, and commodity

risk, as appropriate. For material exposures in significant currencies and markets, modeling techniques must capture spread and basis risk and must incorporate a sufficient number of segments of the yield curve to capture differences in volatility and imperfect correlation of rates along the yield curve.

(4) In the case of a non-cleared cross-currency swap, the covered swap entity's initial margin model need not recognize any risks or risk factors associated with the fixed, physically-settled foreign exchange transaction associated with the exchange of principal embedded in the non-cleared cross-currency swap. The initial margin model must recognize all material risks and risk factors associated with all other payments and cash flows that occur during the life of the non-cleared cross-currency swap.

(5) The initial margin model may calculate initial margin for a non-cleared swap or non-cleared security-based swap or a netting portfolio of non-cleared swaps or non-cleared security-based swaps covered by an eligible master netting agreement. It may reflect offsetting exposures, diversification, and other hedging benefits for non-cleared swaps and non-cleared security-based swaps that are governed by the same eligible master netting agreement by incorporating empirical correlations within the following broad risk categories, provided the covered swap entity validates and demonstrates the reasonableness of its process for modeling and measuring hedging benefits: Commodity, credit, equity, and foreign exchange or interest rate. Empirical correlations under an eligible master netting agreement may be recognized by the initial margin model within each broad risk category, but not across broad risk categories.

(6) If the initial margin model does not explicitly reflect offsetting exposures, diversification, and hedging benefits between subsets of non-cleared swaps or non-cleared security-based swaps within a broad risk category, the covered swap entity must calculate an amount of initial margin separately for each subset within which such relationships are explicitly recognized by the initial margin model. The sum of the initial margin amounts calculated for each subset of non-cleared swaps and non-cleared security-based swaps within a broad risk category will be used to determine the aggregate initial margin due from the counterparty for the portfolio of non-cleared swaps and non-cleared security-based swaps within the broad risk category.

(7) The sum of the initial margin amounts calculated for each broad risk category will be used to determine the aggregate initial margin due from the counterparty.

(8) The initial margin model may not permit the calculation of any initial margin collection amount to be offset by, or otherwise take into account, any initial margin that may be owed or otherwise payable by the covered swap entity to the counterparty.

(9) The initial margin model must include all material risks arising from the nonlinear price characteristics of option positions or positions with embedded optionality and the sensitivity of the market value of the positions to changes in the volatility of the underlying rates, prices, or other material risk factors.

(10) The covered swap entity may not omit any risk factor from the calculation of its initial margin that the covered swap entity uses in its initial margin model unless it has first demonstrated to the satisfaction of FHFA that such omission is appropriate.

(11) The covered swap entity may not incorporate any proxy or approximation used to capture the risks of the covered swap entity's non-cleared swaps or non-cleared security-based swaps unless it has first demonstrated to the satisfaction of FHFA that such proxy or approximation is appropriate.

(12) The covered swap entity must have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal margin model to ensure continued applicability and relevance.

(13) The covered swap entity must review and, as necessary, revise the data used to calibrate the initial margin model at least annually, and more frequently as market conditions warrant, to ensure that the data incorporate a period of significant financial stress

appropriate to the non-cleared swaps and non-cleared security-based swaps to which the initial margin model is applied.

(14) The level of sophistication of the initial margin model must be commensurate with the complexity of the non-cleared swaps and non-cleared security-based swaps to which it is applied. In calculating an initial margin collection amount, the initial margin model may make use of any of the generally accepted approaches for modeling the risk of a single instrument or portfolio of instruments.

(15) FHFA may in its sole discretion require a covered swap entity using an initial margin model to collect a greater amount of initial margin than that determined by the covered swap entity's initial margin model if FHFA determines that the additional collateral is appropriate due to the nature, structure, or characteristics of the covered swap entity's transaction(s), or is commensurate with the risks associated with the transaction(s).

(e) *Periodic review.* A covered swap entity must periodically, but no less frequently than annually, review its initial margin model in light of developments in financial markets and modeling technologies, and enhance the initial margin model as appropriate to ensure that the initial margin model continues to meet the requirements for approval in this section.

(f) *Control, oversight, and validation mechanisms.* (1) The covered swap entity must maintain a risk control unit that reports directly to senior management and is independent from the business trading units.

(2) The covered swap entity's risk control unit must validate its initial margin model prior to implementation and on an ongoing basis. The covered swap entity's validation process must be independent of the development, implementation, and operation of the initial margin model, or the validation process must be subject to an independent review of its adequacy and effectiveness. The validation process must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the initial margin model;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking by comparing the covered swap entity's initial margin model outputs (estimation of initial margin) with relevant alternative internal and external data sources or estimation techniques. The benchmark(s) must address the chosen model's limitations. When applicable, the covered swap entity should consider benchmarks that allow for non-normal distributions such as historical and Monte Carlo simulations. When applicable, validation shall include benchmarking against observable margin standards to ensure that the initial margin required is not less than what a derivatives clearing organization or a clearing agency would require for similar cleared transactions; and

(iii) An outcomes analysis process that includes backtesting the initial margin model. This analysis must recognize and compensate for the challenges inherent in back-testing over periods that do not contain significant financial stress.

(3) If the validation process reveals any material problems with the initial margin model, the covered swap entity must promptly notify FHFA of the problems, describe to FHFA any remedial actions being taken, and adjust the initial margin model to ensure an appropriately conservative amount of required initial margin is being calculated.

(4) The covered swap entity must have an internal audit function independent of business-line management and the risk control unit that at least annually assesses the effectiveness of the controls supporting the covered swap entity's initial margin model measurement systems, including the activities of the business trading units and risk control unit, compliance with policies and procedures, and calculation of the covered swap entity's initial margin requirements under this part. At least annually, the internal audit function must report its findings to the covered swap entity's board of directors or a committee thereof.

(g) *Documentation.* The covered swap entity must adequately document all material aspects of its initial margin model, including the management and

valuation of the non-cleared swaps and non-cleared security-based swaps to which it applies, the control, oversight, and validation of the initial margin model, any review processes and the results of such processes.

(h) *Escalation procedures.* The covered swap entity must adequately document internal authorization procedures, including escalation procedures, that require review and approval of any change to the initial margin calculation under the initial margin model, demonstrable analysis that any basis for any such change is consistent with the requirements of this section, and independent review of such demonstrable analysis and approval.

§ 1221.9 Cross-border application of margin requirements.

(a) *Transactions to which this rule does not apply.* The requirements of §§ 1221.3 through 1221.8 and §§ 1221.10 through 1221.12 shall not apply to any foreign non-cleared swap or foreign non-cleared security-based swap of a foreign covered swap entity.

(b) For purposes of this section, a *foreign non-cleared swap* or *foreign non-cleared security-based swap* is any non-cleared swap or non-cleared security-based swap with respect to which neither the counterparty to the foreign covered swap entity nor any party that provides a guarantee of either party's obligations under the non-cleared swap or non-cleared security-based swap is:

(1) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States;

(2) A branch or office of an entity organized under the laws of the United States or any State; or

(3) A swap entity that is a subsidiary of an entity that is organized under the laws of the United States or any State.

(c) For purposes of this section, a *foreign covered swap entity* is any covered swap entity that is not:

(1) An entity organized under the laws of the United States or any State, including a U.S. branch, agency, or subsidiary of a foreign bank;

(2) A branch or office of an entity organized under the laws of the United States or any State; or

(3) An entity that is a subsidiary of an entity that is organized under the laws of the United States or any State.

(d) *Transactions for which substituted compliance determination may apply*—(1) *Determinations and reliance.* For non-cleared swaps and non-cleared security-based swaps entered into by covered swap entities described in paragraph (d)(3) of this section, a covered swap entity may satisfy the provisions of this part by complying with the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps that the prudential regulators jointly, conditionally or unconditionally, determine by public order satisfy the corresponding requirements of §§ 1221.3 through 1221.8 and §§ 1221.10 through 1221.12.

(2) *Standard.* In determining whether to make a determination under paragraph (d)(1) of this section, the prudential regulators will consider whether the requirements of such foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps applicable to such covered swap entities are comparable to the otherwise applicable requirements of this part and appropriate for the safe and sound operation of the covered swap entity, taking into account the risks associated with non-cleared swaps and non-cleared security-based swaps.

(3) *Covered swap entities eligible for substituted compliance.* A covered swap entity may rely on a determination under paragraph (d)(1) of this section only if:

(i) The covered swap entity's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(A) An entity organized under the laws of the United States or any State (other than a U.S. branch or agency of a foreign bank) or a natural person who is a resident of the United States; or

(B) A branch or office of an entity organized under the laws of the United States or any State; and

(ii) The covered swap entity is:

(A) A foreign covered swap entity;

(B) A U.S. branch or agency of a foreign bank; or

(C) An entity that is not organized under the laws of the United States or any State and is a subsidiary of a depository institution, Edge corporation, or agreement corporation.

(4) *Compliance with foreign margin collection requirement.* A covered swap entity satisfies its requirement to post initial margin under §1221.3(b) by posting to its counterparty initial margin in the form and amount, and at such times, that its counterparty is required to collect pursuant to a foreign regulatory framework, provided that the counterparty is subject to the foreign regulatory framework and the prudential regulators have made a determination under paragraph (d)(1) of this section, unless otherwise stated in that determination, and the counterparty's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(i) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States; or

(ii) A branch or office of an entity organized under the laws of the United States or any State.

(e) *Requests for determinations.* (1) A covered swap entity described in paragraph (d)(3) of this section may request that the prudential regulators make a determination pursuant to this section. A request for a determination must include a description of:

(i) The scope and objectives of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps;

(ii) The specific provisions of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps that govern:

(A) The scope of transactions covered;

(B) The determination of the amount of initial margin and variation margin required and how that amount is calculated;

(C) The timing of margin requirements;

(D) Any documentation requirements;

(E) The forms of eligible collateral;

(F) Any segregation and rehypothecation requirements; and

(G) The approval process and standards for models used in calculating initial margin and variation margin;

(iii) The supervisory compliance program and enforcement authority exercised by a foreign financial regulatory authority or authorities in such system to support its oversight of the application of the non-cleared swap or non-cleared security-based swap regulatory framework and how that framework applies to the non-cleared swaps or non-cleared security-based swaps of the covered swap entity; and

(iv) Any other descriptions and documentation that the prudential regulators determine are appropriate.

(2) A covered swap entity described in paragraph (d)(3) of this section may make a request under this section only if the non-cleared swap or non-cleared security-based swap activities of the covered swap entity are directly supervised by the authorities administering the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps.

(f) *Segregation unavailable.* Sections 1221.3(b) and 1221.7 do not apply to a non-cleared swap or non-cleared security-based swap entered into by:

(1) A foreign branch of a covered swap entity that is a depository institution; or

(2) A covered swap entity that is not organized under the laws of the United States or any State and is a subsidiary of a depository institution, Edge corporation, or agreement corporation, if:

(i) Inherent limitations in the legal or operational infrastructure in the foreign jurisdiction make it impracticable for the covered swap entity and the counterparty to post any form of eligible initial margin collateral recognized pursuant to §1221.6(b) in compliance with the segregation requirements of §1221.7;

(ii) The covered swap entity is subject to foreign regulatory restrictions that require the covered swap entity to transact in the non-cleared swap or non-cleared security-based swap with the counterparty through an establishment within the foreign jurisdiction and do not accommodate the posting of collateral for the non-cleared swap or

non-cleared security-based swap outside the jurisdiction;

(iii) The counterparty to the non-cleared swap or non-cleared security-based swap is not, and the counterparty's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(A) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States; or

(B) A branch or office of an entity organized under the laws of the United States or any State;

(iv) The covered swap entity collects initial margin for the non-cleared swap or non-cleared security-based swap in accordance with §1221.3(a) in the form of cash pursuant to §1221.6(b)(1), and posts and collects variation margin in accordance with §1221.4(a) in the form of cash pursuant to §1221.6(b)(1); and

(v) FHFA provides the covered swap entity with prior written approval for the covered swap entity's reliance on this paragraph (f) for the foreign jurisdiction.

(g) *Guarantee* means an arrangement pursuant to which one party to a non-cleared swap or non-cleared security-based swap has rights of recourse against a third-party guarantor, with respect to its counterparty's obligations under the non-cleared swap or non-cleared security-based swap. For these purposes, a party to a non-cleared swap or non-cleared security-based swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the non-cleared swap or non-cleared security-based swap. In addition, any arrangement pursuant to which the guarantor has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from any other third party guarantor with respect to the counterparty's obligations under the non-cleared swap or non-cleared security-based swap, such arrangement will be deemed a guarantee of the counterparty's obligations under the non-cleared swap or non-cleared security-based swap by the other guarantor.

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) of this section is not subject to the requirements of §1221.3(a) or §1221.11(a) for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in §1221.11(d).

[80 FR 74913, Nov. 30, 2015, as amended at 85 FR 39779, July 1, 2020]

§1221.10 Documentation of margin matters.

A covered swap entity shall execute trading documentation with each counterparty that is either a swap entity or financial end user regarding credit support arrangements that:

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this part, and at such time as initial margin or variation margin is required to be collected or posted under §1221.3 or §1221.4, as applicable; and

(b) Specifies:

(1) The methods, procedures, rules, and inputs for determining the value of each non-cleared swap or non-cleared security-based swap for purposes of calculating variation margin requirements; and

(2) The procedures by which any disputes concerning the valuation of non-cleared swaps or non-cleared security-based swaps, or the valuation of assets collected or posted as initial margin or variation margin, may be resolved; and

(c) Describes the methods, procedures, rules, and inputs used to calculate initial margin for non-cleared swaps and non-cleared security based swaps entered into between the covered swap entity and the counterparty.

[80 FR 74913, Nov. 30, 2015, as amended at 85 FR 39779, July 1, 2020]

§ 1221.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under §1221.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under §1221.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under §1221.3(c), until the earlier of;

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding §1221.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity; and

(4) For purposes of paragraph (a) of this section, ''tier 1 capital'' means:

(i) The sum of common equity tier 1 capital as defined in 12 CFR 1240.20(b) and additional tier 1 capital as defined in 12 CFR 1240.20(c).

(5) If any subsidiary of the covered swap entity (including a subsidiary described in §1221.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity;

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under §1221.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under §1221.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 1221.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in §1221.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in §1221.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

[85 FR 39779, July 1, 2020]

§ 1221.12 Capital.

A covered swap entity shall comply with the capital levels or such other amounts applicable to it as required by the Director of FHFA pursuant to 12 U.S.C. 4611.

[80 FR 74914, Nov. 30, 2015]

APPENDIX A TO PART 1221—STANDARDIZED MINIMUM INITIAL MARGIN REQUIREMENTS FOR NON-CLEARED SWAPS AND NON—CLEARED SECURITY-BASED SWAPS

TABLE A—STANDARDIZED MINIMUM GROSS INITIAL MARGIN REQUIREMENTS FOR NON-CLEARED SWAPS AND NON-CLEARED SECURITY-BASED SWAPS[1]

Asset Class	Gross initial margin (% of notional exposure)
Credit: 0–2 year duration	2
Credit: 2–5 year duration	5
Credit: 5+ year duration	10
Commodity	15
Equity	15
Foreign Exchange/Currency	6
Cross Currency Swaps: 0–2 year duration	1
Cross-Currency Swaps: 2–5 year duration	2
Cross-Currency Swaps: 5+ year duration	4
Interest Rate: 0–2 year duration	1
Interest Rate: 2–5 year duration	2
Interest Rate: 5+ year duration	4
Other	15

[1] The initial margin amount applicable to multiple non-cleared swaps or non-cleared security-based swaps subject to an eligible master netting agreement that is calculated according to Appendix A will be computed as follows:

Initial Margin=0.4xGross Initial Margin +0.6x NGRxGross Initial Margin

where;

Gross Initial Margin = the sum of the product of each non-cleared swap's or non-cleared security-based swap's effective notional amount and the gross initial margin requirement for all non-cleared swaps and non-cleared security-based swaps subject to the eligible master netting agreement;

and

NGR = the net-to-gross ratio (that is, the ratio of the net current replacement cost to the gross current replacement cost). In calculating NGR, the gross current replacement cost equals the sum of the replacement cost for each non-cleared swap and non-cleared security-based swap subject to the eligible master netting agreement for which the cost is positive. The net current replacement cost equals the total replacement cost for all non-cleared swaps and non-cleared security-based swaps subject to the eligible master netting agreement. In cases where the gross replacement cost is zero, the NGR should be set to 1.0.

APPENDIX B TO PART 1221—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL.

TABLE B—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL

Asset class	Discount (%)
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in § 1221.6(a)(2)(iv) or (b)(5) debt: residual maturity less than one-year	0.5
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in § 1221.6(a)(2)(iv) or (b)(5) debt: residual maturity between one and five years	2.0
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in § 1221.6(a)(2)(iv) or (b)(5) debt: residual maturity greater than five years	4.0
Eligible GSE debt securities not identified in § 1221.6(a)(2)(iv) or (b)(5): residual maturity less than one-year	1.0
Eligible GSE debt securities not identified in § 1221.6(a)(2)(iv) or (b)(5): residual maturity between one and five years:	4.0
Eligible GSE debt securities not identified in § 1221.6(a)(2)(iv) or (b)(5): residual maturity greater than five years:	8.0
Other eligible publicly traded debt: residual maturity less than one-year	1.0
Other eligible publicly traded debt: residual maturity between one and five years	4.0
Other eligible publicly traded debt: residual maturity greater than five years	8.0
Equities included in S&P 500 or related index	15.0
Equities included in S&P 1500 Composite or related index but not S&P 500 or related index	25.0

TABLE B—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL—Continued

Asset class	Discount (%)
Gold	15.0

[1] The discount to be applied to an eligible investment fund is the weighted average discount on all assets within the eligible investment fund at the end of the prior month. The weights to be applied in the weighted average should be calculated as a fraction of the fund's total market value that is invested in each asset with a given discount amount. As an example, an eligible investment fund that is comprised solely of $100 of 91 day Treasury bills and $100 of 3 year US Treasury bonds would receive a discount of (100/200)*0.5+(100/200)*2.0=(0.5)*0.5+(0.5)*2.0=1.25 percent.

PART 1222—APPRAISALS

Subpart A—Requirements for Higher-Priced Mortgage Loans

Subpart B—Appraisal Management Company Minimum Requirements

Subparts C to Z [Reserved]

AUTHORITY: 12 U.S.C. 4501 *et seq.*, 12 U.S.C. 4526 and 15 U.S.C. 1639h.

SOURCE: 78 FR 10446, Feb. 13, 2013, unless otherwise noted.

Subpart A—Requirements for Higher-Priced Mortgage Loans

§ 1222.1 Purpose and scope.

This subpart cross-references the requirement that creditors extending credit in the form of higher-priced mortgage loans comply with Section 129H of the Truth-in-Lending Act (TILA), 15 U.S.C. 1639h, and its implementing regulations in Regulation Z, 12 CFR 1026.35. Neither the Banks nor the Enterprises are subject to Section 129H of TILA or 12 CFR 1026.35. Originators of higher-priced mortgage loans, including Bank members and institutions that sell mortgage loans to the Enterprises, are subject to those provisions. A failure of those institutions to comply with Section 129H of TILA and 12 CFR 1026.35 may limit their ability to sell such loans to the Banks or Enterprises or to pledge such loans to the Banks as collateral, to the extent provided in the parties' agreements.

§ 1222.2 Reservation of authority.

Nothing in this subpart A shall be read to limit the authority of the Director of the Federal Housing Finance Agency to take supervisory or enforcement action, including action to address unsafe and unsound practices or conditions, or violations of law. In addition, nothing in this subpart A shall be read to limit the authority of the Director to impose requirements for any purchase of higher-priced mortgage loans by an Enterprise or a Federal Home Loan Bank, or acceptance of higher-priced mortgage loans as collateral to secure advances by a Federal Home Loan Bank.

Subpart B—Appraisal Management Company Minimum Requirements

SOURCE: 80 FR 32687, June 9, 2015, unless otherwise noted.

§ 1222.20 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Federal Housing Finance Agency pursuant to 12 U.S.C. 4501 *et seq.*, 12 U.S.C. 4526, and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) (Pub. L. 111–203, 124 Stat. 1376 (2010)), 12 U.S.C. 3331 *et seq.*

(b) *Purpose.* The purpose of this subpart is to implement sections 1109, 1117,

1121, and 1124 of FIRREA Title XI, 12 U.S.C. 3338, 3346, 3350, and 3353.

(c) *Scope.* This subpart applies to States and to appraisal management companies (AMCs) providing appraisal management services in connection with consumer credit transactions secured by a consumer's principal dwelling or securitizations of those transactions.

(d) *Rule of construction.* Nothing in this subpart should be construed to prevent a State from establishing requirements in addition to those in this subpart. In addition, nothing in this subpart should be construed to alter guidance in, and applicability of, the Interagency Appraisal and Evaluation Guidelines[1] or other relevant agency guidance that cautions banks, bank holding companies, Federal savings associations, state savings associations, and credit unions, as applicable, that each such entity is accountable for overseeing the activities of third-party service providers and ensuring that any services provided by a third party comply with applicable laws, regulations, and supervisory guidance applicable directly to the financial institution.

§ 1222.21 Definitions.

For purposes of this subpart:

(a) *Affiliate* has the meaning provided in 12 U.S.C. 1841.

(b) *AMC National Registry* means the registry of State-registered AMCs and Federally regulated AMCs maintained by the Appraisal Subcommittee.

(c)(1) *Appraisal management company* (AMC) means a person that:

(i) Provides appraisal management services to creditors or to secondary mortgage market participants, including affiliates;

(ii) Provides such services in connection with valuing a consumer's principal dwelling as security for a consumer credit transaction or incorporating such transactions into securitizations; and

(iii) Within a given 12-month period, as defined in § 1222.22(d), oversees an appraiser panel of more than 15 State-certified or State-licensed appraisers in a State or 25 or more State-certified or State-licensed appraisers in two or more States, as described in § 1222.22;

(2) An AMC does not include a department or division of an entity that provides appraisal management services only to that entity.

(d) *Appraisal management services* means one or more of the following:

(1) Recruiting, selecting, and retaining appraisers;

(2) Contracting with State-certified or State-licensed appraisers to perform appraisal assignments;

(3) Managing the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and secondary market participants, collecting fees from creditors and secondary market participants for services provided, and paying appraisers for services performed; and

(4) Reviewing and verifying the work of appraisers.

(e) *Appraiser panel* means a network, list or roster of licensed or certified appraisers approved by an AMC to perform appraisals as independent contractors for the AMC. Appraisers on an AMC's ''appraiser panel'' under this part include both appraisers accepted by the AMC for consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions and appraisers engaged by the AMC to perform one or more appraisals in covered transactions or for secondary mortgage market participants in connection with covered transactions. An appraiser is an independent contractor for purposes of this subpart if the appraiser is treated as an independent contractor by the AMC for purposes of Federal income taxation.

(f) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(g) *Consumer credit* means credit offered or extended to a consumer primarily for personal, family, or household purposes.

(h) *Covered transaction* means any consumer credit transaction secured by the consumer's principal dwelling.

[1] 75 FR 77450 (December 10, 2010).

(i) *Creditor* means:

(1) A person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(2) A person regularly extends consumer credit if the person extended credit (other than credit subject to the requirements of 12 CFR 1026.32) more than 5 times for transactions secured by a dwelling in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any 12-month period, the person originates more than one credit extension that is subject to the requirements of 12 CFR 1026.32 or one or more such credit extensions through a mortgage broker.

(j) *Dwelling* means:

(1) A residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(2) A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this section.

(k) *Federally regulated AMC* means an AMC that is owned and controlled by an insured depository institution, as defined in 12 U.S.C. 1813 and that is regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation.

(l) *Federally related transaction regulations* means regulations established by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the National Credit Union Administration, pursuant to sections 1112, 1113, and 1114 of FIRREA Title XI, 12 U.S.C. 3341–3343.

(m) *Person* means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(n) *Secondary mortgage market participant* means a guarantor or insurer of mortgage-backed securities, or an underwriter or issuer of mortgage-backed securities. Secondary mortgage market participant only includes an individual investor in a mortgage-backed security if that investor also serves in the capacity of a guarantor, insurer, underwriter, or issuer for the mortgage-backed security.

(o) *States* mean the 50 States and the District of Columbia and the territories of Guam, Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

(p) *Uniform Standards of Professional Appraisal Practice* (USPAP) means the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation.

§ 1222.22 Appraiser panel—annual size calculation.

For purposes of determining whether, within a 12-month period, an AMC oversees an appraiser panel of more than 15 State-certified or State-licensed appraisers in a State or 25 or more State-certified or State-licensed appraisers in two or more States pursuant to § 1222.21(c)(1)(iii)—

(a) An appraiser is deemed part of the AMC's appraiser panel as of the earliest date on which the AMC:

(1) Accepts the appraiser for the AMC's consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions; or

(2) Engages the appraiser to perform one or more appraisals on behalf of a creditor for a covered transaction or secondary mortgage market participant in connection with covered transactions.

(b) An appraiser who is deemed part of the AMC's appraiser panel pursuant

to paragraph (a) of this section is deemed to remain on the panel until the date on which the AMC:

(1) Sends written notice to the appraiser removing the appraiser from the appraiser panel, with an explanation of its action; or

(2) Receives written notice from the appraiser asking to be removed from the appraiser panel or notice of the death or incapacity of the appraiser.

(c) If an appraiser is removed from an AMC's appraiser panel pursuant to paragraph (b) of this section, but the AMC subsequently accepts the appraiser for consideration for future assignments or engages the appraiser at any time during the twelve months after the AMC's removal, the removal will be deemed not to have occurred, and the appraiser will be deemed to have been part of the AMC's appraiser panel without interruption.

(d) The period for purposes of counting appraisers on an AMC's appraiser panel may be the calendar year or a 12-month period established by law or rule of each State with which the AMC is required to register.

§ 1222.23 Appraisal management company registration.

Each State electing to register AMCs pursuant to paragraph (b)(1) of this section must:

(a) Establish and maintain within the State appraiser certifying and licensing agency a licensing program that is subject to the limitations set forth in § 1222.24 and with the legal authority and mechanisms to:

(1) Review and approve or deny an AMC's application for initial registration;

(2) Review and renew or review and deny an AMC's registration periodically;

(3) Examine the books and records of an AMC operating in the State and require the AMC to submit reports, information, and documents;

(4) Verify that the appraisers on the AMC's panel hold valid State certifications or licenses, as applicable;

(5) Conduct investigations of AMCs to assess potential violations of applicable appraisal-related laws, regulations, or orders;

(6) Discipline, suspend, terminate, or deny renewal of the registration of an AMC that violates applicable appraisal-related laws, regulations, or orders; and

(7) Report an AMC's violation of applicable appraisal-related laws, regulations, or orders, as well as disciplinary and enforcement actions and other relevant information about an AMC's operations, to the Appraisal Subcommittee.

(b) Impose requirements on AMCs that are not owned and controlled by an insured depository institution and not regulated by a Federal financial institutions regulatory agency to:

(1) Register with and be subject to supervision by the State appraiser certifying and licensing agency;

(2) Engage only State-certified or State-licensed appraisers for Federally related transactions in conformity with any Federally related transaction regulations;

(3) Establish and comply with processes and controls reasonably designed to ensure that the AMC, in engaging an appraiser, selects an appraiser who is independent of the transaction and who has the requisite education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type;

(4) Direct the appraiser to perform the assignment in accordance with USPAP; and

(5) Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a)–(i) of the Truth in Lending Act, 15 U.S.C. 1639e(a)–(i), and regulations thereunder.

§ 1222.24 Ownership limitations for State-registered appraisal management companies.

(a) *Appraiser certification or licensing of owners.* (1) An AMC subject to State registration pursuant to § 1222.23 shall not be registered by a State or included on the AMC National Registry if such AMC, in whole or in part, directly or indirectly, is owned by any person who

has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for a substantive cause, as determined by the appropriate State appraiser certifying and licensing agency.

(2) An AMC subject to State registration pursuant to §1222.23 is not barred by paragraph (a)(1) of this section from being registered by a State or included on the AMC National Registry if the license or certificate of the appraiser with an ownership interest was not revoked for a substantive cause and has been reinstated by the State or States in which the appraiser was licensed or certified.

(b) *Good moral character of owners.* An AMC shall not be registered by a State if any person that owns more than 10 percent of the AMC—

(1) Is determined by the State appraiser certifying and licensing agency not to have good moral character; or

(2) Fails to submit to a background investigation carried out by the State appraiser certifying and licensing agency.

§1222.25 Requirements for Federally regulated appraisal management companies.

(a) *Requirements in providing services.* To provide appraisal management services for a creditor or secondary mortgage market participant relating to a covered transaction, a Federally regulated AMC must comply with the requirements in §1222.23(b)(2) through (5).

(b) *Ownership limitations.* (1) A Federally regulated AMC shall not be included on the AMC National Registry if such AMC, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for a substantive cause, as determined by the ASC.

(2) A Federally regulated AMC is not barred pursuant to paragraph (b)(1) of this section from being included on the AMC National Registry if the license or certificate of the appraiser with an ownership interest was not revoked for substantive cause and has been reinstated by the State or States in which the appraiser was licensed or certified.

(c) *Reporting information for the AMC National Registry.* A Federally regulated AMC must report to the State or States in which it operates the information required to be submitted by the State to the Appraisal Subcommittee pursuant to the Appraisal Subcommittee's policies regarding the determination of the AMC National Registry fee, including but not necessarily limited to the collection of information related to the limitations set forth in this section, as applicable.

§1222.26 Information to be presented to the Appraisal Subcommittee by participating States.

Each State electing to register AMCs for purposes of permitting AMCs to provide appraisal management services relating to covered transactions in the State must submit to the Appraisal Subcommittee the information required to be submitted by Appraisal Subcommittee regulations or guidance concerning AMCs that operate in the State.

PART 1223—MINORITY AND WOMEN INCLUSION

Subpart A—General

Subpart B [Reserved]

Subpart C—Minority and Women Inclusion and Diversity at Regulated Entities

AUTHORITY: 12 U.S.C. 4520 and 4526; 12 U.S.C. 1833e; E.O. 11478.

SOURCE: 75 FR 81402, Dec. 28, 2010. Redesignated at 82 FR 14994, Mar. 24, 2017, unless otherwise noted.

Subpart A—General

§ 1223.1 Definitions.

The following definitions apply to the terms used in this part:

Applicant means an individual who submits an expression of interest in employment in conjunction with all of the following:

(1) The regulated entity acted to fill a particular position;

(2) The individual followed the regulated entity's standard process for submitting an application;

(3) The individual's expression of interest indicates that the individual possesses the basic qualifications for the position; and

(4) The individual has not removed him or herself from consideration or otherwise indicated that he or she is no longer interested in the position.

Business and activities means operational, commercial, and economic endeavors of any kind, whether for profit or not for profit and whether regularly or irregularly engaged in by a regulated entity or the Office of Finance, and includes, but is not limited to, management of the regulated entity or the Office of Finance, employment, procurement, insurance, and all types of contracts, including contracts for the issuance or guarantee of any debt, equity, or mortgage-related securities, the management of mortgage and securities portfolios, the making of equity investments, the purchase, sale and servicing of single- and multi-family mortgage loans, and the implementation of affordable housing or community investment programs and initiatives.

Disability has the same meaning as defined in 29 CFR 1630.2(g) and 1630.3 and Appendix to Part 1630—Interpretive Guidance on title I of the Americans with Disabilities Act.

Disabled-owned business means a business, and includes, but is not limited to, financial institutions, firms engaged in mortgage banking, investment banking, financial services, asset management, investment consultants or advisors, underwriters, accountants, brokers, broker-dealers, and providers of legal services—

(1) Qualified as a Service-Disabled Veteran-Owned Small Business Concern as defined in 13 CFR 125.8 through 125.13; or

(2) More than fifty percent (50%) of the ownership or control of which is held, directly or indirectly, by one or more persons with a disability; and

(3) More than fifty percent (50%) of the net profit or loss of which accrues to one or more persons with a disability.

D&I strategic planning is the process of analyzing the business and activities of a regulated entity to develop strategies for promoting diversity and ensuring the inclusion of minorities, women, individuals with disabilities, and MWDOBs in all activities and at every level of the organization, including management, employment, and contracting. A D&I strategic plan serves as the primary means to communicate the board of directors' long-term D&I vision for the organization, to establish measurable goals and objectives for achieving the vision, and to ensure accountability for achieving those goals and objectives.

Diversity spend with non-diverse-owned businesses means the dollar amount(s) paid by a regulated entity to a prime contractor that is not a minority-, women-, or disabled-owned business for professional services (*i.e.*, the amount paid for work performed, as may be adjusted, in connection with providing legal, accounting, or other professional or consulting services) provided by or allocated to a partner, member, or other equity owner who is a minority, woman, or an individual with a disability.

Minority means any Black (or African) American, Native American (or American Indian), Hispanic (or Latino) American, or Asian American.

Minority-owned business means a business, and includes, but is not limited to, financial institutions, firms engaged in mortgage banking, investment banking, financial services, and asset management, investment consultants or advisors, underwriters, accountants, brokers, broker-dealers, and providers of legal services—

(1) More than fifty percent (50%) of the ownership or control of which is held, directly or indirectly, by one or more minority individuals; and

(2) More than fifty percent (50%) of the net profit or loss of which accrues to one or more minority individuals.

Prime contractor (tier 1) means a supplier that enters into a contract with a regulated entity to provide goods and/or services directly to that regulated entity.

Promotion means the advancement of an employee within a regulated entity and may be the result of an employee's proactive pursuit of a higher job ranking or a reward for good performance. A promotion is typically associated with an increase in an employee's pay due to additional or enhanced job responsibilities.

Reasonable accommodation has the same meaning as defined in 29 CFR 1630.2(o) and Appendix to Part 1630—Interpretive Guidance on title I of the Americans with Disabilities Act.

Subcontractor (tier 2) means a supplier that enters into a contract with a prime contractor (tier 1) of a regulated entity to provide goods and/or services to that prime contractor (tier 1) for the benefit of the regulated entity.

Women-owned business means a business and includes, but is not limited to, financial institutions, firms engaged in mortgage banking, investment banking, financial services, and asset management, investment consultants or advisors, underwriters, accountants, brokers, broker-dealers, and providers of legal services—

(1) More than fifty percent (50%) of the ownership or control of which is held, directly or indirectly, by one or more women; and

(2) More than fifty percent (50%) of the net profit or loss of which accrues to one or more women.

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34394, July 25, 2017]

§ 1223.2 Policy, purpose, and scope.

(a) *General policy.* FHFA's policy is to promote non-discrimination, diversity and, at a minimum, the inclusion of women, minorities, and individuals with disabilities in its own activities and in the business and activities of the regulated entities.

(b) *Purpose.* This part establishes minimum standards and requirements for the regulated entities to promote diversity and ensure, to the maximum extent possible, in balance with financially safe and sound business practices, the inclusion and utilization of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses at all levels, in management and employment, in all business and activities, and in all contracts for services of any kind, including services that require the services of investment banking, asset management entities, broker-dealers, financial services entities, underwriters, accountants, investment consultants, and providers of legal services.

(c) *Scope.* This part applies to each regulated entity's development, implementation, and adherence to diversity, inclusion, and non-discrimination policies, practices, and principles, including opportunities to award contracts for goods and/or services.

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34395, July 25, 2017]

§ 1223.3 Limitations.

(a) Except as expressly provided herein for enforcement by FHFA, the regulations in this part do not, are not intended to, and should not be construed to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, a regulated entity, their officers, employees or agents, or any other person.

(b) The contract clause required by § 1223.21(b)(9) and the itemized data reporting on numbers of contracts and amounts involved required under §§ 1223.22 and 1223.23(b)(13) through (22) apply only to contracts for services in any amount and to contracts for goods that equal or exceed $25,000 in annual value, whether in a single contract, multiple contracts, a series of contracts or renewals of contracts, with a single vendor.

(c) Within ninety (90) days after August 24, 2017 each regulated entity shall submit to FHFA a list of the types of contracts it considers exempt under § 1223.3(b) and any thresholds, exceptions, and limitations the regulated entity establishes for the implementation

of §1223.21(c)(2). The submission shall address the criteria identified in §1223.21(b)(9).

(d) Each regulated entity shall notify FHFA within thirty (30) days after any change in the types of contracts it considers exempt under §1223.3(b) or any change in the thresholds, exceptions, and limitations the regulated entity establishes for the implementation of §1223.21(c)(2).

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34395, July 25, 2017; 83 FR 39326, Aug. 9, 2018]

§§ 1223.4–1223.9 [Reserved]

Subpart B [Reserved]

Subpart C—Minority and Women Inclusion and Diversity at Regulated Entities

§ 1223.20 Office of Minority and Women Inclusion.

(a) *Establishment.* Each regulated entity shall establish and maintain an Office of Minority and Women Inclusion, or designate and maintain an office to perform the responsibilities of this part, under the direction of an officer of the regulated entity who reports directly to either the Chief Executive Officer or the Chief Operating Officer, or the equivalent. Each regulated entity shall notify the Director within thirty (30) days after any change in the designation of the office performing the responsibilities of this part.

(b) *Adequate resources.* The board of directors of each regulated entity will ensure that the Office of Minority and Women Inclusion, or office designated to lead the regulated entity in performing the responsibilities of this part, is provided relevant resources including, but not limited to, human, technological, and financial resources sufficient to fulfill the requirements of this part. The regulated entity will also ensure that any officer(s) designated to direct and oversee its D&I programs has the necessary knowledge, skills, competencies, and abilities to effectively implement the minimum standards and requirements found in this part.

(c) *Responsibilities.* Each Office of Minority and Women Inclusion, or the office designated to perform the responsibilities of this part, is responsible for leading the regulated entity's board-approved strategies, for fulfilling the requirements of this part, 12 U.S.C. 1833e(b) and 4520, and such standards and requirements as the Director may issue hereunder.

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34395, July 25, 2017]

§ 1223.21 Promoting diversity and ensuring inclusion in all business and activities.

(a) *Equal opportunity notice.* Each regulated entity shall publish a statement, endorsed by its Chief Executive Officer and approved by its Board of Directors, confirming its commitment to the principles of equal opportunity in employment and in contracting, at a minimum, regardless of race, color, religion, sex, national origin, disability status, genetic information, age, sexual orientation, gender identity, or status as a parent. The notice also shall confirm commitment against retaliation or reprisal. Publication shall include, at a minimum, conspicuous posting in all regulated entity physical facilities, including through alternative media formats, as necessary, and accessible posting on the regulated entity's Web site. The notice shall be updated and re-published, re-endorsed by the Chief Executive Officer and re-approved by the Board of Directors annually.

(b) *Policies and procedures.* Each regulated entity shall develop, implement, and maintain policies and procedures to ensure, to the maximum extent possible in balance with financially safe and sound business practices, the inclusion and utilization of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses in all business and activities and at all levels of the regulated entity, including in management, employment, procurement, insurance, and all types of contracts. The policies and procedures of each regulated entity, at a minimum, shall:

(1) Confirm its adherence to the principles of equal opportunity and nondiscrimination in employment and in contracting;

(2) Describe its practices and principles for prohibiting discrimination in employment and contracting;

(3) Describe its processes for giving consideration to MWDOBs when reviewing and evaluating contract proposals and hiring service providers as required under §1223.2(c);

(4) Establish a process for receiving and attempting to resolve complaints of discrimination in employment and in contracting. Publication will include, at a minimum, making the procedure conspicuously accessible to employees and applicants through print, electronic, or alternative media formats, as necessary, and through the regulated entity's Web site;

(5) Establish a process for accepting, reviewing, and granting or denying requests for reasonable accommodations of disabilities from employees or applicants for employment;

(6) Establish a process for accepting, reviewing, and granting or denying requests for reasonable accommodations for religious beliefs or practices from employees or applicants for employment;

(7) Encourage the consideration of diversity in nominating or soliciting nominees for positions on boards of directors and engage in recruiting and outreach directed at encouraging individuals who are minorities, women and individuals with disabilities to seek or apply for employment with the regulated entity;

(8) Establish a process for developing a stand-alone D&I strategic plan or incorporating into its existing strategic plan a D&I plan that proactively focuses on promoting the advancement of D&I. The stand-alone D&I strategic plan and the incorporated D&I plan are hereinafter referred to as the D&I strategic plan;

(9) Except as limited by §1223.3(b), require that each contract it enters contains a material clause committing the contractor to practice the principles of equal employment opportunity and non-discrimination in all its business activities and requiring each such contractor to include the clause in each subcontract it enters for services or goods provided to the regulated entity;

(10) Identify the types of contracts the regulated entity considers exempt under §1223.3(b) and any thresholds, exceptions, and limitations the regulated entity establishes for implementing paragraph (c)(2) of this section. The policies and procedures must describe the following:

(i) The rationale and need for the thresholds, exceptions, or limitations;

(ii) The criteria used to implement the thresholds, exceptions, or limitations; and

(iii) Any negative or adverse impact the implementation of the thresholds, exceptions, or limitations would likely have on contracting opportunities for minorities, women, individuals with disabilities, and MWDOBs;

(11) Be published and made accessible to employees, applicants for employment, contractors, potential contractors, and members of the public through print, electronic, or alternative media formats, as necessary, and through the regulated entity's Web site; and

(12) Be reviewed at the direction of the officer immediately responsible for directing the Office of Minority and Women Inclusion, or other office designated to perform the responsibilities of this part, at least annually to assess their effectiveness and to incorporate appropriate changes.

(c) *Outreach for contracting.* Each regulated entity shall establish a program for outreach designed to ensure to the maximum extent possible the inclusion in contracting opportunities of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses. The program at a minimum shall:

(1) Apply to all contracts entered into by the regulated entity, including contracts with financial institutions, investment banking firms, investment consultants or advisors, financial services entities, mortgage banking firms, asset management entities, underwriters, accountants, brokers, brokers-dealers, and providers of legal services;

(2) Establish policies, procedures and standards requiring the publication of contracting opportunities designed to

encourage contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses to submit offers or bid for the award of such contracts; and

(3) Ensure the consideration of the diversity of a contractor when the regulated entity reviews and evaluates offers from contractors.

(d) *D&I strategic planning.* By no later than January 25, 2018 the board of directors of each regulated entity shall adopt a D&I strategic plan for promoting D&I of minorities, women, individuals with disabilities, and MWDOBs. The board of directors of each regulated entity shall review the D&I strategic plan at least annually and shall readopt the plan, including any interim amendments, at least every three years.

(e) *Contents of the D&I strategic plan.* The D&I strategic plan shall include the following:

(1) A vision and/or mission statement that addresses the importance of promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities in order to fulfill § 1223.2;

(2) Measurable strategic goals and objectives for accomplishing the agreed-upon priorities and intended outcomes developed to advance diversity and ensure the inclusion of minorities, women, and individuals with disabilities at the regulated entity in accordance with § 1223.2; and

(3) A requirement to create and implement action plans to achieve the strategic goals and objectives and management reporting requirements for monitoring the implementation of those goals and objectives.

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34396, July 25, 2017; 83 FR 39326, Aug. 9, 2018]

§ 1223.22 Regulated entity reports.

(a) *General.* Each regulated entity, through its Office of Minority and Women Inclusion or other office designated to perform the responsibilities of this part, shall report in writing, in such format as the Director may require, to the Director describing its efforts to promote diversity and ensure the inclusion and utilization of minorities, women, individuals with disabilities, and MWDOBs at all levels, in management and employment, in all business and activities, and in all contracts for services and those contracts for goods above the material clause threshold in § 1223.3(b) and the results of such efforts.

(1) Within 180 days after the effective date of this regulation each regulated entity and the Office of Finance shall submit to the Director or his or her designee a preliminary status report describing actions taken, plans for and progress toward implementing the provisions of 12 U.S.C. 4520 and this part; and including to the extent available the data and information required by this part to be included in an annual report.

(2) FHFA intends to use the preliminary status report solely for the purpose of examining the submitting regulated entity or the Office of Finance and reporting to the institution on its operations and the condition of its program.

(b) *FHFA use of reports.* The data and information reported to FHFA under this part (except for the initial report under paragraph (a)(1) of this section) are intended to be used for any permissible supervisory and regulatory purpose, including examinations, enforcement actions, identification of matters requiring attention, and production of FHFA examination, operating and condition reports related to one or more of the regulated entities. FHFA may use the information and data submitted to issue aggregate reports and data summaries that each regulated entity may use to assess its own progress and accomplishments, or to the public as it deems necessary. FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information.

(c) *Frequency of reports.* Each regulated entity shall submit an annual report on or before March 31 of each year, reporting on the period of January 1 through December 31 of the preceding year, and such other reports as the Director may require. If the date for submission falls on a Saturday, Sunday, or Federal holiday, the report is due no later than the next business day that is

not a Saturday, Sunday, or Federal holiday.

(d) *Annual summary.* Each regulated entity shall include in its annual report to the Director (pursuant to 12 U.S.C. 1723a(k), 1456(c), or 1440, with respect to the regulated entities) a summary of its activities under this part during the previous year, including at a minimum, detailed information describing the actions taken by the regulated entity pursuant to 12 U.S.C. 4520 and a statement of the total amounts paid by the regulated entity to contractors during the previous year and the percentage of such amounts paid to contractors that are minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities and disabled-owned businesses respectively, as limited by §1207.3(b).

[75 FR 81402, Dec. 28, 2010, as amended at 80 FR 25215, May 4, 2015; 82 FR 34395, July 25, 2017]

§1223.23 Annual reports—format and contents.

(a) *Format.* Each annual report shall consist of a detailed summary of the regulated entity's activities during the reporting year to carry out the requirements of this part, which report may also be made a part of the regulated entity's annual report to the Director. The report shall contain a table of contents and conclude with a certification by the regulated entity's officer responsible for the annual report that the data and information presented in the report are accurate, and are approved for submission.

(b) *Contents.* The annual report shall contain the information provided in the regulated entity's annual summary pursuant to §1223.22(d) and shall include:

(1) The EEO–1 Employer Information Report (Form EEO–1 used by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) to collect certain demographic information) or similar reports filed by the regulated entity during the reporting year. If the regulated entity does not file Form EEO–1 or similar reports, the regulated entity shall submit to FHFA a completed Form EEO–1;

(2) All other reports or plans the regulated entity submitted to the EEOC, the Department of Labor, OFCCP or Congress (''reports or plans'' is not intended to include separate complaints or charges of discrimination or responses thereto) during the reporting year;

(3) Data showing by minority and gender the number of applicants for employment with the regulated entity in each occupational or job category identified on the Form EEO–1 during the reporting year;

(4) Data showing by minority and gender the number of individuals hired for employment with the regulated entity in each occupational or job category identified on the Form EEO–1 during the reporting year;

(5) Data showing by minority, gender and disability classification, and categorized as voluntary or involuntary, the number of separations from employment with the regulated entity in each occupational or job category identified on the Form EEO–1 during the reporting year;

(6) Data showing the number of requests for reasonable accommodation received from employees and applicants for employment, the number of requests granted, and the disabilities accommodated and the types of accommodation granted during the reporting year;

(7) Data showing for the reporting year by minority, gender, and disability classification the number of applicants for promotion at the regulated entity—

(i) Within each occupational or job category identified on the Form EEO–1; and

(ii) From one such occupational or job category to another;

(8) Data showing by minority, gender, and disability classification the number of individuals—

(i) Promoted at the regulated entity within each occupational or job category identified on the Form EEO–1, after applying for such a promotion;

(ii) Promoted at the regulated entity within each occupational or job category identified on the Form EEO–1, without applying for such a promotion; and

(iii) Promoted at the regulated entity from one occupational or job category identified on the Form EEO–1 to another such category, after applying for such a promotion;

(9) Data showing for the reporting year by minority, gender, and disability classification—

(i) The number of individuals responsible for supervising employees and/or managing the functions or departments of the regulated entity; and

(ii) A description of the strategies, initiatives, and activities executed during the preceding year to promote diverse individuals to supervisory and management roles;

(10)(i) Data showing for the reporting year by minority and gender classification, the number of individuals on the board of directors of each Bank and the Office of Finance—

(A) Using data collected by each Bank and the Office of Finance through an information collection requesting each director's voluntary self-identification of his or her minority and gender classification without personally identifiable information;

(B) Using the same classifications as those on the Form EEO–1; and

(ii) A description of the outreach activities and strategies executed during the preceding year to promote diversity in nominating or soliciting nominees for positions on boards of directors of the Banks (consistent with 12 CFR 1261.9) and the Office of Finance;

(11) A comparison of the data reported by Fannie Mae and Freddie Mac under paragraphs (b)(1) through (8) of this section, and by the Banks under paragraphs (b)(1) through (9) of this section, to such data as reported in the previous year together with a narrative analysis;

(12) A provision addressing the strategies, initiatives, and activities that the regulated entity has undertaken during the prior year to:

(i) Communicate with minority serving organizations to help identify ways in which it might be able to improve MWDOB business with the regulated entity by enhancing MWDOB customer access, including in affordable housing and community investment programs;

(ii) Evaluate the regulated entity's processes for identifying, considering, and selecting MWDOBs to participate in financial transactions, which evaluation shall include an assessment of the regulated entity's internal policies and practices that may have presented unique challenges to MWDOBs' participation in financial transactions of the regulated entity.

(13) Descriptions of all regulated entity outreach activity during the reporting year to recruit individuals who are minorities, women, or persons with disabilities for employment, to solicit or advertise for minority or minority-owned, women or women-owned, and disabled-owned contractors or contractors who are individuals with disabilities to offer proposals or bids to enter into business with the regulated entity, or to inform such contractors of the regulated entity's contracting process, including the identification of any partners, organizations, or government offices with which the regulated entity participated in such outreach activity;

(14) Cumulative data separately showing the total number of contracts in place at the beginning of the reporting year as well as those entered into during the reporting year;

(15) Cumulative data separately showing the total amount paid for contracts in place at the beginning of the reporting year as well as those entered into during the reporting year;

(16) Cumulative data separately showing the total number of contracts entered into during the reporting year that were—

(i) Considered exempt under §1223.3(b);

(ii) Prime contracts (tier 1) entered into with minorities, women, individuals with disabilities, or MWDOBs;

(iii) Subcontractor (tier 2) contracts that prime contractors (tier 1) entered into with minorities, women, individuals with disabilities, or MWDOBs;

(17) Cumulative data separately showing the total amount paid for contracts entered into during the reporting year that were—

(i) Considered exempt under §1223.3(b);

(ii) To prime contractors (tier 1) that are minorities, women, individuals with disabilities, or MWDOBs in place at the beginning of the reporting year

as well as those entered into during the reporting year;

(iii) To subcontractors (tier 2) that are minorities, women, individuals with disabilities, or MWDOBs in place at the beginning of the reporting year;

(18) Cumulative data separately showing the total diversity spend with non-diverse-owned businesses during the reporting year;

(19) The annual total of amounts paid to prime contractors (tier 1) and subcontractors (tier 2) and the percentage of which was paid separately through prime contracts and subcontracts to minorities, women, individuals with disabilities, or MWDOBs during the reporting year;

(20) Certification of compliance with §§ 1223.20 and 1223.21, together with sufficient documentation to verify compliance;

(21) Data for the reporting year showing, separately, the number of equal opportunity complaints (including administrative agency charges or complaints, arbitral or judicial claims) against the regulated entity that—

(i) Claim employment discrimination, by basis or kind of the alleged discrimination (race, sex, disability, *etc.*) and by result (settlement, favorable, or unfavorable outcome);

(ii) Claim discrimination in any aspect of the contracting process or administration of contracts, by basis of the alleged discrimination and by result; and

(iii) Were resolved through the regulated entity's internal processes;

(22) Data showing for the reporting year amounts paid to claimants by the regulated entity for settlements or judgments on discrimination complaints—

(i) In employment, by basis of the alleged discrimination; and

(ii) In any aspect of the contracting process or in the administration of contracts, by basis of the alleged discrimination;

(23) A comparison of the data reported under paragraphs (b)(13) through (19) of this section with the same information reported for the previous year;

(24) A narrative identification and analysis of the reporting year's activities the regulated entity considers successful and unsuccessful in achieving the purpose and policy of regulations in this part and a description of progress made from the previous year; and

(25) A narrative identification and analysis of business activities, levels, and areas in which the regulated entity's efforts need to improve with respect to achieving the purpose and policy of regulations in this part, together with a description of anticipated efforts and results the regulated entity expects in the succeeding year.

[75 FR 81402, Dec. 28, 2010, as amended at 80 FR 25215, May 4, 2015; 82 FR 34396, July 25, 2017; 83 FR 39326, Aug. 9, 2018]

§ 1223.24 Enforcement.

The Director may enforce this regulation and standards issued under it in any manner and through any means within his or her authority, including through identifying matters requiring attention, corrective action orders, directives, or enforcement actions under 12 U.S.C. 4513b and 4514. The Director may conduct examinations of a regulated entity's activities under and in compliance with this part pursuant to 12 U.S.C. 4517.

[75 FR 81402, Dec. 28, 2010, as amended at 82 FR 34397, July 25, 2017]

§ 1223.25 Office of Finance.

All sections of this part and the standards issued under it shall apply to the Office of Finance, as defined in § 1201.1 of this chapter, in the same manner in which it applies to the regulated entities, unless the Office of Finance is otherwise specifically addressed or excluded.

[82 FR 34397, July 25, 2017]

Subparts C–Z [Reserved]

PART 1225—MINIMUM CAPITAL—TEMPORARY INCREASE

Sec.

AUTHORITY: 12 U.S.C. 4513, 4526, and 4612.

SOURCE: 76 FR 11674, Mar. 3, 2011, unless otherwise noted.

§ 1225.1 Purpose.

FHFA is responsible for ensuring the safe and sound operation of regulated entities. In furtherance of that responsibility, this part sets forth standards and procedures FHFA will employ to determine whether to require or rescind a temporary increase in the minimum capital levels for a regulated entity or entities pursuant to 12 U.S.C. 4612(d).

§ 1225.2 Definitions.

For purposes of this part, the term:

Minimum capital level means the lowest amount of capital meeting any regulation or orders issued pursuant to 12 U.S.C. 1426 and 12 U.S.C. 4612, or any similar requirement established by regulation, order or other action.

Rescission means a removal in whole or in part of an increase in the temporary minimum capital level.

[76 FR 11674, Mar. 3, 2011, as amended at 78 FR 2323, Jan. 11, 2013; 85 FR 82198, Dec. 17, 2020]

§ 1225.3 Procedures.

(a) *Information*—(1) *Information to the regulated entity or entities.* If the Director determines, based on standards enunciated in this part, that a temporary increase in the minimum capital level is necessary, the Director will provide notice to the affected regulated entity or entities 30 days in advance of the date that the temporary minimum capital requirement becomes effective, unless the Director determines that an exigency exists that does not permit such notice or the Director determines a longer time period would be appropriate.

(2) *Information to the Government.* The Director shall inform the Secretary of the Treasury, the Secretary of Housing and Urban Development, and the Chairman of the Securities and Exchange Commission of a temporary increase in the minimum capital level contemporaneously with informing the affected regulated entity or entities.

(b) *Comments.* The affected regulated entity or entities may provide comments regarding or objections to the temporary increase to FHFA within 15 days or such other period as the Director determines appropriate under the circumstances. The Director may determine to modify, delay, or rescind the announced temporary increase in response to such comments or objection, but no further notice is required for the temporary increase to become effective upon the date originally determined by the Director.

(c) *Communication.* The Director shall transmit notice of a temporary increase or rescission of a temporary increase in the minimum capital level in writing, using electronic or such other means as appropriate. Such communication shall set forth, at a minimum, the bases for the Director's determination, the amount of increase or decrease in the minimum capital level, the anticipated duration of such increase, and a description of the procedures for requesting a rescission of the temporary increase in the minimum capital level.

(d) *Written plan.* In making a finding under this part, the Director may require a written plan to augment capital to be submitted on a timely basis to address the methods by which such temporary increase may be attained and the time period for reaching the new temporary minimum capital level.

(e) *Time frame for review of temporary increase for purpose of rescission.* (1) Absent an earlier determination to rescind in whole or in part a temporary increase in the minimum capital level for a regulated entity or entities, the Director shall no less than every 12 months, consider the need to maintain, modify, or rescind such increase.

(2) A regulated entity or regulated entities may at any time request in writing such review by the Director.

§ 1225.4 Standards and factors.

(a) *Standard for imposing a temporary increase.* In making a determination to increase temporarily a minimum capital requirement for a regulated entity or entities, the Director will consider the necessity and consistency of such an increase with the prudential regulation and the safe and sound operations of a regulated entity. The Director may impose a temporary minimum-capital increase if consideration of one or more of the following factors leads

the Director to the judgment that the current minimum capital requirement for a regulated entity is insufficient to address the entity's risks:

(1) Current or anticipated declines in the value of assets held by a regulated entity; the amounts of mortgage-backed securities issued or guaranteed by the regulated entity; and, its ability to access liquidity and funding;

(2) Credit (including counterparty), market, operational and other risks facing a regulated entity, especially where an increase in risks is foreseeable and consequential;

(3) Current or projected declines in the capital held by a regulated entity;

(4) A regulated entity's material non-compliance with regulations, written orders, or agreements;

(5) Housing finance market conditions;

(6) Level of reserves or retained earnings;

(7) Initiatives, operations, products, or practices that entail heightened risk;

(8) With respect to a Bank, the ratio of the market value of its equity to par value of its capital stock where the market value of equity is the value calculated and reported by the Bank as ''market value of total capital'' under 12 CFR 932.5(a)(1)(ii)(A); or

(9) Other conditions as detailed by the Director in the notice provided under §1225.3.

(b) *Standard for rescission of a temporary increase.* In making a determination to rescind a temporary increase in the minimum capital level for a regulated entity or entities, whether in full or in part, the Director will consider the consistency of such a rescission with the prudential regulation and safe and sound operations of a regulated entity. The Director will rescind, in full or in part, a temporary minimum capital increase if consideration of one or more of the following factors leads the Director to the judgment that rescission of a temporary minimum-capital increase for a regulated entity is appropriate considering the entity's risks:

(1) Changes to the circumstances or facts that led to the imposition of a temporary increase in the minimum capital levels;

(2) The meeting of targets set for a regulated entity in advance of any capital or capital-related plan agreed to by the Director;

(3) Changed circumstances or facts based on new developments occurring since the imposition of the temporary increase in the minimum capital level, particularly where the original problems or concerns have been successfully addressed or alleviated in whole or in part; or

(4) Such other standard as the Director may consider as detailed by the Director in the notice provided under §1225.3.

§1225.5 Guidances.

The Director may determine, from time to time, issue guidance to elaborate, to refine or to provide new information regarding standards or procedures contained herein.

PART 1227—SUSPENDED COUNTERPARTY PROGRAM

Subpart A—General

Sec.

Subpart B [Reserved]

AUTHORITY: 12 U.S.C. 4513, 4513b, 4514, 4526.

SOURCE: 78 FR 63012, Oct. 23, 2013, unless otherwise noted.

Subpart A—General

§1227.1 Purpose.

This part sets forth the procedures FHFA follows under its Suspended Counterparty Program, the purpose of which is to protect the safety and soundness of the regulated entities. The procedures require the regulated entities to submit reports when they become aware that a person with whom

they have engaged or are engaging in a covered transaction within the past three (3) years has engaged in covered misconduct. The procedures set forth a process for FHFA to issue suspension orders directing the regulated entities to cease or refrain from engaging in covered transactions with such persons and any affiliates thereof for a specified period of time or permanently. A suspension order is not intended to be, and may not be issued as, a form of punishment for the suspended person. The procedures include options for:

(a) Appeal of a final suspension order to the Director;

(b) Request for reconsideration of a final suspension order after twelve (12) months have elapsed; and

(c) Request for an exception to a final suspension order in effect in order to engage in a particular covered transaction with the suspended person.

§ 1227.2 Definitions.

For purposes of this part:

Administrative sanction means debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.

Affiliate means a party that either controls or is controlled by another person, whether directly or indirectly, including one or more persons that are controlled by the same third person.

Conviction means:

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea; or

(2) Any other resolution that is the functional equivalent of a judgment of guilt of a criminal offense, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Covered misconduct means:

(1) Any conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product.

(2) FHFA may impute covered misconduct among affiliates as follows:

(i) *Conduct imputed from an individual to an organization.* FHFA may impute the covered misconduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval, or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

(ii) *Conduct imputed from an organization to an individual, or between individuals.* FHFA may impute the covered misconduct of any organization to an individual, or from one individual to another individual, if the individual to whom the conduct is imputed either participated in, had knowledge of, or had reason to know of the conduct.

(iii) *Conduct imputed from one organization to another organization.* FHFA may impute the covered misconduct of one organization to another organization when the conduct occurred in connection with a partnership, joint venture, joint application, association, or similar arrangement, or when the organization to whom the conduct is imputed has the power to direct, manage, control, or influence the activities of the organization responsible for the conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence and hence is a basis for imputation of conduct.

Covered transaction means a contract, agreement, or financial or business relationship between a regulated entity and a person and any affiliates thereof.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, or other entity.

Respondent means a person and any affiliate thereof that is the subject of a proposed or final suspension order.

Suspending official means the Director, or any other FHFA official with delegated authority to sign proposed and final suspension orders and their accompanying notices.

Suspension means an action taken by a suspending official pursuant to a final suspension order that requires a regulated entity to cease or refrain from engaging in any covered transactions with a person and any affiliates thereof for a specified period of time or permanently.

§ 1227.3 Scope of suspension orders.

(a) *General.* A suspending official may issue a final suspension order to the regulated entities directing them to cease or refrain from engaging in any covered transactions with a particular person and any affiliates thereof for a specified period of time or permanently, pursuant to the requirements of this part.

(b) *No effect on other actions by FHFA.* Nothing in this part shall limit the authority of FHFA to pursue any other regulatory or supervisory action with respect to any regulated entity or any other person and any affiliates thereof, whether instead of or in addition to any action taken under this part.

(c) *No effect on other actions by a regulated entity.* Nothing in this part shall limit the authority of any regulated entity to take any action it determines appropriate to address risks from any person and any affiliates thereof with which it engages in covered transactions.

(d) *No effect on residential mortgage loans secured by respondent's own personal or household residence.* A final suspension order issued pursuant to this part shall have no effect on any transaction involving a residential mortgage loan if the loan is secured by the respondent's own personal or household residence.

[78 FR 63012, Oct. 23, 2013, as amended at 80 FR 79680, Dec. 23, 2015]

§ 1227.4 Regulated entity reports on covered misconduct.

(a) *General.* A regulated entity shall submit a report to FHFA when the regulated entity becomes aware that a person or any affiliates thereof with which the regulated entity is engaging or has engaged in a covered transaction within the past three (3) years has engaged in covered misconduct. A regulated entity is aware of covered misconduct when the regulated entity has reliable information that such misconduct has occurred.

(b) *Content of reports.* Each report on covered misconduct shall:

(1) Include sufficient information for FHFA to identify the person or persons that are the subject of the report, as well as any affiliates thereof if such affiliates are known to the regulated entity;

(2) Describe the nature and extent of any covered transaction that the regulated entity has or had with any persons and any affiliates thereof identified in the report; and

(3) Include a description of the covered misconduct, including the date of the covered misconduct, documents evidencing the covered misconduct if in the possession of the regulated entity, and any other relevant information that the regulated entity chooses to submit.

(c) *Timing of reports.* (1) A regulated entity shall submit a report to FHFA on covered misconduct no later than thirty (30) calendar daysafter the regulated entity becomes aware of such misconduct, even if the regulated entity lacks sufficient information to submit a complete report.

(2) A regulated entity may supplement the submission of any covered misconduct report by submitting additional relevant information to FHFA at any time.

[78 FR 63012, Oct. 23, 2013, as amended at 80 FR 79680, Dec. 23, 2015]

§ 1227.5 Proposed suspension order.

(a) A suspending official may base a proposed suspension order upon evidence of covered misconduct from any of the following sources:

(1) A required report submitted by a regulated entity;

(2) A referral submitted by FHFA's Office of Inspector General; or

(3) Any other source of information.

(b) *Grounds for issuance.* A suspending official may issue a proposed suspension order with respect to a particular person and any affiliates thereof if the suspending official determines that there is evidence that:

(1) The person or any affiliates thereof has engaged in covered misconduct, which evidence may include copies of any order or other documents documenting a conviction or administrative sanction for such conduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(c) *Notice required.* If a suspending official determines that grounds exist under paragraph (b) of this section for issuance of a proposed suspension order with respect to a particular person and any affiliates thereof, the suspending official may issue a written notice of proposed suspension to the person and any affiliates thereof, and shall provide a copy of such notice to the regulated entity and to all of the other regulated entities.

(d) *Content of notice.* The notice of proposed suspension shall include:

(1) The time period during which the suspension will apply;

(2) A statement of the suspending official's proposed suspension determination and supporting grounds;

(3) The proposed suspension order;

(4) Instructions on how to respond; and

(5) The date by which any response must be received, which must be at least thirty (30) calendar days after the date on which the notice is sent.

(e) *Method of sending notice.* The suspending official shall send the notice of proposed suspension to the last known street address, facsimile number, or email address of:

(1) The person, the person's counsel, or an agent for service of process; and

(2) Any affiliates of the person, the counsel for those affiliates, or an agent for service of process, if suspension is also being proposed for such affiliates.

(f) *Response from respondent*—(1) *Timing of response.* Any response from the affected person and any affiliates thereof must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or disregard such response, in the suspending official's discretion.

(2) *Content of response.* The response shall identify:

(i) Any information and argument in opposition to the proposed suspension;

(ii) Any specific facts that contradict the statements contained in the notice of proposed suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(iii) All criminal and civil proceedings not included in the notice of proposed suspension that grew out of facts relevant to the bases for the proposed suspension stated in such notice;

(iv) All existing, proposed, or prior exclusions under regulations implementing Executive Order 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies; and

(v) The names and identifying information for any affiliates of the affected person.

(g) *Response from regulated entities*—(1) *Timing of response.* Any response from the regulated entities must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or disregard such response, in the suspending official's discretion.

(2) *Content of response.* (i) The response shall include:

(A) Any information that would indicate that suspension of the person in question could reasonably be expected to have a negative financial impact or other significant adverse effect on the financial or operating performance of the regulated entity; and

(B) Any existing contractual relationship with the person in question for which the regulated entity might request a limitation or qualification.

(ii) The response may include any other information that the regulated

entity believes would be relevant to the proposed suspension determination, including but not limited to:

(A) Any information related to the factual basis for the proposed suspension;

(B) Any information about other known affiliates of the person;

(C) Recommendations for alternatives to suspension that could mitigate the risks presented by engaging in covered transactions with the respondent; and

(D) Recommendations for limitations or qualifications on the scope of the proposed suspension.

[78 FR 63012, Oct. 23, 2013, as amended at 80 FR 79680, Dec. 23, 2015]

§ 1227.6 Final suspension order.

(a) *Grounds for issuance.* A suspending official may issue a final suspension order with respect to a respondent proposed for suspension if, based solely on the written record, the suspending official determines that there is adequate evidence that:

(1) The respondent engaged in covered misconduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(b) *Written record.* The written record shall include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the final determination, including any information related to the factors in paragraph (c) of this section. FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record.

(c) *Factors that may be considered by the suspending official.* In determining whether or not to issue a final suspension order with respect to the respondent where the grounds for suspension are satisfied, the suspending official may also consider any factors that the suspending official determines may be relevant in light of the circumstances of the particular case, including but not limited to:

(1) The actual or potential harm or impact that results or may result from the covered misconduct;

(2) The frequency of incidents or duration of the covered misconduct;

(3) Whether there is a pattern of prior covered misconduct;

(4) Whether and to what extent the respondent planned, initiated, or carried out the covered misconduct;

(5) Whether the respondent has accepted responsibility for the covered misconduct and recognizes its seriousness;

(6) Whether the respondent has paid or agreed to pay all criminal, civil and administrative penalties or liabilities for the covered misconduct, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution;

(7) Whether the covered misconduct was pervasive within the respondent's organization;

(8) The kind of positions held by the individuals involved in the covered misconduct;

(9) Whether the respondent's organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence of the covered misconduct;

(10) Whether the respondent brought the covered misconduct to the attention of the appropriate government agency in a timely manner;

(11) Whether the respondent has fully investigated the circumstances surrounding the covered misconduct and, if so, made the result of the investigation available to the suspending official;

(12) Whether the respondent had effective standards of conduct and internal control systems in place at the time the covered misconduct occurred;

(13) Whether the respondent has taken appropriate disciplinary action against the individuals responsible for the covered misconduct; or

(14) Whether the respondent has had adequate time to eliminate the circumstances within the organization that led to the covered misconduct.

(d) *Deadline for decision.* The suspending official shall make a determination on whether to issue a final

suspension order with respect to the respondent within thirty (30) calendar days of the deadline given for the respondent's response in the notice of proposed suspension, unless the suspending official notifies the respondent in writing that additional time is needed.

(e) *Determination not to issue final suspension order*. If the suspending official determines that suspension is not appropriate with respect to the respondent, the suspending official shall provide prompt written notice of that determination to the respondent, the regulated entity, and all of the other regulated entities.

(f) *Issuance of final suspension order*—(1) *General*. If the suspending official makes a final determination to suspend the respondent, the suspending official shall issue a final suspension order to each regulated entity regarding the respondent.

(2) *Content of final suspension order*. A final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent or regulated entities;

(ii) Identification of each person and any affiliates thereof to which the suspension applies;

(iii) A description of the scope of the suspension, including the time period to which the suspension applies; and

(iv) A description of any limitations or qualifications that apply to the scope of the suspension, including modification of the conduct of covered transactions that may be engaged in with the respondent.

(3) *Notice to respondent required*. The suspending official shall provide prompt written notice to the respondent of the final suspension order issued to the regulated entities with respect to such respondent.

(4) *Content of notice*. The notice of a final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent; and

(ii) A copy of the final suspension order.

(g) *Effective date*. A final suspension order shall take effect on the date specified in the order, which shall be at least forty-five (45) calendar days after the date on which the order is signed by the suspending official.

[78 FR 63012, Oct. 23, 2013, as amended at 80 FR 79680, Dec. 23, 2015]

§ 1227.7 Appeal to the Director.

(a) *Opportunity to appeal*. A respondent may submit an appeal to the Director within thirty (30) calendar days after the date a final suspension order has been signed. If the Director signed the final suspension order as the suspension official, the respondent has no appeal right under this section. The appeal shall be accompanied by a written brief specifically identifying the respondent's objections to the final suspension order and the supporting reasons for such objections.

(b) *Decision on appeal*. The Director shall issue a written final decision on an appeal of a final suspension order based on the record submitted by the suspending official, together with any material submitted with an appeal. The Director may affirm, vacate or amend the suspension, or remand to the suspending official for further proceedings, in the discretion of the Director. If the Director does not take action on an appeal prior to the effective date of the order, the order shall take effect as if it had been affirmed by the Director, on the date specified in the order.

(c) *Final agency action*. The written final decision of the Director on an appeal of a final suspension order shall be the final agency action. If the Director does not take action on an appeal prior to the effective date of the order, the order shall be the final agency action.

(d) *Exhaustion of administrative remedies*. In order to fulfill the requirement to exhaust administrative remedies, a respondent must appeal a final suspension order to the Director as provided in this section prior to seeking judicial review of such order.

§ 1227.8 Posting of final suspension orders.

(a) *Required posting*. FHFA will publish on its Web site all final suspension

orders issued by FHFA on the effective date of the order.

(b) *Content of posting.* Each posting on FHFA's Web site shall include:

(1) The full name (where available) of each suspended person and any affiliates thereof subject to the final suspension order, in alphabetical order;

(2) A description of the time period for which the suspension applies; and

(3) A copy of each final suspension order applicable to the person and any affiliates thereof.

(c) *Removal of names.* FHFA will remove from the Web site all references to the suspension of a person and any affiliates thereof at such time as the suspension expires or is otherwise vacated.

§ 1227.9 Request for reconsideration.

(a) *Time period for request.* A suspended person may submit a request to the Director for reconsideration of a final suspension order at any time after the expiration of a twelve (12)-month period from the date the order took effect, but no such request may be made within twelve (12) months of a previous request for reconsideration from such person.

(b) *Content of request.* A request for reconsideration must be submitted in writing and state the specific grounds for relief from the final suspension order, which shall be limited to any new information that may indicate that engaging in covered transactions with a regulated entity would no longer present a risk of significant financial or reputational harm or threat to the safe and sound operation of a regulated entity.

(c) *Decision on request.* The Director may approve a request for reconsideration if the Director determines that engaging in covered transactions with a regulated entity is no longer likely to result in significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. The Director will inform the requestor of the decision on the request for reconsideration in a timely manner. A decision on a request for reconsideration shall not constitute an appealable order.

§ 1227.10 Exception to final suspension order in effect.

(a) *Request for exception.* A regulated entity to which a final suspension order in effect is applicable may request an exception from such order to allow it to engage in a particular covered transaction with a suspended person and any affiliates thereof. Any such request shall clearly state any reasons supporting an exception, as well as any steps the regulated entity will take to mitigate any risks presented by the exception. An exception may not be requested by a suspended person or any affiliates thereof.

(b) *Decision on exception.* A suspending official may approve an exception from a final suspension order in effect to permit a regulated entity to engage in a particular covered transaction with a suspended person and any affiliates thereof for reasons consistent with those for which the suspending official may limit or qualify the scope or effect of a final suspension order under §1227.6(f)(2)(iv) of this part. The decision on a request for an exception shall not constitute an appealable order.

(c) *Notice required.* FHFA shall provide written notice in a timely manner to the regulated entity, the suspended person and any affiliates thereof, and the other regulated entities of any exception approved for a particular covered transaction.

Subpart B [Reserved]

PART 1228—RESTRICTIONS ON THE ACQUISITION OF, OR TAKING SECURITY INTERESTS IN, MORTGAGES ON PROPERTIES ENCUMBERED BY CERTAIN PRIVATE TRANSFER FEE COVENANTS AND RELATED SECURITIES

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513, 4526, 4616, 4617, 4631.

SOURCE: 77 FR 15574, Mar. 16, 2012, unless otherwise noted.

§ 1228.1 Definitions.

For the purposes of this part, the following definitions apply:

Adjacent or contiguous property means property that borders the burdened community, *provided that* such adjacent or contiguous property may be separated from the burdened community by public right of way.

Burdened community means a community comprising all of the parcels or interests in real property encumbered by a single private transfer fee covenant or a series of separate private transfer fee covenants that require payment of private transfer fees to the same entity to be used for the same purposes.

Covered association means a nonprofit mandatory membership organization comprising owners of homes, condominiums, cooperatives, manufactured homes, or any interest in real property, created pursuant to a declaration, covenant or other applicable law; or an organization described in section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code. A covered association may include master and sub-associations, each of which is also a covered association.

Direct benefit means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association of which the owners of the burdened property are members and used primarily for their benefit. *Direct benefit* also includes cultural, educational, charitable, recreational, environmental, conservation or other similar activities that—

(1) Are conducted in or protect the burdened community or adjacent or contiguous property, or

(2) Are conducted on other property that is used primarily by residents of the burdened community.

Excepted transfer fee covenant means a private transfer fee covenant that requires payment of a private transfer fee to a covered association and limits the use of such transfer fees exclusively to purposes which provide a direct benefit to the real property encumbered by the private transfer fee covenants.

Private transfer fee means a transfer fee, including a charge or payment, imposed by a covenant, restriction, or other similar document and required to be paid in connection with or as a result of a transfer of title to real estate, and payable on a continuing basis each time a property is transferred (except for transfers specifically excepted) for a period of time or indefinitely. A *private transfer fee* does not include fees, charges, payments, or other obligations—

(1) Imposed by or payable to the Federal government or a State or local government; or

(2) That defray actual costs of the transfer of the property, including transfer of membership in the relevant covered association.

Private transfer fee covenant means a covenant that:

(1) Purports to run with the land or to bind current owners of, and successors in title to, such real property; and

(2) Obligates a transferee or transferor of all or part of the property to pay a private transfer fee upon transfer of an interest in all or part of the property, or in consideration for permitting such transfer.

Transfer means, with respect to real property, the sale, gift, grant, conveyance, assignment, inheritance, or other transfer of an interest in the real property.

[77 FR 15574, Mar. 16, 2012, as amended at 78 FR 2323, Jan. 11, 2013]

§ 1228.2 Restrictions.

The regulated entities shall not purchase, invest or otherwise deal in any mortgages on properties encumbered by private transfer fee covenants, securities backed by such mortgages, or securities backed by the income stream from such covenants, unless such covenants are excepted transfer fee covenants. The Federal Home Loan Banks shall not accept such mortgages or securities as collateral, unless such covenants are excepted transfer fee covenants.

§ 1228.3 Prospective application and effective date.

This part shall apply only to mortgages on properties encumbered by private transfer fee covenants if those

covenants are created on or after February 8, 2011. This part shall not apply to mortgages on properties encumbered by private transfer fee covenants if those covenants are created pursuant to an agreement entered into before February 8, 2011, applicable to land that is identified in the agreement, and the agreement was in settlement of litigation or approved by a government agency or body. This part also applies to securities backed by mortgages to which this part applies, and to securities issued after February 8, 2011, backed by revenue from private transfer fees regardless of when the covenants were created. The regulated entities shall comply with this part not later July 16, 2012.

§ 1228.4 State restrictions unaffected.

This part does not affect state restrictions or requirements with respect to private transfer fee covenants, such as with respect to validity, enforceability, disclosures, or duration.

PART 1229—CAPITAL CLASSIFICATIONS AND PROMPT CORRECTIVE ACTION

Subpart A—Federal Home Loan Banks

Subpart B—Enterprises

AUTHORITY: 12 U.S.C. 1426, 4513, 4526, 4613, 4614, 4615, 4616, 4617, 4618, 4622, 4623.

SOURCE: 74 FR 5604, Jan. 30, 2009, unless otherwise noted.

Subpart A—Federal Home Loan Banks

§ 1229.1 Definitions.

For purposes of this subpart:

Capital distribution means any payment by the Bank, whether in cash or stock, of a dividend, any return of capital or retained earnings by the Bank to its shareholders, any transaction in which the Bank redeems or repurchases capital stock, or any transaction in which the Bank redeems, repurchases or retires any other instrument which is included in the calculation of its total capital.

Class A stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(i) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(i)) and related regulations.

Class B stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(ii) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(ii)) and related regulations.

Critical capital level for a Bank means an amount equal to 2 percent of the Bank's total assets.

Executive officer means for a Bank any of the following persons, provided that the Director may from time to time add or remove persons, positions, or functions to or from the list (individually for one or more Banks or jointly for all the Banks) by communication to the affected Banks:

(1) Executive officers about whom the Banks must publicly disclose detailed compensation information under Regulation S–K, 17 CFR part 229, issued by the Securities and Exchange Commission;

(2) Any other executive who occupies one of the following positions or is in charge of one of the following subject areas:

(i) Overall Bank operations, such as the Chief Operating Officer or an equivalent employee;

(ii) Chief Financial Officer or an equivalent employee;

(iii) Chief Administrative Officer or an equivalent employee;

(iv) Chief Risk Officer or an equivalent employee;

(v) Asset and Liability Management officer, or an equivalent employee;

(vi) Chief Accounting Officer or an equivalent employee;

(vii) General Counsel or an equivalent employee;

(viii) Strategic Planning officer or an equivalent employee;

(ix) Internal Audit officer or an equivalent employee; or

(x) Chief Information Officer or an equivalent employee; or

(3) Any other individual, without regard to title:

(i) Who is in charge of a principal business unit, division or function; or

(ii) Who reports directly to the Bank's chairman of the board of directors, vice chairman of the board of directors, president or chief operating officer.

Minimum capital requirement means the leverage and total capital requirements established for a Bank under section 6(a)(2) of the Bank Act (12 U.S.C. 1426(a)(2)) and related regulations, as such requirements may be revised by the Director, or any similar requirement established for a Bank by regulation, order, written agreement or other action.

New business activity when used in this subpart has the same meaning set forth in §1272.1 of this chapter.

Permanent capital means the retained earnings of a Bank, determined in accordance with generally accepted accounting principles in the United States (GAAP), plus the amount paid-in for the Bank's Class B stock.

Risk-based capital requirement means any capital requirement established for a Bank under section 6(a)(3) of the Bank Act (12 U.S.C. 1426(a)(3)) and related regulations that ensures a Bank will hold sufficient permanent capital and reserves to support the risks that arise from its operations.

Tangible equity means, for a Bank, the paid-in value of its outstanding capital stock plus its retained earnings calculated in accordance with generally accepted accounting principles in the United States (GAAP) less the amount of any assets that would be intangible assets under GAAP.

Total capital means the sum of the Bank's permanent capital, the amount paid-in for its Class A stock, the amount of any general allowances for losses, and the amount of any other instruments identified in a Bank's capital plan that the Director has determined to be available to absorb losses incurred by such Bank.

[74 FR 5604, Jan. 30, 2009, as amended at 78 FR 2323, Jan. 11, 2013; 81 FR 76295, Nov. 2, 2016]

§ 1229.2 Determination of a Bank's capital classification.

(a) *Quarterly determination.* The Director shall determine the capital classification for each Bank no less often than once a quarter based on the capital classifications in §1229.3 of this subpart. The Director may make a determination with regard to a capital classification for a Bank more often than the minimum required under this paragraph or make a determination for one or more Banks without making a determination for all the Banks.

(b) *Notification to a Bank.* Before finalizing any action to classify a Bank under this section, the Director shall provide a Bank written notice describing the proposed action and an opportunity to submit information that the Bank considers relevant to the proposed action in accordance with §1229.12 of this subpart.

(c) *Notification to the FHFA.* A Bank shall provide written notification within ten calendar days of any event or development that has caused or is likely to cause its permanent or total capital to fall below the level necessary to maintain its capital classification at the level assigned in the most recent capital classification or reclassification determination by the Director or that is contained in the most recent notice of a proposed capital classification or reclassification provided under §1229.12(a) of this subpart.

§ 1229.3 Criteria for a Bank's capital classification.

(a) *Adequately capitalized.* Except where the Director has exercised authority to reclassify a Bank, a Bank shall be considered adequately capitalized if, at the time of the determination under §1229.2(a) of this subpart,

the Bank has sufficient permanent and total capital, as applicable, to meet or exceed its risk-based and minimum capital requirements.

(b) *Undercapitalized.* Except where the Director has exercised authority to reclassify a Bank, a Bank shall be considered undercapitalized if, at the time of the determination under §1229.2(a) of this subpart, the Bank does not have sufficient permanent or total capital, as applicable, to meet any one or more of its risk-based or minimum capital requirements but such deficiency is not of a magnitude to classify the Bank as significantly undercapitalized or critically undercapitalized.

(c) *Significantly undercapitalized.* Except where the Director has exercised authority to reclassify a Bank, a Bank shall be considered significantly undercapitalized if, at the time of the determination under §1229.2(a) of this subpart, the amount of permanent or total capital held by the Bank is less than 75 percent of what is required to meet any one of its risk-based or minimum capital requirements but the magnitude of the Bank's deficiency in total capital is not sufficient to classify it as critically undercapitalized.

(d) *Critically undercapitalized.* Except where the Director has exercised authority to reclassify a Bank, a Bank shall be considered critically undercapitalized if, at the time of the determination under §1229.2(a) of this subpart, the total capital held by the Bank is less than or equal to the critical capital level for a Bank as defined under §1229.1 of this subpart.

§1229.4 Reclassification by the Director.

(a) *Discretionary reclassification.* Where the Director determines that any of the grounds described in paragraph (b) of this section exist, the Director may reclassify a Bank as:

(1) Undercapitalized, if it is otherwise classified as adequately capitalized;

(2) Significantly undercapitalized, if it is otherwise classified as undercapitalized; or

(3) Critically undercapitalized if it is otherwise classified as significantly undercapitalized.

(b) *Grounds for discretionary reclassification.* Notwithstanding any other provision of this subpart, the Director may at any time reclassify a Bank under this section if:

(1) The Director determines in writing that:

(i) The Bank is engaging in conduct that could result in the rapid depletion of permanent or total capital;

(ii) The value of collateral pledged to the Bank has decreased significantly; or

(iii) The value of property subject to mortgages owned by the Bank has decreased significantly.

(2) The Director determines, after notice to the Bank and opportunity for an informal hearing before the Director, that a Bank is in an unsafe and unsound condition; or

(3) The Director finds, under §1371(b) of Safety and Soundness Act (12 U.S.C. 4631(b)), that the Bank is engaging in an unsafe and unsound practice because the Bank's asset quality, management, earnings or liquidity were found to be less than satisfactory during the most recent examination, and any deficiency has not been corrected.

(c) *Procedures.* Before finalizing any action to reclassify a Bank under this section, the Director shall provide a Bank written notice describing the proposed action and an opportunity to submit information that the Bank considers relevant to the Director's proposed action in accordance with §1229.12 of this subpart.

(d) *Duration.* Any condition, action or inaction by a Bank that is the basis for a decision to reclassify a Bank under this section or under any other authority provided the Director may be considered by the Director and form the basis of further, subsequent actions to reclassify the Bank until such time as the Bank remedies such condition or takes necessary action to correct such situation to the satisfaction of the Director.

(e) *Reservation of authority.* Nothing in this section shall prevent the Director from exercising any other authority under the Safety and Soundness Act, the Bank Act or any regulation to reclassify a Bank for reasons not set forth in paragraph (b) of this section or to take any other action against a Bank.

§ 1229.5 Capital distributions for adequately capitalized Banks.

(a) *Restriction.* An adequately capitalized Bank may not make a capital distribution if after doing so the Bank's capital would be insufficient to maintain a classification of adequately capitalized. A Bank may not make a capital distribution if such distribution would violate any restriction on the redemption or repurchase of capital stock or the payment of a dividend set forth in section 6 of the Bank Act (12 U.S.C. 1426) and any other applicable regulation.

(b) *Exception.* Notwithstanding the restriction in paragraph (a) of this section, the Director may permit a Bank to repurchase or redeem its shares of stock if the transaction is made in connection with the issuance of additional Bank shares or obligations in at least an equivalent amount to the shares that are redeemed or repurchased and will reduce the Bank's financial obligations or otherwise improve its financial condition. Any transaction under this paragraph also must conform with any restriction on the redemption or repurchase of Bank stock set forth in section 6 of the Bank Act (12 U.S.C. 1426) and in any other applicable regulation.

§ 1229.6 Mandatory actions applicable to undercapitalized Banks.

(a) *Mandatory Actions by the Bank.* A Bank that is classified as undercapitalized shall:

(1) Submit to the Director for approval a capital restoration plan that complies with the requirements and procedures established by §1229.11 of this part and receive approval from the Director for such plan;

(2) Fulfill all terms, conditions and obligations contained in the capital restoration plan as approved by the Director;

(3) Not make any capital distribution unless:

(i) The distribution meets the requirements of §1229.5(b) and paragraphs (a)(3)(ii) and (iii) of this section and the Director has provided permission for such distribution as set forth in §1229.5(b);

(ii) The capital distribution will not result in the Bank being reclassified as significantly undercapitalized or critically undercapitalized; and

(iii) The capital distribution does not violate any restriction on the redemption or repurchase of capital stock or the declaration or payment of a dividend set forth in section 6 of the Bank Act (12 U.S.C. 1426) or in any other applicable regulation;

(4) Not permit its average total assets in any calendar quarter to exceed its average total assets during the preceding calendar quarter, where such average is calculated based on the total amount of assets held by the Bank for each day in a quarter, unless:

(i) The Director has approved the Bank's capital restoration plan; and

(ii) The Director determines that:

(A) The increase in total assets is consistent with the approved capital restoration plan; and

(B) The ratio of tangible equity to the Bank's total assets is increasing at a rate sufficient to enable the Bank to become adequately capitalized within a reasonable time and consistent with any schedule established in the capital restoration plan; and

(5) Not acquire, directly or indirectly, an equity interest in any operating entity (other than as necessary to enforce a security interest granted to the Bank) nor engage in any new business activity unless:

(i) The Director has approved the Bank's capital restoration plan, the Bank is implementing the capital restoration plan and the Director determines that proposed acquisition or activity will further achievement of the goals set forth in that plan; or

(ii) The Director determines that the proposed acquisition or activity will be consistent with the safe and sound operation of the Bank and will further the Bank's compliance with its risk-based and minimum capital requirements in a reasonable period of time.

(b) *Mandatory reclassification by the Director.* The Director shall reclassify an undercapitalized Bank as significantly undercapitalized if:

(1) The Bank does not submit a capital restoration plan that is substantially in compliance with §1229.11 of this subpart and within the time frame required.

(2) The Director does not approve the capital restoration plan submitted by the Bank; or

(3) The Director determines that the Bank has failed in any material respect to comply with its approved capital restoration plan or fulfill any schedule for action established by that plan.

(c) *Monitoring.* The Director shall monitor the condition of any undercapitalized Bank and monitor the Bank's compliance with the capital restoration plan and any restrictions imposed under this section or §1229.7 of this subpart. As part of this process, the Director shall review the capital restoration plan and any restrictions or requirements imposed on the undercapitalized Bank to determine whether such plan, restrictions or requirements are consistent with the safe and sound operation of the Bank and will further the Bank's compliance with its risk-based and minimum capital requirements in a reasonable period of time.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009; 81 FR 76295, Nov. 2, 2016]

§1229.7 Discretionary actions applicable to undercapitalized Banks.

(a) *Discretionary safeguards.* The Director may take any action with regard to an undercapitalized Bank that may be taken with regard to a significantly undercapitalized Bank under section 1366 of the Safety and Soundness Act (12 U.S.C. 4616) or §1229.8 or §1229.9 if the Director determines that such action is necessary to assure the safe and sound operation of the Bank and the Bank's compliance with its risk-based and minimum capital requirements in a reasonable period of time.

(b) *Procedures.* Before finalizing any action under this section, the Director shall provide a Bank written notice describing the proposed action or actions and an opportunity to submit information that the Bank considers relevant to the Director's decision to take such action in accordance with §1229.12 of this subpart.

[74 FR 5604, Jan. 30, 2009, as amended at 81 FR 76295, Nov. 2, 2016]

§1229.8 Mandatory actions applicable to significantly undercapitalized Banks.

A Bank that is classified as significantly undercapitalized:

(a) Shall submit to the Director for approval a capital restoration plan that complies with the requirements and procedures established by §1229.11 of this part and receive approval from the Director for such plan;

(b) Fulfill all terms, conditions and obligations contained in the capital restoration plan once the plan is approved by the Director;

(c) Shall not make any capital distribution that would result in the Bank being reclassified as critically undercapitalized or that would violate any restriction on the redemption or repurchase of capital stock or the payment of a dividend set forth in section 6 of the Bank Act (12 U.S.C. 1426) or any applicable regulation;

(d) Shall not make any capital distribution not otherwise prohibited under paragraph (c) of this section absent the prior written approval of the Director, provided that the Director may approve such distribution only if the Director determines that:

(1) The capital distribution will enhance the ability of the Bank to meet its risk-based and minimum capital requirements promptly;

(2) The capital distribution will contribute to the long-term financial safety and soundness of the Bank; or

(3) The capital distribution is otherwise in the public interest;

(e) Shall not without prior written approval of the Director pay a bonus to any executive officer, provided that for purposes of this paragraph a bonus shall include any amount paid or accruing to an executive officer under a profit sharing arrangement;

(f) Shall not without the prior written approval of the Director compensate an executive officer at a rate exceeding the average rate of compensation of that officer during the 12 months preceding the calendar month in which the Bank became significantly undercapitalized, provided however, that for purposes of calculating the executive officer's average rate of compensation, such compensation shall not include any bonus or profit sharing

paid or accruing to the officer during the 12 month period;

(g) Comply with §1229.6(a)(4) and (a)(5) of this subpart; and

(h) Comply with any on-going restrictions or obligations that were imposed on the Bank by the Director under §1229.7 of this subpart.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009]

§1229.9 Discretionary actions applicable to significantly undercapitalized Banks.

(a) *Actions by the Director*. The Director shall carry out this section by taking, at any time, one or more of the following actions with respect to a significantly undercapitalized Bank:

(1) Limit the increase in any obligations or class of obligations of the Bank, including any off-balance sheet obligations. Such limitation may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(2) Reduce the amount of any obligations or class of obligations held by the Bank, including any off-balance sheet obligations. Such reduction may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(3) Limit the increase in, or prohibit the growth of any asset or class of assets held by the Bank. Such limitation may be stated in an absolute dollar amount, as a percentage of current assets or in any other form chosen by the Director;

(4) Reduce the amount of any asset or class of asset held by the Bank. Such reduction may be stated in an absolute dollar amount, as a percentage of current obligations or in any other form chosen by the Director;

(5) Acquire new capital in the form and amount determined by the Director, which specifically may include requiring a Bank to increase its level of retained earnings;

(6) Modify, limit or terminate any activity of the Bank that the Director determines creates excessive risk;

(7) Take steps to improve the management at the Bank by:

(i) Ordering a new election for the Bank's board of directors in accordance with procedures established by the Director;

(ii) Dismissing particular directors or executive officers, in accordance with section 1366(b)(5)(B) of the Safety and Soundness Act (12 U.S.C. 4616(b)(5)(B)), who held office for more than 180 days immediately prior to the date on which the Bank became undercapitalized, provided further that such dismissals shall not be considered removal pursuant to an enforcement action under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) and shall not be subject to the requirements necessary to remove an officer or director under that section; or

(iii) Ordering the Bank to hire qualified executive officers, the hiring of whom, prior to employment by the Bank and at of the option of the Director, may be subject to review and approval by the Director; or

(8)(i) Reclassify a significantly undercapitalized Bank as critically undercapitalized if:

(A) The Bank does not submit a capital restoration plan that is substantially in compliance with §1229.11 of this part and within the time frame required;

(B) The Director does not approve the capital restoration plan submitted by the Bank; or

(C) The Director determines that the Bank has failed to make reasonable, good faith efforts to comply with its approved capital restoration plan and fulfill any schedule established by that plan.

(ii) Subject to paragraph (c) of this section, the Director may reclassify a significantly undercapitalized Bank under paragraph (a)(8)(i) of this section at any time the grounds for such action exist, notwithstanding the fact that such grounds had formed the basis on which the Director reclassified a Bank from undercapitalized to significantly undercapitalized.

(b) *Additional safeguards*. The Director may require a significantly undercapitalized Bank to take any other action not specifically listed in this section if the Director determines such action will help ensure the safe and sound operation of the Bank and the Bank's

compliance with its risk-based and minimum capital requirements in a reasonable period of time more than any action specifically authorized under paragraph (a) of this section.

(c) *Procedures.* Before finalizing any action under this section, the Director shall provide a Bank written notice describing the proposed action or actions and an opportunity to submit information that the Bank considers relevant to the Director's decision to take such action in accordance with §1229.12 of this subpart.

§1229.10 Actions applicable to critically undercapitalized Banks.

(a) *Appointment of conservator or receiver.* Notwithstanding any other provision of federal or state law, the Director may appoint the FHFA as conservator or receiver of any Bank at any time after the Director determines that the Bank is, or the Director otherwise exercises authority to reclassify the Bank as, critically undercapitalized.

(b) *Periodic determination*—(1) *Determination.* Not later than 30 calendar days after the Director first determines that a Bank is, or the Director otherwise exercises authority to reclassify the Bank as, critically undercapitalized, and a least once during each succeeding 30-day calendar period, the Director make a determination in writing as to whether:

(i) The assets of the Bank are, and during the preceding 60 calendar days have been, less than its obligations to its creditors and others, provided that the Director shall consider as an obligation only that amount of outstanding consolidated obligations for which the Bank is primary obligor or for which the Bank has been ordered to make payments of principal or interest on behalf of another Bank, or is actually making payments of principal or interest on behalf of another Bank; or

(ii) The Bank is not, and during the previous 60 calendar days has not been paying its debts on a regular basis as such debts become due, provided that this provision does not apply to any unpaid debts that are the subject of a *bona fide* dispute.

(2) *Mandatory receivership.* If the Director determines that the conditions described in either paragraph (b)(1)(i) or (b)(1)(ii) of this section applies to a Bank, the Director shall appoint the FHFA as receiver for the Bank. The appointment of the FHFA as receiver under this paragraph shall immediately terminate any conservatorship established for the Bank.

(3) *Determination not required.* A determination under paragraph (b)(1) of this section shall not be required during any period in which the FHFA serves as receiver for a Bank.

(c) *Judicial review.* If the Director appoints the FHFA as conservator or receiver of a Bank under paragraph (a) or (b)(2) of this section, the Bank may within 30 days of such appointment bring an action in the United States district court for the judicial district in which the Bank was established pursuant to section 3 of the Bank Act (12 U.S.C. 1423) or in the United States District Court for the District of Columbia, for an order requiring the FHFA to remove itself as conservator or receiver.

(d) *Other applicable actions.* Until such time as FHFA is appointed as conservator or receiver for a critically undercapitalized Bank, a critically undercapitalized Bank shall be subject to all mandatory restrictions or obligations applicable to a significantly undercapitalized Bank under §1229.8 of this subpart and will remain subject to any on-going restrictions or obligations that the Director imposed on the Bank under §1229.7 or §1229.9 of this subpart, or any restrictions or obligations that are applicable to the Bank under the terms of an approved capital restoration plan.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009]

§1229.11 Capital restoration plans.

(a) *Contents.* Each capital restoration plan submitted by a Bank shall set forth a plan to restore its permanent and total capital to levels sufficient to fulfill its risk-based and minimum capital requirements within a reasonable period of time. Such plan must be feasible given general market conditions and the conditions of the Bank and, at a minimum, shall:

(1) Describe the actions the Bank will take, including any changes that the

Bank will make to member stock purchase requirements, to assure that it will become adequately capitalized within the meaning of § 1229.3(a) of this subpart and, if appropriate, to resolve any structural or long term causes for the capital deficiency;

(2) Specify the level of permanent and total capital the Bank will achieve and maintain and provide quarterly projections indicating how each component of total and permanent capital and the major components of income, assets and liabilities are expected to change over the term of the plan;

(3) Specify the types and levels of activities in which the Bank will engage during the term of the plan, including any new business activities that it intends to begin during such term;

(4) Describe any other actions the Bank intends to take to comply with any other requirements imposed on it under this subpart A of part 1229;

(5) Provide a schedule which sets forth dates for meeting specific goals and benchmarks and taking other actions described in the proposed capital restoration plan, including setting forth a schedule for it to restore its permanent and total capital to levels necessary for meeting its risk-based and minimum capital requirements; and

(6) Address such other items that the Director shall provide in writing in advance of such submission.

(b) *Deadline for submission.* A Bank must submit a proposed capital restoration plan no later than 15 business-days after it receives written notification that such a plan is required either because the notice specifically states that the Director has required the submission of a plan or the notice indicates that the Bank's capital classification or reclassification is to a category for which a capital restoration plan is a mandatory action required of the Bank. The Director may extend this deadline if the Director determines that such extension is necessary. Any such extension shall be in writing and provide a specific date by which the Bank must submit its proposed capital restoration plan.

(c) *Review of the plan by the Director.* The Director shall have 30 calendar days from the date the Bank submits a proposed capital restoration plan to approve or disapprove the plan. The Director may extend the period for consideration of a capital restoration plan for a single 30 calendar day period by providing the Bank with written notification that the decision deadline has been extended. The Director shall provide the Bank with written notification of the decision to approve or not approve a proposed capital restoration plan. If the Director does not approve the capital restoration plan, the written notification of such decision shall provide the reasons for the disapproval.

(d) *Resubmission.* If the Director does not approve the Bank's proposed capital restoration plan, the Bank shall submit a new capital restoration plan acceptable to the Director within 30 calendar days of the date that the Bank was notified of the disapproval. The Director may extend the period for the Bank's submission of a new acceptable capital restoration plan upon a determination that such extension is in the public interest. The Director shall provide the Bank written notice of the extension and include in such notice the date by which the Bank must submit an acceptable plan.

(e) *Amendments.* The Director, in his or her sole discretion, may approve amendments to an approved capital restoration plan if, after consideration of changes in conditions of the Bank, changes in market conditions and other relevant factors, the Director determines that such amendments are consistent with the restoration of the Bank's capital to levels necessary to meet its risk-based and minimum capital requirements in a reasonable period of time and with the safe and sound operations of the Bank.

(f) *Effectiveness of provisions.* A Bank is obligated to implement and fulfill all provisions of an approved capital restoration plan. Unless expressly addressed by the terms of the capital restoration plan, a Bank remains bound by each and every obligation and requirement set forth in the approved capital restoration plan until such requirement or obligation is amended under paragraph (e) of this section or terminated in writing by the Director.

(g) *Appointment of conservator or receiver.* Notwithstanding any other provision of federal or state law, the Director may appoint the FHFA as conservator or receiver of any Bank that is classified as undercapitalized or significantly undercapitalized if the Bank fails to submit a capital restoration plan acceptable to the Director within the time frames established by this section or if the Bank materially fails to implement any capital restoration plan that has been approved by the Director. A Bank may within 30 days of such appointment bring an action in the United States district court for the judicial district in which the Bank is established pursuant to section 3 of the Bank Act (12 U.S.C. 1423) or in the United States District Court for the District of Columbia, for an order requiring the FHFA to remove itself as conservator or receiver.

[74 FR 5604, Jan. 30, 2009, as amended at 74 FR 38513, Aug. 4, 2009]

§ 1229.12 Procedures related to capital classification and other actions.

(a) *Classification or reclassification of a Bank.* Before finalizing any decision to classify a Bank under § 1229.2(a) of this subpart or reclassify the Bank under § 1229.4(a) of this subpart, the Director shall provide the Bank with written notification of the proposed action that states the reasons for the proposed action and describes the information on which the proposed action is based. The notice required under this paragraph may be combined with the notice of a proposed supervisory action required under paragraph (b) of this section. The Director also may combine a notice informing the Bank of its capital classification and simultaneously informing the Bank that the Director intends to reclassify a Bank to a lower capital classification category.

(b) *Notice of a supervisory action.* Before finalizing any action or actions authorized under § 1229.7 or § 1229.9 of this subpart, the Director shall provide the Bank with written notification of the proposed action that states the reasons for the proposed action and describes the information on which the proposed action is based. The notice required under this paragraph may be combined with the notice of a proposed action to classify or reclassify the Bank required under paragraph (a) of this section.

(c) *Bank response.* During the 30 calendar day period beginning on the date that the Bank is provided notice under paragraph (a) or (b) of this section of a proposed action or actions, a Bank may submit to the Director any information that the Bank considers relevant or appropriate for the Director to consider in determining whether to finalize the proposed action. The Director may, in his or her sole discretion, convene an informal hearing with representatives of the Bank to receive or discuss any such information. The Director, in his or her sole discretion, also may extend the period in which the Bank may respond to a notice for an additional 30 calendar days for good cause, or shorten such comment period if the Director determines the condition of the Bank requires faster action or a shorter comment period or if the Bank consents to a shorter comment period. The Director shall inform the Bank in writing, which may be provided as part of the notice required under paragraphs (a) or (b) of this section, of any decision to extend or shorten the comment period. The failure of a Bank to provide information during the allotted comment period will waive any right of the Bank to comment on the proposed action.

(d) *Final action.* At the earlier of the completion of the comment period established under paragraph (c) or the receipt of information provided by the Bank during such period, the Director shall determine whether to take the proposed action or actions that were the subject of the notice under paragraphs (a) or (b) of this section, after taking into consideration any information provided by the Bank. Such notice shall respond to any information submitted by the Bank. Any final order that the Bank take action, refrain from action or comply with any other requirement that was the subject of a notice under paragraph (b) of this section shall take effect upon the Bank's receipt of the notice required under this paragraph, unless a different effective date is set forth in this notice, and shall remain in effect and binding on the Bank until terminated in writing by the Director or until any terms and

conditions for termination, as set forth in the notice, have been met.

(e) *Final actions under this section.* Any final decision that the Bank take action, refrain from action or comply with any other requirement that was the subject of a notice under paragraph (b) of this section shall constitute an order under the Safety and Soundness Act. The Director in his or her discretion may apply to the United States District Court for the District of Columbia or to the United States district court for the judicial district in which the Bank in question is established pursuant to section 3 of the Bank Act (12 U.S.C. 1423) for the enforcement of such order, as allowed under §1375 of the Safety and Soundness Act (12 U.S.C. 4635) . In addition, a Bank or any executive officer or director of a Bank can be subject to enforcement action, including the imposition of civil monetary penalties, under §1371, §1372 or §1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, or 4636) for failure to comply with such an order.

(f) *Judicial review.* A Bank that is not classified as critically undercapitalized may obtain judicial review of any final capital classification decision or of any final decision to take supervisory action made by the Director under §1229.2, §1229.4, §1229.7 or §1229.9 in accordance with the requirements and procedures set forth in §1369D of the Safety and Soundness Act (12 U.S.C. 4623).

Subpart B—Enterprises

AUTHORITY: 12 U.S.C. 4513b, 4526, 4613, 4614, 4615, 4616, 4617.

SOURCE: 76 FR 35733, June 20, 2011, unless otherwise noted.

§1229.13 Definitions.

For purposes of this subpart:

Capital distribution means—

(1) Any dividend or other distribution in cash or in kind made with respect to any shares of, or other ownership interest in, an Enterprise, except a dividend consisting only of shares of the Enterprise;

(2) Any payment made by an Enterprise to repurchase, redeem, retire, or otherwise acquire any of its shares or other ownership interests, including any extension of credit made to finance an acquisition by the Enterprise of such shares or other ownership interests, except to the extent the Enterprise makes a payment to repurchase its shares for the purpose of fulfilling an obligation of the Enterprise under an employee stock ownership plan that is qualified under the Internal Revenue Code of 1986 (26 U.S.C. 401 *et seq.*) or any substantially equivalent plan as determined by the Director of FHFA in writing in advance; and

(3) Any payment of any claim, whether or not reduced to judgment, liquidated or unliquidated, fixed, contingent, matured or unmatured, disputed or undisputed, legal, equitable, secured or unsecured, arising from rescission of a purchase or sale of an equity security of an Enterprise or for damages arising from the purchase, sale, or retention of such a security.

PART 1230—EXECUTIVE COMPENSATION

Sec.

AUTHORITY: 12 U.S.C. 1427, 1431(l)(5), 1452(h), 4502(6), 4502(12), 4513, 4514, 4517, 4518, 4518a, 4526, 4631, 4632, 4636, and 1723a(d).

SOURCE: 79 FR 4393, Jan. 28, 2014, unless otherwise noted.

§1230.1 Purpose.

The purpose of this part is to implement requirements relating to the supervisory authority of FHFA under the Safety and Soundness Act with respect to compensation provided by the regulated entities and the Office of Finance to their executive officers. This part also establishes a structured process for submission of relevant information by the regulated entities and the Office of Finance, in order to facilitate and enhance the efficiency of FHFA's oversight of executive compensation.

§ 1230.2 Definitions.

The following definitions apply to the terms used in this part:

Charter acts mean the Federal National Mortgage Association Charter Act and the Federal Home Loan Mortgage Corporation Act, which are codified at 12 U.S.C. 1716 through 1723i and 12 U.S.C. 1451 through 1459, respectively.

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with employment. Compensation includes all direct and indirect payments of benefits, both cash and non-cash, granted to or for the benefit of any executive officer, including, but not limited to, payments and benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, post-employment benefit, or other compensatory arrangement.

Enterprise means the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, Enterprises) and, except as provided by the Director, any affiliate thereof.

Executive officer means:

(1) With respect to an Enterprise:

(i) The chairman of the board of directors, chief executive officer, chief financial officer, chief operating officer, president, vice chairman, any executive vice president, any senior vice president, any individual in charge of a principal business unit, division, or function, and any individual who performs functions similar to such positions whether or not the individual has an official title; and

(ii) Any other officer as identified by the Director;

(2) With respect to a Bank:

(i) The president, the chief financial officer, and the three other most highly compensated officers; and

(ii) Any other officer as identified by the Director.

(3) With respect to the Office of Finance:

(i) The chief executive officer, chief financial officer, and chief operating officer; and

(ii) Any other officer identified by the Director.

Reasonable and comparable means compensation that is:

(1) *Reasonable*—compensation, taken in whole or in part, that would be appropriate for the position and based on a review of relevant factors including, but not limited to:

(i) The duties and responsibilities of the position;

(ii) Compensation factors that indicate added or diminished risks, constraints, or aids in carrying out the responsibilities of the position; and

(iii) Performance of the regulated entity, the specific employee, or one of the entity's significant components with respect to achievement of goals, consistency with supervisory guidance and internal rules of the entity, and compliance with applicable law and regulation.

(2) *Comparable*—compensation that, taken in whole or in part, does not materially exceed compensation paid at institutions of similar size and function for similar duties and responsibilities.

Regulated entity means any Enterprise and any Federal Home Loan Bank.

§ 1230.3 Prohibition and withholding of executive compensation.

(a) *In general.* The Director may review the compensation arrangements for any executive officer of a regulated entity or the Office of Finance at any time, and shall prohibit the regulated entity or the Office of Finance from providing compensation to any such executive officer that the Director determines is not reasonable and comparable with compensation for employment in other similar businesses involving similar duties and responsibilities. No regulated entity or the Office of Finance shall pay compensation to an executive officer that is not reasonable and comparable with compensation paid by such similar businesses involving similar duties and responsibilities. No Enterprise in conservatorship shall pay a bonus to any senior executive during the period of that conservatorship.

(b) *Factors to be taken into account.* In determining whether compensation provided by a regulated entity or the

Office of Finance to an executive officer is not reasonable and comparable, the Director may take into consideration any factors the Director considers relevant, including any wrongdoing on the part of the executive officer, such as any fraudulent act or omission, breach of trust or fiduciary duty, violation of law, rule, regulation, order, or written agreement, and insider abuse with respect to the regulated entity or the Office of Finance.

(c) *Prohibition on setting compensation by Director.* In carrying out paragraph (a) of this section, the Director may not prescribe or set a specific level or range of compensation.

(d) *Advance notice to Director of certain compensation actions.* (1) A regulated entity or the Office of Finance shall not, without providing the Director at least 60 days' advance written notice, enter into any written arrangement that provides incentive awards to any executive officer or officers.

(2) A regulated entity or the Office of Finance shall not, without providing the Director at least 30 days' advance written notice, enter into any written arrangement that:

(i) Provides an executive officer a term of employment for a term of six months or more; or

(ii) In the case of a Bank or the Office of Finance, provides compensation to any executive officer in connection with the termination of employment, or establishes a policy of compensation in connection with the termination of employment.

(3) A regulated entity or the Office of Finance shall not, without providing the Director at least 30 days' advance written notice, pay, disburse, or transfer to any executive officer, annual compensation (where the annual amount has changed); pay for performance or other incentive pay; any amounts under a severance plan, change-in-control agreement, or other separation agreement; any compensation that would qualify as direct compensation for purposes of securities filings; or any other element of compensation identified by the Director prior to the notice period.

(4) Notwithstanding the foregoing review periods, a regulated entity or the Office of Finance shall provide five business days' advance written notice to the Director before committing to pay compensation of any amount or type to an executive officer who is being newly hired.

(5) The Director reserves the right to extend any of the foregoing review periods, and may do so in the Director's discretion, upon notice to the regulated entity or the Office of Finance. Any such notice shall set forth the number of business or calendar days by which the review period is being extended.

(e) *Withholding, escrow, prohibition.* During the review period required by paragraph (d) of this section, or any extension thereof, a regulated entity or the Office of Finance shall not execute the compensation action that is under review unless the Director provides written notice of approval or non-objection. During a review under paragraph (a) or (d) of this section, or at any time before an executive compensation action has been taken, the Director may, by written notice, require a regulated entity or the Office of Finance to withhold any payment, transfer, or disbursement of compensation to an executive officer, or to place such compensation in an escrow account, or may prohibit the action.

§ 1230.4 Prior approval of termination agreements of Enterprises.

(a) *In general.* An Enterprise may not enter into any agreement or contract to provide any payment of money or other thing of current or potential value in connection with the termination of employment of an executive officer unless the agreement or contract is approved in advance by the Director.

(b) *Covered agreements or contracts.* An agreement or contract that provides for termination payments to an executive officer of an Enterprise that was entered into before October 28, 1992,[1] is not retroactively subject to approval or disapproval by the Director. However, any renegotiation, amendment, or change to such an agreement or contract shall be considered as entering

[1] This date refers to the date of enactment of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

into an agreement or contract that is subject to approval by the Director.

(c) *Factors to be taken into account.* In making the determination whether to approve or disapprove termination benefits, the Director may consider:

(1) Whether the benefits provided under the agreement or contract are comparable to benefits provided under such agreements or contracts for officers of other public or private entities involved in financial services and housing interests who have comparable duties and responsibilities;

(2) The factors set forth in §1230.3(b); and

(3) Such other information as deemed appropriate by the Director.

(d) *Exception to prior approval.* An employment agreement or contract subject to prior approval of the Director under this section may be entered into prior to that approval, provided that such agreement or contract specifically provides notice that termination benefits under the agreement or contract shall not be effective and no payments shall be made under such agreement or contract unless and until approved by the Director. Such notice should make clear that alteration of benefit plans subsequent to FHFA approval under this section, which affect final termination benefits of an executive officer, requires review at the time of the individual's termination from the Enterprise and prior to the payment of any benefits.

(e) *Effect of prior approval of an agreement or contract.* The Director's approval of an executive officer's termination of employment benefits shall not preclude the Director from making any subsequent determination under this section to prohibit and withhold executive compensation.

(f) *Form of approval.* The Director's approval pursuant to this section may occur in such form and manner as the Director shall provide through written notice to the regulated entities or the Office of Finance.

§1230.5 Submission of supporting information.

In support of the reviews and decisions provided for in this part, the Director may issue guidance, orders, or notices on the subject of information submissions by the regulated entities and the Office of Finance.

PART 1231—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513, 4517, 4518, 4518a, 4526, and 4617.

SOURCE: 73 FR 53357, Sept. 16, 2008, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part appear at 83 FR 49993, Oct. 4, 2018.

§1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Safety and Soundness Act (12 U.S.C. 4518(e)) by setting forth the factors that the Director will take into consideration in determining whether to limit or prohibit golden parachute payments and agreements and by setting forth conditions for prohibited and permissible indemnification payments that regulated entities and the Office of Finance (OF) may make to affiliated parties.

[83 FR 65289, Dec. 20, 2018]

§1231.2 Definitions.

The following definitions apply to the terms used in this part:

Affiliated party means:

(1) With respect to a golden parachute payment:

(i) Any director, officer, or employee of a regulated entity or the OF; and

(ii) Any other person as determined by the Director (by regulation or on a case-by-case basis) who participates or participated in the conduct of the affairs of the regulated entity or the OF, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank; and

(2) With respect to an indemnification payment:

(i) By the OF, any director, officer, or manager of the OF; and

(ii) By a regulated entity:

(A) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(B) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

(C) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant) if:

(*1*) The independent contractor knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice; and

(*2*) Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a significant adverse effect on, the regulated entity; or

(D) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity.

Agreement means, with respect to a golden parachute payment, any plan, contract, arrangement, or other statement setting forth conditions for any payment by a regulated entity or the OF to an affiliated party.

Bona fide deferred compensation plan or arrangement means any plan, contract, agreement, or other arrangement:

(1) Whereby an affiliated party voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals); or

(2) That is established as a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (1) of this definition:

(i) Primarily for the purpose of providing benefits for certain affiliated parties in excess of the limitations on contributions and benefits imposed by sections 401(a)(17), 402(g), 415, or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 401(a)(17), 402(g), 415); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management, or highly compensated employees; and

(3) In the case of any plans as described in paragraphs (1) and (2) of this definition, the following requirements shall apply:

(i) The affiliated party has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(ii) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(iii) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to the regulated entity or the OF becoming a troubled institution;

(iv) The regulated entity or the OF has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP, or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits and related expenses, except that the assets of such trust may be available to satisfy claims of the troubled institution's creditors in the case of insolvency; and

(v) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

Executive officer means an ''executive officer'' as defined in 12 CFR 1230.2, and includes any director, officer, employee or other affiliated party whose participation in the conduct of the business of

the regulated entity or the OF has been determined by the Director to be so substantial as to justify treatment as an ''executive officer.''

Golden parachute payment means any payment in the nature of compensation made by a troubled institution for the benefit of any current or former affiliated party that is contingent on or provided in connection with the termination of such party's primary employment or affiliation with the troubled institution.

Indemnification payment means any payment (or any agreement to make any payment) by any regulated entity or the OF for the benefit of any current or former affiliated party, to pay or reimburse such person for any liability or legal expense.

Individually negotiated settlement agreement means an agreement that settles a claim, or avoids a claim reasonably anticipated to be brought, against a troubled institution by an affiliated party and involves a payment in association with termination to, and a release of claims by, the affiliated party.

Liability or legal expense means—

(1) Any legal or other professional expense incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

Payment means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

Permitted means, with regard to any agreement, that the agreement either does not require the Director's consent under this part or has received the Director's consent in accordance with this part.

Troubled institution means a regulated entity or the OF that is:

(1) Insolvent;

(2) In conservatorship or receivership;

(3) Subject to a cease-and-desist order or written agreement issued by FHFA that requires action to improve its financial condition or is subject to a proceeding initiated by the Director, which contemplates the issuance of an order that requires action to improve its financial condition, unless otherwise informed in writing by FHFA;

(4) Assigned a composite rating of 4 or 5 by FHFA under its CAMELSO examination rating system as it may be revised from time to time;

(5) Informed in writing by the Director that it is a troubled institution for purposes of the requirements of this part on the basis of the most recent report of examination or other information available to FHFA, on account of its financial condition, risk profile, or management deficiencies; or

(6) In contemplation of the occurrence of an event described in paragraphs (1) through (5) of this definition. A regulated entity or the OF is subject to a rebuttable presumption that it is in contemplation of the occurrence of such an event during the 90 day period preceding such occurrence.

[83 FR 65289, Dec. 20, 2018]

§ 1231.3 Golden parachute payments and agreements.

(a) *In general, FHFA consent is required.* No troubled institution shall make or agree to make any golden

parachute payment without the Director's consent, except as provided in this part.

(b) *Exempt agreements and payments.* The following agreements and payments, including payments associated with an agreement, are not golden parachute agreements or payments for purposes of this part and, for that reason, may be made without the Director's consent:

(1) Any pension or retirement plan that is qualified (or is intended to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401);

(2) Any ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), other than:

(i) Any deferred compensation plan or arrangement; and

(ii) Any severance pay plan or agreement;

(3) Any benefit plan that:

(i) Is a ''nondiscriminatory employee plan or program'' for the purposes of section 280G of the Internal Revenue Code of 1986 (26 U.S.C. 280G) and applicable regulations; or

(ii) Has been submitted to the Director for review in accordance with this part and that the Director has determined to be nondiscriminatory, unless such a plan is otherwise specifically addressed by this part;

(4) Any ''bona fide deferred compensation plan or arrangement'' as defined in this part provided that the plan:

(i) Was in effect for, and not materially amended to increase benefits payable thereunder (except for changes required by law) within, the one-year period prior to the regulated entity or the OF becoming a troubled institution; or

(ii) Has been determined to be permissible by the Director;

(5) Any payment made by reason of:

(i) Death; or

(ii) Termination caused by disability of the affiliated party; and

(6) Any severance or similar payment that is required to be made pursuant to a state statute that is applicable to all employers within the appropriate jurisdiction (with the exception of employers that are exempt due to their small number of employees or other similar criteria).

(c) *Golden parachute payment agreements for which FHFA consent is not required.* A troubled institution may enter into the following agreements to make a golden parachute payment without the Director's consent:

(1) With any affiliated party where the agreement is expressly directed or established by the Director exercising authority conferred by 12 U.S.C. 4617.

(2) With an affiliated party who is not an executive officer where the agreement:

(i) Is an individually negotiated settlement agreement, and the conditions of paragraph (e)(2) of this section are met; or

(ii) Provides for a golden parachute payment that, when aggregated with all other golden parachute payments to the affiliated party, does not exceed $5,000 (subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(d) *Golden parachute payments for which FHFA consent is not required.* A troubled institution may make the following golden parachute payments without the Director's consent:

(1) To any affiliated party where:

(i) The payment is required to be made pursuant to a permitted individually negotiated settlement agreement; or

(ii) The Director previously consented to such payment in a written notice to the troubled institution (which may be included in the Director's consent to the agreement), the payment is made in accordance with a permitted agreement, and the troubled institution has met any conditions established by the Director for making the payment.

(2) To an executive officer where the payment recognizes a significant life event and does not exceed $500 in value (subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(3) To an affiliated party who is not an executive officer, where:

(i) The payment is made in accordance with a permitted agreement and the conditions of paragraph (e)(2) of this section are met; or

(ii) The payment when aggregated with other golden parachute payments to the affiliated party does not exceed $5,000 (subject to any adjustment for inflation pursuant to paragraph (g) of this section).

(e) *Required due diligence review; due diligence standard*—(1) *Agreements and payments where consent is requested.* A troubled institution making a request for consent to enter into a golden parachute payment agreement with, or to make a golden parachute payment to, an individual affiliated party shall conduct due diligence appropriate to the level and responsibility of the affiliated party covered by the agreement or to whom payment would be made, to determine whether there is information, evidence, documents, or other materials that indicate there is a reasonable basis to believe, at the time the request is submitted, that the affiliated party:

(i) Has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity or the OF that is likely to have a material adverse effect on the regulated entity or the OF;

(ii) Is substantially responsible for the regulated entity or the OF being a troubled institution;

(iii) Has materially violated any applicable Federal or State law or regulation that has had or is likely to have a material effect on the regulated entity or the OF; or

(iv) Has violated or conspired to violate sections 215, 657, 1006, 1014, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a ''financial institution'' as the term is defined in title 18 of the United States Code (18 U.S.C. 20).

(2) *Agreements and payments permitted without the Director's consent.* No troubled institution shall enter into an agreement pursuant to paragraph (c)(2)(i) of this section or make a payment pursuant to paragraph (d)(3)(i) of this section unless it is reasonably assured, following due diligence in accordance with paragraph (e)(1) of this section, that the affiliated party to whom payment would be made has not engaged in any of the actions listed in paragraphs (e)(1)(i) through (iv) of this section.

(3) *Required notice to FHFA.* If a troubled institution determines it is unable to enter into an agreement pursuant to paragraph (c)(2)(i) of this section or make a payment pursuant to (d)(3)(i) of this section without the Director's consent because it cannot meet the standard set forth in paragraph (e)(2) of this section, and thereafter does not request the Director's consent to make the payment, then the troubled institution shall provide notice to FHFA of each reason for which it cannot meet the standard set forth in paragraph (e)(2) of this section, within 15 business days of its determination.

(f) *Factors for Director consideration.* In making a determination under this section, the Director may consider:

(1) Whether, and to what degree, the affiliated party was in a position of managerial or fiduciary responsibility;

(2) The length of time the affiliated party was affiliated with the regulated entity or the OF, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of affiliation;

(3) Whether the golden parachute payment would be made pursuant to an employee benefit plan that is usual and customary;

(4) Whether the golden parachute payment or agreement is excessive or abusive or threatens the financial condition of the troubled institution; and

(5) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment or agreement, including any fraudulent act or omission, breach of fiduciary duty, violation of law, rule, regulation, order, or written agreement, and the level of willful misconduct, breach of fiduciary duty, and malfeasance on the part of the affiliated party.

(g) *Adjustment for inflation.* Monetary amounts set forth in this part may be adjusted for inflation by increasing the dollar amount set forth in this part by the percentage, if any, by which the Consumer Price Index for all-urban consumers published by the Department of Labor (''CPI–U'') for December of the calendar year preceding payment

exceeds the CPI–U for the month of November 2018, with the resulting sum rounded up to the nearest whole dollar.

[83 FR 62590, Dec. 20, 2018]

§ 1231.4 Indemnification payments.

(a) *Prohibited indemnification payments.* Except as permitted in paragraph (b) of this section, a regulated entity or the OF may not make indemnification payments with respect to an administrative proceeding or civil action that has been initiated by FHFA.

(b) *Permissible indemnification payments.* A regulated entity or the OF may pay:

(1) Premiums for any commercial insurance policy or fidelity bonds for directors and officers, to the extent that the insurance or fidelity bond covers expenses and restitution, but not a judgment in favor of FHFA or a civil money penalty imposed by FHFA.

(2) Expenses of defending an action, subject to the affiliated party's agreement to repay those expenses if the affiliated party either:

(i) When the proceeding results in a final and non-reviewable order, is found culpable for violating a law or regulation that is the basis for the charges to which the expenses specifically relate; or

(ii) Enters into a settlement of those charges in which the affiliated party admits culpability with respect to them; or

(iii) Is subject to a final and non-reviewable prohibition order under 12 U.S.C. 4636a.

(3) Amounts due under an indemnification agreement entered into with a named affiliated party on or prior to September 20, 2016.

(c) *Process; factors.* With respect to payments under paragraph (b)(2) of this section:

(1) The board of directors of the regulated entity or the OF must conduct a due investigation and make a written determination in good faith that:

(i) The affiliated party acted in good faith and in a manner that he or she reasonably believed to be in the best interests of the regulated entity or the OF; and

(ii) Such payments will not materially adversely affect the safety and soundness of the regulated entity or the OF.

(2) The affiliated party may not participate in the board's deliberations or decision.

(3) If a majority of the board are respondents in the action, the remaining board members may approve payment after obtaining a written opinion of outside counsel that the conditions of this regulation have been met.

(4) If all of the board members are respondents, they may approve payment after obtaining a written opinion of outside counsel that the conditions of this regulation have been met.

(d) *Scope.* This section does not apply to a regulated entity operating in conservatorship or receivership or to a limited-life regulated entity.

[83 FR 49993, Oct. 4, 2018]

§ 1231.5 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by FHFA, shall not in any way bind any receiver of a regulated entity. Any consent or approval granted under the provisions of this part by FHFA shall not in any way obligate FHFA as receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification, or other agreement, or otherwise improve any claim of any affiliated party on or against FHFA as receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of an affiliated party contrary to section 1318(e)(3) of the Safety and Soundness Act (12 U.S.C. 4518(e)(3)).

[83 FR 65291, Dec, 20, 2018]

§ 1231.6 Filing instructions.

(a) *Scope.* This section contains procedures for requesting the consent of the Director and for filing any notice, where consent or notice is required by § 1231.3.

(b) *Where to file.* A troubled institution must submit any request for consent or notice required by § 1231.3 to the Manager, Executive Compensation Branch, or to such other person as FHFA may direct.

(c) *Content of a request for FHFA consent.* A request pursuant to §1231.3 must:

(1) Be in writing;

(2) State the reasons why the troubled institution seeks to enter into the agreement or make the payment;

(3) Identify the affiliated party or describe of the class or group of affiliated parties who would receive or be eligible to receive payment;

(4) Include a copy of any agreement, including any plan document, contract, other agreement or policy regarding the subject matter of the request;

(5) State the cost of the proposed payment or payments, and the impact on the capital and earnings of the troubled institution;

(6) State the reasons why consent to the agreement or payment, or to both the agreement and payment, should be granted;

(7) For any plan that the troubled institution believes is a nondiscriminatory benefit plan, other than a plan covered by §1231.3(b)(3)(i), state the basis for the conclusion that the plan is nondiscriminatory;

(8) For any bona fide deferred compensation plan or arrangement, state whether the plan would be exempt under this part but for the fact that it was either established or materially amended to increase benefits payable thereunder (except for changes required by law) within the one-year period prior to the regulated entity or the OF becoming a troubled institution;

(9) For any agreement with an individual affiliated party, or for any payment, either:

(i) State that the troubled institution is reasonably assured that the affiliated party has not engaged in any of the actions listed in §1231.3(e)(1)(i) through (iv), or,

(ii) If the troubled institution is not reasonably assured that the affiliated party has not engaged in any of the actions listed in §1231.3(e)(1)(i) through (iv) but nonetheless wishes to request consent, describe the results of its due diligence and, in light of those results, the reason why consent to the agreement or payment should be granted.

(d) *FHFA decision on a request.* FHFA shall provide the troubled institution with written notice of the decision on a request as soon as practicable after it is rendered.

(e) *Content of notice to FHFA.* A notice pursuant to §1231.3(e)(3) must:

(1) Be in writing;

(2) Identify the affiliated party who would receive or be eligible to receive payment;

(3) Include a copy of any agreement or policy regarding the subject matter of the request; and

(4) State each reason why the troubled institution cannot meet the standard set forth in §1231.3(e)(2).

(f) *Waiver of form or content requirements.* FHFA may waive or modify any requirement related to the form or content of a request or notice, in circumstances deemed appropriate by FHFA.

(g) *Additional information.* FHFA may request additional information at any time during the processing of the request or after receiving a notice.

[83 FR 65291, Dec. 20, 2018]

PART 1233—REPORTING OF FRAUDULENT FINANCIAL INSTRUMENTS

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513, 4514, 4526, 4642.

SOURCE: 75 FR 4258, Jan. 27, 2010, unless otherwise noted.

§1233.1 Purpose.

The purpose of this part is to implement the Safety and Soundness Act by requiring each regulated entity to report to FHFA upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. In addition, each regulated entity must establish and maintain internal controls, policies, procedures, and operational training to discover such transactions.

§ 1233.2 Definitions.

The following definitions apply to the terms used in this part:

Entity-affiliated party means—

(1) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(2) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

(3) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant);

(4) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and

(5) The Office of Finance.

Financial instrument means any legally enforceable agreement, certificate, or other writing, in hardcopy or electronic form, having monetary value including, but not limited to, any agreement, certificate, or other writing evidencing an asset pledged as collateral to a Bank by a member to secure an advance by the Bank to that member.

Fraud means a misstatement, misrepresentation, or omission that cannot be corrected and that was relied upon by a regulated entity to purchase or sell a loan or financial instrument.

Possible fraud means that a regulated entity has a reasonable belief, based upon a review of information available to the regulated entity, that fraud may be occurring or has occurred.

Purchased or sold or relating to the purchase or sale means any transaction involving a financial instrument including, but not limited to, any purchase, sale, other acquisition, or creation of a financial instrument by the member of a Bank to be pledged as collateral to the Bank to secure an advance by the Bank to that member, the pledging by a member to a Bank of such financial instrument to secure such an advance, the making of a grant by a Bank under its affordable housing program or community investment program, and the effecting of a wire transfer or other form of electronic payments transaction by the Bank.

[75 FR 4258, Jan. 27, 2010, as amended at 78 FR 2323, Jan. 11, 2013]

§ 1233.3 Reporting.

(a) *Timeframe for reporting.* (1) A regulated entity shall submit to the Director a timely written report upon discovery by the regulated entity that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument.

(2) In addition to submitting a report in accordance with paragraph (a)(1) of this section, in any situation that would have a significant impact on the regulated entity, the regulated entity shall immediately report any fraud or possible fraud to the Director by telephone or electronic communication.

(b) *Format for reporting.* (1) The report shall be in such format and shall be filed in accordance with such procedures that the Director may prescribe.

(2) The Director may require a regulated entity to provide such additional or continuing information relating to such fraud or possible fraud that the Director deems appropriate.

(3) A regulated entity may satisfy the reporting requirements of this section by submitting the required information on a form or in another format used by any other regulatory agency, provided it has first obtained the prior written approval of the Director.

(c) *Retention of records.* A regulated entity or entity-affiliated party shall maintain a copy of any report submitted to the Director and the original or business record equivalent of any supporting documentation for a period of five years from the date of submission.

(d) *Nondisclosure.* (1) A regulated entity or entity-affiliated party may not disclose to any person that it has submitted a report to the Director pursuant to this section, unless it has first obtained the prior written approval of the Director.

(2) The restriction in paragraph (d)(1) of this section does not prohibit a regulated entity from—

(i) Disclosing or reporting such fraud or possible fraud pursuant to legal requirements, including reporting to appropriate law enforcement or other governmental authorities; or

(ii) Taking any legal or business action it may deem appropriate, including any action involving the party or parties connected with the fraud or possible fraud.

(e) *No waiver of privilege.* A regulated entity does not waive any privilege it may possess under any applicable law as a consequence of reporting fraud or possible fraud under this part.

§ 1233.4 Internal controls, policies, procedures, and training.

(a) *In general.* Each regulated entity shall establish and maintain adequate and efficient internal controls, policies, procedures, and an operational training program to discover and report fraud or possible fraud in connection with the purchase or sale of any loan or financial instrument.

(b) *Examination.* The examination by FHFA of fraud reporting programs of each regulated entity includes an evaluation of the effectiveness of the internal controls, policies, procedures, and operational training program in place to minimize risks from fraud and to report fraud or possible fraud to FHFA in accordance with this regulation.

§ 1233.5 Protection from liability for reports.

As provided by section 1379E of the Safety and Soundness Act (12 U.S.C. 4642(b)), a regulated entity that, in good faith, submits a report pursuant to this part, and any entity-affiliated party, that, in good faith, submits or requires a person to submit a report pursuant to this part, shall not be liable to any person under any provision of law or regulation, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement) for such report, or for any failure to provide notice of such report to the person who is the subject of such report, or any other persons identified in the report.

§ 1233.6 Supervisory action.

Failure by a regulated entity to comply with this part may subject the regulated entity or the board members, officers, or employees thereof to supervisory action by FHFA, including but not limited to, cease-and-desist proceedings and civil money penalties.

PART 1234—CREDIT RISK RETENTION

Subpart A—Authority, Purpose, Scope and Definitions

Sec.

Subpart B—Credit Risk Retention

Subpart C—Transfer of Risk Retention

Subpart D—Exceptions and Exemptions

AUTHORITY: 12 U.S.C. 4511(b), 4526, 4617; 15 U.S.C. 78o–11(b)(2).

SOURCE: 79 FR 77740, Dec. 24, 2014, unless otherwise noted.

Subpart A—Authority, Purpose, Scope and Definitions

§ 1234.1 Purpose, scope and reservation of authority.

(a) *Purpose.* This part requires securitizers to retain an economic interest in a portion of the credit risk for any residential mortgage asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party in a transaction within the scope of section 15G of the Exchange Act. This part specifies the permissible types, forms, and amounts of credit risk retention, and it establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or that otherwise qualify for an exemption.

(b) *Scope.* (1) Effective December 24, 2015, this part will apply to any securitizer that is an entity regulated by the Federal Housing Finance Agency with respect to a securitization transaction collateralized by residential mortgages.

(2) Effective December 24, 2016, this part will apply to any securitizer that is an entity regulated by the Federal Housing Finance Agency with respect to a securitization transaction collateralized by assets other than residential mortgages.

(c) *Reservation of authority.* Nothing in this part shall be read to limit the authority of the Director of the Federal Housing Finance Agency to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, or violations of law.

[79 FR 77765, Dec. 24, 2014]

§ 1234.2 Definitions.

For purposes of this part, the following definitions apply:

ABS interest means:

(1) Any type of interest or obligation issued by an issuing entity, whether or not in certificated form, including a security, obligation, beneficial interest or residual interest (other than an uncertificated regular interest in a REMIC that is held by another REMIC, where both REMICs are part of the same structure and a single REMIC in that structure issues ABS interests to investors, or a non-economic residual interest issued by a REMIC), payments on which are primarily dependent on the cash flows of the collateral owned or held by the issuing entity; and

(2) Does not include common or preferred stock, limited liability interests, partnership interests, trust certificates, or similar interests that:

(i) Are issued primarily to evidence ownership of the issuing entity; and

(ii) The payments, if any, on which are not primarily dependent on the cash flows of the collateral held by the issuing entity; and

(3) Does not include the right to receive payments for services provided by the holder of such right, including servicing, trustee services and custodial services.

Affiliate of, or a person *affiliated* with, a specified person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

Appropriate Federal banking agency has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Asset means a self-liquidating financial asset (including but not limited to a loan, lease, mortgage, or receivable).

Asset-backed security has the same meaning as in section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)).

Collateral means, with respect to any issuance of ABS interests, the assets that provide the cash flow and the servicing assets that support such cash flow for the ABS interests irrespective of the legal structure of issuance, including security interests in assets or other property of the issuing entity, fractional undivided property interests in the assets or other property of the issuing entity, or any other property interest in or rights to cash flow from such assets and related servicing assets. Assets or other property

collateralize an issuance of ABS interests if the assets or property serve as collateral for such issuance.

Commercial real estate loan has the same meaning as in §1234.14.

Commission means the Securities and Exchange Commission.

Control including the terms ''controlling,'' ''controlled by'' and ''under common control with'':

(1) Means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(2) Without limiting the foregoing, a person shall be considered to control another person if the first person:

(i) Owns, controls or holds with power to vote 25 percent or more of any class of voting securities of the other person; or

(ii) Controls in any manner the election of a majority of the directors, trustees or persons performing similar functions of the other person.

Credit risk means:

(1) The risk of loss that could result from the failure of the borrower in the case of a securitized asset, or the issuing entity in the case of an ABS interest in the issuing entity, to make required payments of principal or interest on the asset or ABS interest on a timely basis;

(2) The risk of loss that could result from bankruptcy, insolvency, or a similar proceeding with respect to the borrower or issuing entity, as appropriate; or

(3) The effect that significant changes in the underlying credit quality of the asset or ABS interest may have on the market value of the asset or ABS interest.

Creditor has the same meaning as in 15 U.S.C. 1602(g).

Depositor means:

(1) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity;

(2) The sponsor, in the case of a securitization transaction where there is not an intermediate transfer of the assets from the sponsor to the issuing entity; or

(3) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity in the case of a securitization transaction where the person transferring or selling the securitized assets directly to the issuing entity is itself a trust.

Eligible horizontal residual interest means, with respect to any securitization transaction, an ABS interest in the issuing entity:

(1) That is an interest in a single class or multiple classes in the issuing entity, provided that each interest meets, individually or in the aggregate, all of the requirements of this definition;

(2) With respect to which, on any payment date or allocation date on which the issuing entity has insufficient funds to satisfy its obligation to pay all contractual interest or principal due, any resulting shortfall will reduce amounts payable to the eligible horizontal residual interest prior to any reduction in the amounts payable to any other ABS interest, whether through loss allocation, operation of the priority of payments, or any other governing contractual provision (until the amount of such ABS interest is reduced to zero); and

(3) That, with the exception of any non-economic REMIC residual interest, has the most subordinated claim to payments of both principal and interest by the issuing entity.

Eligible horizontal cash reserve account means an account meeting the requirements of §1234.4(b).

Eligible vertical interest means, with respect to any securitization transaction, a single vertical security or an interest in each class of ABS interests in the issuing entity issued as part of the securitization transaction that constitutes the same proportion of each such class.

Federal banking agencies means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

GAAP means generally accepted accounting principles as used in the United States.

Issuing entity means, with respect to a securitization transaction, the trust or other entity:

(1) That owns or holds the pool of assets to be securitized; and

(2) In whose name the asset-backed securities are issued.

Majority-owned affiliate of a person means an entity (other than the issuing entity) that, directly or indirectly, majority controls, is majority controlled by or is under common majority control with, such person. For purposes of this definition, majority control means ownership of more than 50 percent of the equity of an entity, or ownership of any other controlling financial interest in the entity, as determined under GAAP.

Originator means a person who:

(1) Through an extension of credit or otherwise, creates an asset that collateralizes an asset-backed security; and

(2) Sells the asset directly or indirectly to a securitizer or issuing entity.

REMIC has the same meaning as in 26 U.S.C. 860D.

Residential mortgage means:

(1) A transaction that is a covered transaction as defined in §1026.43(b) of Regulation Z (12 CFR 1026.43(b)(1));

(2) Any transaction that is exempt from the definition of ''covered transaction'' under §1026.43(a) of Regulation Z (12 CFR 1026.43(a)); and

(3) Any other loan secured by a residential structure that contains one to four units, whether or not that structure is attached to real property, including an individual condominium or cooperative unit and, if used as a residence, a mobile home or trailer.

Retaining sponsor means, with respect to a securitization transaction, the sponsor that has retained or caused to be retained an economic interest in the credit risk of the securitized assets pursuant to subpart B of this part.

Securitization transaction means a transaction involving the offer and sale of asset-backed securities by an issuing entity.

Securitized asset means an asset that:

(1) Is transferred, sold, or conveyed to an issuing entity; and

(2) Collateralizes the ABS interests issued by the issuing entity.

Securitizer means, with respect to a securitization transaction, either:

(1) The depositor of the asset-backed securities (if the depositor is not the sponsor); or

(2) The sponsor of the asset-backed securities.

Servicer means any person responsible for the management or collection of the securitized assets or making allocations or distributions to holders of the ABS interests, but does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the ABS interests if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Servicing assets means rights or other assets designed to assure the servicing or timely distribution of proceeds to ABS interest holders and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the issuing entity's securitized assets. Servicing assets include amounts received by the issuing entity as proceeds of securitized assets, including proceeds of rights or other assets, whether as remittances by obligors or as other recoveries.

Single vertical security means, with respect to any securitization transaction, an ABS interest entitling the sponsor to a specified percentage of the amounts paid on each class of ABS interests in the issuing entity (other than such single vertical security).

Sponsor means a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

State has the same meaning as in Section 3(a)(16) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(16)).

United States or U.S. means the United States of America, including its territories and possessions, any State of the United States, and the District of Columbia.

Wholly-owned affiliate means a person (other than an issuing entity) that, directly or indirectly, wholly controls, is wholly controlled by, or is wholly under common control with, another person. For purposes of this definition, ''wholly controls'' means ownership of 100 percent of the equity of an entity.

Subpart B—Credit Risk Retention

§ 1234.3 Base risk retention requirement.

(a) *Base risk retention requirement.* Except as otherwise provided in this part, the sponsor of a securitization transaction (or majority-owned affiliate of the sponsor) shall retain an economic interest in the credit risk of the securitized assets in accordance with any one of §§ 1234.4 through 1234.10. Credit risk in securitized assets required to be retained and held by any person for purposes of compliance with this part, whether a sponsor, an originator, an originator-seller, or a third-party purchaser, except as otherwise provided in this part, may be acquired and held by any of such person's majority-owned affiliates (other than an issuing entity).

(b) *Multiple sponsors.* If there is more than one sponsor of a securitization transaction, it shall be the responsibility of each sponsor to ensure that at least one of the sponsors of the securitization transaction (or at least one of their majority-owned or wholly-owned affiliates, as applicable) retains an economic interest in the credit risk of the securitized assets in accordance with any one of §§ 1234.4, 1234.5, 1234.8, 1234.9, or 1234.10.

§ 1234.4 Standard risk retention.

(a) *General requirement.* Except as provided in §§ 1234.5 through 1234.10, the sponsor of a securitization transaction must retain an eligible vertical interest or eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of this section.

(1) If the sponsor retains only an eligible vertical interest as its required risk retention, the sponsor must retain an eligible vertical interest in a percentage of not less than 5 percent.

(2) If the sponsor retains only an eligible horizontal residual interest as its required risk retention, the amount of the interest must equal at least 5 percent of the fair value of all ABS interests in the issuing entity issued as a part of the securitization transaction, determined using a fair value measurement framework under GAAP.

(3) If the sponsor retains both an eligible vertical interest and an eligible horizontal residual interest as its required risk retention, the percentage of the fair value of the eligible horizontal residual interest and the percentage of the eligible vertical interest must equal at least five.

(4) The percentage of the eligible vertical interest, eligible horizontal residual interest, or combination thereof retained by the sponsor must be determined as of the closing date of the securitization transaction.

(b) *Option to hold base amount in eligible horizontal cash reserve account.* In lieu of retaining all or any part of an eligible horizontal residual interest under paragraph (a) of this section, the sponsor may, at closing of the securitization transaction, cause to be established and funded, in cash, an eligible horizontal cash reserve account in the amount equal to the fair value of such eligible horizontal residual interest or part thereof, provided that the account meets all of the following conditions:

(1) The account is held by the trustee (or person performing similar functions) in the name and for the benefit of the issuing entity;

(2) Amounts in the account are invested only in cash and cash equivalents; and

(3) Until all ABS interests in the issuing entity are paid in full, or the issuing entity is dissolved:

(i) Amounts in the account shall be released only to:

(A) Satisfy payments on ABS interests in the issuing entity on any payment date on which the issuing entity has insufficient funds from any source to satisfy an amount due on any ABS interest; or

(B) Pay critical expenses of the trust unrelated to credit risk on any payment date on which the issuing entity has insufficient funds from any source to pay such expenses and:

(*1*) Such expenses, in the absence of available funds in the eligible horizontal cash reserve account, would be paid prior to any payments to holders of ABS interests; and

(*2*) Such payments are made to parties that are not affiliated with the sponsor; and

(ii) Interest (or other earnings) on investments made in accordance with paragraph (b)(2) of this section may be released once received by the account.

(c) *Disclosures.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors, under the caption ''Credit Risk Retention'', a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction the following disclosures in written form and within the time frames set forth in this paragraph (c):

(1) *Horizontal interest.* With respect to any eligible horizontal residual interest held under paragraph (a) of this section, a sponsor must disclose:

(i) A reasonable period of time prior to the sale of an asset-backed security issued in the same offering of ABS interests,

(A) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor expects to retain at the closing of the securitization transaction. If the specific prices, sizes, or rates of interest of each tranche of the securitization are not available, the sponsor must disclose a range of fair values (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor expects to retain at the close of the securitization transaction based on a range of bona fide estimates or specified prices, sizes, or rates of interest of each tranche of the securitization. A sponsor disclosing a range of fair values based on a range of bona fide estimates or specified prices, sizes or rates of interest of each tranche of the securitization must also disclose the method by which it determined any range of prices, tranche sizes, or rates of interest.

(B) A description of the material terms of the eligible horizontal residual interest to be retained by the sponsor;

(C) A description of the valuation methodology used to calculate the fair values or range of fair values of all classes of ABS interests, including any portion of the eligible horizontal residual interest retained by the sponsor;

(D) All key inputs and assumptions or a comprehensive description of such key inputs and assumptions that were used in measuring the estimated total fair value or range of fair values of all classes of ABS interests, including the eligible horizontal residual interest to be retained by the sponsor.

(E) To the extent applicable to the valuation methodology used, the disclosure required in paragraph (c)(1)(i)(D) of this section shall include, but should not be limited to, quantitative information about each of the following:

(*1*) Discount rates;

(*2*) Loss given default (recovery);

(*3*) Prepayment rates;

(*4*) Default rates;

(*5*) Lag time between default and recovery; and

(*6*) The basis of forward interest rates used.

(F) The disclosure required in paragraphs (c)(1)(i)(C) and (D) of this section shall include, at a minimum, descriptions of all inputs and assumptions that either could have a material impact on the fair value calculation or would be material to a prospective investor's ability to evaluate the sponsor's fair value calculations. To the extent the disclosure required in this paragraph (c)(1) includes a description of a curve or curves, the description shall include a description of the methodology that was used to derive each curve and a description of any aspects or features of each curve that could materially impact the fair value calculation or the ability of a prospective investor to evaluate the sponsor's fair value calculation. To the extent a sponsor uses information about the securitized assets in its calculation of fair value, such information shall not be as of a date more than 60 days prior to the date of first use with investors; provided that for a subsequent issuance of ABS interests by the same issuing entity with the same sponsor for which

the securitization transaction distributes amounts to investors on a quarterly or less frequent basis, such information shall not be as of a date more than 135 days prior to the date of first use with investors; provided further, that the balance or value (in accordance with the transaction documents) of the securitized assets may be increased or decreased to reflect anticipated additions or removals of assets the sponsor makes or expects to make between the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security and the closing date of the securitization.

(G) A summary description of the reference data set or other historical information used to develop the key inputs and assumptions referenced in paragraph (c)(1)(i)(D) of this section, including loss given default and default rates;

(ii) A reasonable time after the closing of the securitization transaction:

(A) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS are issued, as applicable)) of the eligible horizontal residual interest the sponsor retained at the closing of the securitization transaction, based on actual sale prices and finalized tranche sizes;

(B) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS are issued, as applicable)) of the eligible horizontal residual interest that the sponsor is required to retain under this section; and

(C) To the extent the valuation methodology or any of the key inputs and assumptions that were used in calculating the fair value or range of fair values disclosed prior to sale and required under paragraph (c)(1)(i) of this section materially differs from the methodology or key inputs and assumptions used to calculate the fair value at the time of closing, descriptions of those material differences.

(iii) If the sponsor retains risk through the funding of an eligible horizontal cash reserve account:

(A) The amount to be placed (or that is placed) by the sponsor in the eligible horizontal cash reserve account at closing, and the fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor is required to fund through the eligible horizontal cash reserve account in order for such account, together with other retained interests, to satisfy the sponsor's risk retention requirement;

(B) A description of the material terms of the eligible horizontal cash reserve account; and

(C) The disclosures required in paragraphs (c)(1)(i) and (ii) of this section.

(2) *Vertical interest.* With respect to any eligible vertical interest retained under paragraph (a) of this section, the sponsor must disclose:

(i) A reasonable period of time prior to the sale of an asset-backed security issued in the same offering of ABS interests,

(A) The form of the eligible vertical interest;

(B) The percentage that the sponsor is required to retain as a vertical interest under this section; and

(C) A description of the material terms of the vertical interest and the amount that the sponsor expects to retain at the closing of the securitization transaction.

(ii) A reasonable time after the closing of the securitization transaction, the amount of the vertical interest the sponsor retained at closing, if that amount is materially different from the amount disclosed under paragraph (c)(2)(i) of this section.

(d) *Record maintenance.* A sponsor must retain the certifications and disclosures required in paragraphs (a) and (c) of this section in its records and must provide the disclosure upon request to the Commission and its appropriate Federal banking agency, if any, until three years after all ABS interests are no longer outstanding.

§ 1234.5 Revolving pool securitizations.

(a) *Definitions.* For purposes of this section, the following definitions apply:

Revolving pool securitization means an issuing entity that is established to issue on multiple issuance dates more than one series, class, subclass, or tranche of asset-backed securities that are collateralized by a common pool of securitized assets that will change in composition over time, and that does not monetize excess interest and fees from its securitized assets.

Seller's interest means an ABS interest or ABS interests:

(1) Collateralized by the securitized assets and servicing assets owned or held by the issuing entity, other than the following that are not considered a component of seller's interest:

(i) Servicing assets that have been allocated as collateral only for a specific series in connection with administering the revolving pool securitization, such as a principal accumulation or interest reserve account; and

(ii) Assets that are not eligible under the terms of the securitization transaction to be included when determining whether the revolving pool securitization holds aggregate securitized assets in specified proportions to aggregate outstanding investor ABS interests issued; and

(2) That is *pari passu* with each series of investor ABS interests issued, or partially or fully subordinated to one or more series in identical or varying amounts, with respect to the allocation of all distributions and losses with respect to the securitized assets prior to early amortization of the revolving securitization (as specified in the securitization transaction documents); and

(3) That adjusts for fluctuations in the outstanding principal balance of the securitized assets in the pool.

(b) *General requirement.* A sponsor satisfies the risk retention requirements of § 1234.3 with respect to a securitization transaction for which the issuing entity is a revolving pool securitization if the sponsor maintains a seller's interest of not less than 5 percent of the aggregate unpaid principal balance of all outstanding investor ABS interests in the issuing entity.

(c) *Measuring the seller's interest.* In measuring the seller's interest for purposes of meeting the requirements of paragraph (b) of this section:

(1) The unpaid principal balance of the securitized assets for the numerator of the 5 percent ratio shall not include assets of the types excluded from the definition of seller's interest in paragraph (a) of this section;

(2) The aggregate unpaid principal balance of outstanding investor ABS interests in the denominator of the 5 percent ratio may be reduced by the amount of funds held in a segregated principal accumulation account for the repayment of outstanding investor ABS interests, if:

(i) The terms of the securitization transaction documents prevent funds in the principal accumulation account from being applied for any purpose other than the repayment of the unpaid principal of outstanding investor ABS interests; and

(ii) Funds in that account are invested only in the types of assets in which funds held in an eligible horizontal cash reserve account pursuant to § 1234.4 are permitted to be invested;

(3) If the terms of the securitization transaction documents set minimum required seller's interest as a proportion of the unpaid principal balance of outstanding investor ABS interests for one or more series issued, rather than as a proportion of the aggregate outstanding investor ABS interests in all outstanding series combined, the percentage of the seller's interest for each such series must, when combined with the percentage of any minimum seller's interest set by reference to the aggregate outstanding investor ABS interests, equal at least 5 percent;

(4) The 5 percent test must be determined and satisfied at the closing of each issuance of ABS interests to investors by the issuing entity, and

(i) At least monthly at a seller's interest measurement date specified under the securitization transaction documents, until no ABS interest in the issuing entity is held by any person not a wholly-owned affiliate of the sponsor; or

(ii) If the revolving pool securitization fails to meet the 5 percent test as of any date described in paragraph (c)(4)(i) of this section, and the securitization transaction documents specify a cure period, the 5 percent test must be determined and satisfied within the earlier of the cure period, or one month after the date described in paragraph (c)(4)(i).

(d) *Measuring outstanding investor ABS interests.* In measuring the amount of outstanding investor ABS interests for purposes of this section, ABS interests held for the life of such ABS interests by the sponsor or its wholly-owned affiliates may be excluded.

(e) *Holding and retention of the seller's interest; legacy trusts.* (1) Notwithstanding §1234.12(a), the seller's interest, and any offsetting horizontal retention interest retained pursuant to paragraph (g) of this section, must be retained by the sponsor or by one or more wholly-owned affiliates of the sponsor, including one or more depositors of the revolving pool securitization.

(2) If one revolving pool securitization issues collateral certificates representing a beneficial interest in all or a portion of the securitized assets held by that securitization to another revolving pool securitization, which in turn issues ABS interests for which the collateral certificates are all or a portion of the securitized assets, a sponsor may satisfy the requirements of paragraphs (b) and (c) of this section by retaining the seller's interest for the assets represented by the collateral certificates through either of the revolving pool securitizations, so long as both revolving pool securitizations are retained at the direction of the same sponsor or its wholly-owned affiliates.

(3) If the sponsor retains the seller's interest associated with the collateral certificates at the level of the revolving pool securitization that issues those collateral certificates, the proportion of the seller's interest required by paragraph (b) of this section retained at that level must equal the proportion that the principal balance of the securitized assets represented by the collateral certificates bears to the principal balance of the securitized assets in the revolving pool securitization that issues the ABS interests, as of each measurement date required by paragraph (c) of this section.

(f) *Offset for pool-level excess funding account.* The 5 percent seller's interest required on each measurement date by paragraph (c) of this section may be reduced on a dollar-for-dollar basis by the balance, as of such date, of an excess funding account in the form of a segregated account that:

(1) Is funded in the event of a failure to meet the minimum seller's interest requirements or other requirement to maintain a minimum balance of securitized assets under the securitization transaction documents by distributions otherwise payable to the holder of the seller's interest;

(2) Is invested only in the types of assets in which funds held in a horizontal cash reserve account pursuant to §1234.4 are permitted to be invested; and

(3) In the event of an early amortization, makes payments of amounts held in the account to holders of investor ABS interests in the same manner as payments to holders of investor ABS interests of amounts received on securitized assets.

(g) *Combined seller's interests and horizontal interest retention.* The 5 percent seller's interest required on each measurement date by paragraph (c) of this section may be reduced to a percentage lower than 5 percent to the extent that, for all series of investor ABS interests issued after the applicable effective date of this §1234.5, the sponsor, or notwithstanding §1234.12(a) a wholly-owned affiliate of the sponsor, retains, at a minimum, a corresponding percentage of the fair value of ABS interests issued in each series, in the form of one or more of the horizontal residual interests meeting the requirements of paragraphs (h) or (i).

(h) *Residual ABS interests in excess interest and fees.* The sponsor may take the offset described in paragraph (g) of this section for a residual ABS interest in excess interest and fees, whether certificated or uncertificated, in a single or multiple classes, subclasses, or tranches, that meets, individually or in the aggregate, the requirements of this paragraph (h);

(1) Each series of the revolving pool securitization distinguishes between the series' share of the interest and fee cash flows and the series' share of the principal repayment cash flows from the securitized assets collateralizing the revolving pool securitization, which may according to the terms of the securitization transaction documents, include not only the series' ratable share of such cash flows but also excess cash flows available from other series;

(2) The residual ABS interest's claim to any part of the series' share of the interest and fee cash flows for any interest payment period is subordinated to all accrued and payable interest due on the payment date to more senior ABS interests in the series for that period, and further reduced by the series' share of losses, including defaults on principal of the securitized assets collateralizing the revolving pool securitization (whether incurred in that period or carried over from prior periods) to the extent that such payments would have been included in amounts payable to more senior interests in the series;

(3) The revolving pool securitization continues to revolve, with one or more series, classes, subclasses, or tranches of asset-backed securities that are collateralized by a common pool of assets that change in composition over time; and

(4) For purposes of taking the offset described in paragraph (g) of this section, the sponsor determines the fair value of the residual ABS interest in excess interest and fees, and the fair value of the series of outstanding investor ABS interests to which it is subordinated and supports using the fair value measurement framework under GAAP, as of:

(i) The closing of the securitization transaction issuing the supported ABS interests; and

(ii) The seller's interest measurement dates described in paragraph (c)(4) of this section, except that for these periodic determinations the sponsor must update the fair value of the residual ABS interest in excess interest and fees for the numerator of the percentage ratio, but may at the sponsor's option continue to use the fair values determined in (h)(4)(i) for the outstanding investor ABS interests in the denominator.

(i) *Offsetting eligible horizontal residual interest.* The sponsor may take the offset described in paragraph (g) of this section for ABS interests that would meet the definition of eligible horizontal residual interests in §1234.2 but for the sponsor's simultaneous holding of subordinated seller's interests, residual ABS interests in excess interests and fees, or a combination of the two, if:

(1) The sponsor complies with all requirements of paragraphs (b) through (e) of this section for its holdings of subordinated seller's interest, and paragraph (h) for its holdings of residual ABS interests in excess interests and fees, as applicable;

(2) For purposes of taking the offset described in paragraph (g) of this section, the sponsor determines the fair value of the eligible horizontal residual interest as a percentage of the fair value of the outstanding investor ABS interests in the series supported by the eligible horizontal residual interest, determined using the fair value measurement framework under GAAP:

(i) As of the closing of the securitization transaction issuing the supported ABS interests; and

(ii) Without including in the numerator of the percentage ratio any fair value based on:

(A) The subordinated seller's interest or residual ABS interest in excess interest and fees;

(B) the interest payable to the sponsor on the eligible horizontal residual interest, if the sponsor is including the value of residual ABS interest in excess interest and fees pursuant to paragraph (h) of this section in taking the offset in paragraph (g) of this section; and,

(C) the principal payable to the sponsor on the eligible horizontal residual interest, if the sponsor is including the value of the seller's interest pursuant to paragraphs (b) through (f) of this section and distributions on that seller's interest are available to reduce charge-offs that would otherwise be allocated to reduce principal payable to the offset eligible horizontal residual interest.

(j) *Specified dates.* A sponsor using data about the revolving pool securitization's collateral, or ABS interests previously issued, to determine the closing-date percentage of a seller's interest, residual ABS interest in excess interest and fees, or eligible horizontal residual interest pursuant to this §1234.5 may use such data prepared as of specified dates if:

(1) The sponsor describes the specified dates in the disclosures required by paragraph (k) of this section; and

(2) The dates are no more than 60 days prior to the date of first use with investors of disclosures required for the interest by paragraph (k) of this section, or for revolving pool securitizations that make distributions to investors on a quarterly or less frequent basis, no more than 135 days prior to the date of first use with investors of such disclosures.

(k) *Disclosure and record maintenance.* (1) *Disclosure.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors, under the caption ''Credit Risk Retention'' the following disclosure in written form and within the time frames set forth in this paragraph (k):

(i) A reasonable period of time prior to the sale of an asset-backed security, a description of the material terms of the seller's interest, and the percentage of the seller's interest that the sponsor expects to retain at the closing of the securitization transaction, measured in accordance with the requirements of this §1234.5, as a percentage of the aggregate unpaid principal balance of all outstanding investor ABS interests issued, or as a percentage of the aggregate unpaid principal balance of outstanding investor ABS interests for one or more series issued, as required by the terms of the securitization transaction;

(ii) A reasonable time after the closing of the securitization transaction, the amount of seller's interest the sponsor retained at closing, if that amount is materially different from the amount disclosed under paragraph (k)(1)(i) of this section; and

(iii) A description of the material terms of any horizontal residual interests offsetting the seller's interest in accordance with paragraphs (g), (h), and (i) of this section; and

(iv) Disclosure of the fair value of those horizontal residual interests retained by the sponsor for the series being offered to investors and described in the disclosures, as a percentage of the fair value of the outstanding investor ABS interests issued, described in the same manner and within the same timeframes required for disclosure of the fair values of eligible horizontal residual interests specified in §1234.4(c).

(2) *Adjusted data.* Disclosures required by this paragraph (k) to be made a reasonable period of time prior to the sale of an asset-backed security of the amount of seller's interest, residual ABS interest in excess interest and fees, or eligible horizontal residual interest may include adjustments to the amount of securitized assets for additions or removals the sponsor expects to make before the closing date and adjustments to the amount of outstanding investor ABS interests for expected increases and decreases of those interests under the control of the sponsor.

(3) *Record maintenance.* A sponsor must retain the disclosures required in paragraph (k)(1) of this section in its records and must provide the disclosure upon request to the Commission and its appropriate Federal banking agency, if any, until three years after all ABS interests are no longer outstanding.

(l) *Early amortization of all outstanding series.* A sponsor that organizes a revolving pool securitization that relies on this §1234.5 to satisfy the risk retention requirements of §1234.3, does not violate the requirements of this part if its seller's interest falls below the level required by §1234. 5 after the revolving pool securitization commences early amortization, pursuant to the terms of the securitization transaction documents, of all series of outstanding investor ABS interests, if:

(1) The sponsor was in full compliance with the requirements of this section on all measurement dates specified in paragraph (c) of this section prior to the commencement of early amortization;

(2) The terms of the seller's interest continue to make it *pari passu* with or

subordinate in identical or varying amounts to each series of outstanding investor ABS interests issued with respect to the allocation of all distributions and losses with respect to the securitized assets;

(3) The terms of any horizontal interest relied upon by the sponsor pursuant to paragraph (g) to offset the minimum seller's interest amount continue to require the interests to absorb losses in accordance with the terms of paragraph (h) or (i) of this section, as applicable; and

(4) The revolving pool securitization issues no additional ABS interests after early amortization is initiated to any person not a wholly-owned affiliate of the sponsor, either at the time of issuance or during the amortization period.

§ 1234.6 Eligible ABCP conduits.

(a) *Definitions.* For purposes of this section, the following additional definitions apply:

100 percent liquidity coverage means an amount equal to the outstanding balance of all ABCP issued by the conduit plus any accrued and unpaid interest without regard to the performance of the ABS interests held by the ABCP conduit and without regard to any credit enhancement.

ABCP means asset-backed commercial paper that has a maturity at the time of issuance not exceeding 397 days, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

ABCP conduit means an issuing entity with respect to ABCP.

Eligible ABCP conduit means an ABCP conduit, *provided that:*

(1) The ABCP conduit is bankruptcy remote or otherwise isolated for insolvency purposes from the sponsor of the ABCP conduit and from any intermediate SPV;

(2) The ABS interests acquired by the ABCP conduit are:

(i) ABS interests collateralized solely by assets originated by an originator-seller and by servicing assets;

(ii) Special units of beneficial interest (or similar ABS interests) in a trust or special purpose vehicle that retains legal title to leased property underlying leases originated by an originator-seller that were transferred to an intermediate SPV in connection with a securitization collateralized solely by such leases and by servicing assets;

(iii) ABS interests in a revolving pool securitization collateralized solely by assets originated by an originator-seller and by servicing assets; or

(iv) ABS interests described in paragraph (2)(i), (ii), or (iii) of this definition that are collateralized, in whole or in part, by assets acquired by an originator-seller in a business combination that qualifies for business combination accounting under GAAP, and, if collateralized in part, the remainder of such assets are assets described in paragraph (2)(i), (ii), or (iii) of this definition; and

(v) Acquired by the ABCP conduit in an initial issuance by or on behalf of an intermediate SPV:

(A) Directly from the intermediate SPV,

(B) From an underwriter of the ABS interests issued by the intermediate SPV, or

(C) From another person who acquired the ABS interests directly from the intermediate SPV;

(3) The ABCP conduit is collateralized solely by ABS interests acquired from intermediate SPVs as described in paragraph (2) of this definition and servicing assets; and

(4) A regulated liquidity provider has entered into a legally binding commitment to provide 100 percent liquidity coverage (in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or other similar arrangement) to all the ABCP issued by the ABCP conduit by lending to, purchasing ABCP issued by, or purchasing assets from, the ABCP conduit in the event that funds are required to repay maturing ABCP issued by the ABCP conduit. With respect to the 100 percent liquidity coverage, in the event that the ABCP conduit is unable for any reason to repay maturing ABCP issued by the issuing entity, the liquidity provider shall be obligated to pay an amount equal to any shortfall, and the total amount that may be due pursuant to the 100 percent liquidity coverage shall be equal to 100 percent of the amount of the ABCP outstanding at any time plus accrued and unpaid

interest (amounts due pursuant to the required liquidity coverage may not be subject to credit performance of the ABS interests held by the ABCP conduit or reduced by the amount of credit support provided to the ABCP conduit and liquidity support that only funds performing loans or receivables or performing ABS interests does not meet the requirements of this section).

Intermediate SPV means a special purpose vehicle that:

(1) (i) Is a direct or indirect wholly-owned affiliate of the originator-seller; or

(ii) Has nominal equity owned by a trust or corporate service provider that specializes in providing independent ownership of special purpose vehicles, and such trust or corporate service provider is not affiliated with any other transaction parties;

(2) Is bankruptcy remote or otherwise isolated for insolvency purposes from the eligible ABCP conduit and from each originator-seller and each majority-owned affiliate in each case that, directly or indirectly, sells or transfers assets to such intermediate SPV;

(3) Acquires assets from the originator-seller that are originated by the originator-seller or acquired by the originator-seller in the acquisition of a business that qualifies for business combination accounting under GAAP or acquires ABS interests issued by another intermediate SPV of the originator-seller that are collateralized solely by such assets; and

(4) Issues ABS interests collateralized solely by such assets, as applicable.

Originator-seller means an entity that originates assets and sells or transfers those assets, directly or through a majority-owned affiliate, to an intermediate SPV, and includes (except for the purposes of identifying the sponsorship and affiliation of an intermediate SPV pursuant to this §1234.6) any affiliate of the originator-seller that, directly or indirectly, majority controls, is majority controlled by or is under common majority control with, the originator-seller. For purposes of this definition, majority control means ownership of more than 50 percent of the equity of an entity, or ownership of any other controlling financial interest in the entity, as determined under GAAP.

Regulated liquidity provider means:

(1) A depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(2) A bank holding company (as defined in 12 U.S.C. 1841), or a subsidiary thereof;

(3) A savings and loan holding company (as defined in 12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), or a subsidiary thereof; or

(4) A foreign bank whose home country supervisor (as defined in §211.21 of the Federal Reserve Board's Regulation K (12 CFR 211.21)) has adopted capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof.

(b) *In general.* An ABCP conduit sponsor satisfies the risk retention requirement of §1234.3 with respect to the issuance of ABCP by an eligible ABCP conduit in a securitization transaction if, for each ABS interest the ABCP conduit acquires from an intermediate SPV:

(1) An originator-seller of the intermediate SPV retains an economic interest in the credit risk of the assets collateralizing the ABS interest acquired by the eligible ABCP conduit in the amount and manner required under §1234.4 or §1234.5; and

(2) The ABCP conduit sponsor:

(i) Approves each originator-seller permitted to sell or transfer assets, directly or indirectly, to an intermediate SPV from which an eligible ABCP conduit acquires ABS interests;

(ii) Approves each intermediate SPV from which an eligible ABCP conduit is permitted to acquire ABS interests;

(iii) Establishes criteria governing the ABS interests, and the securitized assets underlying the ABS interests, acquired by the ABCP conduit;

(iv) Administers the ABCP conduit by monitoring the ABS interests acquired by the ABCP conduit and the assets supporting those ABS interests,

arranging for debt placement, compiling monthly reports, and ensuring compliance with the ABCP conduit documents and with the ABCP conduit's credit and investment policy; and

(v) Maintains and adheres to policies and procedures for ensuring that the requirements in this paragraph (b) of this section have been met.

(c) *Originator-seller compliance with risk retention.* The use of the risk retention option provided in this section by an ABCP conduit sponsor does not relieve the originator-seller that sponsors ABS interests acquired by an eligible ABCP conduit from such originator-seller's obligation to comply with its own risk retention obligations under this part.

(d) *Disclosures*—(1) *Periodic disclosures to investors.* An ABCP conduit sponsor relying upon this section shall provide, or cause to be provided, to each purchaser of ABCP, before or contemporaneously with the first sale of ABCP to such purchaser and at least monthly thereafter, to each holder of commercial paper issued by the ABCP conduit, in writing, each of the following items of information, which shall be as of a date not more than 60 days prior to date of first use with investors:

(i) The name and form of organization of the regulated liquidity provider that provides liquidity coverage to the eligible ABCP conduit, including a description of the material terms of such liquidity coverage, and notice of any failure to fund.

(ii) With respect to each ABS interest held by the ABCP conduit:

(A) The asset class or brief description of the underlying securitized assets;

(B) The standard industrial category code (SIC Code) for the originator-seller that will retain (or has retained) pursuant to this section an interest in the securitization transaction; and

(C) A description of the percentage amount of risk retention pursuant to the rule by the originator-seller, and whether it is in the form of an eligible horizontal residual interest, vertical interest, or revolving pool securitization seller's interest, as applicable.

(2) *Disclosures to regulators regarding originator-sellers.* An ABCP conduit sponsor relying upon this section shall provide, or cause to be provided, upon request, to the Commission and its appropriate Federal banking agency, if any, in writing, all of the information required to be provided to investors in paragraph (d)(1) of this section, and the name and form of organization of each originator-seller that will retain (or has retained) pursuant to this section an interest in the securitization transaction.

(e) *Sale or transfer of ABS interests between eligible ABCP conduits.* At any time, an eligible ABCP conduit that acquired an ABS interest in accordance with the requirements set forth in this section may transfer, and another eligible ABCP conduit may acquire, such ABS interest, if the following conditions are satisfied:

(1) The sponsors of both eligible ABCP conduits are in compliance with this section; and

(2) The same regulated liquidity provider has entered into one or more legally binding commitments to provide 100 percent liquidity coverage to all the ABCP issued by both eligible ABCP conduits.

(f) *Duty to comply.* (1) The ABCP conduit sponsor shall be responsible for compliance with this section.

(2) An ABCP conduit sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor compliance by each originator-seller which is satisfying a risk retention obligation in respect of ABS interests acquired by an eligible ABCP conduit with the requirements of paragraph (b)(1) of this section; and

(ii) In the event that the ABCP conduit sponsor determines that an originator-seller no longer complies with the requirements of paragraph (b)(1) of this section, shall:

(A) Promptly notify the holders of the ABCP, and upon request, the Commission and its appropriate Federal banking agency, if any, in writing of:

(*1*) The name and form of organization of any originator-seller that fails to retain risk in accordance with paragraph (b)(1) of this section and the

amount of ABS interests issued by an intermediate SPV of such originator-seller and held by the ABCP conduit;

(*2*) The name and form of organization of any originator-seller that hedges, directly or indirectly through an intermediate SPV, its risk retention in violation of paragraph (b)(1) of this section and the amount of ABS interests issued by an intermediate SPV of such originator-seller and held by the ABCP conduit; and

(*3*) Any remedial actions taken by the ABCP conduit sponsor or other party with respect to such ABS interests; and

(B) Take other appropriate steps pursuant to the requirements of paragraphs (b)(2)(iv) and (v) of this section which may include, as appropriate, curing any breach of the requirements in this section, or removing from the eligible ABCP conduit any ABS interest that does not comply with the requirements in this section.

§ 1234.7 Commercial mortgage-backed securities.

(a) *Definitions.* For purposes of this section, the following definition shall apply:

Special servicer means, with respect to any securitization of commercial real estate loans, any servicer that, upon the occurrence of one or more specified conditions in the servicing agreement, has the right to service one or more assets in the transaction.

(b) *Third-party purchaser.* A sponsor may satisfy some or all of its risk retention requirements under §1234.3 with respect to a securitization transaction if a third party (or any majority-owned affiliate thereof) purchases and holds for its own account an eligible horizontal residual interest in the issuing entity in the same form, amount, and manner as would be held by the sponsor under §1234.4 and all of the following conditions are met:

(1) *Number of third-party purchasers.* At any time, there are no more than two third-party purchasers of an eligible horizontal residual interest. If there are two third-party purchasers, each third-party purchaser's interest must be *pari passu* with the other third-party purchaser's interest.

(2) *Composition of collateral.* The securitization transaction is collateralized solely by commercial real estate loans and servicing assets.

(3) *Source of funds.* (i) Each third-party purchaser pays for the eligible horizontal residual interest in cash at the closing of the securitization transaction.

(ii) No third-party purchaser obtains financing, directly or indirectly, for the purchase of such interest from any other person that is a party to, or an affiliate of a party to, the securitization transaction (including, but not limited to, the sponsor, depositor, or servicer other than a special servicer affiliated with the third-party purchaser), other than a person that is a party to the transaction solely by reason of being an investor.

(4) *Third-party review.* Each third-party purchaser conducts an independent review of the credit risk of each securitized asset prior to the sale of the asset-backed securities in the securitization transaction that includes, at a minimum, a review of the underwriting standards, collateral, and expected cash flows of each commercial real estate loan that is collateral for the asset-backed securities.

(5) *Affiliation and control rights.* (i) Except as provided in paragraph (b)(5)(ii) of this section, no third-party purchaser is affiliated with any party to the securitization transaction (including, but not limited to, the sponsor, depositor, or servicer) other than investors in the securitization transaction.

(ii) Notwithstanding paragraph (b)(5)(i) of this section, a third-party purchaser may be affiliated with:

(A) The special servicer for the securitization transaction; or

(B) One or more originators of the securitized assets, as long as the assets originated by the affiliated originator or originators collectively comprise less than 10 percent of the unpaid principal balance of the securitized assets included in the securitization transaction at the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction.

(6) *Operating Advisor*. The underlying securitization transaction documents shall provide for the following:

(i) The appointment of an operating advisor (the Operating Advisor) that:

(A) Is not affiliated with other parties to the securitization transaction;

(B) Does not directly or indirectly have any financial interest in the securitization transaction other than in fees from its role as Operating Advisor; and

(C) Is required to act in the best interest of, and for the benefit of, investors as a collective whole;

(ii) Standards with respect to the Operating Advisor's experience, expertise and financial strength to fulfill its duties and responsibilities under the applicable transaction documents over the life of the securitization transaction;

(iii) The terms of the Operating Advisor's compensation with respect to the securitization transaction;

(iv) When the eligible horizontal residual interest has been reduced by principal payments, realized losses, and appraisal reduction amounts (which reduction amounts are determined in accordance with the applicable transaction documents) to a principal balance of 25 percent or less of its initial principal balance, the special servicer for the securitized assets must consult with the Operating Advisor in connection with, and prior to, any material decision in connection with its servicing of the securitized assets, including, without limitation:

(A) Any material modification of, or waiver with respect to, any provision of a loan agreement (including a mortgage, deed of trust, or other security agreement);

(B) Foreclosure upon or comparable conversion of the ownership of a property; or

(C) Any acquisition of a property.

(v) The Operating Advisor shall have adequate and timely access to information and reports necessary to fulfill its duties under the transaction documents, including all reports made available to holders of ABS interests and third-party purchasers, and shall be responsible for:

(A) Reviewing the actions of the special servicer;

(B) Reviewing all reports provided by the special servicer to the issuing entity or any holder of ABS interests;

(C) Reviewing for accuracy and consistency with the transaction documents calculations made by the special servicer; and

(D) Issuing a report to investors (including any third-party purchasers) and the issuing entity on a periodic basis concerning:

(*1*) Whether the Operating Advisor believes, in its sole discretion exercised in good faith, that the special servicer is operating in compliance with any standard required of the special servicer in the applicable transaction documents; and

(*2*) Which, if any, standards the Operating Advisor believes, in its sole discretion exercised in good faith, the special servicer has failed to comply.

(vi)(A) The Operating Advisor shall have the authority to recommend that the special servicer be replaced by a successor special servicer if the Operating Advisor determines, in its sole discretion exercised in good faith, that:

(*1*) The special servicer has failed to comply with a standard required of the special servicer in the applicable transaction documents; and

(*2*) Such replacement would be in the best interest of the investors as a collective whole; and

(B) If a recommendation described in paragraph (b)(6)(vi)(A) of this section is made, the special servicer shall be replaced upon the affirmative vote of a majority of the outstanding principal balance of all ABS interests voting on the matter, with a minimum of a quorum of ABS interests voting on the matter. For purposes of such vote, the applicable transaction documents shall specify the quorum and may not specify a quorum of more than the holders of 20 percent of the outstanding principal balance of all ABS interests in the issuing entity, with such quorum including at least three ABS interest holders that are not affiliated with each other.

(7) *Disclosures*. The sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the

Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(i) The name and form of organization of each initial third-party purchaser that acquired an eligible horizontal residual interest at the closing of a securitization transaction;

(ii) A description of each initial third-party purchaser's experience in investing in commercial mortgage-backed securities;

(iii) Any other information regarding each initial third-party purchaser or each initial third-party purchaser's retention of the eligible horizontal residual interest that is material to investors in light of the circumstances of the particular securitization transaction;

(iv) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that will be retained (or was retained) by each initial third-party purchaser, as well as the amount of the purchase price paid by each initial third-party purchaser for such interest;

(v) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest in the securitization transaction that the sponsor would have retained pursuant to §1234.4 if the sponsor had relied on retaining an eligible horizontal residual interest in that section to meet the requirements of §1234.3 with respect to the transaction;

(vi) A description of the material terms of the eligible horizontal residual interest retained by each initial third-party purchaser, including the same information as is required to be disclosed by sponsors retaining horizontal interests pursuant to §1234.4;

(vii) The material terms of the applicable transaction documents with respect to the Operating Advisor, including without limitation:

(A) The name and form of organization of the Operating Advisor;

(B) A description of any material conflict of interest or material potential conflict of interest between the Operating Advisor and any other party to the transaction;

(C) The standards required by paragraph (b)(6)(ii) of this section and a description of how the Operating Advisor satisfies each of the standards; and

(D) The terms of the Operating Advisor's compensation under paragraph (b)(6)(iii) of this section; and

(viii) The representations and warranties concerning the securitized assets, a schedule of any securitized assets that are determined not to comply with such representations and warranties, and what factors were used to make the determination that such securitized assets should be included in the pool notwithstanding that the securitized assets did not comply with such representations and warranties, such as compensating factors or a determination that the exceptions were not material.

(8) *Hedging, transfer and pledging*—(i) *General rule.* Except as set forth in paragraph (b)(8)(ii) of this section, each third-party purchaser and its affiliates must comply with the hedging and other restrictions in §1234.12 as if it were the retaining sponsor with respect to the securitization transaction and had acquired the eligible horizontal residual interest pursuant to §1234.4; provided that, the hedging and other restrictions in §1234.12 shall not apply on or after the date that each CRE loan (as defined in §1234.14) that serves as collateral for outstanding ABS interests has been defeased. For purposes of this section, a loan is deemed to be defeased if:

(A) cash or cash equivalents of the types permitted for an eligible horizontal cash reserve account pursuant to §1234.4 whose maturity corresponds to the remaining debt service obligations, have been pledged to the issuing entity as collateral for the loan and are in such amounts and payable at such times as necessary to timely generate cash sufficient to make all remaining

debt service payments due on such loan; and

(B) the issuing entity has an obligation to release its lien on the loan.

(ii) *Exceptions*—(A) *Transfer by initial third-party purchaser or sponsor*. An initial third-party purchaser that acquired an eligible horizontal residual interest at the closing of a securitization transaction in accordance with this section, or a sponsor that acquired an eligible horizontal residual interest at the closing of a securitization transaction in accordance with this section, may, on or after the date that is five years after the date of the closing of the securitization transaction, transfer that interest to a subsequent third-party purchaser that complies with paragraph (b)(8)(ii)(C) of this section. The initial third-party purchaser shall provide the sponsor with complete identifying information for the subsequent third-party purchaser.

(B) *Transfer by subsequent third-party purchaser*. At any time, a subsequent third-party purchaser that acquired an eligible horizontal residual interest pursuant to this section may transfer its interest to a different third-party purchaser that complies with paragraph (b)(8)(ii)(C) of this section. The transferring third-party purchaser shall provide the sponsor with complete identifying information for the acquiring third-party purchaser.

(C) *Requirements applicable to subsequent third-party purchasers*. A subsequent third-party purchaser is subject to all of the requirements of paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section applicable to third-party purchasers, provided that obligations under paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section that apply to initial third-party purchasers at or before the time of closing of the securitization transaction shall apply to successor third-party purchasers at or before the time of the transfer of the eligible horizontal residual interest to the successor third-party purchaser.

(c) *Duty to comply*. (1) The retaining sponsor shall be responsible for compliance with this section by itself and for compliance by each initial or subsequent third-party purchaser that acquired an eligible horizontal residual interest in the securitization transaction.

(2) A sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures to monitor each third-party purchaser's compliance with the requirements of paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section; and

(ii) In the event that the sponsor determines that a third-party purchaser no longer complies with one or more of the requirements of paragraphs (b)(1), (b)(3) through (5), or (b)(8) of this section, shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by such third-party purchaser.

§ 1234.8 Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ABS.

(a) *In general*. A sponsor satisfies its risk retention requirement under this part if the sponsor fully guarantees the timely payment of principal and interest on all ABS interests issued by the issuing entity in the securitization transaction and is:

(1) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617) with capital support from the United States; or

(2) Any limited-life regulated entity succeeding to the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that the entity is operating with capital support from the United States.

(b) *Certain provisions not applicable*. The provisions of §1234.12(b), (c), and (d) shall not apply to a sponsor described in paragraph (a)(1) or (2) of this section, its affiliates, or the issuing entity with respect to a securitization transaction for which the sponsor has

retained credit risk in accordance with the requirements of this section.

(c) *Disclosure.* A sponsor relying on this section shall provide to investors, in written form under the caption ''Credit Risk Retention'' and, upon request, to the Federal Housing Finance Agency and the Commission, a description of the manner in which it has met the credit risk retention requirements of this part.

§ 1234.9 Open market CLOs.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

CLO means a special purpose entity that:

(i) Issues debt and equity interests, and

(ii) Whose assets consist primarily of loans that are securitized assets and servicing assets.

CLO-eligible loan tranche means a term loan of a syndicated facility that meets the criteria set forth in paragraph (c) of this section.

CLO manager means an entity that manages a CLO, which entity is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b-1 *et seq.*), or is an affiliate of such a registered investment adviser and itself is managed by such registered investment adviser.

Commercial borrower means an obligor under a corporate credit obligation (including a loan).

Initial loan syndication transaction means a transaction in which a loan is syndicated to a group of lenders.

Lead arranger means, with respect to a CLO-eligible loan tranche, an institution that:

(i) Is active in the origination, structuring and syndication of commercial loan transactions (as defined in § 1234.14) and has played a primary role in the structuring, underwriting and distribution on the primary market of the CLO-eligible loan tranche.

(ii) Has taken an allocation of the funded portion of the syndicated credit facility under the terms of the transaction that includes the CLO-eligible loan tranche of at least 20 percent of the aggregate principal balance at origination, and no other member (or members affiliated with each other) of the syndication group that funded at origination has taken a greater allocation; and

(iii) Is identified in the applicable agreement governing the CLO-eligible loan tranche; represents therein to the holders of the CLO-eligible loan tranche and to any holders of participation interests in such CLO-eligible loan tranche that such lead arranger satisfies the requirements of paragraph (i) of this definition and, at the time of initial funding of the CLO-eligible tranche, will satisfy the requirements of paragraph (ii) of this definition; further represents therein (solely for the purpose of assisting such holders to determine the eligibility of such CLO-eligible loan tranche to be held by an open market CLO) that in the reasonable judgment of such lead arranger, the terms of such CLO-eligible loan tranche are consistent with the requirements of paragraphs (c)(2) and (3) of this section; and covenants therein to such holders that such lead arranger will fulfill the requirements of paragraph (c)(1) of this section.

Open market CLO means a CLO:

(i) Whose assets consist of senior, secured syndicated loans acquired by such CLO directly from the sellers thereof in open market transactions and of servicing assets,

(ii) That is managed by a CLO manager, and

(iii) That holds less than 50 percent of its assets, by aggregate outstanding principal amount, in loans syndicated by lead arrangers that are affiliates of the CLO or the CLO manager or originated by originators that are affiliates of the CLO or the CLO manager.

Open market transaction means:

(i) Either an initial loan syndication transaction or a secondary market transaction in which a seller offers senior, secured syndicated loans to prospective purchasers in the loan market on market terms on an arm's length basis, which prospective purchasers include, but are not limited to, entities that are not affiliated with the seller, or

(ii) A reverse inquiry from a prospective purchaser of a senior, secured syndicated loan through a dealer in the

loan market to purchase a senior, secured syndicated loan to be sourced by the dealer in the loan market.

Secondary market transaction means a purchase of a senior, secured syndicated loan not in connection with an initial loan syndication transaction but in the secondary market.

Senior, secured syndicated loan means a loan made to a commercial borrower that:

(i) Is not subordinate in right of payment to any other obligation for borrowed money of the commercial borrower,

(ii) Is secured by a valid first priority security interest or lien in or on specified collateral securing the commercial borrower's obligations under the loan, and

(iii) The value of the collateral subject to such first priority security interest or lien, together with other attributes of the obligor (including, without limitation, its general financial condition, ability to generate cash flow available for debt service and other demands for that cash flow), is adequate (in the commercially reasonable judgment of the CLO manager exercised at the time of investment) to repay the loan and to repay all other indebtedness of equal seniority secured by such first priority security interest or lien in or on the same collateral, and the CLO manager certifies, on or prior to each date that it acquires a loan constituting part of a new CLO-eligible tranche, that it has policies and procedures to evaluate the likelihood of repayment of loans acquired by the CLO and it has followed such policies and procedures in evaluating each CLO-eligible loan tranche.

(b) *In general.* A sponsor satisfies the risk retention requirements of §1234.3 with respect to an open market CLO transaction if:

(1) The open market CLO does not acquire or hold any assets other than CLO-eligible loan tranches that meet the requirements of paragraph (c) of this section and servicing assets;

(2) The governing documents of such open market CLO require that, at all times, the assets of the open market CLO consist of senior, secured syndicated loans that are CLO-eligible loan tranches and servicing assets;

(3) The open market CLO does not invest in ABS interests or in credit derivatives other than hedging transactions that are servicing assets to hedge risks of the open market CLO;

(4) All purchases of CLO-eligible loan tranches and other assets by the open market CLO issuing entity or through a warehouse facility used to accumulate the loans prior to the issuance of the CLO's ABS interests are made in open market transactions on an arms-length basis;

(5) The CLO manager of the open market CLO is not entitled to receive any management fee or gain on sale at the time the open market CLO issues its ABS interests.

(c) *CLO-eligible loan tranche.* To qualify as a CLO-eligible loan tranche, a term loan of a syndicated credit facility to a commercial borrower must have the following features:

(1) A minimum of 5 percent of the face amount of the CLO-eligible loan tranche is retained by the lead arranger thereof until the earliest of the repayment, maturity, involuntary and unscheduled acceleration, payment default, or bankruptcy default of such CLO-eligible loan tranche, provided that such lead arranger complies with limitations on hedging, transferring and pledging in §1234.12 with respect to the interest retained by the lead arranger.

(2) Lender voting rights within the credit agreement and any intercreditor or other applicable agreements governing such CLO-eligible loan tranche are defined so as to give holders of the CLO-eligible loan tranche consent rights with respect to, at minimum, any material waivers and amendments of such applicable documents, including but not limited to, adverse changes to the calculation or payments of amounts due to the holders of the CLO-eligible tranche, alterations to *pro rata* provisions, changes to voting provisions, and waivers of conditions precedent; and

(3) The pro rata provisions, voting provisions, and similar provisions applicable to the security associated with such CLO-eligible loan tranches under the CLO credit agreement and any intercreditor or other applicable agreements governing such CLO-eligible

loan tranches are not materially less advantageous to the holder(s) of such CLO-eligible tranche than the terms of other tranches of comparable seniority in the broader syndicated credit facility.

(d) *Disclosures.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and at least annually with respect to the information required by paragraph (d)(1) of this section and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(1) *Open market CLOs.* A complete list of every asset held by an open market CLO (or before the CLO's closing, in a warehouse facility in anticipation of transfer into the CLO at closing), including the following information:

(i) The full legal name, Standard Industrial Classification (SIC) category code, and legal entity identifier (LEI) issued by a utility endorsed or otherwise governed by the Global LEI Regulatory Oversight Committee or the Global LEI Foundation (if an LEI has been obtained by the obligor) of the obligor of the loan or asset;

(ii) The full name of the specific loan tranche held by the CLO;

(iii) The face amount of the entire loan tranche held by the CLO, and the face amount of the portion thereof held by the CLO;

(iv) The price at which the loan tranche was acquired by the CLO; and

(v) For each loan tranche, the full legal name of the lead arranger subject to the sales and hedging restrictions of §1234.12; and

(2) *CLO manager.* The full legal name and form of organization of the CLO manager.

§1234.10 Qualified tender option bonds.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

Municipal security or *municipal securities* shall have the same meaning as the term ''municipal securities'' in Section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)) and any rules promulgated pursuant to such section.

Qualified tender option bond entity means an issuing entity with respect to tender option bonds for which each of the following applies:

(i) Such entity is collateralized solely by servicing assets and by municipal securities that have the same municipal issuer and the same underlying obligor or source of payment (determined without regard to any third-party credit enhancement), and such municipal securities are not subject to substitution.

(ii) Such entity issues no securities other than:

(A) A single class of tender option bonds with a preferred variable return payable out of capital that meets the requirements of paragraph (b) of this section, and

(B) One or more residual equity interests that, in the aggregate, are entitled to all remaining income of the issuing entity.

(C) The types of securities referred to in paragraphs (ii)(A) and (B) of this definition must constitute asset-backed securities.

(iii) The municipal securities held as assets by such entity are issued in compliance with Section 103 of the Internal Revenue Code of 1986, as amended (the ''IRS Code'', 26 U.S.C. 103), such that the interest payments made on those securities are excludable from the gross income of the owners under Section 103 of the IRS Code.

(iv) The terms of all of the securities issued by the entity are structured so that all holders of such securities who are eligible to exclude interest received on such securities will be able to exclude that interest from gross income pursuant to Section 103 of the IRS Code or as ''exempt-interest dividends'' pursuant to Section 852(b)(5) of the IRS Code (26 U.S.C. 852(b)(5)) in the case of regulated investment companies under the Investment Company Act of 1940, as amended.

(v) Such entity has a legally binding commitment from a regulated liquidity provider as defined in §1234.6(a), to provide a 100 percent guarantee or liquidity coverage with respect to all of the

issuing entity's outstanding tender option bonds.

(vi) Such entity qualifies for monthly closing elections pursuant to IRS Revenue Procedure 2003–84, as amended or supplemented from time to time.

Tender option bond means a security which has features which entitle the holders to tender such bonds to the issuing entity for purchase at any time upon no more than 397 days' notice, for a purchase price equal to the approximate amortized cost of the security, plus accrued interest, if any, at the time of tender.

(b) *Risk retention options.* Notwithstanding anything in this section, the sponsor with respect to an issuance of tender option bonds may retain an eligible vertical interest or eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of §1234.4. In order to satisfy its risk retention requirements under this section, the sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may retain:

(1) An eligible vertical interest or an eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of §1234.4; or

(2) An interest that meets the requirements set forth in paragraph (c) of this section; or

(3) A municipal security that meets the requirements set forth in paragraph (d) of this section; or

(4) Any combination of interests and securities described in paragraphs (b)(1) through (b)(3) of this section such that the sum of the percentages held in each form equals at least five.

(c) *Tender option termination event.* The sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may retain an interest that upon issuance meets the requirements of an eligible horizontal residual interest but that upon the occurrence of a ''tender option termination event'' as defined in Section 4.01(5) of IRS Revenue Procedure 2003–84, as amended or supplemented from time to time will meet the requirements of an eligible vertical interest.

(d) *Retention of a municipal security outside of the qualified tender option bond entity.* The sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may satisfy its risk retention requirements under this Section by holding municipal securities from the same issuance of municipal securities deposited in the qualified tender option bond entity, the face value of which retained municipal securities is equal to 5 percent of the face value of the municipal securities deposited in the qualified tender option bond entity.

(e) *Disclosures.* The sponsor shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(1) The name and form of organization of the qualified tender option bond entity;

(2) A description of the form and subordination features of such retained interest in accordance with the disclosure obligations in §1234.4(c);

(3) To the extent any portion of the retained interest is claimed by the sponsor as an eligible horizontal residual interest (including any interest held in compliance with §1234.10(c)), the fair value of that interest (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and as a dollar amount);

(4) To the extent any portion of the retained interest is claimed by the sponsor as an eligible vertical interest (including any interest held in compliance with §1234.10(c)), the percentage of ABS interests issued represented by the eligible vertical interest; and

(5) To the extent any portion of the retained interest claimed by the sponsor is a municipal security held outside of the qualified tender option bond entity, the name and form of organization of the qualified tender option bond entity, the identity of the issuer of the municipal securities, the face value of the municipal securities deposited into the qualified tender option bond entity,

and the face value of the municipal securities retained by the sponsor or its majority-owned affiliates and subject to the transfer and hedging prohibition.

(f) *Prohibitions on Hedging and Transfer*. The prohibitions on transfer and hedging set forth in §1234.12, apply to any interests or municipal securities retained by the sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity pursuant to of this section.

Subpart C—Transfer of Risk Retention

§1234.11 Allocation of risk retention to an originator.

(a) *In general*. A sponsor choosing to retain an eligible vertical interest or an eligible horizontal residual interest (including an eligible horizontal cash reserve account), or combination thereof under §1234.4, with respect to a securitization transaction may offset the amount of its risk retention requirements under §1234.4 by the amount of the eligible interests, respectively, acquired by an originator of one or more of the securitized assets if:

(1) At the closing of the securitization transaction:

(i) The originator acquires the eligible interest from the sponsor and retains such interest in the same manner and proportion (as between horizontal and vertical interests) as the sponsor under §1234.4, as such interest was held prior to the acquisition by the originator;

(ii) The ratio of the percentage of eligible interests acquired and retained by the originator to the percentage of eligible interests otherwise required to be retained by the sponsor pursuant to §1234.4, does not exceed the ratio of:

(A) The unpaid principal balance of all the securitized assets originated by the originator; to

(B) The unpaid principal balance of all the securitized assets in the securitization transaction;

(iii) The originator acquires and retains at least 20 percent of the aggregate risk retention amount otherwise required to be retained by the sponsor pursuant to §1234.4; and

(iv) The originator purchases the eligible interests from the sponsor at a price that is equal, on a dollar-for-dollar basis, to the amount by which the sponsor's required risk retention is reduced in accordance with this section, by payment to the sponsor in the form of:

(A) Cash; or

(B) A reduction in the price received by the originator from the sponsor or depositor for the assets sold by the originator to the sponsor or depositor for inclusion in the pool of securitized assets.

(2) *Disclosures*. In addition to the disclosures required pursuant to §1234.4(c), the sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, in written form under the caption ''Credit Risk Retention'', the name and form of organization of any originator that will acquire and retain (or has acquired and retained) an interest in the transaction pursuant to this section, including a description of the form and amount (expressed as a percentage and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) and nature (*e.g.*, senior or subordinated) of the interest, as well as the method of payment for such interest under paragraph (a)(1)(iv) of this section.

(3) *Hedging, transferring and pledging*. The originator and each of its affiliates complies with the hedging and other restrictions in §1234.12 with respect to the interests retained by the originator pursuant to this section as if it were the retaining sponsor and was required to retain the interest under subpart B of this part.

(b) *Duty to comply*. (1) The retaining sponsor shall be responsible for compliance with this section.

(2) A retaining sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor the compliance by

each originator that is allocated a portion of the sponsor's risk retention obligations with the requirements in paragraphs (a)(1) and (3) of this section; and

(ii) In the event the sponsor determines that any such originator no longer complies with any of the requirements in paragraphs (a)(1) and (3) of this section, shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by such originator.

§ 1234.12 Hedging, transfer and financing prohibitions.

(a) *Transfer*. Except as permitted by § 1234.7(b)(8), and subject to § 1234.5, a retaining sponsor may not sell or otherwise transfer any interest or assets that the sponsor is required to retain pursuant to subpart B of this part to any person other than an entity that is and remains a majority-owned affiliate of the sponsor and each such majority-owned affiliate shall be subject to the same restrictions.

(b) *Prohibited hedging by sponsor and affiliates*. A retaining sponsor and its affiliates may not purchase or sell a security, or other financial instrument, or enter into an agreement, derivative or other position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative, or position are materially related to the credit risk of one or more particular ABS interests that the retaining sponsor (or any of its majority-owned affiliates) is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the sponsor (or any of its majority-owned affiliates) to the credit risk of one or more of the particular ABS interests that the retaining sponsor (or any of its majority-owned affiliates) is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction.

(c) *Prohibited hedging by issuing entity*. The issuing entity in a securitization transaction may not purchase or sell a security or other financial instrument, or enter into an agreement, derivative or position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative or position are materially related to the credit risk of one or more particular ABS interests that the retaining sponsor for the transaction (or any of its majority-owned affiliates) is required to retain with respect to the securitization transaction pursuant to subpart B of this part; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the retaining sponsor (or any of its majority-owned affiliates) to the credit risk of one or more of the particular ABS interests that the sponsor (or any of its majority-owned affiliates) is required to retain pursuant to subpart B of this part.

(d) *Permitted hedging activities*. The following activities shall not be considered prohibited hedging activities under paragraph (b) or (c) of this section:

(1) Hedging the interest rate risk (which does not include the specific interest rate risk, known as spread risk, associated with the ABS interest that is otherwise considered part of the credit risk) or foreign exchange risk arising from one or more of the particular ABS interests required to be retained by the sponsor (or any of its majority-owned affiliates) under subpart B of this part or one or more of the particular securitized assets that underlie the asset-backed securities issued in the securitization transaction; or

(2) Purchasing or selling a security or other financial instrument or entering into an agreement, derivative, or other position with any third party where payments on the security or other financial instrument or under the agreement, derivative, or position are based,

directly or indirectly, on an index of instruments that includes asset-backed securities if:

(i) Any class of ABS interests in the issuing entity that were issued in connection with the securitization transaction and that are included in the index represents no more than 10 percent of the dollar-weighted average (or corresponding weighted average in the currency in which the ABS interests are issued, as applicable) of all instruments included in the index; and

(ii) All classes of ABS interests in all issuing entities that were issued in connection with any securitization transaction in which the sponsor (or any of its majority-owned affiliates) is required to retain an interest pursuant to subpart B of this part and that are included in the index represent, in the aggregate, no more than 20 percent of the dollar-weighted average (or corresponding weighted average in the currency in which the ABS interests are issued, as applicable) of all instruments included in the index.

(e) *Prohibited non-recourse financing.* Neither a retaining sponsor nor any of its affiliates may pledge as collateral for any obligation (including a loan, repurchase agreement, or other financing transaction) any ABS interest that the sponsor is required to retain with respect to a securitization transaction pursuant to subpart B of this part unless such obligation is with full recourse to the sponsor or affiliate, respectively.

(f) *Duration of the hedging and transfer restrictions*—(1) *General rule.* Except as provided in paragraph (f)(2) of this section, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire on or after the date that is the latest of:

(i) The date on which the total unpaid principal balance (if applicable) of the securitized assets that collateralize the securitization transaction has been reduced to 33 percent of the total unpaid principal balance of the securitized assets as of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction;

(ii) The date on which the total unpaid principal obligations under the ABS interests issued in the securitization transaction has been reduced to 33 percent of the total unpaid principal obligations of the ABS interests at closing of the securitization transaction; or

(iii) Two years after the date of the closing of the securitization transaction.

(2) *Securitizations of residential mortgages.* (i) If all of the assets that collateralize a securitization transaction subject to risk retention under this part are residential mortgages, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire on or after the date that is the later of:

(A) Five years after the date of the closing of the securitization transaction; or

(B) The date on which the total unpaid principal balance of the residential mortgages that collateralize the securitization transaction has been reduced to 25 percent of the total unpaid principal balance of such residential mortgages at the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction.

(ii) Notwithstanding paragraph (f)(2)(i) of this section, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire with respect to the sponsor of a securitization transaction described in paragraph (f)(2)(i) of this section on or after the date that is seven years after the date of the closing of the securitization transaction.

(3) *Conservatorship or receivership of sponsor.* A conservator or receiver of the sponsor (or any other person holding risk retention pursuant to this part) of a securitization transaction is permitted to sell or hedge any economic interest in the securitization transaction if the conservator or receiver has been appointed pursuant to any provision of federal or State law (or regulation promulgated thereunder) that provides for the appointment of the Federal Deposit Insurance Corporation, or an agency or instrumentality

of the United States or of a State as conservator or receiver, including without limitation any of the following authorities:

(i) 12 U.S.C. 1811;

(ii) 12 U.S.C. 1787;

(iii) 12 U.S.C. 4617; or

(iv) 12 U.S.C. 5382.

(4) *Revolving pool securitizations.* The provisions of paragraphs (f)(1) and (2) are not available to sponsors of revolving pool securitizations with respect to the forms of risk retention specified in § 1234.5.

Subpart D—Exceptions and Exemptions

§ 1234.13 Exemption for qualified residential mortgages.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

Currently performing means the borrower in the mortgage transaction is not currently thirty (30) days or more past due, in whole or in part, on the mortgage transaction.

Qualified residential mortgage means a ''qualified mortgage'' as defined in section 129C of the Truth in Lending Act (15 U.S.C.1639c) and regulations issued thereunder, as amended from time to time.

(b) *Exemption.* A sponsor shall be exempt from the risk retention requirements in subpart B of this part with respect to any securitization transaction, if:

(1) All of the assets that collateralize the asset-backed securities are qualified residential mortgages or servicing assets;

(2) None of the assets that collateralize the asset-backed securities are asset-backed securities;

(3) As of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, each qualified residential mortgage collateralizing the asset-backed securities is currently performing; and

(4)(i) The depositor with respect to the securitization transaction certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages or servicing assets and has concluded that its internal supervisory controls are effective; and

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls must be performed, for each issuance of an asset-backed security in reliance on this section, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(4)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to the Commission and its appropriate Federal banking agency, if any.

(c) *Repurchase of loans subsequently determined to be non-qualified after closing.* A sponsor that has relied on the exemption provided in paragraph (b) of this section with respect to a securitization transaction shall not lose such exemption with respect to such transaction if, after closing of the securitization transaction, it is determined that one or more of the residential mortgage loans collateralizing the asset-backed securities does not meet all of the criteria to be a qualified residential mortgage *provided that:*

(1) The depositor complied with the certification requirement set forth in paragraph (b)(4) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining aggregate unpaid principal balance and accrued interest on the loan(s) no later than 90 days after the determination that the loans do not satisfy the requirements to be a qualified residential mortgage; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is (or are) required to be repurchased by the sponsor pursuant

to paragraph (c)(2) of this section, including the amount of such repurchased loan(s) and the cause for such repurchase.

§ 1234.14 Definitions applicable to qualifying commercial real estate loans.

The following definitions apply for purposes of §§ 1234.15 and 1234.17 :

Appraisal Standards Board means the board of the Appraisal Foundation that develops, interprets, and amends the Uniform Standards of Professional Appraisal Practice (USPAP), establishing generally accepted standards for the appraisal profession.

Combined loan-to-value (CLTV) ratio means, at the time of origination, the sum of the principal balance of a first-lien mortgage loan on the property, plus the principal balance of any junior-lien mortgage loan that, to the creditor's knowledge, would exist at the closing of the transaction and that is secured by the same property, divided by:

(1) For acquisition funding, the lesser of the purchase price or the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 1234.17(a)(2)(ii); or

(2) For refinancing, the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 1234.17(a)(2)(ii).

Commercial real estate (CRE) loan means:

(1) A loan secured by a property with five or more single family units, or by nonfarm nonresidential real property, the primary source (50 percent or more) of repayment for which is expected to be:

(i) The proceeds of the sale, refinancing, or permanent financing of the property; or

(ii) Rental income associated with the property;

(2) Loans secured by improved land if the obligor owns the fee interest in the land and the land is leased to a third party who owns all improvements on the land, and the improvements are nonresidential or residential with five or more single family units; and

(3) Does not include:

(i) A land development and construction loan (including 1- to 4-family residential or commercial construction loans);

(ii) Any other land loan; or

(iii) An unsecured loan to a developer.

Debt service coverage (DSC) ratio means the ratio of:

(1) The annual NOI less the annual replacement reserve of the CRE property at the time of origination of the CRE loan(s); to

(2) The sum of the borrower's annual payments for principal and interest (calculated at the fully indexed rate) on any debt obligation.

Environmental risk assessment means a process for determining whether a property is contaminated or exposed to any condition or substance that could result in contamination that has an adverse effect on the market value of the property or the realization of the collateral value.

First lien means a lien or encumbrance on property that has priority over all other liens or encumbrances on the property.

Junior lien means a lien or encumbrance on property that is lower in priority relative to other liens or encumbrances on the property.

Loan-to-value (LTV) ratio means, at the time of origination, the principal balance of a first-lien mortgage loan on the property divided by:

(1) For acquisition funding, the lesser of the purchase price or the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 1234.17(a)(2)(ii); or

(2) For refinancing, the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 1234.17(a)(2)(ii).

Net operating income (NOI) refers to the income a CRE property generates for the owner after all expenses have been deducted for federal income tax purposes, except for depreciation, debt service expenses, and federal and state income taxes, and excluding any unusual and nonrecurring items of income.

Operating affiliate means an affiliate of a borrower that is a lessor or similar

party with respect to the commercial real estate securing the loan.

Purchase money security interest means a security interest in property that secures the obligation of the obligor incurred as all or part of the price of the property.

Qualifying leased CRE loan means a CRE loan secured by commercial nonfarm real property, other than a multifamily property or a hotel, inn, or similar property:

(1) That is occupied by one or more qualified tenants pursuant to a lease agreement with a term of no less than one (1) month; and

(2) Where no more than 20 percent of the aggregate gross revenue of the property is payable from one or more tenants who:

(i) Are subject to a lease that will terminate within six months following the date of origination; or

(ii) Are not qualified tenants.

Qualifying multi-family loan means a CRE loan secured by any residential property (excluding a hotel, motel, inn, hospital, nursing home, or other similar facility where dwellings are not leased to residents):

(1) That consists of five or more dwelling units (including apartment buildings, condominiums, cooperatives and other similar structures) primarily for residential use; and

(2) Where at least 75 percent of the NOI is derived from residential rents and tenant amenities (including income from parking garages, health or swim clubs, and dry cleaning), and not from other commercial uses.

Rental income means:

(1) Income derived from a lease or other occupancy agreement between the borrower or an operating affiliate of the borrower and a party which is not an affiliate of the borrower for the use of real property or improvements serving as collateral for the applicable loan; and

(2) Other income derived from hotel, motel, dormitory, nursing home, assisted living, mini-storage warehouse or similar properties that are used primarily by parties that are not affiliates or employees of the borrower or its affiliates.

Replacement reserve means the monthly capital replacement or maintenance amount based on the property type, age, construction and condition of the property that is adequate to maintain the physical condition and NOI of the property.

Uniform Standards of Professional Appraisal Practice (USPAP) means generally accepted standards for professional appraisal practice issued by the Appraisal Standards Board of the Appraisal Foundation.

[79 FR 77740, Dec. 24, 2014, as amended at 79 FR 77765, Dec. 24, 2014]

§ 1234.15 Qualifying commercial real estate loans.

(a) *General exception.* Commercial real estate loans that are securitized through a securitization transaction shall be subject to a 0 percent risk retention requirement under subpart B of this part, provided that the following conditions are met:

(1) The CRE assets meet the underwriting standards set forth in § 1234.17;

(2) The securitization transaction is collateralized solely by CRE loans and by servicing assets;

(3) The securitization transaction does not permit reinvestment periods; and

(4) The sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of asset-backed securities of the issuing entity, and, upon request, to the Commission, and to the FHFA, in written form under the caption ''Credit Risk Retention'' a description of the manner in which the sponsor determined the aggregate risk retention requirement for the securitization transaction after including qualifying CRE loans with 0 percent risk retention.

(b) *Risk retention requirement.* For any securitization transaction described in paragraph (a) of this section, the percentage of risk retention required under § 1234.3(a) is reduced by the percentage evidenced by the ratio of the unpaid principal balance of the qualifying CRE loans to the total unpaid principal balance of CRE loans that are included in the pool of assets collateralizing the asset-backed securities issued pursuant to the securitization transaction (the qualifying asset ratio); provided that;

(1) The qualifying asset ratio is measured as of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction;

(2) If the qualifying asset ratio would exceed 50 percent, the qualifying asset ratio shall be deemed to be 50 percent; and

(3) The disclosure required by paragraph (a)(4) of this section also includes descriptions of the qualifying CRE loans and descriptions of the CRE loans that are not qualifying CRE loans, and the material differences between the group of qualifying CRE loans and CRE loans that are not qualifying loans with respect to the composition of each group's loan balances, loan terms, interest rates, borrower credit information, and characteristics of any loan collateral.

(c) *Exception for securitizations of qualifying CRE only.* Notwithstanding other provisions of this section, the risk retention requirements of subpart B of this part shall not apply to securitization transactions where the transaction is collateralized solely by servicing assets and qualifying CRE loans.

(d) Record maintenance. A regulated entity must retain the disclosures required in paragraphs (a) and (b) of this section and the certification required in §1234.17(a)(10) of this part, in its records until three years after all ABS interests issued in the securitization are no longer outstanding. The regulated entity must provide the disclosures and certifications upon request to the Commission and the FHFA.

[79 FR 77765, Dec. 24, 2014]

§ 1234.16 [Reserved]

§ 1234.17 Underwriting standards for qualifying CRE loans.

(a) *Underwriting, product and other standards.* (1) The CRE loan must be secured by the following:

(i) An enforceable first lien, documented and recorded appropriately pursuant to applicable law, on the commercial real estate and improvements;

(ii)(A) An assignment of:

(*1*) Leases and rents and other occupancy agreements related to the commercial real estate or improvements or the operation thereof for which the borrower or an operating affiliate is a lessor or similar party and all payments under such leases and occupancy agreements; and

(*2*) All franchise, license and concession agreements related to the commercial real estate or improvements or the operation thereof for which the borrower or an operating affiliate is a lessor, licensor, concession granter or similar party and all payments under such other agreements, whether the assignments described in this paragraph (a)(1)(ii)(A)(*2*) are absolute or are stated to be made to the extent permitted by the agreements governing the applicable franchise, license or concession agreements;

(B) An assignment of all other payments due to the borrower or due to any operating affiliate in connection with the operation of the property described in paragraph (a)(1)(i) of this section; and

(C) The right to enforce the agreements described in paragraph (a)(1)(ii)(A) of this section and the agreements under which payments under paragraph (a)(1)(ii)(B) of this section are due against, and collect amounts due from, each lessee, occupant or other obligor whose payments were assigned pursuant to paragraphs (a)(1)(ii)(A) or (B) of this section upon a breach by the borrower of any of the terms of, or the occurrence of any other event of default (however denominated) under, the loan documents relating to such CRE loan; and

(iii) A security interest:

(A) In all interests of the borrower and any applicable operating affiliate in all tangible and intangible personal property of any kind, in or used in the operation of or in connection with, pertaining to, arising from, or constituting, any of the collateral described in paragraphs (a)(1)(i) or (ii) of this section; and

(B) In the form of a perfected security interest if the security interest in such property can be perfected by the filing of a financing statement, fixture filing, or similar document pursuant to the law governing the perfection of such security interest;

(2) Prior to origination of the CRE loan, the originator:

(i) Verified and documented the current financial condition of the borrower and each operating affiliate;

(ii) Obtained a written appraisal of the real property securing the loan that:

(A) Had an effective date not more than six months prior to the origination date of the loan by a competent and appropriately State-certified or State-licensed appraiser;

(B) Conforms to generally accepted appraisal standards as evidenced by the USPAP and the appraisal requirements[1] of the Federal banking agencies; and

(C) Provides an ''as is'' opinion of the market value of the real property, which includes an income approach;[2]

(iii) Qualified the borrower for the CRE loan based on a monthly payment amount derived from level monthly payments consisting of both principal and interest (at the fully-indexed rate) over the term of the loan, not exceeding 25 years, or 30 years for a qualifying multi-family property;

(iv) Conducted an environmental risk assessment to gain environmental information about the property securing the loan and took appropriate steps to mitigate any environmental liability determined to exist based on this assessment;

(v) Conducted an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections (including operating income projections for the property);

(vi)(A) Determined that based on the two years' actual performance immediately preceding the origination of the loan, the borrower would have had:

(*1*) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(*2*) A DSC ratio of 1.25 or greater, if the loan is a qualifying multi-family property loan; or

(*3*) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan;

(B) If the borrower did not own the property for any part of the last two years prior to origination, the calculation of the DSC ratio, for purposes of paragraph (a)(2)(vi)(A) of this section, shall include the property's operating income for any portion of the two-year period during which the borrower did not own the property;

(vii) Determined that, based on two years of projections, which include the new debt obligation, following the origination date of the loan, the borrower will have:

(A) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(B) A DSC ratio of 1.25 or greater, if the loan is a qualifying multi-family property loan; or

(C) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan.

(3) The loan documentation for the CRE loan includes covenants that:

(i) Require the borrower to provide the borrower's financial statements and supporting schedules to the servicer on an ongoing basis, but not less frequently than quarterly, including information on existing, maturing and new leasing or rent-roll activity for the property securing the loan, as appropriate; and

(ii) Impose prohibitions on:

(A) The creation or existence of any other security interest with respect to the collateral for the CRE loan described in paragraphs (a)(1)(i) and (a)(1)(ii)(A) of this section, except as provided in paragraph (a)(4) of this section;

(B) The transfer of any collateral for the CRE loan described in paragraph (a)(1)(i) or (a)(1)(ii)(A) of this section or of any other collateral consisting of fixtures, furniture, furnishings, machinery or equipment other than any such fixture, furniture, furnishings, machinery or equipment that is obsolete or surplus; and

(C) Any change to the name, location or organizational structure of any borrower, operating affiliate or other pledgor unless such borrower, operating affiliate or other pledgor shall

[1] 12 CFR part 34, subpart C (OCC); 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G (Board); and 12 CFR part 323 (FDIC).

[2] See USPAP, Standard 1.

have given the holder of the loan at least 30 days advance notice and, pursuant to applicable law governing perfection and priority, the holder of the loan is able to take all steps necessary to continue its perfection and priority during such 30-day period.

(iii) Require each borrower and each operating affiliate to:

(A) Maintain insurance that protects against loss on collateral for the CRE loan described in paragraph (a)(1)(i) of this section for an amount no less than the replacement cost of the property improvements, and names the originator or any subsequent holder of the loan as an additional insured or lender loss payee;

(B) Pay taxes, charges, fees, and claims, where non-payment might give rise to a lien on collateral for the CRE loan described in paragraphs (a)(1)(i) and (ii) of this section;

(C) Take any action required to:

(*1*) Protect the security interest and the enforceability and priority thereof in the collateral described in paragraphs (a)(1)(i) and (a)(1)(ii)(A) of this section and defend such collateral against claims adverse to the originator's or any subsequent holder's interest; and

(*2*) Perfect the security interest of the originator or any subsequent holder of the loan in any other collateral for the CRE loan to the extent that such security interest is required by this section to be perfected;

(D) Permit the originator or any subsequent holder of the loan, and the servicer, to inspect any collateral for the CRE loan and the books and records of the borrower or other party relating to any collateral for the CRE loan;

(E) Maintain the physical condition of collateral for the CRE loan described in paragraph (a)(1)(i) of this section;

(F) Comply with all environmental, zoning, building code, licensing and other laws, regulations, agreements, covenants, use restrictions, and proffers applicable to collateral for the CRE loan described in paragraph (a)(1)(i) of this section;

(G) Comply with leases, franchise agreements, condominium declarations, and other documents and agreements relating to the operation of collateral for the CRE loan described in paragraph (a)(1)(i) of this section, and to not modify any material terms and conditions of such agreements over the term of the loan without the consent of the originator or any subsequent holder of the loan, or the servicer; and

(H) Not materially alter collateral for the CRE loan described in paragraph (a)(1)(i) of this section without the consent of the originator or any subsequent holder of the loan, or the servicer.

(4) The loan documentation for the CRE loan prohibits the borrower and each operating affiliate from obtaining a loan secured by a junior lien on collateral for the CRE loan described in paragraph (a)(1)(i) or (a)(1)(ii)(A) of this section, unless:

(i) The sum of the principal amount of such junior lien loan, plus the principal amount of all other loans secured by collateral described in paragraph (a)(1)(i) or (a)(1)(ii)(A) of this section, does not exceed the applicable CLTV ratio in paragraph (a)(5) of this section, based on the appraisal at origination of such junior lien loan; or

(ii) Such loan is a purchase money obligation that financed the acquisition of machinery or equipment and the borrower or operating affiliate (as applicable) pledges such machinery and equipment as additional collateral for the CRE loan.

(5) At origination, the applicable loan-to-value ratios for the loan are:

(i) LTV less than or equal to 65 percent and CLTV less than or equal to 70 percent; or

(ii) LTV less than or equal to 60 percent and CLTV less than or equal to 65 percent, if an appraisal used to meet the requirements set forth in paragraph (a)(2)(ii) of this section used a direct capitalization rate, and that rate is less than or equal to the sum of:

(A) The 10-year swap rate, as reported in the Federal Reserve's H.15 Report (or any successor report) as of the date concurrent with the effective date of such appraisal; and

(B) 300 basis points.

(iii) If the appraisal required under paragraph (a)(2)(ii) of this section included a direct capitalization method using an overall capitalization rate,

that rate must be disclosed to potential investors in the securitization.

(6) All loan payments required to be made under the loan agreement are:

(i) Based on level monthly payments of principal and interest (at the fully indexed rate) to fully amortize the debt over a term that does not exceed 25 years, or 30 years for a qualifying multifamily loan; and

(ii) To be made no less frequently than monthly over a term of at least ten years.

(7) Under the terms of the loan agreement:

(i) Any maturity of the note occurs no earlier than ten years following the date of origination;

(ii) The borrower is not permitted to defer repayment of principal or payment of interest; and

(iii) The interest rate on the loan is:

(A) A fixed interest rate;

(B) An adjustable interest rate and the borrower, prior to or concurrently with origination of the CRE loan, obtained a derivative that effectively results in a fixed interest rate; or

(C) An adjustable interest rate and the borrower, prior to or concurrently with origination of the CRE loan, obtained a derivative that established a cap on the interest rate for the term of the loan, and the loan meets the underwriting criteria in paragraphs (a)(2)(vi) and (vii) of this section using the maximum interest rate allowable under the interest rate cap.

(8) The originator does not establish an interest reserve at origination to fund all or part of a payment on the loan.

(9) At the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, all payments due on the loan are contractually current.

(10)(i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all qualifying CRE loans that collateralize the asset-backed security and that reduce the sponsor's risk retention requirement under §1234.15 meet all of the requirements set forth in paragraphs (a)(1) through (9) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (a)(10)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security;

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (a)(10)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any; and

(11) Within two weeks of the closing of the CRE loan by its originator or, if sooner, prior to the transfer of such CRE loan to the issuing entity, the originator shall have obtained a UCC lien search from the jurisdiction of organization of the borrower and each operating affiliate, that does not report, as of the time that the security interest of the originator in the property described in paragraph (a)(1)(iii) of this section was perfected, other higher priority liens of record on any property described in paragraph (a)(1)(iii) of this section, other than purchase money security interests.

(b) *Cure or buy-back requirement.* If a sponsor has relied on the exception provided in §1234.15 with respect to a qualifying CRE loan and it is subsequently determined that the CRE loan did not meet all of the requirements set forth in paragraphs (a)(1) through (9) and (a)(11) of this section, the sponsor shall not lose the benefit of the exception with respect to the CRE loan if the depositor complied with the certification requirement set forth in paragraph (a)(10) of this section, and:

(1) The failure of the loan to meet any of the requirements set forth in paragraphs (a)(1) through (9) and (a)(11) of this section is not material; or;

(2) No later than 90 days after the determination that the loan does not meet one or more of the requirements

of paragraphs (a)(1) through (9) or (a)(11) of this section, the sponsor:

(i) Effectuates cure, restoring conformity of the loan to the unmet requirements as of the date of cure; or

(ii) Repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) as of the date of repurchase.

(3) If the sponsor cures or repurchases pursuant to paragraph (b)(2) of this section, the sponsor must promptly notify, or cause to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be cured or repurchased by the sponsor pursuant to paragraph (b)(2) of this section, including the principal amount of such repurchased loan(s) and the cause for such cure or repurchase.

§ 1234.18 [Reserved]

§ 1234.19 General exemptions.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

Community-focused residential mortgage means a residential mortgage exempt from the definition of ''covered transaction'' under §1026.43(a)(3)(iv) and (v) of the CFPB's Regulation Z (12 CFR 1026.43(a)).

First pay class means a class of ABS interests for which all interests in the class are entitled to the same priority of payment and that, at the time of closing of the transaction, is entitled to repayments of principal and payments of interest prior to or pro-rata with all other classes of securities collateralized by the same pool of first-lien residential mortgages, until such class has no principal or notional balance remaining.

Inverse floater means an ABS interest issued as part of a securitization transaction for which interest or other income is payable to the holder based on a rate or formula that varies inversely to a reference rate of interest.

Qualifying three-to-four unit residential mortgage loan means a mortgage loan that is:

(i) Secured by a dwelling (as defined in 12 CFR 1026.2(a)(19)) that is owner occupied and contains three-to-four housing units;

(ii) Is deemed to be for business purposes for purposes of Regulation Z under 12 CFR part 1026, Supplement I, paragraph 3(a)(5)(i); and

(iii) Otherwise meets all of the requirements to qualify as a qualified mortgage under §1026.43(e) and (f) of Regulation Z (12 CFR 1026.43(e) and (f)) as if the loan were a covered transaction under that section.

(b) This part shall not apply to:

(1) *U.S. Government-backed securitizations.* Any securitization transaction that:

(i) Is collateralized solely by residential, multifamily, or health care facility mortgage loan assets that are insured or guaranteed (in whole or in part) as to the payment of principal and interest by the United States or an agency of the United States, and servicing assets; or

(ii) Involves the issuance of asset-backed securities that:

(A) Are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States; and

(B) Are collateralized solely by residential, multifamily, or health care facility mortgage loan assets or interests in such assets, and servicing assets.

(2) *Certain agricultural loan securitizations.* Any securitization transaction that is collateralized solely by loans or other assets made, insured, guaranteed, or purchased by any institution that is subject to the supervision of the Farm Credit Administration, including the Federal Agricultural Mortgage Corporation, and servicing assets;

(3) *State and municipal securitizations.* Any asset-backed security that is a security issued or guaranteed by any State, or by any political subdivision of a State, or by any public instrumentality of a State that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act (15 U.S.C. 77c(a)(2)); and

(4) *Qualified scholarship funding bonds.* Any asset-backed security that meets the definition of a qualified scholarship

funding bond, as set forth in section 150(d)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 150(d)(2)).

(5) *Pass-through resecuritizations.* Any securitization transaction that:

(i) Is collateralized solely by servicing assets, and by asset-backed securities:

(A) For which credit risk was retained as required under subpart B of this part; or

(B) That were exempted from the credit risk retention requirements of this part pursuant to subpart D of this part;

(ii) Is structured so that it involves the issuance of only a single class of ABS interests; and

(iii) Provides for the pass-through of all principal and interest payments received on the underlying asset-backed securities (net of expenses of the issuing entity) to the holders of such class.

(6) *First-pay-class securitizations.* Any securitization transaction that:

(i) Is collateralized solely by servicing assets, and by first-pay classes of asset-backed securities collateralized by first-lien residential mortgages on properties located in any state:

(A) For which credit risk was retained as required under subpart B of this part; or

(B) That were exempted from the credit risk retention requirements of this part pursuant to subpart D of this part;

(ii) Does not provide for any ABS interest issued in the securitization transaction to share in realized principal losses other than pro rata with all other ABS interests issued in the securitization transaction based on the current unpaid principal balance of such ABS interests at the time the loss is realized;

(iii) Is structured to reallocate prepayment risk;

(iv) Does not reallocate credit risk (other than as a consequence of reallocation of prepayment risk); and

(v) Does not include any inverse floater or similarly structured ABS interest.

(7) *Seasoned loans.* (i) Any securitization transaction that is collateralized solely by servicing assets, and by seasoned loans that meet the following requirements:

(A) The loans have not been modified since origination; and

(B) None of the loans have been delinquent for 30 days or more.

(ii) For purposes of this paragraph, a *seasoned loan* means:

(A) With respect to asset-backed securities collateralized by residential mortgages, a loan that has been outstanding and performing for the longer of:

(*1*) A period of five years; or

(*2*) Until the outstanding principal balance of the loan has been reduced to 25 percent of the original principal balance.

(*3*) Notwithstanding paragraphs (b)(7)(ii)(A)(*1*) and (*2*) of this section, any residential mortgage loan that has been outstanding and performing for a period of at least seven years shall be deemed a seasoned loan.

(B) With respect to all other classes of asset-backed securities, a loan that has been outstanding and performing for the longer of:

(*1*) A period of at least two years; or

(*2*) Until the outstanding principal balance of the loan has been reduced to 33 percent of the original principal balance.

(8) *Certain public utility securitizations.* (i) Any securitization transaction where the asset-back securities issued in the transaction are secured by the intangible property right to collect charges for the recovery of specified costs and such other assets, if any, of an issuing entity that is wholly owned, directly or indirectly, by an investor owned utility company that is subject to the regulatory authority of a State public utility commission or other appropriate State agency.

(ii) For purposes of this paragraph:

(A) *Specified cost* means any cost identified by a State legislature as appropriate for recovery through securitization pursuant to specified cost recovery legislation; and

(B) *Specified cost recovery legislation* means legislation enacted by a State that:

(*1*) Authorizes the investor owned utility company to apply for, and authorizes the public utility commission or other appropriate State agency to

issue, a financing order determining the amount of specified costs the utility will be allowed to recover;

(*2*) Provides that pursuant to a financing order, the utility acquires an intangible property right to charge, collect, and receive amounts necessary to provide for the full recovery of the specified costs determined to be recoverable, and assures that the charges are non-bypassable and will be paid by customers within the utility's historic service territory who receive utility goods or services through the utility's transmission and distribution system, even if those customers elect to purchase these goods or services from a third party; and

(*3*) Guarantees that neither the State nor any of its agencies has the authority to rescind or amend the financing order, to revise the amount of specified costs, or in any way to reduce or impair the value of the intangible property right, except as may be contemplated by periodic adjustments authorized by the specified cost recovery legislation.

(c) *Exemption for securitizations of assets issued, insured or guaranteed by the United States.* This part shall not apply to any securitization transaction if the asset-backed securities issued in the transaction are:

(1) Collateralized solely by obligations issued by the United States or an agency of the United States and servicing assets;

(2) Collateralized solely by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States (other than those referred to in paragraph (b)(1)(i) of this section) and servicing assets; or

(3) Fully guaranteed as to the timely payment of principal and interest by the United States or any agency of the United States;

(d) *Federal Deposit Insurance Corporation securitizations.* This part shall not apply to any securitization transaction that is sponsored by the Federal Deposit Insurance Corporation acting as conservator or receiver under any provision of the Federal Deposit Insurance Act or of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(e) *Reduced requirement for certain student loan securitizations.* The 5 percent risk retention requirement set forth in §1234.4 shall be modified as follows:

(1) With respect to a securitization transaction that is collateralized solely by student loans made under the Federal Family Education Loan Program (''FFELP loans'') that are guaranteed as to 100 percent of defaulted principal and accrued interest, and servicing assets, the risk retention requirement shall be 0 percent;

(2) With respect to a securitization transaction that is collateralized solely by FFELP loans that are guaranteed as to at least 98 percent but less than 100 percent of defaulted principal and accrued interest, and servicing assets, the risk retention requirement shall be 2 percent; and

(3) With respect to any other securitization transaction that is collateralized solely by FFELP loans, and servicing assets, the risk retention requirement shall be 3 percent.

(f) *Community-focused lending securitizations.* (1) This part shall not apply to any securitization transaction if the asset-backed securities issued in the transaction are collateralized solely by community-focused residential mortgages and servicing assets.

(2) For any securitization transaction that includes both community-focused residential mortgages and residential mortgages that are not exempt from risk retention under this part, the percent of risk retention required under §1234.4(a) is reduced by the ratio of the unpaid principal balance of the community-focused residential mortgages to the total unpaid principal balance of residential mortgages that are included in the pool of assets collateralizing the asset-backed securities issued pursuant to the securitization transaction (the community-focused residential mortgage asset ratio); provided that:

(i) The community-focused residential mortgage asset ratio is measured as of the cut-off date or similar date for establishing the composition of the pool assets collateralizing the asset-backed securities issued pursuant to the securitization transaction; and

(ii) If the community-focused residential mortgage asset ratio would exceed 50 percent, the community-focused residential mortgage asset ratio shall be deemed to be 50 percent.

(g) *Exemptions for securitizations of certain three-to-four unit mortgage loans.* A sponsor shall be exempt from the risk retention requirements in subpart B of this part with respect to any securitization transaction if:

(1)(i) The asset-backed securities issued in the transaction are collateralized solely by qualifying three-to-four unit residential mortgage loans and servicing assets; or

(ii) The asset-backed securities issued in the transaction are collateralized solely by qualifying three-to-four unit residential mortgage loans, qualified residential mortgages as defined in §1234.13, and servicing assets.

(2) The depositor with respect to the securitization provides the certifications set forth in §1234.13(b)(4) with respect to the process for ensuring that all assets that collateralize the asset-backed securities issued in the transaction are qualifying three-to-four unit residential mortgage loans, qualified residential mortgages, or servicing assets; and

(3) The sponsor of the securitization complies with the repurchase requirements in §1234.13(c) with respect to a loan if, after closing, it is determined that the loan does not meet all of the criteria to be either a qualified residential mortgage or a qualifying three-to-four unit residential mortgage loan, as appropriate.

(h) *Rule of construction.* Securitization transactions involving the issuance of asset-backed securities that are either issued, insured, or guaranteed by, or are collateralized by obligations issued by, or loans that are issued, insured, or guaranteed by, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank shall not on that basis qualify for exemption under this part.

§1234.20 Safe harbor for certain foreign-related transactions.

(a) *Definitions.* For purposes of this section, the following definition shall apply:

U.S. person means:

(i) Any of the following:

(A) Any natural person resident in the United States;

(B) Any partnership, corporation, limited liability company, or other organization or entity organized or incorporated under the laws of any State or of the United States;

(C) Any estate of which any executor or administrator is a U.S. person (as defined under any other clause of this definition);

(D) Any trust of which any trustee is a U.S. person (as defined under any other clause of this definition);

(E) Any agency or branch of a foreign entity located in the United States;

(F) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person (as defined under any other clause of this definition);

(G) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(H) Any partnership, corporation, limited liability company, or other organization or entity if:

(*1*) Organized or incorporated under the laws of any foreign jurisdiction; and

(*2*) Formed by a U.S. person (as defined under any other clause of this definition) principally for the purpose of investing in securities not registered under the Act; and

(ii) ''U.S. person(s)'' does not include:

(A) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a person not constituting a U.S. person (as defined in paragraph (i) of this section) by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(B) Any estate of which any professional fiduciary acting as executor or

administrator is a U.S. person (as defined in paragraph (i) of this section) if:

(*1*) An executor or administrator of the estate who is not a U.S. person (as defined in paragraph (i) of this section) has sole or shared investment discretion with respect to the assets of the estate; and

(*2*) The estate is governed by foreign law;

(C) Any trust of which any professional fiduciary acting as trustee is a U.S. person (as defined in paragraph (i) of this section), if a trustee who is not a U.S. person (as defined in paragraph (i) of this section) has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person (as defined in paragraph (i) of this section);

(D) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(E) Any agency or branch of a U.S. person (as defined in paragraph (i) of this section) located outside the United States if:

(*1*) The agency or branch operates for valid business reasons; and

(*2*) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located;

(F) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(b) *In general.* This part shall not apply to a securitization transaction if all the following conditions are met:

(1) The securitization transaction is not required to be and is not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*);

(2) No more than 10 percent of the dollar value (or equivalent amount in the currency in which the ABS interests are issued, as applicable) of all classes of ABS interests in the securitization transaction are sold or transferred to U.S. persons or for the account or benefit of U.S. persons;

(3) Neither the sponsor of the securitization transaction nor the issuing entity is:

(i) Chartered, incorporated, or organized under the laws of the United States or any State;

(ii) An unincorporated branch or office (wherever located) of an entity chartered, incorporated, or organized under the laws of the United States or any State; or

(iii) An unincorporated branch or office located in the United States or any State of an entity that is chartered, incorporated, or organized under the laws of a jurisdiction other than the United States or any State; and

(4) If the sponsor or issuing entity is chartered, incorporated, or organized under the laws of a jurisdiction other than the United States or any State, no more than 25 percent (as determined based on unpaid principal balance) of the assets that collateralize the ABS interests sold in the securitization transaction were acquired by the sponsor or issuing entity, directly or indirectly, from:

(i) A majority-owned affiliate of the sponsor or issuing entity that is chartered, incorporated, or organized under the laws of the United States or any State; or

(ii) An unincorporated branch or office of the sponsor or issuing entity that is located in the United States or any State.

(c) *Evasions prohibited.* In view of the objective of these rules and the policies underlying Section 15G of the Exchange Act, the safe harbor described in paragraph (b) of this section is not available with respect to any transaction or series of transactions that, although in technical compliance with paragraphs (a) and (b) of this section, is part of a plan or scheme to evade the requirements of section 15G and this part. In such cases, compliance with section 15G and this part is required.

§ 1234.21 Additional exemptions.

(a) *Securitization transactions.* The federal agencies with rulewriting authority under section 15G(b) of the Exchange Act (15 U.S.C. 78o-11(b)) with respect to the type of assets involved may jointly provide a total or partial exemption of any securitization transaction as such agencies determine may be appropriate in the public interest and for the protection of investors.

(b) *Exceptions, exemptions, and adjustments.* The Federal banking agencies and the Commission, in consultation with the Federal Housing Finance Agency and the Department of Housing and Urban Development, may jointly adopt or issue exemptions, exceptions or adjustments to the requirements of this part, including exemptions, exceptions or adjustments for classes of institutions or assets in accordance with section 15G(e) of the Exchange Act (15 U.S.C. 78o-11(e)).

§ 1234.22 Periodic review of the QRM definition, exempted three-to-four unit residential mortgage loans, and community-focused residential mortgage exemption

(a) The Federal banking agencies and the Commission, in consultation with the Federal Housing Finance Agency and the Department of Housing and Urban Development, shall commence a review of the definition of qualified residential mortgage in §1234.13, a review of the community-focused residential mortgage exemption in §1234.19(f), and a review of the exemption for qualifying three-to-four unit residential mortgage loans in §1234.19(g):

(1) No later than four years after the effective date of the rule (as it relates to securitizers and originators of asset-backed securities collateralized by residential mortgages), five years following the completion of such initial review, and every five years thereafter; and

(2) At any time, upon the request of any Federal banking agency, the Commission, the Federal Housing Finance Agency or the Department of Housing and Urban Development, specifying the reason for such request, including as a result of any amendment to the definition of qualified mortgage or changes in the residential housing market.

(b) The Federal banking agencies, the Commission, the Federal Housing Finance Agency and the Department of Housing and Urban Development shall publish in the FEDERAL REGISTER notice of the commencement of a review and, in the case of a review commenced under paragraph (a)(2) of this section, the reason an agency is requesting such review. After completion of any review, but no later than six months after the publication of the notice announcing the review, unless extended by the agencies, the agencies shall jointly publish a notice disclosing the determination of their review. If the agencies determine to amend the definition of qualified residential mortgage, the agencies shall complete any required rulemaking within 12 months of publication in the FEDERAL REGISTER of such notice disclosing the determination of their review, unless extended by the agencies.

PART 1235—RECORD RETENTION FOR REGULATED ENTITIES AND OFFICE OF FINANCE

Sec.

AUTHORITY: 12 U.S.C. 4511(b), 4513(a), 4513b(a)(10) and (11), 4526.

SOURCE: 76 FR 33127, June 8, 2011, unless otherwise noted.

§ 1235.1 Purpose and scope.

The purpose of this part is to set forth minimum requirements for a record retention program for each regulated entity and the Office of Finance. The requirements are intended to further prudent management as well as to ensure that complete and accurate records of each regulated entity and the Office of Finance are readily accessible to FHFA.

§ 1235.2 Definitions.

For purposes of this part, the term—

Electronic record means a record created, generated, communicated, or stored by electronic means.

E-mail means a document created or received on a computer network for transmitting messages electronically, and any attachments which may be transmitted with the document.

Employee means any officer or employee of a regulated entity or the Office of Finance.

Record means any information, whether generated internally or received from outside sources by a regulated entity or the Office of Finance, related to the conduct of the business of a regulated entity or the Office of Finance (which business, in the case of the Office of Finance, shall include any functions performed with respect to the Financing Corporation) or to legal or regulatory requirements, regardless of the following—

(1) Form or format, including hard copy documents (*e.g.*, files, logs, and reports), electronic documents (*e.g.*, e-mail, databases, spreadsheets, PowerPoint presentations, electronic reporting systems, electronic tapes and back-up tapes, optical discs, CD–ROMS, and DVDs), and voicemail or recorded telephone line records;

(2) Where the information is stored or located, including network servers, desktop or laptop computers and handheld computers, other wireless devices with text messaging capabilities, and on-site or off-site at a storage facility;

(3) Whether the information is maintained or used on regulated entity or Office of Finance equipment, or on personal or home computer systems of an employee; or

(4) Whether the information is active or inactive.

Record hold means a requirement, an order, or a directive from a regulated entity, the Office of Finance, or FHFA that the regulated entity or the Office of Finance is to retain records relating to a particular issue in connection with an actual or a potential FHFA examination, investigation, enforcement proceeding, or litigation of which the regulated entity or the Office of Finance has received notice from FHFA or otherwise has knowledge.

Record retention schedule means a schedule that details the categories of records a regulated entity or the Office of Finance is required to retain and the corresponding retention periods. The record retention schedule includes all media, such as microfilm and machine-readable computer records, for each record category.

Retention period means the length of time that records must be kept before they are destroyed, as determined by the organization's record retention schedule. Records not authorized for destruction have a retention period of ''permanent.''

[76 FR 33127, June 8, 2011, as amended at 78 FR 2324, Jan. 11, 2013]

§ 1235.3 Establishment and evaluation of a record retention program.

(a) *Establishment.* Each regulated entity and the Office of Finance shall establish and maintain a written record retention program and provide a copy of such program to the Deputy Director of the Division of Enterprise Regulation, or his or her designee, or the Deputy Director for the Division of Federal Home Loan Bank Regulation, or his or her designee, as appropriate, within 180 days of the effective date of this part, and annually thereafter, and whenever a significant revision to the program has been made.

(b) *Evaluation.* Management of each regulated entity and the Office of Finance shall evaluate in writing the adequacy and effectiveness of the record retention program at least every two years and provide a copy of the evaluation to the board of directors and the Director.

§ 1235.4 Minimum requirements of a record retention program.

(a) *General minimum requirements.* The record retention program established and maintained by each regulated entity and the Office of Finance under § 1235.3 shall:

(1) Assure that retained records are complete and accurate;

(2) Assure that the form of retained records and the retention period—

(i) Are appropriate to support administrative, business, external and internal audit functions, and litigation of the regulated entity or the Office of Finance; and

(ii) Comply with requirements of applicable laws and regulations, including this part;

(3) Assign in writing the authorities and responsibilities for record retention activities for employees, including line managers and corporate management;

(4) Include policies and procedures concerning record holds, consistent with §1235.5, and, as appropriate, integrate them with policies and procedures throughout the organization;

(5) Include an accurate, current, and comprehensive record retention schedule that lists records by major categories, subcategories, record type, and retention period, which retention period is appropriate to the specific record and consistent with applicable legal, regulatory, fiscal, operational, and business requirements;

(6) Include appropriate security and internal controls to protect records from unauthorized access and data alteration;

(7) Provide for appropriate back-up and recovery of electronic records to ensure the same accuracy as the primary records;

(8) Provide for a periodic testing of the ability to access records; and

(9) Provide for the proper disposition of records.

(b) *Minimum storage requirements for electronic records.* Electronic records, preferably searchable, must be maintained on immutable, non-rewritable storage in a manner that provides for both ready access by any person who is entitled to access the records, including staff of FHFA, and accurate reproduction for later reference by transmission, printing or other means.

(c) *Communication and training*—(1) The record retention program established and maintained by each regulated entity and the Office of Finance under §1235.3 shall provide for periodic training and communication throughout the organization.

(2) The record retention program shall:

(i) Provide for communication throughout the organization on record retention policies, procedures, and record retention schedule updates; and

(ii) Provide for training of and notice to all employees on a periodic basis on their record retention responsibilities, including instruction regarding penalties provided by law for the unlawful removal or destruction of records. The record retention program also shall provide for training for the agents or independent contractors of a regulated entity or the Office of Finance, as appropriate, consistent with their respective roles and responsibilities to the regulated entity or the Office of Finance.

§1235.5 Record hold.

(a) *Notification by FHFA.* In the event that FHFA is requiring a record hold, FHFA shall notify the chief executive officer of the regulated entity or the Office of Finance. Regulated entities and the Office of Finance must have a written policy for handling notice of a record hold.

(b) *Notification by a regulated entity or the Office of Finance.* The record retention program of a regulated entity and the Office of Finance shall—

(1) Address how employees and, as appropriate, how agents or independent contractors consistent with their respective roles and responsibilities to the regulated entity or the Office of Finance, will receive prompt notification of a record hold;

(2) Designate an individual to communicate specific requirements and instructions, including, when necessary, the instruction to cease immediately any otherwise permissible destruction of records; and

(3) Provide that any employee and, as appropriate, any agent or independent contractor consistent with his or her respective role and responsibility to the regulated entity or Office of Finance, who has received notice of a potential investigation, enforcement proceeding, or litigation by FHFA involving the regulated entity or the Office of Finance or an employee, or otherwise has actual knowledge that an issue is subject to such an investigation, enforcement proceeding or litigation,

shall notify immediately the legal department or the individual providing legal services as well as senior management of the regulated entity or the Office of Finance and shall retain any records that may be relevant in any way to such investigation, enforcement proceeding, or litigation.

(c) *Method of record retention during a record hold.* The record retention program of each regulated entity and the Office of Finance shall address the method by which the regulated entity or the Office of Finance will retain records during a record hold. Specifically, the program shall describe the method for the continued preservation of electronic records, including e-mail, and, as applicable, the conversion of records from paper to electronic form as well as any alternative storage method.

(d) *Access to and retrieval of records during a record hold.* The record retention program of each regulated entity or the Office of Finance shall ensure access to and retrieval of records by the regulated entity and the Office of Finance, and access, upon request, by FHFA, during a record hold. Such access shall be by reasonable means, consistent with the nature and availability of the records and existing information technology.

§ 1235.6 Access to records.

Each regulated entity and the Office of Finance shall make its records available promptly upon request by FHFA, at a location and in a form and manner acceptable to FHFA.

§ 1235.7 Supervisory action.

(a) *Supervisory action.* Failure by a regulated entity or the Office of Finance to comply with this part may subject the regulated entity or the Office of Finance or the board members, officers, or employees thereof to supervisory action by FHFA under the Safety and Soundness Act, including but not limited to cease-and-desist proceedings, temporary cease-and-desist proceedings, and civil money penalties.

(b) *No limitation of authority.* This part does not limit or restrict the authority of FHFA to act under its safety and soundness mandate, in accordance with the Safety and Soundness Act. Such authority includes, but is not limited to, conducting examinations, requiring reports and disclosures, and enforcing compliance with applicable laws, rules, and regulations.

PART 1236—PRUDENTIAL MANAGEMENT AND OPERATIONS STANDARDS

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513(a) and (f), 4513b, and 4526.

SOURCE: 77 FR 33959, June 8, 2012, unless otherwise noted.

§ 1236.1 Purpose.

This part establishes the prudential management and operations standards that are required by 12 U.S.C. 4513b and the processes by which FHFA can notify a regulated entity of its failure to operate in accordance with the standards and can direct the entity to take corrective action. This part further specifies the possible consequences for any regulated entity that fails to operate in accordance with the standards or otherwise fails to comply with this part.

§ 1236.2 Definitions.

Unless otherwise indicated, terms used in this part have the meanings that they have in the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. 4501 *et seq.*, or the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.*

Extraordinary growth—(1) For purposes of 12 U.S.C. 4513b(b)(3)(C), means:

(i) With respect to a Bank, growth of non-advance assets in excess of 30 percent over the six calendar quarter period preceding the date on which FHFA notified the Bank that it was required to submit a corrective plan; and

(ii) With respect to an Enterprise, quarterly non-annualized growth of assets in excess of 7.5 percent in any calendar quarter during the six calendar quarter period preceding the date on which FHFA notified the Enterprise that it was required to submit a corrective plan.

(2) For purposes of calculating an increase in assets, assets acquired through merger or acquisition approved by FHFA are not to be included.

Standards means any one or more of the prudential management and operations standards established by the Director pursuant to 12 U.S.C. 4513b(a), as modified from time to time pursuant to §1236.3(b), including the introductory statement of general responsibilities of boards of directors and senior management of the regulated entities.

[77 FR 33959, June 8, 2012, as amended at 78 FR 2324, Jan. 11, 2013; 80 FR 72336, Nov. 19, 2015]

§1236.3 Prudential standards as guidelines.

(a) The Standards constitute the prudential management and operations standards required by 12 U.S.C. 4513b.

(b) The Standards have been adopted as guidelines, as authorized by 12 U.S.C. 4513b(a), and the Director may modify, revoke, or add to the Standards, or any one or more of them, at any time by order or notice.

(c) In the case of a direct conflict between a Standard and an FHFA regulation, when it is not possible to comply with both the Standard and the FHFA regulation, the regulation shall control.

(d) Failure to meet any Standard may constitute an unsafe and unsound practice for purposes of the enforcement provisions of 12 U.S.C. chapter 46, subchapter III.

§1236.4 Failure to meet a standard; corrective plans.

(a) *Determination.* FHFA may, based upon an examination, inspection or any other information, determine that a regulated entity has failed to meet one or more of the Standards.

(b) *Submission of corrective plan.* If FHFA determines that a regulated entity has failed to meet any Standard, FHFA may require the entity to submit a corrective plan, in which case FHFA shall, by written notice, inform the regulated entity of that determination and the requirement to submit a corrective plan.

(c) *Corrective plans*—(1) *Contents of plan.* A corrective plan shall describe the actions the regulated entity will take to correct its failure to meet any one or more of the Standards, and the time within which each action will be taken.

(2) *Filing deadline*—(i) *In general.* A regulated entity must file a written corrective plan with FHFA within thirty (30) calendar days of being notified by FHFA of its failure to meet a Standard and need to file a corrective plan, unless FHFA notifies the regulated entity in writing that the plan must be filed within a different time period.

(ii) *Other plans.* If a regulated entity must file a capital restoration plan submitted pursuant to 12 U.S.C. 4622, it may submit the corrective plan required under this section as part of the capital restoration plan, subject to the deadline in paragraph (c)(2)(i) of this section. If a regulated entity currently is operating under a cease-and-desist order entered into pursuant to 12 U.S.C. 4631 or 4632, or a formal or informal agreement, or must file a response to a report of examination or report of inspection, it may, with the permission of FHFA, submit the corrective plan required under this section as part of the regulated entity's compliance with that order, agreement or response, subject to the deadline in paragraph (c)(2)(i) of this section, but the corrective plan would not become a part of the order, agreement, or response.

(d) *Amendment of corrective plan.* A regulated entity that is operating in accordance with an approved corrective plan may submit a written request to FHFA to amend the plan as necessary to reflect any changes in circumstance. Until such time that FHFA approves a proposed amendment, the regulated entity must continue to operate in accordance with the terms of the corrective plan as previously approved.

(e) *Review of corrective plans and amendments.* Within thirty (30) calendar days of receiving a corrective plan or proposed amendment to a plan, FHFA

will notify the regulated entity in writing of its decision on the plan, will direct the regulated entity to submit additional information, or will notify the regulated entity in writing that FHFA has established a different deadline.

§ 1236.5 Failure to submit a corrective plan; noncompliance.

(a) *Remedies.* If a regulated entity fails to submit an acceptable corrective plan under §1236.4(b), or fails in any material respect to implement or otherwise comply with an approved corrective plan, FHFA shall order the regulated entity to correct that deficiency, and may:

(1) Prohibit the regulated entity from increasing its average total assets, as defined in 12 U.S.C. 4516(b)(4), for any calendar quarter over its average total assets for the preceding calendar quarter, or may otherwise restrict the rate at which the average total assets of the regulated entity may increase from one calendar quarter to another;

(2) Prohibit the regulated entity from paying dividends;

(3) Prohibit the regulated entity from redeeming or repurchasing capital stock;

(4) Require the regulated entity to maintain or increase its level of retained earnings;

(5) Require an Enterprise to increase its ratio of core capital to assets, or require a Bank to increase its ratio of total capital, as defined in 12 U.S.C. 1426(a)(5), to assets; or

(6) Require the regulated entity to take any other action that the Director determines will better carry out the purposes of the statute by bringing the regulated entity into conformance with the Standards.

(b) *Extraordinary growth.* If a regulated entity that has failed to submit an acceptable corrective plan or has failed in any material respect to implement or otherwise comply with an approved corrective plan, also has experienced extraordinary growth, FHFA shall impose at least one of the sanctions listed in paragraph (a) of this section, consistently with the requirements of 12 U.S.C. 4513b(b)(3).

(c) *Orders*—(1) *Notice.* Except as provided in paragraph (c)(4) of this section, FHFA will notify a regulated entity in writing of its intent to issue an order requiring the regulated entity to correct its failure to submit or its failure in any material respect to implement or otherwise comply with an approved corrective plan. Any such notice will include:

(i) A statement that the regulated entity has failed to submit a corrective plan under §1236.4, or has not implemented or otherwise has not complied in any material respect with an approved plan;

(ii) A description of any sanctions that FHFA intends to impose and, in the case of the mandatory sanctions required by 12 U.S.C. 4513b(b)(3), a statement that FHFA believes that the regulated entity has experienced extraordinary growth; and

(iii) The proposed date when any sanctions would become effective or the proposed date for completion of any required actions.

(2) *Response to notice.* A regulated entity may file a written response to a notice of intent to issue an order, which must be delivered to FHFA within fourteen (14) calendar days of the date of the notice, unless FHFA determines that a different time period is appropriate in light of the safety and soundness of the regulated entity or other relevant circumstances. The response should include:

(i) An explanation why the regulated entity believes that the action proposed by FHFA is not an appropriate exercise of discretion;

(ii) Any recommended modification of the proposed order; and

(iii) Any other relevant information, mitigating circumstances, documentation or other evidence in support of the position of the regulated entity regarding the proposed order.

(3) *Failure to file response.* A regulated entity's failure to file a written response within the specified time period will constitute a waiver of the opportunity to respond and will constitute consent to issuance of the order.

(4) *Immediate issuance of final order.* FHFA may issue an order requiring a regulated entity immediately to take

actions to correct a Standards deficiency or to take or refrain from taking other actions pursuant to paragraph (a) of this section. Within fourteen (14) calendar days of the issuance of an order under this paragraph, or other time period specified by FHFA, a regulated entity may submit a written appeal of the order to FHFA. FHFA will respond in writing to a timely filed appeal within sixty (60) days after receiving the appeal. During this period, the order will remain in effect unless FHFA stays the effectiveness of the order.

(d) *Request for modification or rescission of order.* A regulated entity subject to an order under this part may submit a written request to FHFA for an amendment to the order to reflect a change in circumstance. Unless otherwise ordered by FHFA, the order shall continue in place while such a request is pending before FHFA.

(e) *Agency review and determination.* FHFA will respond in writing within thirty (30) days after receiving a response or amendment request, unless FHFA notifies the regulated entity in writing that it will respond within a different time period. After considering a regulated entity's response or amendment request, FHFA may:

(1) Issue the order as proposed or in modified form;

(2) Determine not to issue the order and instead issue a different order; or

(3) Seek additional information or clarification of the response from the regulated entity, or any other relevant source.

APPENDIX TO PART 1236—PRUDENTIAL MANAGEMENT AND OPERATIONS STANDARDS

The following provisions constitute the prudential management and operations standards established pursuant to 12 U.S.C. 4513b(a).

GENERAL RESPONSIBILITIES OF THE BOARD OF DIRECTORS AND SENIOR MANAGEMENT

The following provisions address the general responsibilities of the boards of directors and senior management of the regulated entities as they relate to the matters addressed by each of the Standards. The descriptions are not a comprehensive listing of the responsibilities of either the boards or senior management, each of whom have additional duties and responsibilities to those described in these Standards.

Responsibilities of the Board of Directors

1. With respect to the subject matter addressed by each Standard, the board of directors is responsible for adopting business strategies and policies that are appropriate for the particular subject matter. The board should review all such strategies and policies periodically. It should review and approve all major strategies and policies at least annually and make any revisions that are necessary to ensure that such strategies and policies remain consistent with the entity's overall business plan.

2. The board of directors is responsible for overseeing management of the regulated entity, which includes ensuring that management includes personnel who are appropriately trained and competent to oversee the operation of the regulated entity as it relates to the functions and requirements addressed by each Standard, and that management implements the policies set forth by the board.

3. The board of directors is responsible for remaining informed about the operations and condition of the regulated entity, including operating consistently with the Standards, and senior management's implementation of the strategies and policies established by the board of directors.

4. The board of directors must remain sufficiently informed about the nature and level of the regulated entity's overall risk exposures, including market, credit, and counterparty risk, so that it can understand the possible short- and long-term effects of those exposures on the financial health of the regulated entity, including the possible short- and long-term consequences to earnings, liquidity, and economic value. The board of directors should: establish the regulated entity's risk tolerances and should provide management with clear guidance regarding the level of acceptable risks; review the regulated entity's entire market risk management framework, including policies and entity-wide risk limits at least annually; oversee the adequacy of the actions taken by senior management to identify, measure, manage, and control the regulated entity's risk exposures; and ensure that management takes appropriate corrective measures whenever market risk limit violations or breaches occur.

Responsibilities of Senior Management

5. With respect to the subject matter addressed by each Standard, senior management is responsible for developing the policies, procedures and practices that are necessary to implement the business strategies and policies adopted by the board of directors. Senior management should ensure that

such items are clearly written, sufficiently detailed, and are followed by all personnel. Senior management also should ensure that the regulated entity has personnel who are appropriately trained and competent to carry out their respective functions and that all delegated responsibilities are performed.

6. Senior management should ensure that the regulated entity has adequate resources, systems and controls available to execute effectively the entity's business strategies, policies and procedures, including operating consistently with each of the Standards.

7. Senior management should provide the board of directors with periodic reports relating to the regulated entity's condition and performance, including the subject matter addressed by each of the Standards, that are sufficiently detailed to allow the board of directors to remain fully informed about the business of the regulated entity.

8. Senior management should regularly review and discuss with the board of directors information regarding the regulated entity's risk exposures that is sufficient in detail and timeliness to permit the board of directors to understand and assess the performance of management in identifying and managing the various risks to which the regulated entity is exposed.

Responsibilities of the Board of Directors and Senior Management

9. The board of directors and senior management should conduct themselves in such a manner as to promote high ethical standards and a culture of compliance throughout the organization.

10. The board of directors and senior management should ensure that the regulated entity's overall risk profile is aligned with its mission objectives.

STANDARD 1—INTERNAL CONTROLS AND INFORMATION SYSTEMS

Responsibilities of the Board of Directors

1. Regarding internal controls and information systems, the board of directors of each regulated entity should adopt appropriate policies, ensure personnel are appropriately trained and competent, approve and periodically review overall business strategies, approve the organizational structure, and assess the adequacy of senior management's oversight of this function.

Responsibilities of Senior Management

2. Regarding internal controls and information systems, senior management should implement strategies and policies approved by the board of directors, establish appropriate policies, monitor the adequacy and effectiveness of this function, and ensure personnel are appropriately trained and competent. The organizational structure should clearly assign responsibility, authority, and reporting relationships.

Responsibilities of the Board of Directors and Senior Management

3. Regarding internal controls and information systems, both the board of directors and senior management should promote high ethical standards, create a culture that emphasizes the importance of this function, and promptly address any issues in need of remediation.

Framework

4. The regulated entity should have an adequate and effective system of internal controls, which should include a board approved organizational structure that clearly assigns responsibilities, authority, and reporting relationships, and establishes an appropriate segregation of duties that ensures that personnel are not assigned conflicting responsibilities.

5. The regulated entity should establish appropriate internal control policies and should monitor the adequacy and effectiveness of its internal controls and information systems on an ongoing basis through a formal self-assessment process.

6. The regulated entity should have an organizational culture that emphasizes and demonstrates to personnel at all levels the importance of internal controls.

7. The regulated entity should address promptly any violations, findings, weaknesses, deficiencies, and other issues in need of remediation relating to the internal control systems.

Risk Recognition and Assessment

8. A regulated entity should have an effective risk assessment process that ensures that management recognizes and continually assesses all material risks, including credit risk, market risk, interest rate risk, liquidity risk, and operational risk.

Control Activities and Segregation of Duties

9. A regulated entity should have an effective internal control system that defines control activities at every business level.

10. A regulated entity's control activities should include:

a. Board of directors and senior management reviews of progress toward goals and objectives;

b. Appropriate activity controls for each business unit;

c. Physical controls to protect property and other assets and limit access to property and systems;

d. Procedures for monitoring compliance with exposure limits and follow-up on noncompliance;

e. A system of approvals and authorizations for transactions over certain limits; and

f. A system for verification and reconciliation of transactions.

Information and Communication

11. A regulated entity should have information systems that provide relevant, accurate and timely information and data.

12. A regulated entity should have secure information systems that are supported by adequate contingency arrangements.

13. A regulated entity should have effective channels of communication to ensure that all personnel understand and adhere to policies and procedures affecting their duties and responsibilities.

Monitoring Activities and Correcting Deficiencies

14. A regulated entity should monitor the overall effectiveness of its internal controls and key risks on an ongoing basis and ensure that business units and internal and external audit conduct periodic evaluations.

15. Internal control deficiencies should be reported to senior management and the board of directors on a timely basis and addressed promptly.

Applicable Laws, Regulations, and Policies

16. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing internal controls and information systems.

STANDARD 2—INDEPENDENCE AND ADEQUACY OF INTERNAL AUDIT SYSTEMS

Audit Committee

1. A regulated entity's board of directors should have an audit committee that exercises proper oversight and adopts appropriate policies and procedures designed to ensure the independence of the internal audit function. The audit committee should ensure that the internal audit department includes personnel who are appropriately trained and competent to oversee the internal audit function.

2. The board of directors should review and approve the audit committee charter at least every three years.

3. The audit committee of the board of directors is responsible for monitoring and evaluating the effectiveness of the regulated entity's internal audit function.

4. Issues reported by the internal audit department to the audit committee should be promptly addressed and satisfactorily resolved.

Internal Audit Function

5. A regulated entity should have an internal audit function that provides for adequate testing of the system of internal controls.

6. A regulated entity should have an independent and objective internal audit department that reports directly to the audit committee of the board of directors.

7. A regulated entity's internal audit department should be adequately staffed with properly trained and competent personnel.

8. The internal audit department should conduct risk-based audits.

9. The internal audit department should conduct adequate testing and review of internal control and information systems.

10. The internal audit department should determine whether violations, findings, weaknesses and other issues reported by regulators, external auditors, and others have been promptly addressed.

Applicable Laws, Regulations, and Policies

11. A regulated entity should comply with applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing the independence and adequacy of internal audit systems.

STANDARD 3—MANAGEMENT OF MARKET RISK EXPOSURE

Responsibilities of the Board of Directors

1. Regarding the overall management of market risk exposure, the board of directors should remain sufficiently informed about the nature and level of the regulated entity's market risk exposures. At least annually, the board should review the entire market risk framework, including policies and risk limits, and provide an assessment of compliance.

2. Regarding the policies, practices and procedures surrounding the management of market risk, the board of directors should approve all major strategies and policies relating to the management of market risk, ensure all major strategies and policies are consistent with the overall business plan, establish and communicate a market risk tolerance, and ensure appropriate corrective measures are taken when market risk limit violations or breaches occur.

3. The board, or a board appointed committee, should oversee the adequacy of actions taken by senior management to identify, measure, manage, and control market risk exposures, ensure market risk policies establish lines of authority and responsibility, and review risk exposures on a periodic basis.

Responsibilities of Senior Management

4. Regarding the overall management of market risk exposure, senior management

should provide sufficient and timely information to the board of directors, ensure personnel are appropriately trained and competent, ensure adequate systems and resources are available to manage and control market risk, report any breaches to the board of directors (or the appropriate board committee), and take appropriate remedial action.

5. Regarding the policies, practices, and procedures surrounding market risk exposure, senior management should ensure market risk policies and procedures are clearly written, sufficiently detailed, and followed. Approved policies and procedures should include clear market risk limits and lines of authority for managing market risk.

Market Risk Strategy

6. A regulated entity should have a clearly defined and well-documented strategy for managing market risk, which must be consistent with its overall business plan, must enable the regulated entity to identify, manage, monitor, and control the regulated entity's risk exposures on a business unit and an enterprise-wide basis, and must ensure that the lines of authority and responsibility for managing market risk and monitoring market risk limits are clearly identified. The strategy should specify a target account, or target accounts, for managing market risk (*e.g.*, specify whether the objective is to control risk to earnings, net portfolio value, or some other target, or some combination of targets), and, if a market risk limit is breached, should require that the breach be reported to the board of directors, or the appropriate board committee, and that appropriate remedial action, including any ordered by the board of directors, should be taken.

7. Management should ensure that the board of directors is made aware of the advantages and disadvantages of the regulated entity's chosen market risk management strategy, as well as those of alternative strategies, so that the board of directors can make an informed judgment about the relative efficacy of the different strategies.

8. A Bank's strategy for managing market risk should take into account the importance of maintaining the market value of equity of member stock commensurate with the par value of that stock so that the Bank is able to redeem and repurchase member stock at par value.

9. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance, (*e.g.*, advisory bulletins) governing the independence and adequacy of the management of market risk exposure.

STANDARD 4—MANAGEMENT OF MARKET RISK—MEASUREMENT SYSTEMS, RISK LIMITS, STRESS TESTING, AND MONITORING AND REPORTING

Risk Measurement Systems

1. A regulated entity should have a risk measurement system (a model or models) that capture(s) all material sources of market risk and provide(s) meaningful and timely measures of the regulated entity's risk exposures, as well as personnel who are appropriately trained and competent to operate and oversee the risk measurement system.

2. The risk measurement system should be capable of estimating the effect of changes in interest rates and other key risk factors on the regulated entity's earnings and market value of equity over a range of scenarios.

3. The measurement system should be capable of valuing all financial assets and liabilities in the regulated entity's portfolio.

4. The measurement system should address all material sources of market risk including repricing risk, yield curve risk, basis risk, and options risk.

5. Management should ensure the integrity and timeliness of the data inputs used to measure the regulated entity's market risk exposures, and should ensure that assumptions and parameters are reasonable and properly documented.

6. The measurement system's methodologies, assumptions, and parameters should be thoroughly documented, understood by management, and reviewed on a regular basis.

7. A regulated entity's market risk model should be upgraded periodically to incorporate advances in risk modeling technology.

8. A regulated entity should have a documented approval process for model changes that requires model changes to be authorized by a party independent of the party making the change.

9. A regulated entity should ensure that its models are independently validated on a regular basis.

Risk Limits

10. Risk limits should be consistent with the regulated entity's strategy for managing interest rate risk and should take into account the financial condition of the regulated entity, including its capital position.

11. Risk limits should address the potential impact of changes in market interest rates on net interest income, net income, and the regulated entity's market value of equity.

Stress Testing

12. A regulated entity should conduct stress tests on a regular basis for a variety of institution-specific and market-wide stress scenarios to identify potential vulnerabilities and to ensure that exposures

are consistent with the regulated entity's tolerance for risk.

13. A regulated entity should use stress test outcomes to adjust its market risk management strategies, policies, and positions and to develop effective contingency plans.

14. Special consideration should be given to ensuring that complex financial instruments, including instruments with complex option features, are properly valued under stress scenarios and that the risks associated with options exposures are properly understood.

15. Management should ensure that the regulated entity's board of directors or a committee thereof considers the results of stress tests when establishing and reviewing its strategies, policies, and limits for managing and controlling interest rate risk.

16. The board of directors and senior management should review periodically the design of stress tests to ensure that they encompass the kinds of market conditions under which the regulated entity's positions and strategies would be most vulnerable.

Monitoring and Reporting

17. A regulated entity should have an adequate management information system for reporting market risk exposures.

18. The board of directors, senior management, and the appropriate line managers should be provided with regular, accurate, informative, and timely market risk reports.

Applicable Laws, Regulations, and Policies

19. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing the management of market risk.

STANDARD 5—ADEQUACY AND MAINTENANCE OF LIQUIDITY AND RESERVES

Responsibilities of the Board of Directors

1. Regarding the adequacy and maintenance of liquidity and reserves, the board of directors should review (at least annually) all major strategies and policies governing this area, approve appropriate revisions to such strategies and policies, and ensure senior management are appropriately trained to effectively manage liquidity.

Responsibilities of Senior Management

2. Regarding the adequacy and maintenance of liquidity and reserves, senior management should develop strategies, policies, and practices to manage liquidity risk, ensure personnel are appropriately trained and competent, and provide the board of directors with periodic reports on the regulated entity's liquidity position.

Policies, Practices, and Procedures

3. A regulated entity should establish a liquidity management framework that ensures it maintains sufficient liquidity to withstand a range of stressful events.

4. A regulated entity should articulate a liquidity risk tolerance that is appropriate for its business strategy and its mission goals and objectives.

5. A regulated entity should have a sound process for identifying, measuring, monitoring, controlling, and reporting its liquidity position and its liquidity risk exposures.

6. A regulated entity should establish a funding strategy that provides effective diversification in the sources and tenor of funding.

7. A regulated entity should conduct stress tests on a regular basis for a variety of institution-specific and market-wide stress scenarios to identify sources of potential liquidity strain and to ensure that current exposures remain in accordance with each regulated entity's established liquidity risk tolerance.

8. A regulated entity should use stress test outcomes to adjust its liquidity management strategies, policies, and positions and to develop effective contingency plans.

9. A regulated entity should have a formal contingency funding plan that clearly sets out the strategies for addressing liquidity shortfalls in emergencies. Where practical, contingent funding sources should be tested or drawn on periodically to assess their reliability and operational soundness.

10. A regulated entity should maintain adequate reserves of liquid assets, including adequate reserves of unencumbered, marketable securities that can be liquidated to meet unexpected needs.

Applicable Laws, Regulations, and Policies

11. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing the adequacy and maintenance of liquidity and reserves.

STANDARD 6—MANAGEMENT OF ASSET AND INVESTMENT PORTFOLIO GROWTH

Responsibilities of the Board of Directors and Senior Management

1. Regarding the management of asset and investment portfolio growth, the board of directors is responsible for overseeing the management of growth in these areas, ensuring senior management are appropriately trained and competent, establishing policies governing the regulated entity's assets and investment growth, with prudential limits on the growth of mortgages and mortgage-backed securities, and reviewing policies at least annually.

2. Regarding the management of asset and investment portfolio growth, senior management should adhere to board-approved policies governing growth in these areas, and ensure personnel are appropriately trained and competent to manage the growth.

Risk Measurement, Monitoring, and Control

3. A regulated entity should manage its asset growth and investment growth in a prudent manner that is consistent with the regulated entity's business strategy, board-approved policies, risk tolerances, and safe and sound operations, and should establish prudential limits on the growth of its portfolios of mortgage loans and mortgage backed securities.

4. A regulated entity should manage asset growth and investment growth in a way that is compatible with mission goals and objectives.

5. A regulated entity should manage investments and acquisition of assets in a way that complies with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins).

STANDARD 7—INVESTMENTS AND ACQUISITIONS OF ASSETS

Responsibilities of the Board of Directors and Senior Management

1. The board of directors is responsible for overseeing the regulated entity's investments and acquisition of other assets, ensuring senior management are appropriately trained and competent, and establishing, approving and periodically reviewing policies and procedures governing investments and acquisitions of other assets.

Policies, Practices, and Procedures

2. A regulated entity should have a board-approved investment policy that establishes clear and explicit guidelines that are appropriate to the regulated entity's mission and objectives. The investment policy should establish the regulated entity's investment objectives, risk tolerances, investment constraints, and policies and procedures for selecting investments.

3. A regulated entity should have a board-approved policy governing acquisitions of major categories of assets other than investments. The policy should establish clear and explicit guidelines for asset acquisitions that are appropriate to the regulated entity's mission and objectives.

4. A regulated entity should manage investments and acquisitions of assets prudently and in a manner that is consistent with mission goals and objectives.

5. Each Bank's investment policies and acquisition of assets should take into account the importance of maintaining the market value of member stock commensurate with the par value of that stock so that the Bank is able to redeem and repurchase member stock at par value at all times.

6. A regulated entity should manage investments and acquisitions of assets in a way that complies with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins).

STANDARD 8—OVERALL RISK MANAGEMENT PROCESSES

Responsibilities of the Board of Directors

1. Regarding overall risk management processes, the board of directors is responsible for overseeing the process, ensuring senior management are appropriately trained and competent, ensuring processes are in place to identify, manage, monitor and control risk exposures (this function may be delegated to a board appointed committee), approving all major risk limits, and ensuring incentive compensation measures for senior management capture a full range of risks.

Responsibilities of the Board and Senior Management

2. Regarding overall risk management processes, the board of directors and senior management should establish and sustain a culture that promotes effective risk management. This culture includes timely, accurate and informative risk reports, alignment of the regulated entity's overall risk profile with its mission objectives, and the annual review of comprehensive self-assessments of material risks.

Independent Risk Management Function

3. A regulated entity should have an independent risk management function, or unit, with responsibility for risk measurement and risk monitoring, including monitoring and enforcement of risk limits.

4. The chief risk officer should head the risk management function.

5. The chief risk officer should report directly to the chief executive officer and the risk committee of the board of directors.

6. The risk management function should have adequate resources, including a well-trained and capable staff.

Risk Measurement, Monitoring, and Control

7. A regulated entity should measure, monitor, and control its overall risk exposures, reviewing market, credit, liquidity, and operational risk exposures on both a business unit (or business segment) and enterprise-wide basis.

8. A regulated entity should have the risk management systems to generate, at an appropriate frequency, the information needed to manage risk. Such systems should include systems for market, credit, operational, and

liquidity risk analysis, asset and liability management, regulatory reporting, and performance measurement.

9. A regulated entity should have a comprehensive set of risk limits and monitoring procedures to ensure that risk exposures remain within established risk limits, and a mechanism for reporting violations and breaches of risk limits to senior management and the board of directors.

10. A regulated entity should ensure that it has sufficient controls around risk measurement models to ensure the completeness, accuracy, and timeliness of risk information.

11. A regulated entity should have adequate and well-tested disaster recovery and business resumption plans for all major systems and have remote facilitates to limit the impact of disruptive events.

Applicable Laws, Regulations, and Policies

12. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing the management of risk.

STANDARD 9—MANAGEMENT OF CREDIT AND COUNTERPARTY RISK

Responsibilities of the Board of Directors and Senior Management

1. Regarding the management of credit and counterparty risk, the board of directors and senior management are responsible for ensuring that the regulated entity has appropriate policies, procedures, and systems that cover all aspects of credit administration, including credit pricing, underwriting, credit limits, collateral standards, and collateral valuation procedures. This should also include derivatives and the use of clearing houses. They are also responsible for ensuring personnel are appropriately trained, competent, and equipped with the necessary tools, procedures and systems to assess risk.

2. Senior management should provide the board of directors with regular briefings and reports on credit exposures.

Policies, Procedures, Controls, and Systems

3. A regulated entity should have policies that limit concentrations of credit risk and systems to identify concentrations of credit risk.

4. A regulated entity should establish prudential limits to restrict exposures to a single counterparty that are appropriate to its business model.

5. A regulated entity should establish prudential limits to restrict exposures to groups of related counterparties that are appropriate to its business model.

6. A regulated entity should have policies, procedures, and systems for evaluating credit risk that will enable it to make informed credit decisions.

7. A regulated entity should have policies, procedures, and systems for evaluating credit risk that will enable it to ensure that claims are legally enforceable.

8. A regulated entity should have policies and procedures for addressing problem credits.

9. A regulated entity should have an ongoing credit review program that includes stress testing and scenario analysis.

Applicable Laws, Regulations, and Policies

10. A regulated entity should manage credit and counterparty risk in a way that complies with applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins).

STANDARD 10—MAINTENANCE OF ADEQUATE RECORDS

1. A regulated entity should maintain financial records in compliance with Generally Accepted Accounting Principles (GAAP), FHFA guidelines, and applicable laws and regulations.

2. A regulated entity should ensure that assets are safeguarded and financial and operational information is timely and reliable.

3. A regulated entity should have a records retention program consistent with laws and corporate policies, including accounting policies, as well as personnel that are appropriately trained and competent to oversee and implement the records management plan.

4. A regulated entity, with oversight from the board of directors, should conduct a review and approval of the records retention program and records retention schedule for all types of records at least once every two years.

5. A regulated entity should ensure that reporting errors are detected and corrected in a timely manner.

6. A regulated entity should comply with all applicable laws, regulations, and supervisory guidance (*e.g.*, advisory bulletins) governing the maintenance of adequate records.

[77 FR 33959, June 8, 2012, as amended at 80 FR 72336, Nov. 19, 2015]

PART 1237—CONSERVATORSHIP AND RECEIVERSHIP

Sec.

Subpart A—Powers

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SOURCE: 76 FR 35733, June 20, 2011, unless otherwise noted.

§ 1237.1 Purpose and applicability.

The provisions of this part shall apply to the appointment and operations of the Federal Housing Finance Agency (''Agency'') as conservator or receiver of a regulated entity. These provisions implement and supplement the procedures and process set forth in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, by the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289 for conduct of a conservatorship or receivership of such entity.

§ 1237.2 Definitions.

For the purposes of this part the following definitions shall apply:

Agency means the Federal Housing Finance Agency (''FHFA'') established under 12 U.S.C. 4511, as amended.

Authorizing statutes mean—

(1) The Federal National Mortgage Association Charter Act,

(2) The Federal Home Loan Mortgage Corporation Act, and

(3) The Federal Home Loan Bank Act.

Capital distribution has, with respect to a Bank, the definition stated in § 1229.1 of this chapter, and with respect to an Enterprise, the definition stated in § 1229.13 of this chapter.

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with employment.

Conservator means the Agency as appointed by the Director as conservator for a regulated entity.

Default; in danger of default:

(1) *Default* means, with respect to a regulated entity, any official determination by the Director, pursuant to which a conservator or receiver is appointed for a regulated entity.

(2) *In danger of default* means, with respect to a regulated entity, the definition under section 1303(8)(B) of the Safety and Soundness Act or applicable FHFA regulations.

Entity-affiliated party means any party meeting the definition of an entity-affiliated party under section 1303(11) of the Safety and Soundness Act or applicable FHFA regulations.

Equity security of any person shall mean any and all shares, interests, rights to purchase or otherwise acquire, warrants, options, participations or other equivalents of or interests (however designated) in equity, ownership or profits of such person, including any preferred stock, any limited or general partnership interest and any limited liability company membership interest, and any securities or other rights or interests convertible into or exchangeable for any of the foregoing.

Executive officer means, with respect to an Enterprise, any person meeting the definition of executive officer under section 1303(12) of the Safety and Soundness Act and applicable FHFA regulations under that section, and, with respect to a Bank, an executive officer as defined in applicable FHFA regulations.

Golden parachute payment means, with respect to a regulated entity, the definition under 12 CFR part 1231 or other applicable FHFA regulations.

Limited-life regulated entity means an entity established by the Agency under section 1367(i) of the Safety and Soundness Act with respect to a Federal Home Loan Bank in default or in danger of default, or with respect to an Enterprise in default or in danger of default.

Receiver means the Agency as appointed by the Director to act as receiver for a regulated entity.

Securities litigation claim means any claim, whether or not reduced to judgment, liquidated or unliquidated, fixed, contingent, matured or unmatured, disputed or undisputed, legal, equitable, secured or unsecured, arising from rescission of a purchase or sale of an equity security of a regulated entity or for damages arising from the purchase, sale, or retention of such a security.

Transfer means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the equity of redemption of the regulated entity.

[76 FR 35733, June 20, 2011, as amended at 78 FR 2324, Jan. 11, 2013; 80 FR 72336, Oct. 22, 2015]

Subpart A—Powers

§ 1237.3 Powers of the Agency as conservator or receiver.

(a) *Operation of the regulated entity.* The Agency, as it determines appropriate to its operations as either conservator or receiver, may:

(1) Take over the assets of and operate the regulated entity with all the powers of the shareholders (including the authority to vote shares of any and all classes of voting stock), the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(2) Continue the missions of the regulated entity;

(3) Ensure that the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets;

(4) Ensure that each regulated entity operates in a safe and sound manner;

(5) Collect all obligations and money due the regulated entity;

(6) Perform all functions of the regulated entity in the name of the regulated entity that are consistent with the appointment as conservator or receiver;

(7) Preserve and conserve the assets and property of the regulated entity (including the exclusive authority to investigate and prosecute claims of any type on behalf of the regulated entity, or to delegate to management of the regulated entity the authority to investigate and prosecute claims); and

(8) Provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

(b) *Agency as receiver.* The Agency, as receiver, shall place the regulated entity in liquidation, employing the additional powers expressed in 12 U.S.C. 4617(b)(2)(E).

(c) *Powers as conservator or receiver.* The Agency, as conservator or receiver, shall have all powers and authorities specifically provided by section 1367 of the Safety and Soundness Act and paragraph (a) of this section, including incidental powers, which include the authority to suspend capital classifications under section 1364(e)(1) of the Safety and Soundness Act during the duration of the conservatorship or receivership of that regulated entity.

(d) *Transfer or sale of assets and liabilities.* The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale. Exercise of this authority by the Agency as conservator will nullify any restraints on sales or transfers in any agreement not entered into by the Agency as conservator. Exercise of this authority by the Agency as receiver will nullify any restraints on sales or transfers in any agreement not entered into by the Agency as receiver.

§ 1237.4 Receivership following conservatorship; administrative expenses.

If a receivership immediately succeeds a conservatorship, the administrative expenses of the conservatorship shall also be deemed to be administrative expenses of the subsequent receivership.

§ 1237.5 Contracts entered into before appointment of a conservator or receiver.

(a) The conservator or receiver for any regulated entity may disaffirm or repudiate any contract or lease to which such regulated entity is a party pursuant to section 1367(d) of the Safety and Soundness Act.

(b) For purposes of section 1367(d)(2) of the Safety and Soundness Act, a reasonable period shall be defined as a period of 18 months following the appointment of a conservator or receiver.

§ 1237.6 Authority to enforce contracts.

The conservator or receiver may enforce any contract entered into by the regulated entity pursuant to the provisions and subject to the restrictions of section 1367(d)(13) of the Safety and Soundness Act.

Subpart B—Claims

§ 1237.7 Period for determination of claims.

Before the end of the 180-day period beginning on the date on which any claim against a regulated entity is filed with the Agency as receiver, the Agency shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim. This period may be extended by a written agreement between the claimant and the Agency as receiver, which may include an agreement to toll any applicable statute of limitations.

§ 1237.8 Alternate procedures for determination of claims.

Claimants seeking a review of the determination of claims may seek alternative dispute resolution from the Agency as receiver in lieu of a judicial determination. The Director may by order, policy statement, or directive establish alternative dispute resolution procedures for this purpose.

§ 1237.9 Priority of expenses and unsecured claims.

(a) *General.* The receiver will grant priority to unsecured claims against a regulated entity or the receiver for that regulated entity that are proven to the satisfaction of the receiver in the following order:

(1) Administrative expenses of the receiver (or an immediately preceding conservator).

(2) Any other general or senior liability of the regulated entity (that is not a liability described under paragraph (a)(3) or (a)(4) of this section).

(3) Any obligation subordinated to general creditors (that is not an obligation described under paragraph (a)(4) of this section).

(4) Any claim by current or former shareholders or members arising as a result of their current or former status as shareholders or members, including, without limitation, any securities litigation claim. Within this priority level, the receiver shall recognize the priorities of shareholder claims *inter se*, such as that preferred shareholder claims are prior to common shareholder claims. This subparagraph (a)(4) shall not apply to any claim by a current or former member of a Federal Home Loan Bank that arises from transactions or relationships distinct from the current or former member's ownership, purchase, sale, or retention of an equity security of the Federal Home Loan Bank.

(b) *Similarly situated creditors.* All claimants that are similarly situated shall be treated in a similar manner, except that the receiver may take any action (including making payments) that does not comply with this section, if:

(1) The Director determines that such action is necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(2) All claimants that are similarly situated under paragraph (a) of this section receive not less than the amount such claimants would have received if the receiver liquidated the assets and liabilities of the regulated entity in receivership and such action had not been taken.

(c) *Priority determined at default.* The receiver will determine priority based

on a claim's status at the time of default, such default having occurred at the time of entry into the receivership, or if a conservatorship immediately preceded the receivership, at the time of entry into the conservatorship provided the claim then existed.

Subpart C—Limited-Life Regulated Entities

§ 1237.10 Limited-life regulated entities.

(a) *Status.* The United States Government shall be considered a person for purposes of section 1367(i)(6)(C)(i) of the Safety and Soundness Act.

(b) *Investment authority.* The requirements of section 1367(i)(4) shall apply only to the liquidity portfolio of a limited-life regulated entity.

(c) *Policies and procedures.* The Agency may draft such policies and procedures with respect to limited-life regulated entities as it determines to be necessary and appropriate, including policies and procedures regarding the timing of the creation of limited-life regulated entities.

§ 1237.11 Authority of limited-life regulated entities to obtain credit.

(a) *Ability to obtain credit.* A limited-life regulated entity may obtain unsecured credit and issue unsecured debt.

(b) *Inability to obtain credit.* If a limited-life regulated entity is unable to obtain unsecured credit or issue unsecured debt, the Director may authorize the obtaining of credit or the issuance of debt by the limited-life regulated entity with priority over any and all of the obligations of the limited-life regulated entity, secured by a lien on property of the limited-life regulated entity that is not otherwise subject to a lien, or secured by a junior lien on property of the limited-life regulated entity that is subject to a lien.

(c) *Limitations.* The Director, after notice and a hearing, may authorize a limited-life regulated entity to obtain credit or issue debt that is secured by a senior or equal lien on property of the limited-life regulated entity that is already subject to a lien (other than mortgages that collateralize the mortgage-backed securities issued or guaranteed by an Enterprise) only if the limited-life regulated entity is unable to obtain such credit or issue such debt otherwise on commercially reasonable terms and there is adequate protection of the interest of the holder of the earlier lien on the property with respect to which such senior or equal lien is proposed to be granted.

(d) *Adequate protection.* The adequate protection referred to in paragraph (c) of this section may be provided by:

(1) Requiring the limited-life regulated entity to make a cash payment or periodic cash payments to the holder of the earlier lien, to the extent that there is likely to be a decrease in the value of such holder's interest in the property subject to the lien;

(2) Providing to the holder of the earlier lien an additional or replacement lien to the extent that there is likely to be a decrease in the value of such holder's interest in the property subject to the lien; or

(3) Granting the holder of the earlier lien such other relief, other than entitling such holder to compensation allowable as an administrative expense under section 1367(c) of the Safety and Soundness Act, as will result in the realization by such holder of the equivalent of such holder's interest in such property.

Subpart D—Other

§ 1237.12 Capital distributions while in conservatorship.

(a) Except as provided in paragraph (b) of this section, a regulated entity shall make no capital distribution while in conservatorship.

(b) The Director may authorize, or may delegate the authority to authorize, a capital distribution that would otherwise be prohibited by paragraph (a) of this section if he or she determines that such capital distribution:

(1) Will enhance the ability of the regulated entity to meet the risk-based capital level and the minimum capital level for the regulated entity;

(2) Will contribute to the long-term financial safety and soundness of the regulated entity;

(3) Is otherwise in the interest of the regulated entity; or

(4) Is otherwise in the public interest.

(c) This section is intended to supplement and shall not replace or affect any other restriction on capital distributions imposed by statute or regulation.

§ 1237.13 Payment of Securities Litigation Claims while in conservatorship.

(a) *Payment of Securities Litigation Claims while in conservatorship.* The Agency, as conservator, will not pay a Securities Litigation Claim against a regulated entity, except to the extent the Director determines is in the interest of the conservatorship.

(b) *Claims against limited-life regulated entities.* A limited-life regulated entity shall not assume, acquire, or succeed to any obligation that a regulated entity for which a receiver has been appointed may have to any shareholder of the regulated entity that arises as a result of the status of that person as a shareholder of the regulated entity, including any Securities Litigation Claim. No creditor of the regulated entity shall have a claim against a limited-life regulated entity unless the receiver has transferred that liability to the limited-life regulated entity. The charter of the regulated entity, or of the limited-life regulated entity, is not an asset against which any claim can be made by any creditor or shareholder of the regulated entity.

§ 1237.14 Golden parachute payments [Reserved]

PART 1238—STRESS TESTING OF REGULATED ENTITIES

Sec.

AUTHORITY: 12 U.S.C. 1426; 4513; 4526; 4612; 5365(i).

SOURCE: 78 FR 59222, Sept. 26, 2013, unless otherwise noted.

§ 1238.1 Authority and purpose.

(a) *Authority.* This part is issued by the Federal Housing Finance Agency (FHFA) under section 165(i) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376, 1423–32 (2010), 12 U.S.C. 5365(i), as amended by section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), Public Law 115–174, 132 Stat. 1296 (2018), 12 U.S.C. 5365(i); and the Safety and Soundness Act (12 U.S.C. 4513, 4526, 4612).

(b) *Purpose.* (1) This part implements section 165(i)(2) of the Dodd-Frank Act, as amended by section 401 of the EGRRCPA, which requires all large financial companies that have total consolidated assets of more than $250 billion, and are regulated by a primary federal financial regulatory agency, to conduct periodic stress tests.

(2) This part establishes requirements that apply to each Enterprise's performance of periodic stress tests. The purpose of the periodic stress test is to provide the Enterprises, FHFA, and the FRB with additional, forward-looking information that will help them to assess capital adequacy at the Enterprises under various scenarios; to review the Enterprises' stress test results; and to increase public disclosure of the Enterprises' capital condition by requiring broad dissemination of the stress test scenarios and results.

[85 FR 16529, Mar. 24, 2020]

§ 1238.2 Definitions.

For purposes of this part, the following definitions apply:

Planning horizon means the period of time over which the stress projections must extend. The planning horizon cannot be less than nine quarters.

Scenarios are sets of economic and financial conditions used in the Enterprises' stress tests, including baseline and severely adverse.

Stress test is a process to assess the potential impact on an Enterprise of economic and financial conditions (''scenarios'') on the consolidated earnings, losses, and capital of the Enterprise over a set planning horizon, taking into account the current condition

of the Enterprise and the Enterprise's risks, exposures, strategies, and activities.

[85 FR 16530, Mar. 24, 2020]

§ 1238.3 Annual stress test.

(a) *In general.* Each Enterprise:

(1) Shall complete an annual stress test of itself based on its data as of December 31 of the preceding calendar year;

(2) The stress test shall be conducted in accordance with this section and the methodologies and practices described in § 1238.4 and in a supplemental guidance or order.

(b) *Scenarios provided by FHFA.* In conducting its annual stress tests under this section, each Enterprise must use scenarios provided by FHFA, which shall be generally consistent with and comparable to those established by the FRB, that reflect a minimum of two sets of economic and financial conditions, including a baseline and severely adverse scenario. Not later than 30 days after the FRB publishes its scenarios, FHFA will issue to the Enterprises a description of the baseline and severely adverse scenarios that each Enterprise shall use to conduct its annual stress tests under this part.

[85 FR 16530, Mar. 24, 2020]

§ 1238.4 Methodologies and practices.

(a) *Potential impact.* Except as noted in this subpart, in conducting a stress test under § 1238.3, each Enterprise shall calculate how each of the following is affected during each quarter of the stress test planning horizon, for each scenario:

(1) Potential losses, pre-provision net revenues, and future pro forma capital positions over the planning horizon; and

(2) Capital levels and capital ratios, including regulatory capital and net worth, and any other capital ratios specified by FHFA.

(b) *Planning horizon.* Each Enterprise must use a planning horizon of at least nine quarters over which the impact of specified scenarios would be assessed.

(c) *Additional analytical techniques.* If FHFA determines that the stress test methodologies and practices of an Enterprise are deficient, FHFA may determine that additional or alternative analytical techniques and exercises are appropriate for an Enterprise to use in identifying, measuring, and monitoring risks to the financial soundness of the Enterprise, and require an Enterprise to implement such techniques and exercises in order to fulfill the requirements of this part. In addition, FHFA will issue guidance annually to describe the baseline and severely adverse scenarios, and methodologies to be used in conducting the annual stress test.

(d) *Controls and oversight of the stress testing processes.* (1) The appropriate senior management of each Enterprise must ensure that the Enterprise establishes and maintains a system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes used by the Enterprises are effective in meeting the requirements of this part. These policies and procedures must, at a minimum, describe the Enterprise's testing practices and methodologies, validation and use of stress test results, and processes for updating the Enterprise's stress testing practices consistent with relevant supervisory guidance;

(2) The board of directors, or a designated committee thereof, shall review and approve the policies and procedures established to comply with this part as frequently as economic conditions or the condition of the Enterprise warrants, but at least annually; and

(3) Senior management of the Enterprise and each member of the board of directors shall receive a summary of the stress test results.

[85 FR 16530, Mar. 24, 2020]

§ 1238.5 Required report to FHFA and FRB of stress test results and related information.

(a) *Report required for stress tests.* On or before May 20 of each year, the Enterprises must report the results of the stress tests required under § 1238.3 to FHFA, and to the FRB, in accordance with paragraph (b) of this section;

(b) *Content of the report for annual stress test.* Each Enterprise must file a report in the manner and form established by FHFA.

(c) *Confidential treatment of information submitted.* Reports submitted to FHFA under this part are FHFA property and records (as defined in 12 CFR part 1202). The reports are and include non-public information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of, FHFA in connection with the performance of the agency's responsibilities regulating or supervising the Enterprises. Disclosure of any reports submitted to FHFA or the information contained in any such report is prohibited unless authorized by this part, legal obligation, or otherwise by the Director of FHFA.

[85 FR 16530, Mar. 24, 2020]

§ 1238.6 Post-assessment actions by the Enterprises.

Each Enterprise shall take the results of the stress test conducted under § 1238.3 into account in making changes, as appropriate, to the Enterprise's capital structure (including the level and composition of capital); its exposures, concentrations, and risk positions; any plans for recovery and resolution; and to improve overall risk management. If an Enterprise is under FHFA conservatorship, any post-assessment actions shall require prior FHFA approval.

[85 FR 16530, Mar. 24, 2020]

§ 1238.7 Publication of results by regulated entities.

(a) *Public disclosure of results required for stress tests of the Enterprises.* The Enterprises must disclose publicly a summary of the stress test results for the severely adverse scenario not earlier than August 1 and not later than August 15 of each year. The summary may be published on the Enterprise's website or in any other form that is reasonably accessible to the public.

(b) *Information to be disclosed in the summary.* The information disclosed by each Enterprise shall, at minimum, include—

(1) A description of the types of risks being included in the stress test;

(2) A high-level description of the scenario provided by FHFA, including key variables (such as GDP, unemployment rate, housing prices, and foreclosure rate, etc.);

(3) A general description of the methodologies employed to estimate losses, pre-provision net revenue, and changes in capital positions over the planning horizon;

(4) A general description of the use of the required stress test as one element in an Enterprise's overall capital planning and capital assessment. If an Enterprise is under conservatorship, this description shall be coordinated with FHFA;

(5) Aggregate losses, pre-provision net revenue, net income, net worth, pro forma capital levels and capital ratios (including regulatory and any other capital ratios specified by FHFA) over the planning horizon, under the scenario; and

(6) Such other data fields, in such form (*e.g.*, aggregated), as the Director may require.

[85 FR 16530, Mar. 24, 2020]

§ 1238.8 Additional implementing action.

The Director may, in circumstances considered appropriate, require any regulated entity not subject to this part to conduct stress testing hereunder; and from time to time, issue such guidance and orders as may be necessary to facilitate implementation of this part.

PART 1239—RESPONSIBILITIES OF BOARDS OF DIRECTORS, CORPORATE PRACTICES, AND CORPORATE GOVERNANCE

Subpart A—General

Sec.

Subpart B—Corporate Practices and Procedures Applicable to All Regulated Entities

Subpart C—Other Requirements Applicable to All Regulated Entities

Subpart D—Enterprise Specific Requirements

Subpart E—Bank Specific Requirements

AUTHORITY: 12 U.S.C. 1426, 1427, 1432(a), 1436(a), 1440, 4511(b), 4513(a), 4513(b), 4526, and 15 U.S.C. 78*oo*(b).

SOURCE: 80 FR 72336, Nov. 19, 2015, unless otherwise noted.

Subpart A—General

§ 1239.1 Purpose.

FHFA is responsible for supervising and ensuring the safety and soundness of the regulated entities. In furtherance of those responsibilities, this part sets forth minimum standards with respect to responsibilities of boards of directors, corporate practices, and corporate governance matters of the regulated entities.

§ 1239.2 Definitions.

As used in this part, (unless otherwise noted):

Board member means a member of the board of directors of a regulated entity.

Board of directors means the board of directors of a regulated entity.

Business risk means the risk of an adverse impact on a regulated entity's profitability resulting from external factors as may occur in both the short and long run.

Community financial institution has the meaning set forth in § 1263.1 of this chapter.

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with employment or in connection with service as a director.

Credit risk is the potential that a borrower or counterparty will fail to meet its financial obligations in accordance with agreed terms.

Employee means an individual, other than an executive officer, who works part-time, full-time, or temporarily for a regulated entity.

Executive officer means the chief executive officer, chief financial officer, chief operating officer, president, any executive vice president, any senior vice president, and any individual with similar responsibilities, without regard to title, who is in charge of a principal business unit, division, or function, or who reports directly to the chairperson, vice chairperson, chief operating officer, or chief executive officer or president of a regulated entity.

Immediate family member means a parent, sibling, spouse, child, dependent, or any relative sharing the same residence.

Internal auditor means the individual responsible for the internal audit function at a regulated entity.

Liquidity risk means the risk that a regulated entity will be unable to meet its financial obligations as they come due or meet the credit needs of its members and associates in a timely and cost-efficient manner.

Market risk means the risk that the market value, or estimated fair value if market value is not available, of a regulated entity's portfolio will decline as a result of changes in interest rates, foreign exchange rates, or equity or commodity prices.

NYSE means the New York Stock Exchange.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, or systems, or from external events (including legal risk but excluding strategic and reputational risk).

Risk appetite means the aggregate level and types of risk the board of directors and management are willing to assume to achieve the regulated entity's strategic objectives and business plan, consistent with applicable capital, liquidity, and other regulatory requirements.

Significant deficiency means a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Subpart B—Corporate Practices and Procedures Applicable to All Regulated Entities

§ 1239.3 Law applicable to corporate governance and indemnification practices.

(a) *General.* The corporate governance practices and procedures of each regulated entity, and practices and procedures relating to indemnification (including advancement of expenses), shall comply with and be subject to the applicable authorizing statutes and other Federal law, rules, and regulations, and shall be consistent with the safe and sound operations of the regulated entities.

(b) *Election and designation of body of law.* (1) To the extent not inconsistent with paragraph (a) of this section, each regulated entity shall elect to follow the corporate governance and indemnification practices and procedures set forth in one of the following:

(i) The law of the jurisdiction in which the principal office of the regulated entity is located;

(ii) The Delaware General Corporation Law (Del. Code Ann. Title 8); or

(iii) The Revised Model Business Corporation Act.

(2) Each regulated entity shall designate in its bylaws the body of law elected for its corporate governance and indemnification practices and procedures pursuant to this paragraph, and shall do so by no later than March 18, 2016.

(c) *Indemnification.* (1) Subject to paragraphs (a) and (b) of this section, to the extent applicable, a regulated entity shall indemnify (and advance the expenses of) its directors, officers, and employees under such terms and conditions as are determined by its board of directors. The regulated entity is authorized to maintain insurance for its directors and any other officer or employee.

(2) Each regulated entity shall have in place policies and procedures consistent with this section for indemnification of its directors, officers, and employees. Such policies and procedures shall address how the board of directors is to approve or deny requests for indemnification from current and former directors, officers, and employees, and shall include standards relating to indemnification, investigations by the board of directors, and review by independent counsel.

(3) Nothing in this paragraph (c) shall affect any rights to indemnification (including the advancement of expenses) that a director or any other officer or employee had with respect to any actions, omissions, transactions, or facts occurring prior to the effective date of this paragraph.

(4) FHFA has the authority under the Safety and Soundness Act to review a regulated entity's indemnification policies, procedures, and practices to ensure that they are conducted in a safe and sound manner, and that they are consistent with the body of law adopted by the board of directors under paragraph (b) of this section.

(d) *No rights created.* Nothing in this part shall create or be deemed to create any rights in any third party, including in any member of a Bank, nor shall it cause or be deemed to cause any regulated entity to become subject to the jurisdiction of any state court with respect to the entity's corporate governance or indemnification practices or procedures.

§ 1239.4 Duties and responsibilities of directors.

(a) *Management of a regulated entity.* The management of each regulated entity shall be by or under the direction of its board of directors. While a board of directors may delegate the execution of operational functions to officers and employees of the regulated entity, the ultimate responsibility of each entity's board of directors for that entity's oversight is non-delegable. The board of directors of a regulated entity is responsible for directing the conduct and affairs of the entity in furtherance of the safe and sound operation of the entity and shall remain reasonably informed of the condition, activities, and operations of the entity.

(b) *Duties of directors.* Each director of a regulated entity shall have the duty to:

(1) Carry out his or her duties as director in good faith, in a manner such director believes to be in the best interests of the regulated entity, and with such care, including reasonable inquiry, as is required under the Revised Model Business Corporation Act or the other body of law that the entity's board of directors has chosen to follow for its corporate governance and indemnification practices and procedures in accordance with §1239.3(b);

(2) For Bank directors, administer the affairs of the regulated entity fairly and impartially and without discrimination in favor of or against any member institution;

(3) At the time of election, or within a reasonable time thereafter, have a working familiarity with basic finance and accounting practices, including the ability to read and understand the regulated entity's balance sheet and income statement and to ask substantive questions of management and the internal and external auditors;

(4) Direct the operations of the regulated entity in conformity with the requirements set forth in the authorizing statutes, the Safety and Soundness Act, and this chapter; and

(5) Adopt and maintain in effect at all times bylaws governing the manner in which the regulated entity administers its affairs. Such bylaws shall be consistent with applicable laws and regulations administered by FHFA, and with the body of law designated for the entity's corporate governance practices and procedures in accordance with §1239.3(b).

(c) *Director responsibilities.* The responsibilities of the board of directors include having in place adequate policies to assure its oversight of, among other matters, the following:

(1) The risk management and compensation programs of the regulated entity;

(2) The processes for providing accurate financial reporting and other disclosures, and communications with stockholders; and

(3) The responsiveness of executive officers in providing accurate and timely reports to FHFA and in addressing all supervisory concerns of FHFA in a timely and appropriate manner.

(d) *Authority regarding staff and outside consultants.* (1) In carrying out its duties and responsibilities under the authorizing statutes, the Safety and Soundness Act, and this chapter, each regulated entity's board of directors and all committees thereof shall have authority to retain staff and outside counsel, independent accountants, or other outside consultants at the expense of the regulated entity.

(2) The board of directors and its committees may require that staff of the regulated entity that provides services to the board or any committee under paragraph (d)(1) of this section report directly to the board or such committee, as appropriate.

§1239.5 Board committees.

(a) *General.* The board of directors may rely, in directing a regulated entity, on reports from committees of the board of directors, provided, however, that no committee of the board of directors shall have the authority of the board of directors to amend the bylaws and no committee shall operate to relieve the board of directors or any board member of a responsibility imposed by applicable law, rule, or regulation.

(b) *Required committees.* The board of directors of each regulated entity shall have committees, however styled, that address each of the following areas of responsibility: Risk management; audit; compensation; and corporate governance (in the case of the Banks, including the nomination of independent board of director candidates, and, in the case of the Enterprises, including the nomination of all board of director candidates). The risk management committee and the audit committee shall not be combined with any other committees. The board of directors may establish any other committees that it deems necessary or useful to carrying out its responsibilities, subject to the provisions of this section. In the case of the Enterprises, board committees shall comply with the charter, independence, composition, expertise, duties, responsibilities, and other requirements set forth under rules issued by the NYSE, and the

audit committees shall also comply with the requirements set forth under section 301 of the Sarbanes-Oxley Act of 2002, Public Law 107–204.

(c) *Charter.* The board of directors shall adopt a formal written charter for each committee that specifies the scope of a committee's powers and responsibilities, as well as the committee's structure, processes, and membership requirements.

(d) *Frequency of meetings.* Each committee of the board of directors shall meet regularly and with sufficient frequency to carry out its obligations and duties under applicable laws, rules, regulations, and guidelines. Committees that are structured to meet only on an as-needed basis shall meet in the manner specified by their charter. All such committees shall also meet with sufficient timeliness as necessary in light of relevant conditions and circumstances to fulfill their obligations and duties.

Subpart C—Other Requirements Applicable to All Regulated Entities

§ 1239.10 Code of conduct and ethics.

(a) *General.* A regulated entity shall establish and administer a written code of conduct and ethics that is reasonably designed to assure that its directors, officers, and employees discharge their duties and responsibilities in an objective and impartial manner that promotes honest and ethical conduct, compliance with applicable laws, rules, and regulations, accountability for adherence to the code, and prompt internal reporting of violations of the code to appropriate persons identified in the code. The code also shall include provisions applicable to the regulated entity's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, that are reasonably designed to promote full, fair, accurate, and understandable disclosure in reports and other documents filed with the Securities and Exchange Commission and in other public communications reporting on the entity's financial condition.

(b) *Review.* Not less often than once every three years, a regulated entity shall review the adequacy of its code of conduct and ethics for consistency with practices appropriate to the entity and make any appropriate revisions to such code.

§ 1239.11 Risk management.

(a) *Risk management program*—(1) *Adoption.* Each regulated entity's board of directors shall approve, have in effect at all times, and periodically review an enterprise-wide risk management program that establishes the regulated entity's risk appetite, aligns the risk appetite with the regulated entity's strategies and objectives, addresses the regulated entity's exposure to credit risk, market risk, liquidity risk, business risk and operational risk, and complies with the requirements of this part and with all applicable FHFA regulations and policies.

(2) *Risk appetite.* The board of directors shall ensure that the risk management program aligns with the regulated entity's risk appetite.

(3) *Risk management program requirements.* The risk management program shall include:

(i) Risk limitations appropriate to each business line of the regulated entity;

(ii) Appropriate policies and procedures relating to risk management governance, risk oversight infrastructure, and processes and systems for identifying and reporting risks, including emerging risks;

(iii) Provisions for monitoring compliance with the regulated entity's risk limit structure and policies relating to risk management governance, risk oversight, and effective and timely implementation of corrective actions; and

(iv) Provisions specifying management's authority and independence to carry out risk management responsibilities, and the integration of risk management with management's goals and compensation structure.

(b) *Risk committee.* The board of each regulated entity shall establish and maintain a risk committee of the board of directors that assists the board in carrying out its duties to oversee the enterprise-wide risk management program at the regulated entity.

(1) *Committee structure.* The risk committee shall:

(i) Be chaired by a director not serving in a management capacity of the regulated entity;

(ii) Have at least one member with risk management experience that is commensurate with the regulated entity's capital structure, risk appetite, complexity, activities, size, and other appropriate risk-related factors;

(iii) Have committee members that have, or that will acquire within a reasonable time after being elected to the committee, a practical understanding of risk management principles and practices relevant to the regulated entity;

(iv) Fully document and maintain records of its meetings, including its risk management decisions and recommendations; and

(v) Report directly to the board and not as part of, or combined with, another committee.

(2) *Committee responsibilities.* The risk committee shall:

(i) Periodically review and recommend for board approval an appropriate enterprise-wide risk management program that is commensurate with the regulated entity's capital structure, risk appetite, complexity, activities, size, and other appropriate risk-related factors;

(ii) Receive and review regular reports from the regulated entity's chief risk officer, as required under paragraph (c)(5) of this section ; and

(iii) Periodically review the capabilities for, and adequacy of resources allocated to, enterprise-wide risk management.

(c) *Chief Risk Officer.*—(1) *Appointment of a chief risk officer (CRO).* Each regulated entity shall appoint a CRO to implement and maintain appropriate enterprise-wide risk management practices for the regulated entity.

(2) *Organizational structure of the risk management function.* The CRO shall head an independent enterprise-wide risk management function, or unit, and shall report directly to the risk committee and to the chief executive officer.

(3) *Responsibilities of the CRO.* The CRO shall be responsible for the enterprise-wide risk management function, including:

(i) Allocating risk limits and monitoring compliance with such limits;

(ii) Establishing appropriate policies and procedures relating to risk management governance, practices, and risk controls, and developing appropriate processes and systems for identifying and reporting risks, including emerging risks;

(iii) Monitoring risk exposures, including testing risk controls and verifying risk measures; and

(iv) Communicating within the organization about any risk management issues and/or emerging risks, and ensuring that risk management issues are effectively resolved in a timely manner.

(4) The CRO should have risk management expertise that is commensurate with the regulated entity's capital structure, risk appetite, complexity, activities, size, and other appropriate risk related factors.

(5) The CRO shall report regularly to the risk committee and to the chief executive officer on significant risk exposures and related controls, changes to risk appetite, risk management strategies, results of risk management reviews, and emerging risks. The CRO shall also report regularly on the regulated entity's compliance with, and the adequacy of, its current risk management policies and procedures, and shall recommend any adjustments to such policies and procedures that he or she considers necessary or appropriate.

(6) The compensation of a regulated entity's CRO shall be appropriately structured to provide for an objective and independent assessment of the risks taken by the regulated entity.

§ 1239.12 Compliance program.

A regulated entity shall establish and maintain a compliance program that is reasonably designed to assure that the regulated entity complies with applicable laws, rules, regulations, and internal controls. The compliance program shall be headed by a compliance officer, however styled, who reports directly to the chief executive officer. The compliance officer also shall report regularly to the board

of directors, or an appropriate committee thereof, on the adequacy of the entity's compliance policies and procedures, including the entity's compliance with them, and shall recommend any revisions to such policies and procedures that he or she considers necessary or appropriate.

§ 1239.13 Regulatory reports.

(a) *Reports.* Each regulated entity shall file Regulatory Reports with FHFA in accordance with the forms, instructions, and schedules issued by FHFA from time to time. If no regularly scheduled reporting dates are established, Regulatory Reports shall be filed as requested by FHFA.

(b) *Definition.* For purposes of this section, the term *Regulatory Report* means any report to FHFA of information or raw or summary data needed to evaluate the safe and sound condition or operations of a regulated entity, or to determine compliance with any:

(1) Provision in the Bank Act, Safety and Soundness Act, or other law, order, rule, or regulation;

(2) Condition imposed in writing by FHFA in connection with the granting of any application or other request by a regulated entity; or

(3) Written agreement entered into between FHFA and a regulated entity.

§ 1239.14 Strategic business plan.

(a) *Adoption of strategic business plan.* Each board of directors shall adopt and have in effect at all times a strategic business plan for the regulated entity that describes, at a minimum, how the significant business activities of the regulated entity will achieve its mission and public purposes consistent with its authorizing statute, the Safety and Soundness Act, and, in the case of a Bank, part 1265 of this chapter. Specifically, each regulated entity's strategic business plan shall at a minimum:

(1)(i) In the case of a Bank, articulate measurable goals and objectives for each significant business activity and for all authorized new business activities, which must include plans for maximizing activities that further the Bank's housing finance and community lending mission, consistent with part 1265 of this chapter;

(ii) In the case of an Enterprise, articulate measurable goals and objectives for each significant existing activity and for significant authorized new activities;

(2) Discuss how the regulated entity will address credit needs and market opportunities identified through ongoing market research and stakeholder consultations;

(3) Describe any significant activities in which the regulated entity is planning to be engaged, including any significant changes to business strategy or approach that the regulated entity is planning to undertake, and discuss how such activities would further the regulated entity's mission and public purposes;

(4)(i) In the case of a Bank, be supported by appropriate and timely research and analysis of relevant market developments and member and housing associate demand for Bank products and services;

(ii) In the case of an Enterprise, be supported by appropriate and timely research and analysis of relevant market developments; and

(5) Identify current and emerging risks associated with the regulated entity's significant existing activities or new activities, and discuss how the regulated entity plans to address such risks while furthering its public purposes and mission in a safe and sound manner.

(b) *Review and monitoring.* Each board of directors shall:

(1) Review the regulated entity's strategic business plan at least annually;

(2) Re-adopt the strategic business plan for the regulated entity at least every three years; and

(3) Establish management reporting requirements and monitor implementation of the strategic business plan and the goals and objectives contained therein.

[83 FR 52954, Oct. 19, 2018]

Subpart D—Enterprise Specific Requirements

§ 1239.20 Board of directors of the Enterprises.

(a) *Membership*—(1) *Limits on service of board members.*—(i) *General requirement.* No board member of an Enterprise may serve on the board of directors for more than 10 years or past the age of 72, whichever comes first; provided, however, a board member may serve his or her full term if he or she has served less than 10 years or is 72 years on the date of his or her election or appointment to the board; and

(ii) *Waiver.* Upon written request of an Enterprise, the Director may waive, in his or her sole discretion and for good cause, the limits on the service of a board member under paragraph (a)(1)(i) of this section.

(2) *Independence of board members.* A majority of seated members of the board of directors of an Enterprise shall be independent board members, as defined under rules set forth by the NYSE, as amended from time to time.

(3) *Segregation of duties.* The position of chairperson of the board of directors shall be filled by a person other than the chief executive officer, who shall also be a director of the Enterprise that is independent, as defined under the rules set forth by the NYSE, as amended from time to time.

(b) *Meetings, quorum and proxies, information, and annual review*—(1) *Frequency of meetings.* The board of directors of an Enterprise shall meet at least eight times a year and no less than once a calendar quarter to carry out its obligations and duties under applicable laws, rules, regulations, and guidelines.

(2) *Non-management board member meetings.* Non-management directors of an Enterprise shall meet at regularly scheduled executive sessions without management participation.

(3) *Quorum of board of directors; proxies not permissible.* For the transaction of business, a quorum of the board of directors of an Enterprise is at least a majority of the seated board of directors and a board member may not vote by proxy.

(4) *Information.* Management of an Enterprise shall provide a board member of the Enterprise with such adequate and appropriate information that a reasonable board member would find important to the fulfillment of his or her fiduciary duties and obligations.

(5) *Annual review.* At least annually, the board of directors of an Enterprise shall be informed of significant changes to the requirements of laws, rules, regulations, and guidelines that are applicable to its activities and duties.

§ 1239.21 Compensation of Enterprise board members.

Each Enterprise may pay its directors reasonable and appropriate compensation for the time required of them, and their necessary and reasonable expenses, in the performance of their duties.

Subpart E—Bank Specific Requirements

§ 1239.30 Bank member products policy.

(a) *Adoption and review of member products policy*—(1) *Adoption.* Each Bank's board of directors shall have in effect at all times a policy that addresses the Bank's management of products offered by the Bank to members and housing associates, including but not limited to advances, standby letters of credit, and acquired member assets, consistent with the requirements of the Bank Act, paragraph (b) of this section, and all applicable FHFA regulations and policies.

(2) *Review and compliance.* Each Bank's board of directors shall:

(i) Review the Bank's member products policy annually;

(ii) Amend the member products policy as appropriate; and

(iii) Re-adopt the member products policy, including interim amendments, not less often than every three years.

(b) *Member products policy requirements.* In addition to meeting any other requirements set forth in this chapter, each Bank's member products policy shall:

(1) Address credit underwriting criteria to be applied in evaluating applications for advances, standby letters of credit, and renewals;

(2) Address appropriate levels of collateralization, valuation of collateral and discounts applied to collateral values for advances and standby letters of credit;

(3) Address advances-related fees to be charged by each Bank, including any schedules or formulas pertaining to such fees;

(4) Address standards and criteria for pricing member products, including differential pricing of advances pursuant to §1266.5(b)(2) of this chapter, and criteria regarding the pricing of standby letters of credit, including any special pricing provisions for standby letters of credit that facilitate the financing of projects that are eligible for any of the Banks' CICA programs under part 1292 of this chapter;

(5) Provide that, for any draw made by a beneficiary under a standby letter of credit, the member will be charged a processing fee calculated in accordance with the requirements of §1271.6(b) of this chapter;

(6) Address the maintenance of appropriate systems, procedures, and internal controls; and

(7) Address the maintenance of appropriate operational and personnel capacity.

§1239.31 [Reserved]

§1239.32 Audit committee.

(a) *Establishment.* The audit committee of each Bank established as required by §1239.5(b) shall be consistent with the requirements set forth in this section.

(b) *Composition.* (1) The audit committee shall comprise five or more persons drawn from the Bank's board of directors, each of whom shall meet the criteria of independence set forth in paragraph (c) of this section.

(2) The audit committee shall include, to the extent practicable, a balance of representatives of:

(i) Community financial institutions and other members; and

(ii) Independent directors and member directors of the Bank, both as defined in the Bank Act.

(3) The terms of audit committee members shall be appropriately staggered so as to provide for continuity of service.

(4) At least one member of the audit committee shall have extensive accounting or related financial management experience.

(c) *Independence.* Any member of the Bank's board of directors shall be considered to be sufficiently independent to serve as a member of the audit committee if that director does not have a disqualifying relationship with the Bank or its management that would interfere with the exercise of that director's independent judgment. Such disqualifying relationships include, but are not limited to:

(1) Being employed by the Bank in the current year or any of the past five years;

(2) Accepting any compensation from the Bank other than compensation for service as a board director;

(3) Serving or having served in any of the past five years as a consultant, advisor, promoter, underwriter, or legal counsel of or to the Bank; or

(4) Being an immediate family member of an individual who is, or has been in any of the past five years, employed by the Bank as an executive officer.

(d) *Charter.* (1) The audit committee of each Bank shall review and assess the adequacy of the Bank's audit committee charter on an annual basis, and shall recommend to the board of directors any amendments that it believes to be appropriate;

(2) The board of directors of each Bank shall review and assess the adequacy of the audit committee charter on an annual basis, shall amend the audit committee charter whenever it deems it appropriate to do so, and shall reapprove the audit committee charter not less often than every three years; and

(3) Each Bank's audit committee charter shall:

(i) Provide that the audit committee has the responsibility to select, evaluate and, where appropriate, replace the internal auditor and that the internal auditor may be removed only with the approval of the audit committee;

(ii) Provide that the internal auditor shall report directly to the audit committee on substantive matters and that the internal auditor is ultimately accountable to the audit committee and board of directors;

(iii) Provide that the audit committee shall be directly responsible for the appointment, compensation, retention, and oversight of the work of the external auditor;

(iv) Provide that the external auditor shall report directly to the audit committee;

(v) Provide that both the internal auditor and the external auditor shall have unrestricted access to the audit committee without the need for any prior management knowledge or approval; and

(vi) Provide that the Bank shall make available appropriate funding, as determined by the audit committee, for payment of compensation to the external auditor, to any independent advisors or counsel engaged by the audit committee, and ordinary administrative expenses that are necessary or appropriate for the audit committee to carry out its duties.

(e) *Duties.* Each Bank's audit committee shall have the duty to:

(1) Direct senior management to maintain the reliability and integrity of the accounting policies and financial reporting and disclosure practices of the Bank;

(2) Review the basis for the Bank's financial statements and the external auditor's opinion rendered with respect to such financial statements (including the nature and extent of any significant changes in accounting principles or the application thereof) and ensure that policies are in place that are reasonably designed to achieve disclosure and transparency regarding the Bank's true financial performance and governance practices;

(3) Oversee the internal audit function by:

(i) Reviewing the scope of audit services required, significant accounting policies, significant risks and exposures, audit activities, and audit findings;

(ii) Assessing the performance and determining the compensation of the internal auditor; and

(iii) Reviewing and approving the internal auditor's work plan.

(4) Oversee the external audit function by:

(i) Approving the external auditor's annual engagement letter; and

(ii) Reviewing the performance of the external auditor.

(5) Provide an independent, direct channel of communication between the Bank's board of directors and the internal and external auditors;

(6) Conduct or authorize investigations into any matters within the audit committee's scope of responsibilities;

(7) Ensure that senior management has established and is maintaining an adequate internal control system within the Bank by:

(i) Reviewing the Bank's internal control system and the resolution of identified material weaknesses and significant deficiencies in the internal control system, including the prevention or detection of management override or compromise of the internal control system; and

(ii) Reviewing the programs and policies of the Bank designed to ensure compliance with applicable laws, regulations and policies, and monitoring the results of these compliance efforts;

(8) Review the policies established by senior management to assess and monitor implementation of the Bank's strategic business plan and the operating goals and objectives contained therein;

(9) Report periodically its findings to the Bank's board of directors; and

(10) Establish procedures for the receipt, retention, and treatment of complaints received by the Bank regarding accounting, internal accounting controls, or auditing matters, and for the confidential, anonymous submission by employees of the Bank of concerns regarding questionable accounting or auditing matters.

(f) *Meetings.* The audit committee shall prepare written minutes of each audit committee meeting.

[80 FR 72336, Nov. 19, 2015, as amended at 81 FR 76295, Nov. 2, 2016]

§ 1239.33 Dividends.

A Bank's board of directors may not declare or pay a dividend based on projected or anticipated earnings and may not declare or pay a dividend if the par value of the Bank's stock is impaired or is projected to become impaired after paying such dividend.

SUBCHAPTER C—ENTERPRISES

PART 1240—CAPITAL ADEQUACY OF ENTERPRISES

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513, 4513b, 4514, 4517, 4526, 4611, and 4612.

SOURCE: 85 FR 82198, Dec. 17, 2020, unless otherwise noted.

Subpart A—General Provisions

§ 1240.1 Purpose, applicability, reservations of authority, reporting, and timing.

(a) *Purpose.* This part establishes capital requirements and overall capital

adequacy standards for the Enterprises. This part includes methodologies for calculating capital requirements, disclosure requirements related to the capital requirements, and transition provisions for the application of this part.

(b) *Authorities*—(1) *Limitations of authority*. Nothing in this part shall be read to limit the authority of FHFA 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 the Safety and Soundness Act, and including action under sections 1313(a)(2), 1365–1367, 1371–1376 of the Safety and Soundness Act (12 U.S.C. 4513(a)(2), 4615–4617, and 4631–4636).

(2) *Permissible activities*. Nothing in this part may be construed to authorize, permit, or require an Enterprise to engage in any activity not authorized by its authorizing statute or that would otherwise be inconsistent with its authorizing statute or the Safety and Soundness Act.

(c) *Applicability*—(1) *Covered regulated entities*. This part applies on a consolidated basis to each Enterprise.

(2) *Capital requirements and overall capital adequacy standards*. Subject to §1240.4, each Enterprise must calculate its capital requirements and meet the overall capital adequacy standards in subpart B of this part.

(3) *Regulatory capital*. Subject to §1240.4, each Enterprise must calculate its regulatory capital in accordance with subpart C of this part.

(4) *Risk-weighted assets*. (i) Subject to §1240.4, each Enterprise must use the methodologies in subparts D and F of this part to calculate standardized total risk-weighted assets.

(ii) Subject to §1240.4, each Enterprise must use the methodologies in subparts E and F of this part to calculate advanced approaches total risk-weighted assets.

(d) *Reservation of authority regarding capital*. Subject to applicable provisions of the Safety and Soundness Act—

(1) *Additional capital in the aggregate*. FHFA may require an Enterprise to hold an amount of regulatory capital greater than otherwise required under this part if FHFA determines that the Enterprise's capital requirements under this part are not commensurate with the Enterprise's credit, market, operational, or other risks.

(2) *Regulatory capital elements*. (i) If FHFA determines that a particular common equity tier 1 capital, additional tier 1 capital, or tier 2 capital element has characteristics or terms that diminish its ability to absorb losses, or otherwise present safety and soundness concerns, FHFA may require the Enterprise to exclude all or a portion of such element from common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, as appropriate.

(ii) Notwithstanding the criteria for regulatory capital instruments set forth in subpart C of this part, FHFA may find that a capital element may be included in an Enterprise's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital on a permanent or temporary basis consistent with the loss absorption capacity of the element and in accordance with §1240.20(e).

(3) *Risk-weighted asset amounts*. If FHFA determines that the risk-weighted asset amount calculated under this part by the Enterprise for one or more exposures is not commensurate with the risks associated with those exposures, FHFA may require the Enterprise to assign a different risk-weighted asset amount to the exposure(s) or to deduct the amount of the exposure(s) from its regulatory capital.

(4) *Total leverage*. If FHFA determines that the adjusted total asset amount calculated by an Enterprise is inappropriate for the exposure(s) or the circumstances of the Enterprise, FHFA may require the Enterprise to adjust this exposure amount in the numerator and the denominator for purposes of the leverage ratio calculations.

(5) *Consolidation of certain exposures*. FHFA may determine that the risk-based capital treatment for an exposure or the treatment provided to an entity that is not consolidated on the Enterprise's balance sheet is not commensurate with the risk of the exposure and the relationship of the Enterprise to the entity. Upon making this determination, FHFA may require the

Enterprise to treat the exposure or entity as if it were consolidated on the balance sheet of the Enterprise for purposes of determining the Enterprise's risk-based capital requirements and calculating the Enterprise's risk-based capital ratios accordingly. FHFA will look to the substance of, and risk associated with, the transaction, as well as other relevant factors FHFA deems appropriate in determining whether to require such treatment.

(6) *Other reservation of authority*. With respect to any deduction or limitation required under this part, FHFA may require a different deduction or limitation, provided that such alternative deduction or limitation is commensurate with the Enterprise's risk and consistent with safety and soundness.

(e) *Corrective action and enforcement*. (1) FHFA may enforce this part pursuant to sections 1371, 1372, and 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, 4636).

(2) FHFA also may enforce the total capital requirement established under §1240.10(a) and the core capital requirement established under §1240.10(e) pursuant to section 1364 of the Safety and Soundness Act (12 U.S.C. 4614).

(3) This part is also a prudential standard adopted under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b), excluding §1240.11, which is a prudential standard only for purposes of §1240.4. Section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b) authorizes the Director to require that an Enterprise submit a corrective plan under §1236.4 specifying the actions the Enterprise will take to correct the deficiency if the Director determines that an Enterprise is not in compliance with this part.

(f) *Reporting procedure and timing*—(1) *Capital Reports*—(i) *In general*. Each Enterprise shall file a capital report with FHFA every calendar quarter providing the information and data required by FHFA. The specifics of required information and data, and the report format, will be separately provided to the Enterprise by FHFA.

(ii) *Required content*. The capital report shall include, as of the end of the last calendar quarter—

(A) The common equity tier 1 capital, core capital, tier 1 capital, total capital, and adjusted total capital of the Enterprise;

(B) The stress capital buffer, the capital conservation buffer amount (if prescribed by FHFA), the stability capital buffer, and the maximum payout ratio of the Enterprise;

(C) The adjusted total assets of the Enterprise; and

(D) The standardized total risk-weighted assets of the Enterprise.

(2) *Timing*. The Enterprise must submit the capital report not later than 60 days after the last day of the calendar quarter or at such other time as the Director requires.

(3) *Approval*. The capital report must be approved by the Chief Risk Officer and the Chief Financial Officer of an Enterprise prior to submission to FHFA.

(4) *Adjustment*. In the event an Enterprise makes an adjustment to its financial statements for a quarter or a date for which information was provided pursuant to this paragraph (f), which would cause an adjustment to a capital report, an Enterprise must file with the Director an amended capital report not later than 15 days after the date of such adjustment.

(5) *Public disclosure*. An Enterprise must disclose in an appropriate publicly available filing or other document each of the information reported under paragraph (f)(1)(ii) of this section.

§1240.2 Definitions.

As used in this part:

Acquired CRT exposure means, with respect to an Enterprise:

(1) Any exposure that arises from a credit risk transfer of the Enterprise and has been acquired by the Enterprise since the issuance or entry into the credit risk transfer by the Enterprise; or

(2) Any exposure that arises from a credit risk transfer of the other Enterprise.

Additional tier 1 capital is defined in §1240.20(c).

Adjusted allowances for credit losses (AACL) means valuation allowances that have been established through a charge against earnings or retained earnings for expected credit losses on financial assets measured at amortized cost and a lessor's net investment in

leases that have been established to reduce the amortized cost basis of the assets to amounts expected to be collected as determined in accordance with GAAP. For purposes of this part, adjusted allowances for credit losses include allowances for expected credit losses on off-balance sheet credit exposures not accounted for as insurance as determined in accordance with GAAP. Adjusted allowances for credit losses allowances created that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities.

Adjusted total assets means the sum of the items described in paragraphs (1) though (9) of this definition, as adjusted pursuant to paragraph (9) of this definition for a clearing member Enterprise:

(1) The balance sheet carrying value of all of the Enterprise's on-balance sheet assets, plus the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, less amounts deducted from tier 1 capital under §1240.22(a), (c), and (d), and less the value of securities received in security-for-security repo-style transactions, where the Enterprise acts as a securities lender and includes the securities received in its on-balance sheet assets but has not sold or re-hypothecated the securities received;

(2) The potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (9) of this definition and, at the discretion of the Enterprise, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the Enterprise is a counterparty as determined under §1240.36, but without regard to §1240.36(c), provided that:

(i) An Enterprise may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under §1240.36, but without regard to §1240.36(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(ii) An Enterprise that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to paragraph (2)(i) of this definition must do so consistently over time for the calculation of the PFE for all such instruments;

(3)(i) The amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the Enterprise's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (3)(iv) through (vii) of this definition;

(ii) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in §1240.36(b), and not the PFE;

(iii) For the purpose of the calculation of the NGR described in §1240.36(b)(2)(ii)(B), variation margin described in paragraph (3)(ii) of this definition may not reduce the net current credit exposure or the gross current credit exposure;

(iv) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(v) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(vi) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(vii) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (3)(vii), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(viii) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(4) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the Enterprise provides credit protection, provided that:

(i) The Enterprise may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(ii) The Enterprise may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the Enterprise provides credit protection and that:

(A) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the Enterprise provides credit protection; or

(B) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the Enterprise provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the Enterprise provides credit protection;

(C) Where an Enterprise has reduced the effective notional amount of a credit derivative through which the Enterprise provides credit protection in accordance with paragraph (4)(i) of this definition, the Enterprise must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the Enterprise provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(D) Where the Enterprise purchases credit protection through a total return swap and records the net payments received on a credit derivative through which the Enterprise provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the Enterprise provides credit protection in net income (either through reductions in fair value or by additions to reserves), the Enterprise may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the Enterprise provides credit protection;

(5) Where an Enterprise acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions

due to the same counterparty, the gross value of receivables associated with the repo-style transactions less any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (1) of this definition, unless the following criteria are met:

(i) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(ii) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(iii) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(6) The counterparty credit risk of a repo-style transaction, including where the Enterprise acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(i) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction i is treated as its own netting set, in accordance with the following formula, where Ei is the fair value of the instruments, gold, or cash that the Enterprise has lent, sold subject to repurchase, or provided as collateral to the counterparty, and Ci is the fair value of the instruments, gold, or cash that the Enterprise has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max \{0, [E_i — C_i]\}$

(ii) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total fair value of the instruments, gold, or cash that the Enterprise has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), less the total fair value of the instruments, gold, or cash that the Enterprise borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions (ΣC_i), in accordance with the following formula:

$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$

(7) If an Enterprise acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(8) The credit equivalent amount of all off-balance sheet exposures of the Enterprise, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under §1240.35(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(9) For an Enterprise that is a clearing member:

(i) A clearing member Enterprise that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its adjusted total assets;

(ii) A clearing member Enterprise that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its adjusted total assets;

(iii) A clearing member Enterprise that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its adjusted total assets;

(iv) An Enterprise that is a clearing member may exclude from its adjusted total assets the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (4) of this definition; and

(v) Notwithstanding paragraphs (9)(i) through (iii) of this definition, an Enterprise may exclude from its adjusted total assets a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the Enterprise's balance sheet.

Adjusted total capital means the sum of tier 1 capital and tier 2 capital.

Advanced approaches total risk-weighted assets means:

(1) The sum of:

(i) Credit-risk-weighted assets for general credit risk (including for mortgage exposures), cleared transactions, default fund contributions, unsettled transactions, securitization exposures (including retained CRT exposures), equity exposures, and the fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts, each as calculated under § 1240.123.

(ii) Risk-weighted assets for operational risk, as calculated under § 1240.162(c); and

(iii) Advanced market risk-weighted assets; minus

(2) Excess eligible credit reserves not included in the Enterprise's tier 2 capital.

Advanced market risk-weighted assets means the advanced measure for spread risk calculated under § 1240.204(a) multiplied by 12.5.

Affiliate has the meaning given in section 1303(1) of the Safety and Soundness Act (12 U.S.C. 4502(1)).

Allowances for loan and lease losses (ALLL) means valuation allowances that have been established through a charge against earnings to cover estimated credit losses on loans, lease financing receivables or other extensions of credit as determined in accordance with GAAP. For purposes of this part, *ALLL* includes allowances that have been established through a charge against earnings to cover estimated credit losses associated with off-balance sheet credit exposures as determined in accordance with GAAP.

Bankruptcy remote means, with respect to an entity or asset, that the entity or asset would be excluded from an insolvent entity's estate in receivership, insolvency, liquidation, or similar proceeding.

Carrying value means, with respect to an asset, the value of the asset on the balance sheet of an Enterprise as determined in accordance with GAAP. For all assets other than available-for-sale debt securities or purchased credit deteriorated assets, the carrying value is not reduced by any associated credit loss allowance that is determined in accordance with GAAP.

Central counterparty (CCP) means a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts.

CFTC means the U.S. Commodity Futures Trading Commission.

Clean-up call means a contractual provision that permits an originating Enterprise or servicer to call securitization exposures before their stated maturity or call date.

Cleared transaction means an exposure associated with an outstanding derivative contract or repo-style transaction that an Enterprise or clearing member has entered into with a central counterparty (that is, a transaction that a central counterparty has accepted).

(1) The following transactions are cleared transactions:

(i) A transaction between a CCP and an Enterprise that is a clearing member of the CCP where the Enterprise enters into the transaction with the CCP for the Enterprise's own account;

(ii) A transaction between a CCP and an Enterprise that is a clearing member of the CCP where the Enterprise is acting as a financial intermediary on behalf of a clearing member client and the transaction offsets another transaction that satisfies the requirements set forth in §1240.3(a);

(iii) A transaction between a clearing member client Enterprise and a clearing member where the clearing member acts as a financial intermediary on behalf of the clearing member client and enters into an offsetting transaction with a CCP, provided that the requirements set forth in §1240.3(a) are met; or

(iv) A transaction between a clearing member client Enterprise and a CCP where a clearing member guarantees the performance of the clearing member client Enterprise to the CCP and the transaction meets the requirements of §1240.3(a)(2) and (3).

(2) The exposure of an Enterprise that is a clearing member to its clearing member client is not a cleared transaction where the Enterprise is either acting as a financial intermediary and enters into an offsetting transaction with a CCP or where the Enterprise provides a guarantee to the CCP on the performance of the client.

Clearing member means a member of, or direct participant in, a CCP that is entitled to enter into transactions with the CCP.

Clearing member client means a party to a cleared transaction associated with a CCP in which a clearing member acts either as a financial intermediary with respect to the party or guarantees the performance of the party to the CCP.

Client-facing derivative transaction means a derivative contract that is not a cleared transaction where the Enterprise is either acting as a financial intermediary and enters into an offsetting transaction with a qualifying central counterparty (QCCP) or where the Enterprise provides a guarantee on the performance of a client on a transaction between the client and a QCCP.

Collateral agreement means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to an Enterprise for a single financial contract or for all financial contracts in a netting set and confers upon the Enterprise a perfected, first-priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the Enterprise with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the Enterprise's exercise of rights under the agreement may be stayed or avoided:

(1) Under applicable law in the relevant jurisdictions, other than

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(i) of this definition; or

(2) Other than to the extent necessary for the counterparty to comply with applicable law.

Commitment means any legally binding arrangement that obligates an Enterprise to extend credit or to purchase assets.

Common equity tier 1 capital is defined in §1240.20(b).

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

Core capital has the meaning given in section 1303(7) of the Safety and Soundness Act (12 U.S.C. 4502(7)).

Corporate exposure means an exposure to a company that is not:

(1) An exposure to a sovereign, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, a multi-lateral development bank (MDB), a depository institution, a foreign bank, a credit union, or a public sector entity (PSE);

(2) An exposure to a GSE;

(3) A mortgage exposure;

(4) A cleared transaction;

(5) A default fund contribution;

(6) A securitization exposure;

(7) An equity exposure;

(8) An unsettled transaction; or

(9) A separate account.

Credit derivative means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure(s)) to another party (the protection provider) for a certain period of time.

Credit-enhancing interest-only strip (CEIO) means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder of the CEIO to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

Credit risk mitigant means collateral, a credit derivative, or a guarantee.

Credit risk transfer (CRT) means any traditional securitization, synthetic securitization, senior/subordinated structure, credit derivative, guarantee, or other contract, structure, or arrangement (other than primary mortgage insurance) that allows an Enterprise to transfer the credit risk of one or more mortgage exposures (reference exposure(s)) to another party (the protection provider).

Credit union means an insured credit union as defined under the Federal Credit Union Act (12 U.S.C. 1752 *et seq.*).

CRT special purpose entity (CRT SPE) means a corporation, trust, or other entity organized for the specific purpose of bearing credit risk transferred through a CRT, the activities of which are limited to those appropriate to accomplish this purpose.

Current Expected Credit Losses (CECL) means the current expected credit losses methodology under GAAP.

Current exposure means, with respect to a netting set, the larger of zero or the fair value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions.

Current exposure methodology means the method of calculating the exposure amount for over-the-counter derivative contracts in § 1240.36(b).

Custodian means a financial institution that has legal custody of collateral provided to a CCP.

Default fund contribution means the funds contributed or commitments made by a clearing member to a CCP's mutualized loss sharing arrangement.

Depository institution means a depository institution as defined in section 3 of the Federal Deposit Insurance Act.

Derivative contract means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market

standard for the particular instrument or five business days.

Discretionary bonus payment means a payment made to an executive officer of an Enterprise, where:

(1) The Enterprise retains discretion as to whether to make, and the amount of, the payment until the payment is awarded to the executive officer;

(2) The amount paid is determined by the Enterprise without prior promise to, or agreement with, the executive officer; and

(3) The executive officer has no contractual right, whether express or implied, to the bonus payment.

Distribution means:

(1) A reduction of tier 1 capital through the repurchase of a tier 1 capital instrument or by other means, except when an Enterprise, within the same quarter when the repurchase is announced, fully replaces a tier 1 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for:

(i) A common equity tier 1 capital instrument if the instrument being repurchased was part of the Enterprise's common equity tier 1 capital, or

(ii) A common equity tier 1 or additional tier 1 capital instrument if the instrument being repurchased was part of the Enterprise's tier 1 capital;

(2) A reduction of tier 2 capital through the repurchase, or redemption prior to maturity, of a tier 2 capital instrument or by other means, except when an Enterprise, within the same quarter when the repurchase or redemption is announced, fully replaces a tier 2 capital instrument it has repurchased by issuing another capital instrument that meets the eligibility criteria for a tier 1 or tier 2 capital instrument;

(3) A dividend declaration or payment on any tier 1 capital instrument;

(4) A dividend declaration or interest payment on any tier 2 capital instrument if the Enterprise has full discretion to permanently or temporarily suspend such payments without triggering an event of default; or

(5) Any similar transaction that FHFA determines to be in substance a distribution of capital.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203, 124 Stat. 1376).

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating Enterprise (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by borrowers on the underlying exposures even after the provision is triggered.

Effective notional amount means for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the exposure amount of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant.

Eligible clean-up call means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating Enterprise or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization or credit risk transfer, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Eligible credit derivative means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by FHFA, provided that:

(1) The contract meets the requirements of an eligible guarantee and has

been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the Enterprise records net payments received on the swap as net income, the Enterprise records offsetting deterioration in the value of the hedged exposure (either through reductions in fair value or by an addition to reserves).

Eligible credit reserves means all general allowances that have been established through a charge against earnings or retained earnings to cover expected credit losses associated with on- or off-balance sheet wholesale and retail exposures, including AACL associated with such exposures. Eligible credit reserves exclude allowances that reflect credit losses on purchased credit deteriorated assets and available-for-sale debt securities and other specific reserves created against recognized losses.

Eligible funded synthetic risk transfer means a credit risk transfer in which—

(1) A CRT SPE that is bankruptcy remote from the Enterprise and not consolidated with the Enterprise under GAAP is contractually obligated to reimburse the Enterprise for specified losses on a reference pool of mortgage exposures of the Enterprise upon designated credit events and designated modification events;

(2) The credit risk transferred to the CRT SPE is transferred to one or more third parties through two or more classes of securities of different seniority issued by the CRT SPE;

(3) The performance of each class of securities issued by the CRT SPE depends on the performance of the reference pool; and

(4) The proceeds of the securities issued by the CRT SPE—

(i) Are, at the time of entry into the transaction, in the aggregate no less than the maximum obligation of the CRT SPE to the Enterprise; and

(ii) Are invested in financial collateral that secures the payment obligations of the CRT SPE to the Enterprise.

Eligible guarantee means a guarantee that:

(1) Is written;

(2) Is either:

(i) Unconditional, or

(ii) A contingent obligation of the U.S. government or its agencies, the enforceability of which is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, meeting servicing requirements);

(3) Covers all or a pro rata portion of all contractual payments of the obligated party on the reference exposure;

(4) Gives the beneficiary a direct claim against the protection provider;

(5) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(6) Except for a guarantee by a sovereign, is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(7) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligated party on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(8) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure;

(9) Is not provided by an affiliate of the Enterprise; and

(10) Is provided by an eligible guarantor.

Eligible guarantor means:

(1) A sovereign, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), the European Stability Mechanism, the European Financial Stability Facility, a multilateral development bank (MDB), a depository institution, a bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*), a savings and loan holding company, a credit union, a foreign bank, or a qualifying central counterparty; or

(2) An entity (other than a special purpose entity):

(i) That at the time the guarantee is issued or anytime thereafter, has issued and outstanding an unsecured debt security without credit enhancement that is investment grade;

(ii) Whose creditworthiness is not positively correlated with the credit risk of the exposures for which it has provided guarantees; and

(iii) That is not an insurance company engaged predominately in the business of providing credit protection (such as a monoline bond insurer or reinsurer).

Eligible margin loan means:

(1) An extension of credit where:

(i) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, or gold;

(ii) The collateral is marked-to-fair value daily, and the transaction is subject to daily margin maintenance requirements; and

(iii) The extension of credit is conducted under an agreement that provides the Enterprise the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case:

(A) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(*1*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,[1] or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (1)(iii)(A)(*1*) in order to facilitate the orderly resolution of the defaulting counterparty; or

(*2*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(iii)(A)(*1*) of this definition; and

(B) The agreement may limit the right to accelerate, terminate, and

[1] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions.

close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law.

(2) In order to recognize an exposure as an eligible margin loan for purposes of this subpart, an Enterprise must comply with the requirements of §1240.3(b) with respect to that exposure.

Eligible multifamily lender risk share means a credit risk transfer under which an entity that is approved by an Enterprise to sell multifamily mortgage exposures to an Enterprise retains credit risk of one or more multifamily mortgage exposures on substantially the same terms and conditions as in effect on June 30, 2020 for Fannie Mae's credit risk transfers known as the ''Delegated Underwriting and Servicing program''.

Eligible reinsurance risk transfer means a credit risk transfer in which the Enterprise transfers the credit risk on one or more mortgage exposures to an insurance company or reinsurer that has been approved by the Enterprise.

Eligible senior-subordinated structure means a traditional securitization in which the underlying exposures are mortgage exposures of the Enterprise and the Enterprise guarantees the timely payment of principal and interest on one or more senior tranches.

Eligible single-family lender risk share means any partial or full recourse agreement or similar agreement (other than a participation agreement) between an Enterprise and the seller or servicer of a single-family mortgage exposure pursuant to which the seller or servicer agrees either to reimburse the Enterprise for losses arising out of the default of the single-family mortgage exposure or to repurchase or replace the single-family mortgage exposure in the event of the default of the single-family mortgage exposure.

Equity exposure means:

(1) A security or instrument (whether voting or non-voting and whether certificated or not certificated) that represents a direct or an indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the Enterprise under GAAP;

(ii) The Enterprise is required to deduct the ownership interest from tier 1 or tier 2 capital under this part;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

ERISA means the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1001 *et seq.*).

Executive officer means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, or head of a major business line, and other staff that the board of directors of the Enterprise deems to have equivalent responsibility.

Exposure amount means:

(1) For the on-balance sheet component of an exposure (including a mortgage exposure); an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the Enterprise determines the exposure amount under §1240.39; a cleared transaction; a default fund contribution; or a securitization exposure), the Enterprise's carrying value of the exposure.

(2) For the off-balance sheet component of an exposure (other than an OTC

derivative contract; a repo-style transaction or an eligible margin loan for which the Enterprise calculates the exposure amount under §1240.39; a cleared transaction; a default fund contribution; or a securitization exposure), the notional amount of the off-balance sheet component multiplied by the appropriate credit conversion factor (CCF) in §1240.35.

(3) For an exposure that is an OTC derivative contract, the exposure amount determined under §1240.36.

(4) For an exposure that is a cleared transaction, the exposure amount determined under §1240.37.

(5) For an exposure that is an eligible margin loan or repo-style transaction for which the Enterprise calculates the exposure amount as provided in §1240.39, the exposure amount determined under §1240.39.

(6) For an exposure that is a securitization exposure, the exposure amount determined under §1240.42.

Federal Deposit Insurance Act means the Federal Deposit Insurance Act (12 U.S.C. 1813).

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

Financial collateral means collateral:

(1) In the form of:

(i) Cash on deposit with the Enterprise (including cash held for the Enterprise by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that are not resecuritization exposures and that are investment grade;

(iv) Short-term debt instruments that are not resecuritization exposures and that are investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded; or

(vii) Money market fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; and

(2) In which the Enterprise has a perfected, first-priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent or any priority security interest granted to a CCP in connection with collateral posted to that CCP).

Gain-on-sale means an increase in the equity capital of an Enterprise resulting from a traditional securitization other than an increase in equity capital resulting from:

(1) The Enterprise's receipt of cash in connection with the securitization; or

(2) The reporting of a mortgage servicing asset.

General obligation means a bond or similar obligation that is backed by the full faith and credit of a public sector entity (PSE).

Government-sponsored enterprise (GSE) means an entity established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government, including an Enterprise.

Guarantee means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider).

Investment grade means that the entity to which the Enterprise is exposed through a loan or security, or the reference entity with respect to a credit derivative, has adequate capacity to meet financial commitments for the projected life of the asset or exposure. Such an entity or reference entity has adequate capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.

Minimum transfer amount means the smallest amount of variation margin that may be transferred between counterparties to a netting set pursuant to the variation margin agreement.

Mortgage-backed security (MBS) means a security collateralized by a pool or pools of mortgage exposures, including any pass-through or collateralized mortgage obligation.

Mortgage exposure means either a single-family mortgage exposure or a multifamily mortgage exposure.

Multifamily mortgage exposure means an exposure that is secured by a first

or subsequent lien on a property with five or more residential units.

Mortgage servicing assets (MSAs) means the contractual rights owned by an Enterprise to service for a fee mortgage loans that are owned by others.

Multilateral development bank (MDB) means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which FHFA determines poses comparable credit risk.

Netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement or a qualifying cross-product master netting agreement. For derivative contracts, netting set also includes a single derivative contract between an Enterprise and a single counterparty. For purposes of calculating risk-based capital requirements using the internal models methodology in subpart E of this part, this term does not cover a transaction:

(1) That is not subject to such a master netting agreement; or

(2) Where the Enterprise has identified specific wrong-way risk.

Non-guaranteed separate account means a separate account where the insurance company:

(1) Does not contractually guarantee either a minimum return or account value to the contract holder; and

(2) Is not required to hold reserves (in the general account) pursuant to its contractual obligations to a policyholder.

Nth-to-default credit derivative means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

Original maturity with respect to an off-balance sheet commitment means the length of time between the date a commitment is issued and:

(1) For a commitment that is not subject to extension or renewal, the stated expiration date of the commitment; or

(2) For a commitment that is subject to extension or renewal, the earliest date on which the Enterprise can, at its option, unconditionally cancel the commitment.

Originating Enterprise, with respect to a securitization, means an Enterprise that directly or indirectly originated or securitized the underlying exposures included in the securitization.

Over-the-counter (OTC) derivative contract means a derivative contract that is not a cleared transaction. An OTC derivative includes a transaction:

(1) Between an Enterprise that is a clearing member and a counterparty where the Enterprise is acting as a financial intermediary and enters into a cleared transaction with a CCP that offsets the transaction with the counterparty; or

(2) In which an Enterprise that is a clearing member provides a CCP a guarantee on the performance of the counterparty to the transaction.

Participation agreement is defined in §1240.33(a).

Protection amount (P) means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative, reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in §1240.38).

Publicly-traded means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act; or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question.

Public sector entity (PSE) means a state, local authority, or other governmental subdivision below the sovereign level.

Qualifying central counterparty (QCCP) means a central counterparty that:

(1)(i) Is a designated financial market utility (FMU) under Title VIII of the Dodd-Frank Act;

(ii) If not located in the United States, is regulated and supervised in a manner equivalent to a designated FMU; or

(iii) Meets the following standards:

(A) The central counterparty requires all parties to contracts cleared by the counterparty to be fully collateralized on a daily basis;

(B) The Enterprise demonstrates to the satisfaction of FHFA that the central counterparty:

(*1*) Is in sound financial condition;

(*2*) Is subject to supervision by the Federal Reserve Board, the CFTC, or the Securities Exchange Commission (SEC), or, if the central counterparty is not located in the United States, is subject to effective oversight by a national supervisory authority in its home country; and

(*3*) Meets or exceeds the risk-management standards for central counterparties set forth in regulations established by the Federal Reserve Board, the CFTC, or the SEC under Title VII or Title VIII of the Dodd-Frank Act; or if the central counterparty is not located in the United States, meets or exceeds similar risk-management standards established under the law of its home country that are consistent with international standards for central counterparty risk management as established by the relevant standard setting body of the Bank of International Settlements; and

(2)(i) Provides the Enterprise with the central counterparty's hypothetical capital requirement or the information necessary to calculate such hypothetical capital requirement, and other information the Enterprise is required to obtain under § 1240.37(d)(3);

(ii) Makes available to FHFA and the CCP's regulator the information described in paragraph (2)(i) of this definition; and

(iii) Has not otherwise been determined by FHFA to not be a QCCP due to its financial condition, risk profile, failure to meet supervisory risk management standards, or other weaknesses or supervisory concerns that are inconsistent with the risk weight assigned to qualifying central counterparties under § 1240.37.

(3) A QCCP that fails to meet the requirements of a QCCP in the future may still be treated as a QCCP under the conditions specified in § 1240.3(f).

Qualifying master netting agreement means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the Enterprise the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly

upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law.

Repo-style transaction means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the Enterprise acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, or gold;

(2) The transaction is marked-to-fair value daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act, or a netting contract between or among financial institutions; or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the Enterprise the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(*1*) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(*i*) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (3)(ii)(A)(*1*)(*i*) in order to facilitate the orderly resolution of the defaulting counterparty;

(*ii*) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (3)(ii)(A)(*1*)(*i*) of this definition; and

(*2*) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with applicable law; or

(B) The transaction is:

(*1*) Either overnight or unconditionally cancelable at any time by the Enterprise; and

(*2*) Executed under an agreement that provides the Enterprise the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of counterparty default; and

(*3*) In order to recognize an exposure as a repo-style transaction for purposes of this subpart, an Enterprise must comply with the requirements of §1240.3(e) with respect to that exposure.

Resecuritization means a securitization which has more than one underlying exposure and in which one or more of the underlying exposures is a securitization exposure.

Resecuritization exposure means:

(1) An on- or off-balance sheet exposure to a resecuritization; or

(2) An exposure that directly or indirectly references a resecuritization exposure.

Retained CRT exposure means, with respect to an Enterprise, any exposure that arises from a credit risk transfer of the Enterprise and has been retained by the Enterprise since the issuance or entry into the credit risk transfer by the Enterprise.

Revenue obligation means a bond or similar obligation that is an obligation of a PSE, but which the PSE is committed to repay with revenues from the specific project financed rather than general tax funds.

Securities and Exchange Commission (SEC) means the U.S. Securities and Exchange Commission.

Securities Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78).

Securitization exposure means:

(1) An on-balance sheet or off-balance sheet credit exposure that arises from

a traditional securitization or synthetic securitization (including a resecuritization);

(2) An exposure that directly or indirectly references a securitization exposure described in paragraph (1) of this definition;

(3) A retained CRT exposure; or

(4) An acquired CRT exposure.

Securitization special purpose entity (securitization SPE) means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

Separate account means a legally segregated pool of assets owned and held by an insurance company and maintained separately from the insurance company's general account assets for the benefit of an individual contract holder. To be a separate account:

(1) The account must be legally recognized as a separate account under applicable law;

(2) The assets in the account must be insulated from general liabilities of the insurance company under applicable law in the event of the insurance company's insolvency;

(3) The insurance company must invest the funds within the account as directed by the contract holder in designated investment alternatives or in accordance with specific investment objectives or policies; and

(4) All investment gains and losses, net of contract fees and assessments, must be passed through to the contract holder, provided that the contract may specify conditions under which there may be a minimum guarantee but must not include contract terms that limit the maximum investment return available to the policyholder.

Servicer cash advance facility means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures.

Single-family mortgage exposure means an exposure that is secured by a first or subsequent lien on a property with one to four residential units.

Sovereign means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

Sovereign default means noncompliance by a sovereign with its external debt service obligations or the inability or unwillingness of a sovereign government to service an existing loan according to its original terms, as evidenced by failure to pay principal and interest timely and fully, arrearages, or restructuring.

Sovereign exposure means:

(1) A direct exposure to a sovereign; or

(2) An exposure directly and unconditionally backed by the full faith and credit of a sovereign.

Specific wrong-way risk means wrong-way risk that arises when either:

(1) The counterparty and issuer of the collateral supporting the transaction; or

(2) The counterparty and the reference asset of the transaction, are affiliates or are the same entity.

Standardized market risk-weighted assets means the standardized measure for spread risk calculated under § 1240.204(a) multiplied by 12.5.

Standardized total risk-weighted assets means:

(1) The sum of—

(i) Total risk-weighted assets for general credit risk as calculated under § 1240.31;

(ii) Total risk-weighted assets for cleared transactions and default fund contributions as calculated under § 1240.37;

(iii) Total risk-weighted assets for unsettled transactions as calculated under § 1240.40;

(iv) Total risk-weighted assets for retained CRT exposures, acquired CRT exposures, and other securitization exposures as calculated under § 1240.42;

(v) Total risk-weighted assets for equity exposures as calculated under § 1240.52;

(vi) Risk-weighted assets for operational risk, as calculated under

§1240.162(c) or §1240.162(d), as applicable; and

(vii) Standardized market risk-weighted assets; minus

(2) Excess eligible credit reserves not included in the Enterprise's tier 2 capital.

Subsidiary means, with respect to a company, a company controlled by that company.

Synthetic securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is retained or transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual mortgage exposure or other retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as mortgage exposures, loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Tier 1 capital means the sum of common equity tier 1 capital and additional tier 1 capital.

Tier 2 capital is defined in §1240.20(d).

Total capital has the meaning given in section 1303(23) of the Safety and Soundness Act (12 U.S.C. 4502(23)).

Traditional securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as mortgage exposures, loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company defined in section 302 of the Small Business Investment Act;

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act;

(8) FHFA may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance;

(9) FHFA may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance; and

(10) The transaction is not:

(i) An investment fund;

(ii) A collective investment fund held by a State member bank as fiduciary and, consistent with local law, invested collectively—

(A) In a common trust fund maintained by such bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act; or

(B) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code (26 U.S.C.).

(iii) An employee benefit plan (as defined in 29 U.S.C. 1002(3)), a governmental plan (as defined in 29 U.S.C.

1002(32)) that complies with the tax deferral qualification requirements provided in the Internal Revenue Code;

(iv) A synthetic exposure to the capital of a financial institution to the extent deducted from capital under § 1240.22; or

(v) Registered with the SEC under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or foreign equivalents thereof.

Tranche means all securitization exposures associated with a securitization that have the same seniority level.

Transition order means an order issued by the Director under section 1371 of the Safety and Soundness Act (12 U.S.C. 4631), a plan required by the Director under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b), or an order, agreement, or similar arrangement of FHFA that, in any case, provides for a compliance date for a requirement of this part that is later than the compliance date for the requirement specified under § 1240.4.

Unconditionally cancelable means with respect to a commitment, that an Enterprise may, at any time, with or without cause, refuse to extend credit under the commitment (to the extent permitted under applicable law).

Underlying exposures means one or more exposures that have been securitized in a securitization transaction.

Variation margin agreement means an agreement to collect or post variation margin.

Variation margin threshold means the amount of credit exposure of an Enterprise to its counterparty that, if exceeded, would require the counterparty to post variation margin to the Enterprise pursuant to the variation margin agreement.

Wrong-way risk means the risk that arises when an exposure to a particular counterparty is positively correlated with the probability of default of such counterparty itself.

§ 1240.3 Operational requirements for counterparty credit risk.

For purposes of calculating risk-weighted assets under subpart D of this part:

(a) *Cleared transaction.* In order to recognize certain exposures as cleared transactions pursuant to paragraphs (1)(ii), (iii), or (iv) of the definition of ''cleared transaction'' in § 1240.2, the exposures must meet the applicable requirements set forth in this paragraph (a).

(1) The offsetting transaction must be identified by the CCP as a transaction for the clearing member client.

(2) The collateral supporting the transaction must be held in a manner that prevents the Enterprise from facing any loss due to an event of default, including from a liquidation, receivership, insolvency, or similar proceeding of either the clearing member or the clearing member's other clients.

(3) The Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from a default or receivership, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the arrangements of paragraph (a)(2) of this section to be legal, valid, binding and enforceable under the law of the relevant jurisdictions.

(4) The offsetting transaction with a clearing member must be transferable under the transaction documents and applicable laws in the relevant jurisdiction(s) to another clearing member should the clearing member default, become insolvent, or enter receivership, insolvency, liquidation, or similar proceedings.

(b) *Eligible margin loan.* In order to recognize an exposure as an eligible margin loan as defined in § 1240.2, an Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (1)(iii) of the definition of ''eligible margin loan'' in § 1240.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(c) [Reserved]

(d) *Qualifying master netting agreement.* In order to recognize an agreement as a qualifying master netting agreement as defined in §1240.2, an Enterprise must:

(1) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(i) The agreement meets the requirements of paragraph (2) of the definition of ''qualifying master netting agreement'' in §1240.2; and

(ii) In the event of a legal challenge (including one resulting from default or from receivership, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(2) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of the definition of ''qualifying master netting agreement'' in §1240.2.

(e) *Repo-style transaction.* In order to recognize an exposure as a repo-style transaction as defined in §1240.2, an Enterprise must conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement underlying the exposure:

(1) Meets the requirements of paragraph (3) of the definition of ''repo-style transaction'' in §1240.2, and

(2) Is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(f) *Failure of a QCCP to satisfy the rule's requirements.* If an Enterprise determines that a CCP ceases to be a QCCP due to the failure of the CCP to satisfy one or more of the requirements set forth in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' in §1240.2, the Enterprise may continue to treat the CCP as a QCCP for up to three months following the determination. If the CCP fails to remedy the relevant deficiency within three months after the initial determination, or the CCP fails to satisfy the requirements set forth in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' continuously for a three-month period after remedying the relevant deficiency, an Enterprise may not treat the CCP as a QCCP for the purposes of this part until after the Enterprise has determined that the CCP has satisfied the requirements in paragraphs (2)(i) through (iii) of the definition of a ''QCCP'' for three continuous months.

§1240.4 Transition.

(a) *Compliance dates.* An Enterprise will not be subject to any requirement under this part until the compliance date for the requirement under this section.

(b) *Reporting requirements.* The compliance date will be January 1, 2022, for the reporting requirements under any of the following:

(1) Any requirement under §1240.1(f);

(2) Any requirement under subpart C, D, or G of this part;

(3) Any requirement under §1240.162(d); and

(4) Any requirement to calculate the standardized measure for spread risk under §1240.204.

(c) *Advanced approaches requirements.* Any requirement under subpart E or F (other than §1240.162(d) or any requirement to calculate the standardized measure for spread risk under §1240.204) will have a compliance date of the later of January 1, 2025 and any later compliance date for that requirement provided in a transition order applicable to the Enterprise.

(d) *Capital requirements and buffers*—(1) *Requirements.* The compliance date of any requirement under §1240.10 will be the later of:

(i) The date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of this part); and

(ii) Any later compliance date for §1240.10 provided in a transition order applicable to the Enterprise.

(2) *Buffers.* The compliance date of any requirement under §1240.11 will be the date of the termination of the conservatorship of the Enterprise (or, if later, the effective date of this part).

(3) *Capital restoration plan.* If a transition order of an Enterprise provides a compliance date for §1240.10, the Director may determine that, for the period

between the compliance date for §1240.11 under paragraph (d)(2) of this section and any later compliance date for §1240.10 provided in the transition order—

(i) The prescribed capital conservation buffer amount of the Enterprise will be the amount equal to the sum of—

(A) The common equity tier 1 capital that would otherwise be required under §1240.10(d); and

(B) The prescribed capital conservation buffer amount that would otherwise apply under §1240.11(a)(5); and

(ii) The prescribed leverage buffer amount of the Enterprise will be equal to 4.0 percent of the adjusted total assets of the Enterprise.

(4) *Prudential standard.* If the Director makes a determination under paragraph (d)(3) of this section, §1240.11 will be a prudential standard adopted under section 1313B of the Safety and Soundness Act (12 U.S.C. 4513b) until the compliance date of §1240.10.

Subpart B—Capital Requirements and Buffers

§1240.10 Capital requirements.

(a) *Total capital.* An Enterprise must maintain total capital not less than the amount equal to 8.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(b) *Adjusted total capital.* An Enterprise must maintain adjusted total capital not less than the amount equal to 8.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(c) *Tier 1 capital.* An Enterprise must maintain tier 1 capital not less than the amount equal to 6.0 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(d) *Common equity tier 1 capital.* An Enterprise must maintain common equity tier 1 capital not less than the amount equal to 4.5 percent of the greater of:

(1) Standardized total risk-weighted assets; and

(2) Advanced approaches total risk-weighted assets.

(e) *Core capital.* An Enterprise must maintain core capital not less than the amount equal to 2.5 percent of adjusted total assets.

(f) *Leverage ratio.* An Enterprise must maintain tier 1 capital not less than the amount equal to 2.5 percent of adjusted total assets.

(g) *Capital adequacy.* (1) Notwithstanding the minimum requirements in this part, an Enterprise must maintain capital commensurate with the level and nature of all risks to which the Enterprise is exposed. The supervisory evaluation of an Enterprise's capital adequacy is based on an individual assessment of numerous factors, including the character and condition of the Enterprise's assets and its existing and prospective liabilities and other corporate responsibilities.

(2) An Enterprise must have a process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

§1240.11 Capital conservation buffer and leverage buffer.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Capital conservation buffer.* An Enterprise's capital conservation buffer is the amount calculated under paragraph (c)(2) of this section.

(2) *Eligible retained income.* The eligible retained income of an Enterprise is the greater of:

(i) The Enterprise's net income, as defined under GAAP, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(ii) The average of the Enterprise's net income for the four calendar quarters preceding the current calendar quarter.

(3) *Leverage buffer.* An Enterprise's leverage buffer is the amount calculated under paragraph (d)(2) of this section.

(4) *Maximum payout ratio.* The maximum payout ratio is the percentage of eligible retained income that an Enterprise can pay out in the form of distributions and discretionary bonus payments during the current calendar quarter. The maximum payout ratio is determined under paragraph (b)(2) of this section.

(5) *Prescribed capital conservation buffer amount.* An Enterprise's prescribed capital conservation buffer amount is equal to its stress capital buffer in accordance with paragraph (a)(7) of this section plus its applicable countercyclical capital buffer amount in accordance with paragraph (e) of this section plus its applicable stability capital buffer in accordance with paragraph (f) of this section.

(6) *Prescribed leverage buffer amount.* An Enterprise's prescribed leverage buffer amount is 1.5 percent of the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter.

(7) *Stress capital buffer.* (i) Subject to paragraph (a)(7)(iii) of this section, FHFA will determine the stress capital buffer pursuant to this paragraph (a)(7).

(ii) An Enterprise's stress capital buffer is equal to the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter, multiplied by the greater of:

(A) The following calculation:

(*1*) The ratio of an Enterprise's common equity tier 1 capital to adjusted total assets, as of the final quarter of the previous calendar year, unless otherwise determined by FHFA; minus

(*2*) The lowest projected ratio of the Enterprise's common equity tier 1 capital to adjusted total assets in any quarter of the planning horizon under a supervisory stress test; plus

(*3*) The ratio of:

(*i*) The sum of the Enterprise's planned common stock dividends (expressed as a dollar amount) for each of the quarters of the planning horizon of the supervisory stress test, unless otherwise determined by FHFA; to

(*ii*) The adjusted total assets of the Enterprise in the quarter in which the Enterprise had its lowest projected ratio of common equity tier 1 capital to adjusted total assets in any quarter of the planning horizon under the supervisory stress test; and

(B) 0.75 percent.

(iii) Notwithstanding anything to the contrary in paragraph (a)(7)(ii) of this section, if FHFA does not determine the stress capital buffer for an Enterprise under this paragraph (a)(7), the Enterprise's stress capital buffer is equal to 0.75 percent of the Enterprise's adjusted total assets, as of the last day of the previous calendar quarter.

(b) *Maximum payout amount*—(1) *Limits on distributions and discretionary bonus payments.* An Enterprise shall not make distributions or discretionary bonus payments or create an obligation to make such distributions or payments during the current calendar quarter that, in the aggregate, exceed the amount equal to the Enterprise's eligible retained income for the calendar quarter, multiplied by its maximum payout ratio.

(2) *Maximum payout ratio.* The maximum payout ratio of an Enterprise is the lowest of the payout ratios determined by its capital conservation buffer and its leverage buffer, as set forth on Table 1 to paragraph (b)(5) of this section.

(3) *No maximum payout amount limitation.* An Enterprise is not subject to a restriction under paragraph (b)(1) of this section if it has:

(i) A capital conservation buffer that is greater than its prescribed capital conservation buffer amount; and

(ii) A leverage buffer that is greater than its prescribed leverage buffer amount.

(4) *Negative eligible retained income.* An Enterprise may not make distributions or discretionary bonus payments during the current calendar quarter if:

(i) The eligible retained income of the Enterprise is negative; and

(ii) Either:

(A) The capital conservation buffer of the Enterprise was less than its stress capital buffer; or

(B) The leverage buffer of the Enterprise was less than its prescribed leverage buffer amount.

(5) *Prior approval.* Notwithstanding the limitations in paragraphs (b)(1) through (3) of this section, FHFA may

permit an Enterprise to make a distribution or discretionary bonus payment upon a request of the Enterprise, if FHFA determines that the distribution or discretionary bonus payment would not be contrary to the purposes of this section or to the safety and soundness of the Enterprise. In making such a determination, FHFA will consider the nature and extent of the request and the particular circumstances giving rise to the request.

TABLE 1 TO PARAGRAPH (b)(5): CALCULATION OF MAXIMUM PAYOUT RATIO

Capital buffer[1]	Maximum payout ratio
Greater than or equal to the Enterprise's prescribed buffer amount.[2]	No payout ratio limitation applies
Less than the Enterprise's prescribed buffer amount, and greater than or equal to 75 percent of the Enterprise's prescribed buffer amount.	60 percent
Less than 75 percent of the Enterprise's prescribed buffer amount, and greater than or equal to 50 percent of the Enterprise's prescribed buffer amount.	40 percent
Less than 50 percent of the Enterprise's prescribed buffer amount, and greater than or equal to 25 percent of the Enterprise's prescribed buffer amount.	20 percent
Less than 25 percent of the Enterprise's prescribed buffer amount.	0 percent

[1] An Enterprise's "capital buffer" means, as applicable, its capital conservation buffer or its leverage buffer.

[2] An Enterprise's "prescribed buffer amount" means, as applicable, its prescribed capital conservation buffer amount or its prescribed leverage buffer amount.

(c) *Capital conservation buffer*—(1) *Composition of the capital conservation buffer*. The capital conservation buffer is composed solely of common equity tier 1 capital.

(2) *Calculation of capital conservation buffer*. (i) An Enterprise's capital conservation buffer is equal to the lowest of the following, calculated as of the last day of the previous calendar quarter:

(A) The Enterprise's adjusted total capital minus the minimum amount of adjusted total capital under § 1240.10(b);

(B) The Enterprise's tier 1 capital minus the minimum amount of tier 1 capital under § 1240.10(c); or

(C) The Enterprise's common equity tier 1 capital minus the minimum amount of common equity tier 1 capital under § 1240.10(d).

(ii) Notwithstanding paragraphs (c)(2)(i)(A) through (C) of this section, if the Enterprise's adjusted total capital, tier 1 capital, or common equity tier 1 capital is less than or equal to the Enterprise's minimum adjusted total capital, tier 1 capital, or common equity tier 1 capital, respectively, the Enterprise's capital conservation buffer is zero.

(d) *Leverage buffer*—(1) *Composition of the leverage buffer*. The leverage buffer is composed solely of tier 1 capital.

(2) *Calculation of the leverage buffer*. (i) An Enterprise's leverage buffer is equal to the Enterprise's tier 1 capital minus the minimum amount of tier 1 capital under § 1240.10(f), calculated as of the last day of the previous calendar quarter.

(ii) Notwithstanding paragraph (d)(2)(i) of this section, if the Enterprise's tier 1 capital is less than or equal to the minimum amount of tier 1 capital under § 1240.10(d), the Enterprise's leverage buffer is zero.

(e) *Countercyclical capital buffer amount*—(1) *Composition of the countercyclical capital buffer amount*. The countercyclical capital buffer amount is composed solely of common equity tier 1 capital.

(2) *Amount*—(i) *Initial countercyclical capital buffer*. The initial countercyclical capital buffer amount is zero.

(ii) *Adjustment of the countercyclical capital buffer amount*. FHFA will adjust the countercyclical capital buffer amount in accordance with applicable law.

(iii) *Range of countercyclical capital buffer amount*. FHFA will adjust the countercyclical capital buffer amount between zero percent and 0.75 percent of adjusted total assets.

(iv) *Adjustment determination*. FHFA will base its decision to adjust the countercyclical capital buffer amount under this section on a range of macroeconomic, financial, and supervisory information indicating an increase in systemic risk, including the ratio of credit to gross domestic product, a variety of asset prices, other factors indicative of relative credit and liquidity expansion or contraction, funding spreads, credit condition surveys, indices based on credit default swap spreads, options implied volatility, and measures of systemic risk.

(3) *Effective date of adjusted countercyclical capital buffer amount*—(i) *Increase adjustment*. A determination by FHFA under paragraph (e)(2)(ii) of this section to increase the countercyclical capital buffer amount will be effective 12 months from the date of announcement, unless FHFA establishes an earlier effective date and includes a statement articulating the reasons for the earlier effective date.

(ii) *Decrease adjustment*. A determination by FHFA to decrease the established countercyclical capital buffer amount under paragraph (e)(2)(ii) of this section will be effective on the day following announcement of the final determination or the earliest date permissible under applicable law or regulation, whichever is later.

(iii) *Twelve month sunset*. The countercyclical capital buffer amount will return to zero percent 12 months after the effective date that the adjusted countercyclical capital buffer amount is announced, unless FHFA announces a decision to maintain the adjusted countercyclical capital buffer amount or adjust it again before the expiration of the 12-month period.

(f) *Stability capital buffer*. An Enterprise must use its stability capital buffer calculated in accordance with subpart G of this part for purposes of determining its maximum payout ratio under Table 1 to paragraph (b)(5) of this section.

Subpart C—Definition of Capital

§ 1240.20 Capital components and eligibility criteria for regulatory capital instruments.

(a) *Regulatory capital components*. An Enterprise's regulatory capital components are:

(1) Common equity tier 1 capital;

(2) Additional tier 1 capital;

(3) Tier 2 capital;

(4) Core capital; and

(5) Total capital.

(b) *Common equity tier 1 capital*. Common equity tier 1 capital is the sum of the common equity tier 1 capital elements in this paragraph (b), minus regulatory adjustments and deductions in § 1240.22. The common equity tier 1 capital elements are:

(1) Any common stock instruments (plus any related surplus) issued by the Enterprise, net of treasury stock, that meet all the following criteria:

(i) The instrument is paid-in, issued directly by the Enterprise, and represents the most subordinated claim in a receivership, insolvency, liquidation, or similar proceeding of the Enterprise;

(ii) The holder of the instrument is entitled to a claim on the residual assets of the Enterprise that is proportional with the holder's share of the Enterprise's issued capital after all senior claims have been satisfied in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument has no maturity date, can only be redeemed via discretionary repurchases with the prior approval of FHFA to the extent otherwise required by law or regulation, and does not contain any term or feature that creates an incentive to redeem;

(iv) The Enterprise did not create at issuance of the instrument through

any action or communication an expectation that it will buy back, cancel, or redeem the instrument, and the instrument does not include any term or feature that might give rise to such an expectation;

(v) Any cash dividend payments on the instrument are paid out of the Enterprise's net income, retained earnings, or surplus related to common stock, and are not subject to a limit imposed by the contractual terms governing the instrument.

(vi) The Enterprise has full discretion at all times to refrain from paying any dividends and making any other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of any other restrictions on the Enterprise;

(vii) Dividend payments and any other distributions on the instrument may be paid only after all legal and contractual obligations of the Enterprise have been satisfied, including payments due on more senior claims;

(viii) The holders of the instrument bear losses as they occur equally, proportionately, and simultaneously with the holders of all other common stock instruments before any losses are borne by holders of claims on the Enterprise with greater priority in a receivership, insolvency, liquidation, or similar proceeding;

(ix) The paid-in amount is classified as equity under GAAP;

(x) The Enterprise, or an entity that the Enterprise controls, did not purchase or directly or indirectly fund the purchase of the instrument;

(xi) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and is not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(xii) The instrument has been issued in accordance with applicable laws and regulations; and

(xiii) The instrument is reported on the Enterprise's regulatory financial statements separately from other capital instruments.

(2) Retained earnings.

(3) Accumulated other comprehensive income (AOCI) as reported under GAAP.[1]

(4) Notwithstanding the criteria for common stock instruments referenced above, an Enterprise's common stock issued and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (b)(1)(iii), (iv), or (xi) of this section, provided that any repurchase of the stock is required solely by virtue of ERISA for an instrument of an Enterprise that is not publicly-traded. In addition, an instrument issued by an Enterprise to its employee stock ownership plan does not violate the criterion in paragraph (b)(1)(x) of this section.

(c) *Additional tier 1 capital.* Additional tier 1 capital is the sum of additional tier 1 capital elements and any related surplus, minus the regulatory adjustments and deductions in §1240.22. Additional tier 1 capital elements are:

(1) Subject to paragraph (e)(2) of this section, instruments (plus any related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in;

(ii) The instrument is subordinated to general creditors and subordinated debt holders of the Enterprise in a receivership, insolvency, liquidation, or similar proceeding;

(iii) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument;

(iv) The instrument has no maturity date and does not contain a dividend step-up or any other term or feature that creates an incentive to redeem; and

(v) If callable by its terms, the instrument may be called by the Enterprise only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called earlier than five years upon the occurrence of a regulatory event that precludes the instrument

[1] *See* §1240.22 for specific adjustments related to AOCI.

from being included in additional tier 1 capital, a tax event, or if the issuing entity is required to register as an investment company pursuant to the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*). In addition:

(A) The Enterprise must receive prior approval from FHFA to exercise a call option on the instrument.

(B) The Enterprise does not create at issuance of the instrument, through any action or communication, an expectation that the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the Enterprise must either: Replace the instrument to be called with an equal amount of instruments that meet the criteria under paragraph (b) of this section or this paragraph (c);[2] or demonstrate to the satisfaction of FHFA that following redemption, the Enterprise will continue to hold capital commensurate with its risk.

(vi) Redemption or repurchase of the instrument requires prior approval from FHFA.

(vii) The Enterprise has full discretion at all times to cancel dividends or other distributions on the instrument without triggering an event of default, a requirement to make a payment-in-kind, or an imposition of other restrictions on the Enterprise except in relation to any distributions to holders of common stock or instruments that are *pari passu* with the instrument.

(viii) Any distributions on the instrument are paid out of the Enterprise's net income, retained earnings, or surplus related to other additional tier 1 capital instruments.

(ix) The instrument does not have a credit-sensitive feature, such as a dividend rate that is reset periodically based in whole or in part on the Enterprise's credit quality, but may have a dividend rate that is adjusted periodically independent of the Enterprise's credit quality, in relation to general market interest rates or similar adjustments.

(x) The paid-in amount is classified as equity under GAAP.

(xi) The Enterprise, or an entity that the Enterprise controls, did not purchase or directly or indirectly fund the purchase of the instrument.

(xii) The instrument does not have any features that would limit or discourage additional issuance of capital by the Enterprise, such as provisions that require the Enterprise to compensate holders of the instrument if a new instrument is issued at a lower price during a specified time frame.

(xiii) If the instrument is not issued directly by the Enterprise or by a subsidiary of the Enterprise that is an operating entity, the only asset of the issuing entity is its investment in the capital of the Enterprise, and proceeds must be immediately available without limitation to the Enterprise or to the Enterprise's top-tier holding company in a form which meets or exceeds all of the other criteria for additional tier 1 capital instruments.[3]

(xiv) The governing agreement, offering circular, or prospectus of an instrument issued after February 16, 2021 must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the Enterprise enters into a receivership, insolvency, liquidation, or similar proceeding.

(2) Notwithstanding the criteria for additional tier 1 capital instruments referenced above, an instrument issued by an Enterprise and held in trust for the benefit of its employees as part of an employee stock ownership plan does not violate any of the criteria in paragraph (c)(1)(iii) of this section, provided that any repurchase is required solely by virtue of ERISA for an instrument of an Enterprise that is not publicly-traded. In addition, an instrument issued by an Enterprise to its employee stock ownership plan does not violate the criteria in paragraphs (c)(1)(v) or (c)(1)(xi) of this section.

(d) *Tier 2 capital.* Tier 2 capital is the sum of tier 2 capital elements and any related surplus, minus the regulatory adjustments and deductions in §1240.22. Tier 2 capital elements are:

[2] Replacement can be concurrent with redemption of existing additional tier 1 capital instruments.

[3] *De minimis* assets related to the operation of the issuing entity can be disregarded for purposes of this criterion.

(1) Subject to paragraph (e)(2) of this section, instruments (plus related surplus) that meet the following criteria:

(i) The instrument is issued and paid-in.

(ii) The instrument is subordinated to general creditors of the Enterprise.

(iii) The instrument is not secured, not covered by a guarantee of the Enterprise or of an affiliate of the Enterprise, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument in relation to more senior claims.

(iv) The instrument has a minimum original maturity of at least five years. At the beginning of each of the last five years of the life of the instrument, the amount that is eligible to be included in tier 2 capital is reduced by 20 percent of the original amount of the instrument (net of redemptions) and is excluded from regulatory capital when the remaining maturity is less than one year. In addition, the instrument must not have any terms or features that require, or create significant incentives for, the Enterprise to redeem the instrument prior to maturity.[4]

(v) The instrument, by its terms, may be called by the Enterprise only after a minimum of five years following issuance, except that the terms of the instrument may allow it to be called sooner upon the occurrence of an event that would preclude the instrument from being included in tier 2 capital, a tax event. In addition:

(A) The Enterprise must receive the prior approval of FHFA to exercise a call option on the instrument.

(B) The Enterprise does not create at issuance, through action or communication, an expectation the call option will be exercised.

(C) Prior to exercising the call option, or immediately thereafter, the Enterprise must either: Replace any amount called with an equivalent amount of an instrument that meets the criteria for regulatory capital under this section;[5] or demonstrate to the satisfaction of FHFA that following redemption, the Enterprise would continue to hold an amount of capital that is commensurate with its risk.

(vi) The holder of the instrument must have no contractual right to accelerate payment of principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or similar proceeding of the Enterprise.

(vii) The instrument has no credit-sensitive feature, such as a dividend or interest rate that is reset periodically based in whole or in part on the Enterprise's credit standing, but may have a dividend rate that is adjusted periodically independent of the Enterprise's credit standing, in relation to general market interest rates or similar adjustments.

(viii) The Enterprise, or an entity that the Enterprise controls, has not purchased and has not directly or indirectly funded the purchase of the instrument.

(ix) If the instrument is not issued directly by the Enterprise or by a subsidiary of the Enterprise that is an operating entity, the only asset of the issuing entity is its investment in the capital of the Enterprise, and proceeds must be immediately available without limitation to the Enterprise or the Enterprise's top-tier holding company in a form that meets or exceeds all the other criteria for tier 2 capital instruments under this section.[6]

(x) Redemption of the instrument prior to maturity or repurchase requires the prior approval of FHFA.

(xi) The governing agreement, offering circular, or prospectus of an instrument issued after February 16, 2021 must disclose that the holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the Enterprise enters into a receivership, insolvency, liquidation, or similar proceeding.

[4] An instrument that by its terms automatically converts into a tier 1 capital instrument prior to five years after issuance complies with the five-year maturity requirement of this criterion.

[5] An Enterprise may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

[6] An Enterprise may disregard *de minimis* assets related to the operation of the issuing entity for purposes of this criterion.

(2) Any eligible credit reserves that exceed expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of credit risk-weighted assets.

(e) *FHFA approval of a capital element.* (1) An Enterprise must receive FHFA prior approval to include a capital element (as listed in this section) in its common equity tier 1 capital, additional tier 1 capital, or tier 2 capital unless the element:

(i) Was included in an Enterprise's tier 1 capital or tier 2 capital prior to June 30, 2020 and the underlying instrument may continue to be included under the criteria set forth in this section; or

(ii) Is equivalent, in terms of capital quality and ability to absorb losses with respect to all material terms, to a regulatory capital element FHFA determined may be included in regulatory capital pursuant to paragraph (e)(3) of this section.

(2) An Enterprise may not include an instrument in its additional tier 1 capital or a tier 2 capital unless FHFA has determined that the Enterprise has made appropriate provision, including in any resolution plan of the Enterprise, to ensure that the instrument would not pose a material impediment to the ability of an Enterprise to issue common stock instruments following the appointment of FHFA as conservator or receiver under the Safety and Soundness Act.

(3) After determining that a regulatory capital element may be included in an Enterprise's common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, FHFA will make its decision publicly available, including a brief description of the material terms of the regulatory capital element and the rationale for the determination.

(f) *FHFA prior approval.* An Enterprise may not repurchase or redeem any common equity tier 1 capital, additional tier 1, or tier 2 capital instrument without the prior approval of FHFA to the extent such prior approval is required by paragraph (b), (c), or (d) of this section, as applicable.

§ 1240.21 [Reserved]

§ 1240.22 Regulatory capital adjustments and deductions.

(a) *Regulatory capital deductions from common equity tier 1 capital.* An Enterprise must deduct from the sum of its common equity tier 1 capital elements the items set forth in this paragraph (a):

(1) Goodwill, net of associated deferred tax liabilities (DTLs) in accordance with paragraph (e) of this section;

(2) Intangible assets, other than MSAs, net of associated DTLs in accordance with paragraph (e) of this section;

(3) Deferred tax assets (DTAs) that arise from net operating loss and tax credit carryforwards net of any related valuation allowances and net of DTLs in accordance with paragraph (e) of this section;

(4) Any gain-on-sale in connection with a securitization exposure;

(5) Any defined benefit pension fund net asset, net of any associated DTL in accordance with paragraph (e) of this section, held by the Enterprise. With the prior approval of FHFA, this deduction is not required for any defined benefit pension fund net asset to the extent the Enterprise has unrestricted and unfettered access to the assets in that fund. An Enterprise must risk weight any portion of the defined benefit pension fund asset that is not deducted under this paragraph (a) as if the Enterprise directly holds a proportional ownership share of each exposure in the defined benefit pension fund.

(6) The amount of expected credit loss that exceeds its eligible credit reserves.

(b) *Regulatory adjustments to common equity tier 1 capital.* (1) An Enterprise must adjust the sum of common equity tier 1 capital elements pursuant to the requirements set forth in this paragraph (b). Such adjustments to common equity tier 1 capital must be made net of the associated deferred tax effects.

(i) An Enterprise must deduct any accumulated net gains and add any accumulated net losses on cash flow hedges included in AOCI that relate to the

hedging of items that are not recognized at fair value on the balance sheet.

(ii) An Enterprise must deduct any net gain and add any net loss related to changes in the fair value of liabilities that are due to changes in the Enterprise's own credit risk. An Enterprise must deduct the difference between its credit spread premium and the risk-free rate for derivatives that are liabilities as part of this adjustment.

(2) [Reserved]

(c) *Deductions from regulatory capital related to investments in capital instruments.*[1] An Enterprise must deduct an investment in the Enterprise's own capital instruments as follows:

(1) An Enterprise must deduct an investment in the Enterprise's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 1240.20(b)(1);

(2) An Enterprise must deduct an investment in the Enterprise's own additional tier 1 capital instruments from its additional tier 1 capital elements; and

(3) An Enterprise must deduct an investment in the Enterprise's own tier 2 capital instruments from its tier 2 capital elements.

(d) *Items subject to the 10 and 15 percent common equity tier 1 capital deduction thresholds.* (1) An Enterprise must deduct from common equity tier 1 capital elements the amount of each of the items set forth in this paragraph (d) that, individually, exceeds 10 percent of the sum of the Enterprise's common equity tier 1 capital elements, less adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section (the 10 percent common equity tier 1 capital deduction threshold).

(i) DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section. An Enterprise is not required to deduct from the sum of its common equity tier 1 capital elements DTAs (net of any related valuation allowances and net of DTLs, in accordance with paragraph (e) of this section) arising from timing differences that the Enterprise could realize through net operating loss carrybacks. The Enterprise must risk weight these assets at 100 percent.

(ii) MSAs net of associated DTLs, in accordance with paragraph (e) of this section.

(2) An Enterprise must deduct from common equity tier 1 capital elements the items listed in paragraph (d)(1) of this section that are not deducted as a result of the application of the 10 percent common equity tier 1 capital deduction threshold, and that, in aggregate, exceed 17.65 percent of the sum of the Enterprise's common equity tier 1 capital elements, minus adjustments to and deductions from common equity tier 1 capital required under paragraphs (a) through (c) of this section, minus the items listed in paragraph (d)(1) of this section (the 15 percent common equity tier 1 capital deduction threshold).[2]

(3) For purposes of calculating the amount of DTAs subject to the 10 and 15 percent common equity tier 1 capital deduction thresholds, an Enterprise may exclude DTAs and DTLs relating to adjustments made to common equity tier 1 capital under paragraph (b) of this section. An Enterprise that elects to exclude DTAs relating to adjustments under paragraph (b) of this section also must exclude DTLs and must do so consistently in all future calculations. An Enterprise may change its exclusion preference only after obtaining the prior approval of FHFA.

(e) *Netting of DTLs against assets subject to deduction.* (1) Except as described in paragraph (e)(3) of this section, netting of DTLs against assets that are subject to deduction under this section

[1] The Enterprise must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as applicable, includable in tier 2 capital under § 1240.20(d).

[2] The amount of the items in paragraph (d) of this section that is not deducted from common equity tier 1 capital pursuant to this section must be included in the risk-weighted assets of the Enterprise and assigned a 250 percent risk weight.

is permitted, but not required, if the following conditions are met:

(i) The DTL is associated with the asset; and

(ii) The DTL would be extinguished if the associated asset becomes impaired or is derecognized under GAAP.

(2) A DTL may only be netted against a single asset.

(3) For purposes of calculating the amount of DTAs subject to the threshold deduction in paragraph (d) of this section, the amount of DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and of DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances, may be offset by DTLs (that have not been netted against assets subject to deduction pursuant to paragraph (e)(1) of this section) subject to the conditions set forth in this paragraph (e).

(i) Only the DTAs and DTLs that relate to taxes levied by the same taxation authority and that are eligible for offsetting by that authority may be offset for purposes of this deduction.

(ii) The amount of DTLs that the Enterprise nets against DTAs that arise from net operating loss and tax credit carryforwards, net of any related valuation allowances, and against DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks, net of any related valuation allowances, must be allocated in proportion to the amount of DTAs that arise from net operating loss and tax credit carryforwards (net of any related valuation allowances, but before any offsetting of DTLs) and of DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks (net of any related valuation allowances, but before any offsetting of DTLs), respectively.

(4) An Enterprise must net DTLs against assets subject to deduction under this section in a consistent manner from reporting period to reporting period. An Enterprise may change its preference regarding the manner in which it nets DTLs against specific assets subject to deduction under this section only after obtaining the prior approval of FHFA.

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if an Enterprise does not have a sufficient amount of a specific component of capital to effect the required deduction after completing the deductions required under paragraph (d) of this section, the Enterprise must deduct the shortfall from the next higher (that is, more subordinated) component of regulatory capital.

(g) *Treatment of assets that are deducted.* An Enterprise must exclude from standardized total risk-weighted assets and advanced approaches total risk-weighted assets any item deducted from regulatory capital under paragraphs (a), (c), and (d) of this section.

Subpart D—Risk-Weighted Assets—Standardized Approach

§ 1240.30 Applicability.

(a) This subpart sets forth methodologies for determining risk-weighted assets for purposes of the generally applicable risk-based capital requirements for the Enterprises.

(b) This subpart is also applicable to covered positions, as defined in subpart F of this part.

RISK-WEIGHTED ASSETS FOR GENERAL CREDIT RISK

§ 1240.31 Mechanics for calculating risk-weighted assets for general credit risk.

(a) *General risk-weighting requirements.* An Enterprise must apply risk weights to its exposures as follows:

(1) An Enterprise must determine the exposure amount of each mortgage exposure, each other on-balance sheet exposure, each OTC derivative contract, and each off-balance sheet commitment, trade and transaction-related contingency, guarantee, repo-style transaction, forward agreement, or other similar transaction that is not:

(i) An unsettled transaction subject to § 1240.40;

(ii) A cleared transaction subject to § 1240.37;

(iii) A default fund contribution subject to § 1240.37;

(iv) A retained CRT exposure, acquired CRT exposure, or other securitization exposure subject to §§ 1240.41 through 1240.46; or

(v) An equity exposure (other than an equity OTC derivative contract) subject to §§ 1240.51 and 1240.52.

(2) An Enterprise must multiply each exposure amount by the risk weight appropriate to the exposure based on the exposure type or counterparty, eligible guarantor, or financial collateral to determine the risk-weighted asset amount for each exposure.

(b) *Total risk-weighted assets for general credit risk.* Total risk-weighted assets for general credit risk equals the sum of the risk-weighted asset amounts calculated under this section.

§ 1240.32 General risk weights.

(a) *Exposures to the U.S. government.* (1) Notwithstanding any other requirement in this subpart, an Enterprise must assign a zero percent risk weight to:

(i) An exposure to the U.S. government, its central bank, or a U.S. government agency; and

(ii) The portion of an exposure that is directly and unconditionally guaranteed by the U.S. government, its central bank, or a U.S. government agency. This includes a deposit or other exposure, or the portion of a deposit or other exposure, that is insured or otherwise unconditionally guaranteed by the FDIC or NCUA.

(2) An Enterprise must assign a 20 percent risk weight to the portion of an exposure that is conditionally guaranteed by the U.S. government, its central bank, or a U.S. government agency. This includes an exposure, or the portion of an exposure, that is conditionally guaranteed by the FDIC or NCUA.

(b) *Certain supranational entities and multilateral development banks (MDBs).* An Enterprise must assign a zero percent risk weight to an exposure to the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the European Stability Mechanism, the European Financial Stability Facility, or an MDB.

(c) *Exposures to GSEs.* (1) An Enterprise must assign a zero percent risk weight to any MBS guaranteed by the Enterprise (other than any retained CRT exposure).

(2) An Enterprise must assign a 20 percent risk weight to an exposure to another GSE, including an MBS guaranteed by the other Enterprise.

(d) *Exposures to depository institutions and credit unions.* (1) An Enterprise must assign a 20 percent risk weight to an exposure to a depository institution or credit union that is organized under the laws of the United States or any state thereof, except as otherwise provided under paragraph (d)(2) of this section.

(2) An Enterprise must assign a 100 percent risk weight to an exposure to a financial institution if the exposure may be included in that financial institution's capital unless the exposure is:

(i) An equity exposure; or

(ii) Deducted from regulatory capital under § 1240.22.

(e) *Exposures to U.S. public sector entities (PSEs).* (1) An Enterprise must assign a 20 percent risk weight to a general obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(2) An Enterprise must assign a 50 percent risk weight to a revenue obligation exposure to a PSE that is organized under the laws of the United States or any state or political subdivision thereof.

(f) *Corporate exposures.* (1) An Enterprise must assign a 100 percent risk weight to all its corporate exposures, except as provided in paragraphs (f)(2) and (3) of this section.

(2) An Enterprise must assign a 2 percent risk weight to an exposure to a QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 1240.37(b)(3)(i)(A) and a 4 percent risk weight to an exposure to a QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of § 1240.37(b)(3)(i)(B).

(3) An Enterprise must assign a 2 percent risk weight to an exposure to a

QCCP arising from the Enterprise posting cash collateral to the QCCP in connection with a cleared transaction that meets the requirements of §1240.37(c)(3)(i).

(g) *Residential mortgage exposures*—(1) *Single-family mortgage exposures.* An Enterprise must assign a risk weight to a single-family mortgage exposure in accordance with §1240.33.

(2) *Multifamily mortgage exposures.* An Enterprise must assign a risk weight to a multifamily mortgage exposure in accordance with §1240.34.

(h) *Past due exposures.* Except for an exposure to a sovereign entity or a mortgage exposure, if an exposure is 90 days or more past due or on nonaccrual:

(1) An Enterprise must assign a 150 percent risk weight to the portion of the exposure that is not guaranteed or that is unsecured;

(2) An Enterprise may assign a risk weight to the guaranteed portion of a past due exposure based on the risk weight that applies under §1240.38 if the guarantee or credit derivative meets the requirements of that section; and

(3) An Enterprise may assign a risk weight to the collateralized portion of a past due exposure based on the risk weight that applies under §1240.39 if the collateral meets the requirements of that section.

(i) *Other assets.* (1) An Enterprise must assign a zero percent risk weight to cash owned and held in the offices of an insured depository institution or in transit.

(2) An Enterprise must assign a 20 percent risk weight to cash items in the process of collection.

(3) An Enterprise must assign a 100 percent risk weight to DTAs arising from temporary differences that the Enterprise could realize through net operating loss carrybacks.

(4) An Enterprise must assign a 250 percent risk weight to the portion of each of the following items to the extent it is not deducted from common equity tier 1 capital pursuant to §1240.22(d):

(i) MSAs; and

(ii) DTAs arising from temporary differences that the Enterprise could not realize through net operating loss carrybacks.

(5) An Enterprise must assign a 100 percent risk weight to all assets not specifically assigned a different risk weight under this subpart and that are not deducted from tier 1 or tier 2 capital pursuant to §1240.22.

(j) *Insurance assets.* (1) An Enterprise must risk-weight the individual assets held in a separate account that does not qualify as a non-guaranteed separate account as if the individual assets were held directly by the Enterprise.

(2) An Enterprise must assign a zero percent risk weight to an asset that is held in a non-guaranteed separate account.

§1240.33 Single-family mortgage exposures.

(a) *Definitions.* Subject to any additional instructions set forth on table 1 to this paragraph (a), for purposes of this section:

Adjusted MTMLTV means, with respect to a single-family mortgage exposure and as of a particular time, the amount equal to:

(i) The MTMLTV of the single-family mortgage exposure (or, if the loan age of the single-family mortgage exposure is less than 6, the OLTV of the single-family mortgage exposure); divided by

(ii) The amount equal to 1 plus the single-family countercyclical adjustment as of that time.

Approved insurer means an insurance company that is currently approved by an Enterprise to guarantee or insure single-family mortgage exposures acquired by the Enterprise.

Cancelable mortgage insurance means a mortgage insurance policy that, pursuant to its terms, may or will be terminated before the maturity date of the insured single-family mortgage exposure, including as required or permitted by the Homeowners Protection Act of 1998 (12 U.S.C. 4901).

Charter-level coverage means mortgage insurance that satisfies the minimum requirements of the authorizing statute of an Enterprise.

Cohort burnout means the number of refinance opportunities since the loan age of the single-family mortgage exposure was 6, categorized into ranges

pursuant to the instructions set forth on Table 1 to this paragraph (a).

Coverage percent means the percent of the sum of the unpaid principal balance, any lost interest, and any foreclosure costs that is used to determine the benefit or other coverage under a mortgage insurance policy.

COVID–19-related forbearance means a forbearance granted pursuant to section 4022 of the Coronavirus Aid, Relief, and Economic Security Act or under a program established by FHFA to provide forbearance to borrowers adversely impacted by COVID–19.

Days past due means the number of days a single-family mortgage exposure is past due.

Debt-to-income ratio (DTI) means the ratio of a borrower's total monthly obligations (including housing expense) divided by the borrower's monthly income, as calculated under the Guide of the Enterprise.

Deflated HPI means, as of a particular time, the amount equal to:

(i) The national, not-seasonally adjusted Expanded-Data FHFA House Price Index® as of the end of the preceding calendar quarter; divided by

(ii) The average of the three monthly observations of the preceding calendar quarter from the non-seasonally adjusted Consumer Price Index for All Urban Consumers, U.S. City Average, All Items Less Shelter.

Guide means, as applicable, the Fannie Mae Single Family Selling Guide, the Fannie Mae Single Family Servicing Guide and the Freddie Mac Single-family Seller/Servicers Guide.

Guide-level coverage means mortgage insurance that satisfies the requirements of the Guide of the Enterprise with respect to mortgage insurance that has a coverage percent that exceeds charter-level coverage.

Interest-only (IO) means a single-family mortgage exposure that requires only payment of interest without any principal amortization during all or part of the loan term.

Loan age means the number of scheduled payment dates since the origination of a single-family mortgage exposure.

Loan-level credit enhancement means:

(i) Mortgage insurance; or

(ii) A participation agreement.

Loan documentation means the completeness of the documentation used to underwrite a single-family mortgage exposure, as determined under the Guide of the Enterprise.

Loan purpose means the purpose of a single-family mortgage exposure at origination.

Long-term HPI trend means, as of a particular time, the amount equal to: 0.66112295.

$$\times 1.0045^{t}$$

Where t = the number of quarters from the first quarter of 1975 to and including the end of the preceding calendar quarter and where the first quarter of 1975 is counted as one.[1]

Long-term trend departure means, as of a particular time, the percent amount equal to—

(i) The deflated HPI as of that time divided by the long-term HPI trend as of that time; minus

(ii) 1.0.

MI cancelation feature means an indicator for whether mortgage insurance is cancelable mortgage insurance or non-cancelable mortgage insurance, assigned pursuant to the instructions set forth on Table 1 to this paragraph (a).

Modification means a permanent amendment or other change to the interest rate, maturity date, unpaid principal balance, or other contractual term of a single-family mortgage exposure or a deferral of a required payment until the maturity or earlier payoff of the single-family mortgage exposure. A modification does not include a repayment plan with respect to any

[1] FHFA will adjust the formula for the long-term HPI trend in accordance with applicable law if two conditions are satisfied as of the end of a calendar quarter that follows the last adjustment to the long-term HPI trend: (i) The average of the long-term trend departures over four consecutive calendar quarters has been less than −5.0 percent; and (ii) after the end of the calendar quarter in which the first condition is satisfied, the deflated HPI has increased to an extent that it again exceeds the long-term HPI trend. The point in time of the new trough used by FHFA to adjust the formula for the long-term HPI trend will be identified by the calendar quarter with the smallest deflated HPI in the period that includes the calendar quarter in which the first condition is satisfied and ends at the end of the calendar quarter in which the second condition is first satisfied.

amounts that are past due or a COVID–19-related forbearance.

Modified re-performing loan (modified RPL) means a single-family mortgage exposure (other than an NPL) that is or has been subject to a modification, excluding any single-family mortgage exposure that was not 60 or more days past due at any time in a continuous 60-calendar month period that begins at any time after the effective date of the last modification.

Months since last modification means the number of scheduled payment dates since the effective date of the last modification of a single-family mortgage exposure.

Mortgage concentration risk means the extent to which a mortgage insurer or other counterparty is exposed to mortgage credit risk relative to other risks.

MTMLTV means, with respect to a single-family mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the single-family mortgage exposure; divided by

(ii) The amount equal to:

(A) The unpaid principal balance of the single-family mortgage exposure at origination; divided by

(B) The OLTV of the single-family mortgage exposure; multiplied by

(C) The most recently available FHFA Purchase-only State-level House Price Index of the State in which the property securing the single-family mortgage exposure is located; divided by

(D) The FHFA Purchase-only State-level House Price Index, as of date of the origination of the single-family mortgage exposure, in which the property securing the single-family mortgage exposure is located.

Non-cancelable mortgage insurance means a mortgage insurance policy that, pursuant to its terms, may not be terminated before the maturity date of the insured single-family mortgage exposure.

Non-modified re-performing loan (non-modified RPL) means a single-family mortgage exposure (other than a modified RPL or an NPL) that was previously an NPL at any time in the prior 48 calendar months.

Non-performing loan (NPL) means a single-family mortgage exposure that is 60 days or more past due.

Occupancy type means the borrowers' intended use of the property securing a single-family mortgage exposure.

Original credit score means the borrower's credit score as of the origination date of a single-family mortgage exposure.

OLTV means, with respect to a single-family mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the single-family mortgage exposure at *origination;* divided by

(ii) The lesser of:

(A) The appraised value of the property securing the single-family mortgage exposure; and

(B) The sale price of the property securing the single-family mortgage exposure.

Origination channel means the type of institution that originated a single-family mortgage exposure, assigned pursuant to the instructions set forth on table 1 to this paragraph (a).

Participation agreement means, with respect to a single-family mortgage exposure, any agreement between an Enterprise and the seller of the single-family mortgage exposure pursuant to which the seller retains a participation of not less than 10 percent in the single-family mortgage exposure.

Past due means, with respect to a single-family mortgage exposure, that any amount required to be paid by the borrower under the terms of the single-family mortgage exposure has not been paid.

Payment change from modification means the amount, expressed as a percent, equal to:

(i) The amount equal to:

(A) The monthly payment of a single-family mortgage exposure after a modification; divided by

(B) The monthly payment of the single-family mortgage exposure before the modification; minus

(ii) 1.0.

Performing loan means any single-family mortgage exposure that is not an NPL, a modified RPL, or a non-modified RPL.

Previous maximum days past due means the maximum number of days a

modified RPL or non-modified RPL was past due in the prior 36 calendar months.

Product type means an indicator reflecting the contractual terms of a single-family mortgage exposure as of the origination date, assigned pursuant to the instructions set forth on Table 1 to this paragraph (a).

Property type means the physical structure of the property securing a single-family mortgage exposure.

Refinance opportunity means, with respect to a single-family mortgage exposure, any calendar month in which the Primary Mortgage Market Survey (PMMS) rate for the month and year of the origination of the single-family mortgage exposure exceeds the PMMS rate for that calendar month by more than 50 basis points.

Refreshed credit score means the borrower's most recently available credit score.

Single-family countercyclical adjustment means, as of a particular time, zero percent except:

(i) If the long-term trend departure as of that time is greater than 5 percent, the percent amount equal to:

(A) 1.05 multiplied by the long-term HPI trend, as of that time, divided by the deflated HPI, as of that time, minus

(B) 1.0.

(ii) If the long-term trend departure as of that time is less than −5 percent, the percent amount equal to:

(A) 0.95 multiplied by the long-term HPI trend, as of that time, divided by the deflated HPI, as of that time, minus

(B) 1.0.

Streamlined refi means a single-family mortgage exposure that was refinanced through a streamlined refinance program of an Enterprise, including the Home Affordable Refinance Program, Relief Refi, and Refi-Plus.

Subordination means, with respect to a single-family mortgage exposure, the amount equal to the original unpaid principal balance of any second lien single-family mortgage exposure divided by the lesser of the appraised value or sale price of the property that secures the single-family mortgage exposure.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS

Defined term	Permissible values	Additional instructions
Cohort burnout	"No burnout," if the single-family mortgage exposure has not had a refinance opportunity since the loan age of the single-family mortgage exposure was 6. "Low," if the single-family mortgage exposure has had 12 or fewer refinance opportunities since the loan age of the single-family mortgage exposure was 6. "Medium," if the single-family mortgage exposure has had between 13 and 24 refinance opportunities since the loan age of the single-family mortgage exposure was 6. "High," if the single-family mortgage exposure has had more than 24 refinance opportunities since the loan age of the single-family mortgage exposure was 6.	High if unable to determine.
Coverage percent	0 percent <= coverage percent <= 100 percent	0 percent if outside of permissible range or unable to determine.
Days past due	Non-negative integer	210 if negative or unable to determine.
Debt-to-income (DTI) ratio.	0 percent < DTI < 100 percent	42 percent if outside of permissible range or unable to determine.
Interest-only (IO)	Yes, no	Yes if unable to determine.
Loan age	0 <= loan age <= 500	500 if outside of permissible range or unable to determine.
Loan documentation	None, low, full	None if unable to determine.
Loan purpose	Purchase, cashout refinance, rate/term refinance	Cashout refinance if unable to determine.
MTMLTV	0 percent < MTMLTV <= 300 percent	If the property securing the single-family mortgage exposure is located in Puerto Rico or the U.S. Virgin Islands, use the FHFA House Price Index of the United States.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS—Continued

Defined term	Permissible values	Additional instructions
		If the property securing the single-family mortgage exposure is located in Guam, use the FHFA Purchase-only State-level House Price Index of Hawaii. If the single-family mortgage exposure was originated before 1991, use the Enterprise's proprietary housing price index. Use geometric interpolation to convert quarterly housing price index data to monthly data. 300 percent if outside of permissible range or unable to determine.
Mortgage concentration risk.	High, not high	High if unable to determine.
MI cancellation feature	Cancelable mortgage insurance, non-cancelable mortgage insurance.	Cancelable mortgage insurance, if unable to determine.
Occupancy type	Investment, owner-occupied, second home	Investment if unable to determine.
OLTV	0 percent < OLTV <= 300 percent	300 percent if outside of permissible range or unable to determine.
Original credit score	300 <= original credit score <= 850	If there are credit scores from multiple credit repositories for a borrower, use the following logic to determine a single original credit score: • If there are credit scores from two repositories, take the lower credit score. • If there are credit scores from three repositories, use the middle credit score. • If there are credit scores from three repositories and two of the credit scores are identical, use the identical credit score. If there are multiple borrowers, use the following logic to determine a single original credit score: • Using the logic above, determine a single credit score for each borrower. • Select the lowest single credit score across all borrowers. 600 if outside of permissible range or unable to determine.
Origination channel	Retail, third-party origination (TPO)	TPO includes broker and correspondent channels. TPO if unable to determine.
Payment change from modification.	−80 percent < payment change from modification < 50 percent.	If the single-family mortgage exposure initially had an adjustable or step-rate feature, the monthly payment after a permanent modification is calculated using the initial modified rate. 0 percent if unable to determine. −79 percent if less than or equal to −80 percent. 49 percent if greater than or equal to 50 percent.
Previous maximum days past due.	Non-negative integer	181 months if negative or unable to determine.
Product type	"FRM30" means a fixed-rate single-family mortgage exposure with an original amortization term greater than 309 months and less than or equal to 429 months. "FRM20" means a fixed-rate single-family mortgage exposure with an original amortization term greater than 189 months and less than or equal to 309 months. "FRM15" means a fixed-rate single-family mortgage exposure with an original amortization term less than or equal to 189 months. "ARM 1/1" is an adjustable-rate single-family mortgage exposure that has a mortgage rate and required payment that adjust annually.	Product types other than FRM30, FRM20, FRM15 or ARM 1/1 should be assigned to FRM30. Use the post-modification product type for modified mortgage exposures. ARM 1/1 if unable to determine.
Property type	1-unit, 2–4 units, condominium, manufactured home.	Use condominium for cooperatives. 2–4 units if unable to determine.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS—Continued

Defined term	Permissible values	Additional instructions
Refreshed credit score	300 <= refreshed credit score <= 850	If there are credit scores from multiple credit repositories for a borrower, use the following logic to determine a single refreshed credit score: • If there are credit scores from two repositories, take the lower credit score. • If there are credit scores from three repositories, use the middle credit score. • If there are credit scores from three repositories and two of the credit scores are identical, use the identical credit score. If there are multiple borrowers, use the following logic to determine a single Original Credit Score: • Using the logic above, determine a single credit score for each borrower. • Select the lowest single credit score across all borrowers. 600 if outside of permissible range or unable to determine.
Streamlined refi	Yes, no	No if unable to determine.
Subordination	0 percent <= Subordination <= 80 percent	80 percent if outside permissible range.

(b) *Risk weight*—(1) *In general.* Subject to paragraph (b)(2) of this section, an Enterprise must assign a risk weight to a single-family mortgage exposure equal to:

(i) The base risk weight for the single-family mortgage exposure as determined under paragraph (c) of this section; multiplied by

(ii) The combined risk multiplier for the single-family mortgage exposure as determined under paragraph (d) of this section; multiplied by

(iii) The adjusted credit enhancement multiplier for the single-family mortgage exposure as determined under paragraph (e) of this section.

(2) *Minimum risk weight.* Notwithstanding the risk weight determined under paragraph (b)(1) of this section, the risk weight assigned to a single-family mortgage exposure may not be less than 20 percent.

(c) *Base risk weight*—(1) *Performing loan.* The base risk weight for a performing loan is set forth on Table 2 to this paragraph (c)(1). For purposes of this paragraph (c)(1), credit score means, with respect to a single-family mortgage exposure:

(i) The original credit score of the single-family mortgage exposure, if the loan age of the single-family mortgage exposure is less than 6; or

(ii) The refreshed credit score of the single-family mortgage exposure.

TABLE 2 TO PARAGRAPH (c)(1): PERFORMING LOANS

	Adjusted MTMLTV													
Credit Score	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	> 60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
< 620	2%	10%	18%	34%	49%	72%	105%	129%	159%	188%	218%	247%	275%	317%
>=620, < 640	2%	8%	14%	27%	39%	58%	84%	102%	127%	151%	178%	208%	237%	282%
>=640, < 660	2%	7%	12%	23%	34%	51%	73%	89%	111%	133%	159%	186%	214%	258%
>=660, < 680	2%	6%	10%	20%	29%	44%	63%	78%	98%	119%	141%	168%	194%	236%
>=680, < 700	2%	6%	9%	18%	26%	38%	55%	67%	88%	109%	125%	150%	176%	215%
>=700, < 720	2%	5%	8%	15%	22%	33%	47%	57%	75%	94%	110%	134%	158%	194%
>=720, < 740	2%	4%	6%	13%	19%	28%	41%	50%	66%	84%	96%	118%	140%	172%
>=740, < 760	2%	4%	5%	11%	16%	23%	33%	40%	54%	69%	80%	99%	119%	147%
>=760, < 780	2%	3%	4%	9%	13%	19%	27%	32%	43%	56%	65%	82%	99%	122%
>= 780	2%	3%	3%	7%	10%	14%	21%	25%	33%	43%	50%	63%	77%	96%

(2) *Non-modified RPL.* The base risk weight for a non-modified RPL is set forth on Table 3 to this paragraph (c)(2). For purposes of this paragraph (c)(2), re-performing duration means, with respect to a non-modified RPL, the number of scheduled payment dates since the non-modified RPL was last an NPL.

TABLE 3 TO PARAGRAPH (c)(2): NON-MODIFIED RPLS

	Adjusted MTMLTV													
Non-modified re-performing duration	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
<= 3	2%	11%	20%	35%	50%	69%	84%	105%	122%	135%	149%	160%	174%	180%
>3, <= 12	2%	8%	14%	27%	39%	54%	67%	84%	100%	113%	127%	141%	160%	177%
> 12, <= 36	2%	7%	11%	22%	32%	46%	57%	69%	84%	97%	111%	127%	150%	175%
> 36, <= 48	2%	5%	7%	14%	21%	32%	46%	56%	72%	88%	103%	123%	143%	174%

(3) *Modified RPL.* The base risk weight for a modified RPL is set forth on Table 4 to paragraph (c)(3)(ii) of this section. For purposes of this paragraph (c)(3), re-performing duration means, with respect to a modified RPL, the lesser of:

(i) The months since last modification of the modified RPL; and

(ii) The number of scheduled payment dates since the modified RPL was last an NPL.

TABLE 4 TO PARAGRAPH (c)(3)(ii): MODIFIED RPLS

	Adjusted MTMLTV													
Modified re-performing duration	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%, <= 95%	> 95%, <= 100%	> 100%, <= 110%	> 110%, <= 120%	> 120%
<= 3	2%	17%	31%	54%	76%	98%	115%	129%	145%	159%	170%	179%	189%	196%
>3, <= 12	2%	14%	25%	44%	62%	81%	95%	109%	124%	139%	152%	164%	178%	195%
> 12, <= 36	2%	11%	19%	35%	50%	66%	79%	92%	107%	123%	136%	152%	169%	194%
> 36	2%	8%	13%	24%	35%	50%	68%	80%	98%	117%	133%	150%	168%	193%

(4) *NPL.* The base risk weight for an NPL is set forth on Table 5 to this paragraph (c)(4).

TABLE 5 TO PARAGRAPH (c)(4): NPLS

	Adjusted MTMLTV									
Days past due	<= 30%	> 30%, <= 40%	> 40%, <= 50%	> 50%, <= 60%	>60%, <= 70%	> 70%, <= 75%	> 75%, <= 80%	> 80%, <= 85%	> 85%, <= 90%	> 90%
60 to 89 days	8%	40%	71%	122%	173%	193%	205%	215%	226%	238%
90 to 209 days	11%	48%	85%	135%	184%	201%	211%	218%	224%	230%
>= 210 days	28%	76%	124%	172%	219%	227%	231%	233%	234%	221%

(d) *Combined risk multiplier*—(1) *In general.* Subject to paragraph (d)(2) of this section, the combined risk multiplier for a single-family mortgage exposure is equal to the product of each of the applicable risk multipliers set forth under the applicable single-family segment on Table 6 to paragraph (d)(2) of this section.

(2) *Maximum combined risk multiplier.* Notwithstanding the combined risk multiplier determined under paragraph (d)(1) of this section, the combined risk multiplier for a single-family mortgage exposure may not exceed 3.0.

TABLE 6 TO PARAGRAPH (d)(2): RISK MULTIPLIERS

Risk factor	Value or range	Single-family segment			
		Performing loan	Non-modified RPL	Modified RPL	NPL
Loan Purpose	Purchase	1.0	1.0	1.0	
	Cashout refinance	1.4	1.4	1.4	
	Rate/term refinance	1.3	1.2	1.3	
Occupancy Type	Owner-occupied or second home.	1.0	1.0	1.0	1.0
	Investment	1.2	1.5	1.3	1.2
Property Type	1-unit	1.0	1.0	1.0	1.0
	2–4 unit	1.4	1.4	1.3	1.1
	Condominium	1.1	1.0	1.0	1.0
	Manufactured home	1.3	1.8	1.6	1.2
Origination Channel	Retail	1.0	1.0	1.0	1.0
	TPO	1.1	1.1	1.1	1.0
DTI	DTI <= 25%	0.8	0.9	0.9	
	25% < DTI <= 40%	1.0	1.0	1.0	
	DTI >40%	1.2	1.2	1.1	
Product Type	FRM30	1.0	1.0	1.0	1.0
	ARM1/1	1.7	1.1	1.0	1.1

TABLE 6 TO PARAGRAPH (d)(2): RISK MULTIPLIERS—Continued

Risk factor	Value or range	Single-family segment			
		Performing loan	Non-modified RPL	Modified RPL	NPL
	FRM15	0.3	0.3	0.5	0.5
	FRM20	0.6	0.6	0.5	0.8
Subordination	No subordination	1.0	1.0	1.0	
	30% < OLTV <= 60% and 0% <subordination <= 5%.	1.1	0.8	1.0	
	30% < OLTV <= 60% and subordination >5%.	1.5	1.1	1.2	
	OLTV >60% and 0% <subordination <= 5%.	1.1	1.2	1.1	
	OLTV >60% and subordination >5%.	1.4	1.5	1.3	
Loan Age	Loan age <= 24 months	1.0			
	24 months <loan age <= 36 months.	0.95			
	36 months <loan Age <= 60 months.	0.80			
	Loan age >60 months	0.75			
Cohort Burnout	No burnout	1.0			
	Low	1.2			
	Medium	1.3			
	High	1.4			
Interest-only	No IO	1.0	1.0	1.0	
	Yes IO	1.6	1.4	1.1	
Loan Documentation	Full	1.0	1.0	1.0	
	None or low	1.3	1.3	1.2	
Streamlined Refi	No	1.0	1.0	1.0	
	Yes	1.0	1.2	1.1	
Refreshed Credit Score for Modified RPLs and Non-modified RPLs.	Refreshed credit score <620	1.6	1.4		
	620 <= refreshed credit score <640.	1.3	1.2		
	640 <= refreshed credit score <660.		1.2	1.1	
	660 <= refreshed credit score <700.		1.0	1.0	
	700 <= refreshed credit score <720.		0.7	0.8	
	720 <= refreshed credit score <740.		0.6	0.7	
	740 <= refreshed credit score <760.		0.5	0.6	
	760 <= refreshed credit score <780.		0.4	0.5	
	Refreshed credit score >= 780.		0.3	0.4	
Payment Change from Modification.	Payment change >= 0%			1.1	
	−20% <= payment change <0%.			1.0	
	−30% <= payment change < −20%.			0.9	
	Payment change < −30%			0.8	
Previous Maximum Days Past Due.	0–59 days		1.0	1.0	
	60–90 days		1.2	1.1	
	91–150 days		1.3	1.1	
	151+ days		1.5	1.1	
Refreshed Credit Score for NPLs.	Refreshed credit score <580				1.2
	580 <= refreshed credit score <640.				1.1
	640 <= refreshed credit score <700.				1.0
	700 <= refreshed credit score <720.				0.9
	720 <= refreshed credit score <760.				0.8
	760 <= refreshed credit score <780.				0.7

TABLE 6 TO PARAGRAPH (d)(2): RISK MULTIPLIERS—Continued

Risk factor	Value or range	Single-family segment			
		Performing loan	Non-modified RPL	Modified RPL	NPL
	Refreshed credit score >= 780.	.....	.....	.....	0.5

(e) *Credit enhancement multiplier*—(1) *Amount*—(i) *In general.* The adjusted credit enhancement multiplier for a single-family mortgage exposure that is subject to loan-level credit enhancement is equal to 1.0 minus the product of:

(A) 1.0 minus the credit enhancement multiplier for the single-family mortgage exposure as determined under paragraph (e)(2) of this section; multiplied by

(B) 1.0 minus the counterparty haircut for the loan-level credit enhancement as determined under paragraph (e)(3) of this section.

(ii) *No loan-level credit enhancement.* The adjusted credit enhancement multiplier for a single-family mortgage exposure that is not subject to loan-level credit enhancement is equal to 1.0.

(2) *Credit enhancement multiplier.* (i) The credit enhancement multiplier for a single-family mortgage exposure that is subject to a participation agreement is 1.0.

(ii) Subject to paragraph (e)(2)(iii) of this section, the credit enhancement multiplier for—

(A) A performing loan, non-modified RPL, or modified RPL that is subject to non-cancelable mortgage insurance is set forth on Table 7 to paragraph (e)(2)(iii)(E) of this section;

(B) A performing loan or non-modified RPL that is subject to cancelable mortgage insurance is set forth on Table 8 to paragraph (e)(2)(iii)(E) of this section;

(C) A modified RPL with a 30-year post-modification amortization that is subject to cancelable mortgage insurance is set forth on Table 9 to paragraph (e)(2)(iii)(E) of this section;

(D) A modified RPL with a 40-year post-modification amortization that is subject to cancelable mortgage insurance is set forth on Table 10 to paragraph (e)(2)(iii)(E) of this section; and

(E) NPL, whether subject to non-cancelable mortgage insurance or cancelable mortgage insurance, is set forth on Table 11 to paragraph (e)(2)(iii)(E) of this section.

(iii) Notwithstanding anything to the contrary in this paragraph (e), for purposes of paragraph (e)(2)(ii) of this section:

(A) The OLTV of a single-family mortgage exposure will be deemed to be 80 percent if the single-family mortgage exposure has an OLTV less than or equal to 80 percent.

(B) If the single-family mortgage exposure has an interest-only feature, any cancelable mortgage insurance will be deemed to be non-cancelable mortgage insurance.

(C) If the coverage percent of the mortgage insurance is greater than charter-level coverage and less than guide-level coverage, the credit enhancement multiplier is the amount equal to a linear interpolation between the credit enhancement multiplier of the single-family mortgage exposure for charter-level coverage and the credit enhancement multiplier of the single-family mortgage exposure for guide-level coverage.

(D) If the coverage percent of the mortgage insurance is less than charter-level coverage, the credit enhancement multiplier is the amount equal to the midpoint of a linear interpolation between a credit enhancement multiplier of 1.0 and the credit enhancement multiplier of the single-family mortgage exposure for charter-level coverage.

(E) If the coverage percent of the mortgage insurance is greater than guide-level coverage, the credit enhancement multiplier is determined as if the coverage percent were guide-level coverage.

TABLE 7 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR SINGLE-FAMILY MORTGAGE EXPOSURES SUBJECT TO NON-CANCELABLE MORTGAGE INSURANCE (EXCEPT NPLS)

Amortization Term / Coverage Type	Coverage Category	Credit Enhancement Multiplier
15/20-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.846
	85% < OLTV <= 90% and coverage percent = 12%	0.701
	90% < OLTV <= 95% and coverage percent = 25%	0.408
	95% < OLTV <= 97% and coverage percent = 35%	0.226
	OLTV > 97% and coverage percent = 35%	0.184
30-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 12%	0.706
	85% < OLTV <= 90% and coverage percent = 25%	0.407
	90% < OLTV <= 95% and coverage percent = 30%	0.312
	95% < OLTV <= 97% and coverage percent = 35%	0.230
	OLTV > 97% and coverage percent = 35%	0.188
15/20-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.846
	85% < OLTV <= 90% and coverage percent = 12%	0.701
	90% < OLTV <= 95% and coverage percent = 16%	0.612
	95% < OLTV <= 97% and coverage percent = 18%	0.570
	OLTV > 97% and coverage percent = 20%	0.535
30-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.850
	85% < OLTV <= 90% and coverage percent = 12%	0.713
	90% < OLTV <= 95% and coverage percent = 16%	0.627
	95% < OLTV <= 97% and coverage percent = 18%	0.590
	OLTV > 97% and coverage percent = 20%	0.558

TABLE 8 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR PERFORMING LOANS AND NON-MODIFIED RPLS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

			Loan Age											
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.912	0.973	0.996	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.848	0.936	0.986	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	35%	0.630	0.673	0.762	0.865	0.945	0.980	0.996	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.884	0.928	0.962	0.994	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.584	0.627	0.679	0.785	0.893	0.950	0.986	0.998	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.440	0.456	0.484	0.547	0.654	0.743	0.845	0.932	0.969	0.992	1.000
	>95%, <=97%	35%	0.322	0.351	0.369	0.391	0.449	0.535	0.631	0.746	0.873	0.925	0.965	1.000
	>97%	35%	0.272	0.295	0.314	0.353	0.410	0.462	0.515	0.607	0.756	0.826	0.887	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.943	0.983	0.997	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.918	0.966	0.992	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	20%	0.788	0.810	0.859	0.922	0.969	0.989	0.998	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.943	0.964	0.981	0.997	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.795	0.819	0.845	0.896	0.948	0.976	0.993	0.999	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.690	0.703	0.719	0.755	0.813	0.861	0.916	0.963	0.983	0.995	1.000
	>95%, <=97%	18%	0.642	0.652	0.662	0.676	0.708	0.756	0.806	0.866	0.933	0.960	0.981	1.000
	>97%	20%	0.597	0.607	0.617	0.629	0.658	0.686	0.715	0.765	0.845	0.882	0.914	1.000

TABLE 9 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR MODIFIED RPLS WITH 30-YEAR POST-MODIFICATION AMORTIZATION THAT IS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

			Months Since Last Modification											
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.912	0.973	0.996	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.848	0.936	0.986	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	35%	0.630	0.673	0.762	0.865	0.945	0.980	0.996	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.906	0.978	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.568	0.653	0.839	0.968	0.992	0.998	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.426	0.470	0.601	0.794	0.889	0.951	0.981	0.992	1.000	1.000	1.000
	>95%, <=97%	35%	0.322	0.337	0.380	0.492	0.689	0.810	0.899	0.945	0.965	1.000	1.000	1.000
	>97%	35%	0.272	0.284	0.334	0.436	0.561	0.682	0.791	0.857	0.887	1.000	1.000	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.988	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.943	0.983	0.997	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.918	0.966	0.992	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>97%	20%	0.788	0.810	0.859	0.922	0.969	0.989	0.998	1.000	1.000	1.000	1.000	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.954	0.989	0.999	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.788	0.832	0.922	0.985	0.996	0.999	1.000	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.685	0.711	0.784	0.889	0.940	0.973	0.989	0.995	1.000	1.000	1.000
	>95%, <=97%	18%	0.642	0.647	0.669	0.732	0.836	0.900	0.947	0.971	0.981	1.000	1.000	1.000
	>97%	20%	0.597	0.602	0.623	0.672	0.740	0.805	0.864	0.898	0.914	1.000	1.000	1.000

TABLE 10 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR MODIFIED RPLS WITH 40-YEAR POST-MODIFICATION AMORTIZATION THAT IS SUBJECT TO CANCELABLE MORTGAGE INSURANCE

			Months Since Last Modification											
	OLTV	Coverage Percent	<= 5	>5, <= 12	>12, <= 24	>24, <= 36	>36, <= 48	>48, <= 60	> 60, <= 72	> 72, <= 84	> 84, <= 96	>96, <=108	>108, <=120	>120
15/20 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	6%	0.997	0.998	0.999	0.999	0.999	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.971	0.971	0.980	0.988	0.994	0.999	1.000	1.000	1.000	1.000
	>90%, <=95%	25%	0.826	0.853	0.853	0.853	0.883	0.912	0.943	0.973	0.996	1.000	1.000	1.000
	>95%, <=97%	35%	0.732	0.765	0.765	0.765	0.807	0.848	0.892	0.936	0.986	0.998	1.000	1.000
	>97%	35%	0.630	0.673	0.673	0.673	0.718	0.762	0.814	0.865	0.945	0.980	0.996	1.000
30 Year Amortizing Loan with Guide-level Coverage	>80%, <=85%	12%	0.867	0.884	0.928	0.962	0.994	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	25%	0.551	0.584	0.627	0.679	0.785	0.893	0.950	0.986	0.998	1.000	1.000	1.000
	>90%, <=95%	30%	0.412	0.440	0.456	0.484	0.547	0.654	0.743	0.845	0.932	0.969	0.992	1.000
	>95%, <=97%	35%	0.322	0.351	0.369	0.391	0.449	0.535	0.631	0.746	0.873	0.925	0.965	1.000
	>97%	35%	0.272	0.295	0.314	0.353	0.410	0.462	0.515	0.607	0.756	0.826	0.887	1.000
15/20 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.997	0.998	0.998	0.999	0.998	0.998	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.963	0.971	0.971	0.971	0.980	0.988	0.994	0.999	1.000	1.000	1.000	1.000
	>90%, <=95%	16%	0.887	0.904	0.904	0.904	0.924	0.943	0.963	0.983	0.997	1.000	1.000	1.000
	>95%, <=97%	18%	0.854	0.874	0.874	0.874	0.896	0.918	0.942	0.966	0.992	0.999	1.000	1.000
	>97%	20%	0.788	0.810	0.810	0.810	0.835	0.859	0.891	0.922	0.969	0.989	0.998	1.000
30 Year Amortizing Loan with Charter-level Coverage	>80%, <=85%	6%	0.934	0.943	0.964	0.981	0.997	0.999	1.000	1.000	1.000	1.000	1.000	1.000
	>85%, <=90%	12%	0.780	0.795	0.819	0.845	0.896	0.948	0.976	0.993	0.999	1.000	1.000	1.000
	>90%, <=95%	16%	0.679	0.690	0.703	0.719	0.755	0.813	0.861	0.916	0.963	0.983	0.995	1.000
	>95%, <=97%	18%	0.642	0.652	0.662	0.676	0.708	0.756	0.806	0.866	0.933	0.960	0.981	1.000
	>97%	20%	0.597	0.607	0.617	0.629	0.658	0.686	0.715	0.765	0.845	0.882	0.914	1.000

TABLE 11 TO PARAGRAPH (e)(2)(iii)(E): CREDIT ENHANCEMENT MULTIPLIERS FOR NPLS SUBJECT TO CANCELABLE MORTGAGE INSURANCE OR NON-CANCELABLE MORTGAGE INSURANCE

Amortization Term / Coverage Type	Coverage Category	Credit Enhancement Multiplier
15/20-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.893
	85% < OLTV <= 90% and coverage percent = 12%	0.803
	90% < OLTV <= 95% and coverage percent = 25%	0.597
	95% < OLTV <= 97% and coverage percent = 35%	0.478
	OLTV > 97% and coverage percent = 35%	0.461
30-year with Guide-level Coverage	80% < OLTV <= 85% and coverage percent = 12%	0.813
	85% < OLTV <= 90% and coverage percent = 25%	0.618
	90% < OLTV <= 95% and coverage percent = 30%	0.530
	95% < OLTV <= 97% and coverage percent = 35%	0.490
	OLTV > 97% and coverage percent = 35%	0.505
15/20-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.893
	85% < OLTV <= 90% and coverage percent = 12%	0.803
	90% < OLTV <= 95% and coverage percent = 16%	0.775
	95% < OLTV <= 97% and coverage percent = 18%	0.678
	OLTV > 97% and coverage percent = 20%	0.663
30-year with Charter-level Coverage	80% < OLTV <= 85% and coverage percent = 6%	0.902
	85% < OLTV <= 90% and coverage percent = 12%	0.835
	90% < OLTV <= 95% and coverage percent = 16%	0.787
	95% < OLTV <= 97% and coverage percent = 18%	0.765
	OLTV > 97% and coverage percent = 20%	0.760

(3) *Credit enhancement counterparty haircut*—(i) *Counterparty rating*—(A) *In general.* For purposes of this paragraph (e)(3), the counterparty rating for a counterparty is—

(*1*) 1, if the Enterprise has determined that the counterparty has extremely strong capacity to perform its financial obligations in a severely adverse stress;

(*2*) 2, if the Enterprise has determined that the counterparty has very strong capacity to perform its financial obligations in a severely adverse stress;

(*3*) 3, if the Enterprise has determined that the counterparty has strong capacity to perform its financial obligations in a severely adverse stress;

(*4*) 4, if the Enterprise has determined that the counterparty has adequate capacity to perform its financial obligations in a severely adverse stress;

(*5*) 5, if the Enterprise has determined that the counterparty does not have adequate capacity to perform its financial obligations in a severely adverse stress but does have adequate capacity to perform its financial obligations in an adverse stress;

(*6*) 6, if the Enterprise has determined that the counterparty does not have adequate capacity to perform its financial obligations in an adverse stress;

(*7*) 7, if the Enterprise has determined that the counterparty's capacity to perform its financial obligations is questionable under prevailing economic conditions;

(*8*) 8, if the Enterprise has determined that the counterparty is in default on a material contractual obligation (including any obligation with respect to collateral requirements) or is under a resolution proceeding or similar regulatory proceeding.

(B) *Required considerations.* (*1*) In determining the capacity of a counterparty to perform its financial obligations, the Enterprise must consider the likelihood that the counterparty will not perform its material obligations with respect to the posting of collateral and the payment of any amounts payable under its contractual obligations.

(*2*) A counterparty does not have an adequate capacity to perform its financial obligations in a severely adverse stress if there is a material risk that the counterparty would fail to timely

perform any financial obligation in a severely adverse stress.

(ii) *Counterparty haircut.* The counterparty haircut is set forth on table 12 to this paragraph (e)(3)(ii). For purposes of this paragraph (e)(3)(ii), RPL means either a modified RPL or a non-modified RPL.

TABLE 12 TO PARAGRAPH (e)(3)(ii): COUNTERPARTY HAIRCUTS

	Mortgage Concentration Risk: Not High			High Mortgage Concentration Risk and Approved Insurer			High Mortgage Concentration Risk and Not an Approved Insurer		
Counterparty Rating	Performing Loans and RPLs		NPLs	Performing Loans and RPLs		NPLs	Performing Loans and RPLs		NPLs
	30 Year Product	20/15 Year Product		30 Year Product	20/15 Year Product		30 Year Product	20/15 Year Product	
1	1.8%	1.3%	0.6%	2.3%	1.6%	0.7%	2.8%	2.0%	0.9%
2	4.5%	3.5%	2.0%	5.9%	4.5%	2.6%	7.3%	5.6%	3.2%
3	5.2%	4.0%	2.4%	6.7%	5.1%	3.1%	8.3%	6.4%	3.9%
4	11.4%	9.5%	6.9%	14.2%	11.8%	8.5%	17.2%	14.3%	10.4%
5	14.8%	12.7%	9.9%	17.8%	15.2%	11.9%	20.9%	18.0%	14.0%
6	21.2%	19.1%	16.4%	24.0%	21.7%	18.6%	26.8%	24.2%	20.8%
7	40.0%	38.2%	35.7%	42.0%	40.1%	37.5%	43.7%	41.7%	39.0%
8	47.6%	46.6%	45.3%	47.6%	46.6%	45.3%	47.6%	46.6%	45.3%

(f) *COVID–19-related forbearances*—(1) *During forbearance.* Notwithstanding anything to the contrary under paragraph (c)(4) of this section, the base risk weight for an NPL is equal to the product of 0.45 and the base risk weight that would otherwise be assigned to the NPL under paragraph (c)(4) of this section if the NPL—

(i) Is subject to a COVID–19-related forbearance; or

(ii) Was subject to a COVID–19-related forbearance at any time in the prior 6 calendar months and is subject to a trial modification plan.

(2) *After forbearance.* Notwithstanding the definition of ''past due'' under paragraph (a) of this section, any period of time in which a single-family mortgage exposure was past due while subject to a COVID–19-related forbearance is to be disregarded for the purpose of assigning a risk weight under this section if the entire amount past due was repaid upon the termination of the COVID–19-related forbearance.

§ 1240.34 Multifamily mortgage exposures.

(a) *Definitions.* Subject to any additional instructions set forth on Table 1 to this paragraph (a), for purposes of this section:

Acquisition debt-service-coverage ratio (acquisition DSCR) means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The net operating income (NOI) (or, if not available, the net cash flow) of the multifamily property that secures the multifamily mortgage exposure, at the time of the acquisition by the Enterprise (or, if not available, at the time of the underwriting or origination) of the multifamily mortgage exposure; divided by

(ii) The scheduled periodic payment on the multifamily mortgage exposure (or, if interest-only, fully amortizing payment), at the time of the acquisition by the Enterprise (or, if not available, at the time of the origination) of the multifamily mortgage exposure.

Acquisition loan-to-value (acquisition LTV) means, with respect to a multifamily mortgage exposure, the amount, determined as of the time of the acquisition by the Enterprise (or, if not available, at the time of the underwriting or origination) of the multifamily mortgage exposure, equal to:

(i) The unpaid principal balance of the multifamily mortgage exposure; divided by

(ii) The value of the multifamily property securing the multifamily mortgage exposure.

Debt-service-coverage ratio (DSCR) means, with respect to a multifamily mortgage exposure:

(i) The acquisition DSCR of the multifamily mortgage exposure if the loan age of the multifamily mortgage exposure is less than 6; or

(ii) The MTMDSCR of the multifamily mortgage exposure.

Interest-only (IO) means a multifamily mortgage exposure that requires only payment of interest without any principal amortization during all or part of the loan term.

Loan age means the number of scheduled payment dates since the origination of the multifamily mortgage exposure.

Loan term means the number of years until final loan payment (which may be a balloon payment) under the terms of a multifamily mortgage exposure.

LTV means, with respect to a multifamily mortgage exposure;

(i) The acquisition LTV of the multifamily mortgage exposure if the loan age of the multifamily mortgage exposure is less than 6, or

(ii) The MTMLTV of the multifamily mortgage exposure.

Mark-to-market debt-service coverage ratio (MTMDSCR) means, with respect to a multifamily mortgage exposure, the amount equal to—

(i) The net operating income (or, if not available, the net cash flow) of the multifamily property that secures the multifamily mortgage exposure, as reported on the most recently available property operating statement; divided by

(ii) The scheduled periodic payment on the multifamily mortgage exposure (or, for interest-only, fully amortizing payment), as reported on the most recently available property operating statement.

Mark-to-market loan-to-value (MTMLTV) means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the multifamily mortgage exposure; divided by

(ii) The current value of the property security the multifamily mortgage exposure, estimated using either:

(A) The acquisition property value adjusted using a multifamily property value index; or

(B) The property value estimated based on net operating income and capitalization rate indices.

Multifamily adjustable-rate exposure means a multifamily mortgage exposure that is not, at that time, a multifamily fixed-rate exposure.

Multifamily fixed-rate exposure means a multifamily mortgage exposure that, at that time, has an interest rate that may not then increase or decrease based on a change in a reference index or other methodology, including:

(i) A multifamily mortgage exposure that has an interest rate that is fixed over the life of the loan; and

(ii) A multifamily mortgage exposure that has an interest rate that may increase or decrease in the future, but is fixed at that time.

Net cash flow means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The net operating income of the multifamily mortgage exposure; minus

(ii) Reserves for capital improvements; minus

(iii) Other expenses not included in net operating income required for the proper operation of the multifamily property securing the multifamily mortgage exposure, including any commissions paid to leasing agents in securing renters and special improvements to the property to accommodate the needs of certain renters.

Net operating income means, with respect to a multifamily mortgage exposure, the amount equal to:

(i) The rental income generated by the multifamily property securing the multifamily mortgage exposure; minus

(ii) The vacancy and property operating expenses of the multifamily property securing the multifamily mortgage exposure.

Original amortization term means the number of years, determined as of the time of the origination of a multifamily mortgage exposure, that it would take a borrower to pay a multifamily mortgage exposure completely if the borrower only makes the scheduled payments, and without making any balloon payment.

Original loan size means the dollar amount of the unpaid principal balance of a multifamily mortgage exposure at origination.

Payment performance means the payment status of history of a multifamily mortgage exposure, assigned pursuant to the instructions set forth on table 1 to this paragraph (a).

Supplemental mortgage exposure means any multifamily fixed-rate exposure or multifamily adjustable-rate exposure that is originated after the origination of a multifamily mortgage exposure that is secured by all or part of the same multifamily property.

Unpaid principal balance (UPB) means the outstanding loan amount of a multifamily mortgage exposure.

TABLE 1 TO PARAGRAPH (a): PERMISSIBLE VALUES AND ADDITIONAL INSTRUCTIONS

Defined Term	Permissible Values	Additional Instructions
Acquisition DSCR	Greater than or equal to 0.	Origination DSCR if negative or unable to determine. If origination DSCR is unavailable, use underwriting DSCR. If underwriting DSCR is unavailable, use 1.00.
Acquisition LTV	Greater than or equal to 0.	Origination LTV if negative or unable to determine. If origination LTV is unavailable, use underwriting LTV. If underwriting LTV is unavailable, use 100 percent.
Interest-only	Yes, no.	Yes if unable to determine.
Loan Term	Non-negative integer in years.	11 years if negative or unable to determine.
MTMDSCR	Greater than or equal to 0.	If the MTMDSCR is unavailable, the last observed DSCR can be marked to market using a property NOI index or an NOI estimate based on rent and expense indices. If the index is not sufficiently granular, either because of its frequency or geography, or with respect to a certain multifamily property type, use a more geographically broad index or a recently estimated mark-to-market value.
MTMLTV	Greater than or equal to 0.	If the MTMLTV is unavailable, mark to market using an index. If the index is not sufficiently granular, either because of its frequency or geography or with respect to a certain multifamily property type, use a more geographically broad index or a recently estimated mark-to-market value.
Net Operating Income (NOI) / Net Cash Flow (NCF)	Greater than or equal to 0.	Infer using origination LTV or origination DSCR if NOI/NCF is unavailable. Alternatively, infer using actual MTMLTV or actual MTMDSCR.
Original Amortization Term	Non-negative integer in years.	31 years if negative or unable to determine.
Original Loan Size	Non-negative dollar value.	$3,000,000 if negative or unable to determine
Payment Performance	Performing, delinquent 60 days or more, re-performing (without modification), modified.	Modified if unable to determine.
Special Product	Not a special product, student housing, rehab/value-add/lease-up, supplemental mortgage exposure.	Rehab/value-add/lease-up if unable to determine.
UPB	UPB > $0	$100,000,000 if negative or unable to determine.

(b) *Risk weight*—(1) *In general.* Subject to paragraphs (b)(2) and (3) of this section, an Enterprise must assign a risk weight to a multifamily mortgage exposure equal to:

(i) The base risk weight for the multifamily mortgage exposure as determined under paragraph (c) of this section; multiplied by

(ii) The combined risk multiplier for the multifamily mortgage exposure as

determined under paragraph (d) of this section.

(2) *Minimum risk weight.* Notwithstanding the risk weight determined under paragraph (b)(1) of this section, the risk weight assigned to a multifamily mortgage exposure may not be less than 20 percent.

(3) *Loan groups.* If a multifamily property that secures a multifamily mortgage exposure also secures one or more supplemental mortgage exposures:

(i) A multifamily mortgage exposure-specific base risk weight must be determined under paragraph (c) of this section using for each of these multifamily mortgage exposures a single DSCR and single LTV, both calculated as if all of the multifamily mortgage exposures secured by the multifamily property were consolidated into a single multifamily mortgage exposure; and

(ii) A multifamily mortgage exposure-specific combined risk multiplier must be determined under paragraph (d) of this section based on the risk characteristics of the multifamily mortgage exposure (except with respect to the loan size multiplier, which would be determined using the aggregate unpaid principal balance of these multifamily mortgage exposures).

(c) *Base risk weight*—(1) *Multifamily fixed-rate exposure.* The base risk weight for a multifamily fixed-rate exposure is set forth on table 2 to this paragraph (c)(1).

TABLE 2 TO PARAGRAPH (c)(1): MULTIFAMILY FIXED-RATE EXPOSURE

		LTV									
		<=35%	> 35%, <=45%	> 45%, <=55%	> 55%, <=65%	> 65%, <=70%	> 70%, <=75%	> 75%, <=80%	> 80%, <=90%	> 90%, <=100%	>100%
DSCR	<1.00	52%	60%	76%	109%	125%	140%	153%	166%	172%	182%
	>= 1.00, <1.15	45%	52%	65%	92%	105%	118%	129%	140%	145%	153%
	>=1.15, < 1.20	40%	46%	58%	81%	93%	103%	112%	122%	127%	134%
	>=1.20, < 1.25	37%	42%	52%	72%	83%	92%	97%	107%	112%	119%
	>=1.25, < 1.30	33%	38%	47%	65%	74%	81%	86%	94%	99%	105%
	>=1.30, < 1.35	31%	35%	43%	59%	66%	71%	76%	84%	88%	93%
	>=1.35, < 1.50	29%	32%	39%	54%	59%	64%	69%	76%	80%	86%
	>=1.50, < 1.65	25%	27%	31%	39%	43%	47%	51%	57%	62%	70%
	>=1.65, < 1.80	22%	23%	26%	31%	34%	37%	41%	47%	53%	61%
	>=1.80, < 1.95	16%	17%	19%	24%	26%	29%	32%	41%	47%	56%
	>=1.95, < 2.10	15%	15%	16%	20%	23%	26%	28%	37%	44%	54%
	>=2.10, < 2.25	13%	14%	15%	19%	21%	24%	25%	36%	42%	53%
	>=2.25	13%	13%	14%	18%	20%	23%	24%	35%	42%	52%

(2) *Multifamily adjustable-rate exposure.* The base risk weight for a multifamily adjustable-rate exposure is set forth on table 3 to this paragraph (c)(2).

TABLE 3 TO PARAGRAPH (c)(2): MULTIFAMILY ADJUSTABLE-RATE EXPOSURE

		LTV									
		<=35%	> 35%, <=45%	> 45%, <=55%	> 55%, <=65%	> 65%, <=70%	> 70%, <=75%	> 75%, <=80%	> 80%, <=90%	> 90%, <=100%	>100%
DSCR	<1.00	81%	86%	93%	133%	153%	172%	189%	211%	229%	255%
	>=1.00, <1.25	71%	75%	80%	113%	129%	145%	158%	178%	193%	215%
	>=1.25, < 1.30	63%	67%	71%	100%	114%	127%	138%	156%	169%	188%
	>=1.30, < 1.36	57%	60%	63%	88%	101%	113%	120%	136%	149%	168%
	>=1.36, < 1.42	51%	54%	57%	79%	90%	99%	106%	120%	131%	148%
	>=1.42, < 1.47	45%	49%	51%	71%	80%	86%	93%	107%	116%	131%
	>=1.47, < 1.53	37%	42%	47%	64%	71%	77%	84%	97%	106%	120%
	>=1.53, < 1.70	30%	33%	37%	47%	51%	56%	63%	72%	83%	98%
	>=1.70, < 1.87	23%	26%	30%	36%	40%	45%	51%	60%	70%	86%
	>=1.87, < 2.03	19%	21%	22%	28%	31%	35%	40%	52%	62%	79%
	>=2.03, < 2.21	17%	18%	19%	24%	26%	31%	34%	47%	58%	75%
	>=2.21, < 2.38	16%	17%	17%	22%	24%	28%	31%	45%	56%	73%
	>=2.38	16%	16%	16%	21%	23%	27%	30%	44%	55%	72%

(d) *Combined risk multiplier*. The combined risk multiplier for a multifamily mortgage exposure is equal to the product of each of the applicable risk multipliers set forth on table 4 to this paragraph (d).

TABLE 4 TO PARAGRAPH (d): MULTIFAMILY RISK MULTIPLIERS

Risk Factor	Value or Range	Risk Multiplier
Payment Performance	Performing	1.00
	Delinquent more than 60 days	1.10
	Re-performing (without modification)	1.10
	Modified	1.20
Interest-only	No	1.00
	Yes (during the interest-only period)	1.10
Loan Term	Loan term <= 1Yr	0.70
	1Yr < loan term <= 2Yr	0.75
	2Yr < loan term <= 3Yr	0.80
	3Yr < loan term <= 4Yr	0.85
	4Yr < loan term <= 5Yr	0.90
	5Yr < loan term <= 7Yr	0.95
	7Yr < loan term <= 10Yr	1.00
	Loan term > 10Yr	1.15
Original Amortization Term	Original amortization term <= 20Yr	0.70
	20Yr < original amortization term <= 25Yr	0.80
	25Yr < original amortization term <= 30Yr	1.00
	Original amortization term > 30Yr	1.10
Original Loan Size (in millions)	Loan size <= $2m	1.45
	$2m < loan size <= $3m	1.35
	$3m < loan size <= $4m	1.25
	$4m < loan size <= $5m	1.15
	$5m < loan size <= $6m	1.08
	$6m < loan size <= $7m	1.02
	$7m < loan size <= $8m	0.96
	$8m < loan size <= $9m	0.92
	$9m < loan size <= $10m	0.88
	$10m < loan size <= $11m	0.86
	$11m < loan size <= $12m	0.84
	$12m < loan size <= $13m	0.82
	$13m < loan size <= $14m	0.81
	$14m < loan size <= $15m	0.81
	$15m < loan size <= $16m	0.80
	$16m < loan size <= $17m	0.80
	$17m < loan size <= $18m	0.80
	$18m < loan size <= $19m	0.80
	$19m < loan size <= $20m	0.80
	$20m < loan size <= $21m	0.80
	$21m < loan size <= $22m	0.80
	$22m < loan size <= $23m	0.79
	$23m < loan size <= $24m	0.78
	$24m < loan size <= $25m	0.76
	Loan size >$25m	0.70
Special Products	Not a special product	1.00
	Student housing	1.15
	Rehab/value-add/lease-up	1.25

§ 1240.35 Off-balance sheet exposures.

(a) *General.* (1) An Enterprise must calculate the exposure amount of an off-balance sheet exposure using the credit conversion factors (CCFs) in paragraph (b) of this section.

(2) Where an Enterprise commits to provide a commitment, the Enterprise may apply the lower of the two applicable CCFs.

(3) Where an Enterprise provides a commitment structured as a syndication or participation, the Enterprise is only required to calculate the exposure amount for its pro rata share of the commitment.

(4) Where an Enterprise provides a commitment or enters into a repurchase agreement and such commitment or repurchase agreement, the exposure amount shall be no greater than the maximum contractual amount of the commitment or repurchase agreement, as applicable.

(b) *Credit conversion factors*—(1) *Zero percent CCF.* An Enterprise must apply a zero percent CCF to the unused portion of a commitment that is unconditionally cancelable by the Enterprise.

(2) *20 percent CCF.* An Enterprise must apply a 20 percent CCF to the amount of commitments with an original maturity of one year or less that are not unconditionally cancelable by the Enterprise.

(3) *50 percent CCF.* An Enterprise must apply a 50 percent CCF to the amount of commitments with an original maturity of more than one year that are not unconditionally cancelable by the Enterprise.

(4) *100 percent CCF.* An Enterprise must apply a 100 percent CCF to the amount of the following off-balance sheet items and other similar transactions:

(i) Guarantees;

(ii) Repurchase agreements (the off-balance sheet component of which equals the sum of the current fair values of all positions the Enterprise has sold subject to repurchase);

(iii) Off-balance sheet securities lending transactions (the off-balance sheet component of which equals the sum of the current fair values of all positions the Enterprise has lent under the transaction);

(iv) Off-balance sheet securities borrowing transactions (the off-balance sheet component of which equals the sum of the current fair values of all non-cash positions the Enterprise has posted as collateral under the transaction); and

(v) Forward agreements.

§ 1240.36 Derivative contracts.

(a) *Exposure amount for derivative contracts.* An Enterprise must use the current exposure methodology (CEM) described in paragraph (b) of this section to calculate the exposure amount for all its OTC derivative contracts.

(b) *Current exposure methodology exposure amount*—(1) *Single OTC derivative contract.* Except as modified by paragraph (c) of this section, the exposure amount for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the Enterprise's current credit exposure and potential future credit exposure (PFE) on the OTC derivative contract.

(i) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the fair value of the OTC derivative contract or zero.

(ii) *PFE.* (A) The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative fair value, is calculated by multiplying the notional principal amount of the OTC derivative contract by the appropriate conversion factor in Table 1 to paragraph (b)(1)(ii)(E) of this section.

(B) For purposes of calculating either the PFE under this paragraph (b)(1)(ii) or the gross PFE under paragraph (b)(2)(ii)(A) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency.

(C) For an OTC derivative contract that does not fall within one of the specified categories in table 1 to paragraph (b)(1)(ii)(E) of this section, the PFE must be calculated using the appropriate ''other'' conversion factor.

(D) An Enterprise must use an OTC derivative contract's effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than the apparent or stated notional principal amount in calculating PFE.

(E) The PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 1 TO PARAGRAPH (b)(1)(ii)(E)—CONVERSION FACTOR MATRIX FOR DERIVATIVE CONTRACTS[1]

Remaining maturity[2]	Interest rate	Foreign exchange rate and gold	Credit (investment grade reference asset)[3]	Credit (non-investment-LI>grade reference asset)	Equity	Precious metals (except gold)	Other
One year or less	0.00	0.01	0.05	0.10	0.06	0.07	0.10
Greater than one year and less than or equal to five years	0.005	0.05	0.05	0.10	0.08	0.07	0.12
Greater than five years	0.015	0.075	0.05	0.10	0.10	0.08	0.15

[1] For a derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[2] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the fair value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[3] An Enterprise must use the column labeled "Credit (investment-grade reference asset)" for a credit derivative whose reference asset is an outstanding unsecured long-term debt security without credit enhancement that is investment grade. An Enterprise must use the column labeled "Credit (non-investment-grade reference asset)" for all other credit derivatives.

(2) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (c) of this section, the exposure amount for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE amounts for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) *Net current credit exposure.* The net current credit exposure is the greater of the net sum of all positive and negative fair values of the individual OTC derivative contracts subject to the qualifying master netting agreement or zero.

(ii) *Adjusted sum of the PFE amounts.* The adjusted sum of the PFE amounts, Anet, is calculated as Anet = (0.4 × Agross) + (0.6 × NGR × Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts as determined under paragraph (b)(1)(ii) of this section for each individual derivative contract subject to the qualifying master netting agreement); and

(B) Net-to-gross Ratio (NGR) = the ratio of the net current credit exposure to the gross current credit exposure. In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (b)(1)(i) of this section) of all individual derivative contracts subject to the qualifying master netting agreement.

(c) *Recognition of credit risk mitigation of collateralized OTC derivative contracts.* (1) An Enterprise may recognize the

credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or multiple OTC derivative contracts subject to a qualifying master netting agreement (netting set) by using the simple approach in § 1240.39(b).

(2) As an alternative to the simple approach, an Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set if the financial collateral is marked-to-fair value on a daily basis and subject to a daily margin maintenance requirement by applying a risk weight to the uncollateralized portion of the exposure, after adjusting the exposure amount calculated under paragraph (b)(1) or (2) of this section using the collateral haircut approach in § 1240.39(c). The Enterprise must substitute the exposure amount calculated under paragraph (b)(1) or (2) of this section for ΣE in the equation in § 1240.39(c)(2).

(d) *Counterparty credit risk for credit derivatives*—(1) *Protection purchasers.* An Enterprise that purchases a credit derivative that is recognized under § 1240.38 as a credit risk mitigant for an exposure is not required to compute a separate counterparty credit risk capital requirement under this subpart provided that the Enterprise does so consistently for all such credit derivatives. The Enterprise must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(2) *Protection providers.* (i) An Enterprise that is the protection provider under a credit derivative must treat the credit derivative as an exposure to the underlying reference asset. The Enterprise is not required to compute a counterparty credit risk capital requirement for the credit derivative under this subpart, provided that this treatment is applied consistently for all such credit derivatives. The Enterprise must either include all or exclude all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure.

(ii) The provisions of this paragraph (d)(2) apply to all relevant counterparties for risk-based capital purposes.

(e) [Reserved]

(f) *Clearing member Enterprise's exposure amount.* (1) The exposure amount of a clearing member Enterprise for a client-facing derivative transaction or netting set of client-facing derivative transactions equals the exposure amount calculated according to paragraph (b)(1) or (2) of this section multiplied by the scaling factor the square root of ½ (which equals 0.707107). If the Enterprise determines that a longer period is appropriate, the Enterprise must use a larger scaling factor to adjust for a longer holding period as follows:

$$\text{Scaling factor} = \sqrt{\frac{H}{10}}$$

Where H = the holding period greater than or equal to five days.

(2) Additionally, FHFA may require the Enterprise to set a longer holding period if FHFA determines that a longer period is appropriate due to the nature, structure, or characteristics of the transaction or is commensurate with the risks associated with the transaction.

§ 1240.37 Cleared transactions.

(a) *General requirements*—(1) *Clearing member clients.* An Enterprise that is a clearing member client must use the methodologies described in paragraph (b) of this section to calculate risk-weighted assets for a cleared transaction.

(2) *Clearing members.* An Enterprise that is a clearing member must use the methodologies described in paragraph

(c) of this section to calculate its risk-weighted assets for a cleared transaction and paragraph (d) of this section to calculate its risk-weighted assets for its default fund contribution to a CCP.

(b) *Clearing member client Enterprise*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, an Enterprise that is a clearing member client must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (b)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (b)(3) of this section.

(ii) A clearing member client Enterprise's total risk-weighted assets for cleared transactions is the sum of the risk-weighted asset amounts for all its cleared transactions.

(2) *Trade exposure amount.* (i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract or netting set of derivative contracts, calculated using the methodology used to calculate exposure amount for OTC derivative contracts under §1240.36; plus

(B) The fair value of the collateral posted by the clearing member client Enterprise and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, the trade exposure amount equals:

(A) The exposure amount for the repo-style transaction calculated using the methodologies under §1240.39(c); plus

(B) The fair value of the collateral posted by the clearing member client Enterprise and held by the CCP, clearing member, or custodian in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weights.* (i) For a cleared transaction with a QCCP, a clearing member client Enterprise must apply a risk weight of:

(A) 2 percent if the collateral posted by the Enterprise to the QCCP or clearing member is subject to an arrangement that prevents any losses to the clearing member client Enterprise due to the joint default or a concurrent insolvency, liquidation, or receivership proceeding of the clearing member and any other clearing member clients of the clearing member; and the clearing member client Enterprise has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that in the event of a legal challenge (including one resulting from an event of default or from liquidation, insolvency, or receivership proceedings) the relevant court and administrative authorities would find the arrangements to be legal, valid, binding and enforceable under the law of the relevant jurisdictions; or

(B) 4 percent if the requirements of §1240.37(b)(3)(i)(A) are not met.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member client Enterprise must apply the risk weight appropriate for the CCP according to this subpart D.

(4) *Collateral.* (i) Notwithstanding any other requirements in this section, collateral posted by a clearing member client Enterprise that is held by a custodian (in its capacity as custodian) in a manner that is bankruptcy remote from the CCP, clearing member, and other clearing member clients of the clearing member, is not subject to a capital requirement under this section.

(ii) A clearing member client Enterprise must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or custodian in connection with a cleared transaction in accordance with the requirements under this subpart D.

(c) *Clearing member Enterprises*—(1) *Risk-weighted assets for cleared transactions.* (i) To determine the risk-weighted asset amount for a cleared transaction, a clearing member Enterprise must multiply the trade exposure amount for the cleared transaction, calculated in accordance with paragraph (c)(2) of this section, by the risk weight appropriate for the cleared transaction, determined in accordance with paragraph (c)(3) of this section.

(ii) A clearing member Enterprise's total risk-weighted assets for cleared

transactions is the sum of the risk-weighted asset amounts for all of its cleared transactions.

(2) *Trade exposure amount.* A clearing member Enterprise must calculate its trade exposure amount for a cleared transaction as follows:

(i) For a cleared transaction that is either a derivative contract or a netting set of derivative contracts, the trade exposure amount equals:

(A) The exposure amount for the derivative contract, calculated using the methodology to calculate exposure amount for OTC derivative contracts under § 1240.36; plus

(B) The fair value of the collateral posted by the clearing member Enterprise and held by the CCP in a manner that is not bankruptcy remote.

(ii) For a cleared transaction that is a repo-style transaction or netting set of repo-style transactions, trade exposure amount equals:

(A) The exposure amount for repo-style transactions calculated using methodologies under § 1240.39(c); plus

(B) The fair value of the collateral posted by the clearing member Enterprise and held by the CCP in a manner that is not bankruptcy remote.

(3) *Cleared transaction risk weight.* (i) A clearing member Enterprise must apply a risk weight of 2 percent to the trade exposure amount for a cleared transaction with a QCCP.

(ii) For a cleared transaction with a CCP that is not a QCCP, a clearing member Enterprise must apply the risk weight appropriate for the CCP according to this subpart D.

(iii) Notwithstanding paragraphs (c)(3)(i) and (ii) of this section, a clearing member Enterprise may apply a risk weight of zero percent to the trade exposure amount for a cleared transaction with a CCP where the clearing member Enterprise is acting as a financial intermediary on behalf of a clearing member client, the transaction offsets another transaction that satisfies the requirements set forth in § 1240.3(a), and the clearing member Enterprise is not obligated to reimburse the clearing member client in the event of the CCP default.

(4) *Collateral.* (i) Notwithstanding any other requirement in this section, collateral posted by a clearing member Enterprise that is held by a custodian in a manner that is bankruptcy remote from the CCP is not subject to a capital requirement under this section.

(ii) A clearing member Enterprise must calculate a risk-weighted asset amount for any collateral provided to a CCP, clearing member, or a custodian in connection with a cleared transaction in accordance with requirements under this subpart D.

(d) *Default fund contributions*—(1) *General requirement.* A clearing member Enterprise must determine the risk-weighted asset amount for a default fund contribution to a CCP at least quarterly, or more frequently if, in the opinion of the Enterprise or FHFA, there is a material change in the financial condition of the CCP.

(2) *Risk-weighted asset amount for default fund contributions to non-qualifying CCPs.* A clearing member Enterprise's risk-weighted asset amount for default fund contributions to CCPs that are not QCCPs equals the sum of such default fund contributions multiplied by 1,250 percent, or an amount determined by FHFA, based on factors such as size, structure and membership characteristics of the CCP and riskiness of its transactions, in cases where such default fund contributions may be unlimited.

(3) *Risk-weighted asset amount for default fund contributions to QCCPs.* A clearing member Enterprise's risk-weighted asset amount for default fund contributions to QCCPs equals the sum of its capital requirement, K_{CM} for each QCCP, as calculated under the methodology set forth in paragraphs (d)(3)(i) through (iii) of this section (Method 1), multiplied by 1,250 percent or in paragraphs (d)(3)(iv) of this section (Method 2).

(i) *Method 1.* The hypothetical capital requirement of a QCCP (K_{CCP}) equals:

$$K_{CCP} = \sum_{clearing\ member\ i} max\left(EBRM_i - VM_i - IM_i - DF_i; 0\right) \times RW \times 0.08$$

Where:

(A) $EBRM_i$ = the exposure amount for each transaction cleared through the QCCP by clearing member i, calculated in accordance with §1240.36 for OTC derivative contracts and §1240.39(c)(2) for repo-style transactions, provided that:

(*1*) For purposes of this section, in calculating the exposure amount the Enterprise may replace the formula provided in §1240.36(b)(2)(ii) with the following: Anet = (0.15 × Agross) + (0.85 × NGR × Agross); and

(*2*) For option derivative contracts that are cleared transactions, the PFE described in §1240.36(b)(1)(ii) must be adjusted by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 1 to paragraph (b)(1)(ii)(E) of §1240.36 and the absolute value of the option's delta, that is, the ratio of the change in the value of the derivative contract to the corresponding change in the price of the underlying asset.

(*3*) For repo-style transactions, when applying §1240.39(c)(2), the Enterprise must use the methodology in §1240.39(c)(3);

(B) VM_i = any collateral posted by clearing member i to the QCCP that it is entitled to receive from the QCCP, but has not yet received, and any collateral that the QCCP has actually received from clearing member i;

(C) IM_i = the collateral posted as initial margin by clearing member i to the QCCP;

(D) DF_i = the funded portion of clearing member i's default fund contribution that will be applied to reduce the QCCP's loss upon a default by clearing member i;

(E) RW = 20 percent, except when FHFA has determined that a higher risk weight is more appropriate based on the specific characteristics of the QCCP and its clearing members; and

(F) Where a QCCP has provided its K_{CCP}, an Enterprise must rely on such disclosed figure instead of calculating K_{CCP} under this paragraph (d), unless the Enterprise determines that a more conservative figure is appropriate based on the nature, structure, or characteristics of the QCCP.

(ii) For an Enterprise that is a clearing member of a QCCP with a default fund supported by funded commitments, K_{CM} equals:

$$K_{CM_i} = \left(1 + \beta \cdot \frac{N}{N-2}\right) \cdot \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

$$K^*_{CM} = \begin{cases} c_2 \cdot \mu \cdot (K_{CCP} - DF') + c_2 \cdot DF'_{CM} & if \quad DF' < K_{CCP} \quad (i) \\ c_2 \cdot (K_{CCP} - DF_{CCP}) + c_1 \cdot (DF' - K_{CCP}) & if \quad DF_{CCP} < K_{CCP} \leq DF' \quad (ii) \\ c_1 \cdot DF'_{CM} & if \quad K_{CCP} \leq DF_{CCP} \quad (iii) \end{cases}$$

Where

(A) $\beta = \frac{A_{Net,1} + A_{Net,2}}{\sum_i A_{Net,i}}$

Subscripts 1 and 2 denote the clearing members with the two largest A_{Net} values. For purposes of this paragraph (d), for derivatives A_{Net} is defined in §1240.36(b)(2)(ii) and for repo-style transactions, A_{Net} means the exposure amount as defined in §1240.39(c)(2) using the methodology in §1240.39(c)(3);

(B) N = the number of clearing members in the QCCP;

(C) DF_{CCP} = the QCCP's own funds and other financial resources that would be used to cover its losses before clearing members' default fund contributions are used to cover losses;

(D) DF_{CM} = funded default fund contributions from all clearing members and any other clearing member contributed financial resources that are

available to absorb mutualized QCCP losses;

(E) $DF = DF_{CCP} + DF_{CM}$ (that is, the total funded default fund contribution);

(F) $\overline{DF}_l$ = average $\overline{DF}_l$ = the average funded default fund contribution from an individual clearing member;

(G) $DF'_{CM} = DF_{CM} - 2 \cdot \overline{DF}_l = \Sigma_i DF_I - 2 \cdot \overline{DF}_l$ (that is, the funded default fund contribution from surviving clearing members assuming that two average clearing members have defaulted and their default fund contributions and initial margins have been used to absorb the resulting losses);

(H) $DF' = DF_{CCP} + DF'_{CM} = DF - 2 \cdot \overline{DF}_l$ (that is, the total funded default fund contributions from the QCCP and the surviving clearing members that are available to mutualize losses, assuming that two average clearing members have defaulted);

$$\text{(I) } c_1 = Max\left\{\frac{1.6\%}{(DF'/K_{CCP})^{0.3}}; 0.16\%\right\}$$

(that is, a decreasing capital factor, between 1.6 percent and 0.16 percent, applied to the excess funded default funds provided by clearing members);

(J) c_2 = 100 percent; and

(K) $\mu = 1.2$;

(iii)(A) For an Enterprise that is a clearing member of a QCCP with a default fund supported by unfunded commitments, K_{CM} equals;

$$K_{CM_i} = \frac{DF_i}{DF_{CM}} \cdot K^*_{CM}$$

Where:

(*1*) DF_i = the Enterprise's unfunded commitment to the default fund;

(*2*) DF_{CM} = the total of all clearing members' unfunded commitment to the default fund; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(B) For an Enterprise that is a clearing member of a QCCP with a default fund supported by unfunded commitments and is unable to calculate K_{CM} using the methodology described in paragraph (d)(3)(iii) of this section, K_{CM} equals:

$$K_{CM_i} = \frac{IM_i}{IM_{CM}} \cdot K^*_{CM}$$

Where:

(*1*) IM_i = the Enterprise's initial margin posted to the QCCP;

(*2*) IM_{CM} = the total of initial margin posted to the QCCP; and

(*3*) K^*_{CM} as defined in paragraph (d)(3)(ii) of this section.

(iii) *Method 2.* A clearing member Enterprise's risk-weighted asset amount for its default fund contribution to a QCCP, RWA_{DF}, equals:

$RWA_{DF} = Min \{12.5 * DF; 0.18 * TE\}$

Where:

(A) TE = the Enterprise's trade exposure amount to the QCCP, calculated according to paragraph (c)(2) of this section;

(B) DF = the funded portion of the Enterprise's default fund contribution to the QCCP.

(*4*) *Total risk-weighted assets for default fund contributions.* Total risk-weighted assets for default fund contributions is the sum of a clearing member Enterprise's risk-weighted assets for all of its default fund contributions to all

CCPs of which the Enterprise is a clearing member.

§ 1240.38 Guarantees and credit derivatives: substitution treatment.

(a) *Scope*—(1) *General*. An Enterprise may recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative by substituting the risk weight associated with the protection provider for the risk weight assigned to an exposure, as provided under this section.

(2) *Applicability*. This section applies to exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the Enterprise and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(3) *Tranching*. Exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) generally are securitization exposures subject to §§ 1240.41 through 1240.46.

(4) *Multiple guarantees or credit derivatives*. If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in this section, an Enterprise may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-weighted asset amount for each separate exposure as described in paragraph (c) of this section.

(5) *Single guarantees or credit derivatives*. If a single eligible guarantee or eligible credit derivative covers multiple hedged exposures described in paragraph (a)(2) of this section, an Enterprise must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-weighted asset amount for each exposure as described in paragraph (c) of this section.

(b) *Rules of recognition*. (1) An Enterprise may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) An Enterprise may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks *pari passu* with, or is subordinated to, the hedged exposure; and

(ii) The reference exposure and the hedged exposure are to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to ensure payments under the credit derivative are triggered when the obligated party of the hedged exposure fails to pay under the terms of the hedged exposure.

(c) *Substitution approach*—(1) *Full coverage*. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the exposure amount of the hedged exposure, an Enterprise may recognize the guarantee or credit derivative in determining the risk-weighted asset amount for the hedged exposure by substituting the risk weight applicable to the guarantor or credit derivative protection provider under this subpart D for the risk weight assigned to the exposure.

(2) *Partial coverage*. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the exposure amount of the hedged exposure, the Enterprise must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(i) The Enterprise may calculate the risk-weighted asset amount for the protected exposure under this subpart D, where the applicable risk weight is the risk weight applicable to the guarantor or credit derivative protection provider.

(ii) The Enterprise must calculate the risk-weighted asset amount for the

unprotected exposure under this subpart D, where the applicable risk weight is that of the unprotected portion of the hedged exposure.

(iii) The treatment provided in this section is applicable when the credit risk of an exposure is covered on a partial pro rata basis and may be applicable when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(d) *Maturity mismatch adjustment.* (1) An Enterprise that recognizes an eligible guarantee or eligible credit derivative in determining the risk-weighted asset amount for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligated party of the hedged exposure is scheduled to fulfil its obligation on the hedged exposure. If a credit risk mitigant has embedded options that may reduce its term, the Enterprise (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the Enterprise (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the Enterprise to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the Enterprise must apply the following adjustment to reduce the effective notional amount of the credit risk mitigant: $Pm = E \times (t-0.25)/(T-0.25)$, where:

(i) Pm = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E = effective notional amount of the credit risk mitigant;

(iii) t = the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Adjustment for credit derivatives without restructuring as a credit event.* If an Enterprise recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the Enterprise must apply the following adjustment to reduce the effective notional amount of the credit derivative: $Pr = Pm \times 0.60$, where:

(1) Pr = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) Pm = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch, if applicable).

(f) *Currency mismatch adjustment.* (1) If an Enterprise recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the Enterprise must apply the following formula to the effective notional amount of the guarantee or credit derivative: $Pc = Pr \times (1-H_{FX})$, where:

(i) Pc = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) Pr = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) H_{FX} = haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) An Enterprise must set H_{FX} equal to eight percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period. An Enterprise qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for the use of its own-estimates haircuts in §1240.39(c)(4).

(3) An Enterprise must adjust H_{FX} calculated in paragraph (f)(2) of this section upward if the Enterprise revalues the guarantee or credit derivative less frequently than once every 10 business days using the following square root of time formula:

$$H_{FX} = 8\%\sqrt{\frac{T_M}{10}},$$

where T_M equals the greater of 10 or the number of days between revaluation.

§ 1240.39 Collateralized transactions.

(a) *General.* (1) To recognize the risk-mitigating effects of financial collateral (other than with respect to a retained CRT exposure), an Enterprise may use:

(i) The simple approach in paragraph (b) of this section for any exposure; or

(ii) The collateral haircut approach in paragraph (c) of this section for repo-style transactions, eligible margin loans, collateralized derivative contracts, and single-product netting sets of such transactions.

(2) An Enterprise may use any approach described in this section that is valid for a particular type of exposure or transaction; however, it must use the same approach for similar exposures or transactions.

(b) *The simple approach*—(1) *General requirements.* (i) An Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures any exposure (other than a retained CRT exposure).

(ii) To qualify for the simple approach, the financial collateral must meet the following requirements:

(A) The collateral must be subject to a collateral agreement for at least the life of the exposure;

(B) The collateral must be revalued at least every six months; and

(C) The collateral (other than gold) and the exposure must be denominated in the same currency.

(2) *Risk weight substitution.* (i) An Enterprise may apply a risk weight to the portion of an exposure that is secured by the fair value of financial collateral (that meets the requirements of paragraph (b)(1) of this section) based on the risk weight assigned to the collateral under this subpart D. For repurchase agreements, reverse repurchase agreements, and securities lending and borrowing transactions, the collateral is the instruments, gold, and cash the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction. Except as provided in paragraph (b)(3) of this section, the risk weight assigned to the collateralized portion of the exposure may not be less than 20 percent.

(ii) An Enterprise must apply a risk weight to the unsecured portion of the exposure based on the risk weight applicable to the exposure under this subpart.

(3) *Exceptions to the 20 percent risk-weight floor and other requirements.* Notwithstanding paragraph (b)(2)(i) of this section:

(i) An Enterprise may assign a zero percent risk weight to an exposure to an OTC derivative contract that is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, to the extent the contract is collateralized by cash on deposit.

(ii) An Enterprise may assign a 10 percent risk weight to an exposure to an OTC derivative contract that is marked-to-market daily and subject to

a daily margin maintenance requirement, to the extent that the contract is collateralized by an exposure to a sovereign that qualifies for a zero percent risk weight under § 1240.32.

(iii) An Enterprise may assign a zero percent risk weight to the collateralized portion of an exposure where:

(A) The financial collateral is cash on deposit; or

(B) The financial collateral is an exposure to a sovereign that qualifies for a zero percent risk weight under § 1240.32, and the Enterprise has discounted the fair value of the collateral by 20 percent.

(c) *Collateral haircut approach*—(1) *General.* An Enterprise may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, collateralized derivative contract, or single-product netting set of such transactions, by using the collateral haircut approach in this section. An Enterprise may use the standard supervisory haircuts in paragraph (c)(3) of this section or, with prior written notice to FHFA, its own estimates of haircuts according to paragraph (c)(4) of this section.

(2) *Exposure amount equation.* An Enterprise must determine the exposure amount for an eligible margin loan, repo-style transaction, collateralized derivative contract, or a single-product netting set of such transactions by setting the exposure amount equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(i)(A) For eligible margin loans and repo-style transactions and netting sets thereof, ΣE equals the value of the exposure (the sum of the current fair values of all instruments, gold, and cash the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set)); and

(B) For collateralized derivative contracts and netting sets thereof, ΣE equals the exposure amount of the OTC derivative contract (or netting set) calculated under § 1240.36(b)(1) or (2).

(ii) ΣC equals the value of the collateral (the sum of the current fair values of all instruments, gold and cash the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(iii) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in the instrument or gold equals the sum of the current fair values of the instrument or gold the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of that same instrument or gold the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(iv) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(v) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current fair values of any instruments or cash in the currency the Enterprise has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current fair values of any instruments or cash in the currency the Enterprise has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(vi) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(3) *Standard supervisory haircuts.* (i) An Enterprise must use the haircuts for market price volatility (Hs) provided in table 1 to this paragraph (c)(3)(i), as adjusted in certain circumstances in accordance with the requirements of paragraphs (c)(3)(iii) and (iv) of this section.

TABLE 1 TO PARAGRAPH (c)(3)(i)—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS[1]

Residual maturity	Haircut (in percent) assigned based on: Sovereign issuers risk weight under §1240.32 (in percent)[2]			Non-sovereign issuers risk weight under §1240.32 (in percent)			Investment grade securitization exposures (in percent)
	Zero	20 or 50	100	20	50	100	
Less than or equal to 1 year	0.5	1.0	15.0	1.0	2.0	4.0	4.0
Greater than 1 year and less than or equal to 5 years	2.0	3.0	15.0	4.0	6.0	8.0	12.0
Greater than 5 years	4.0	6.0	15.0	8.0	12.0	16.0	24.0
Main index equities (including convertible bonds) and Gold				15.0			
Other publicly traded equities (including convertible bonds)				25.0			
Mutual funds				Highest haircut applicable to any security in which the fund can invest.			
Cash collateral held				Zero.			
Other exposure types				25.0			

[1] The market price volatility haircuts in Table 1 to §1240.39 are based on a 10 business-day holding period.

[2] Includes a foreign PSE that receives a zero percent risk weight.

(ii) For currency mismatches, an Enterprise must use a haircut for foreign exchange rate volatility (Hfx) of 8.0 percent, as adjusted in certain circumstances under paragraphs (c)(3)(iii) and (iv) of this section.

(iii) For repo-style transactions and client-facing derivative transactions, an Enterprise may multiply the standard supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section by the square root of ½ (which equals 0.707107). For client-facing derivative transactions, if a larger scaling factor is applied under §1240.36(f), the same factor must be used to adjust the supervisory haircuts.

(iv) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an Enterprise must adjust the supervisory haircuts provided in paragraphs (c)(3)(i) and (ii) of this section upward on the basis of a holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of §1240.37. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an Enterprise must adjust the supervisory haircuts upward on the basis of a holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the Enterprise must adjust the supervisory haircuts upward for that netting set on the basis of a holding period that is at

least two times the minimum holding period for that netting set. An Enterprise must adjust the standard supervisory haircuts upward using the following formula:

$$H_A = H_S\sqrt{\frac{T_M}{T_S}},$$

where

(A) T_M equals a holding period of longer than 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or longer than 5 business days for repo-style transactions and client-facing derivative transactions;

(B) H_S equals the standard supervisory haircut; and

(C) T_S equals 10 business days for eligible margin loans and derivative contracts other than client-facing derivative transactions or 5 business days for repo-style transactions and client-facing derivative transactions.

(v) If the instrument an Enterprise has lent, sold subject to repurchase, or posted as collateral does not meet the definition of ''financial collateral,'' the Enterprise must use a 25.0 percent haircut for market price volatility (Hs).

(4) *Own internal estimates for haircuts.* With the prior written notice to FHFA, an Enterprise may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates:

(i) To use its own internal estimates, an Enterprise must satisfy the following minimum standards:

(A) An Enterprise must use a 99th percentile one-tailed confidence interval.

(B) The minimum holding period for a repo-style transaction and client-facing derivative transaction is five business days and for an eligible margin loan and a derivative contract other than a client-facing derivative transaction is ten business days except for transactions or netting sets for which paragraph (c)(4)(i)(C) of this section applies. When an Enterprise calculates an own-estimates haircut on a T_N-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut (H_M) is calculated using the following square root of time formula:

$$H_M = H_N\sqrt{\frac{T_M}{T_N}},$$

where

(*1*) T_M equals 5 for repo-style transactions and client-facing derivative transactions and 10 for eligible margin loans and derivative contracts other than client-facing derivative transactions;

(*2*) T_N equals the holding period used by the Enterprise to derive H_N; and

(*3*) H_N equals the haircut based on the holding period T_N.

(C) If the number of trades in a netting set exceeds 5,000 at any time during a quarter, an Enterprise must calculate the haircut using a minimum holding period of twenty business days for the following quarter except in the calculation of the exposure amount for purposes of § 1240.37. If a netting set contains one or more trades involving illiquid collateral or an OTC derivative that cannot be easily replaced, an Enterprise must calculate the haircut using a minimum holding period of twenty business days. If over the two previous quarters more than two margin disputes on a netting set have occurred that lasted more than the holding period, then the Enterprise must

calculate the haircut for transactions in that netting set on the basis of a holding period that is at least two times the minimum holding period for that netting set.

(D) An Enterprise is required to calculate its own internal estimates with inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the security or category of securities.

(E) An Enterprise must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the Enterprise's own internal estimates for haircuts under this section and must be able to provide empirical support for the period used. The Enterprise must provide prior written notice to FHFA if the Enterprise makes any material changes to these policies and procedures.

(F) Nothing in this section prevents FHFA from requiring an Enterprise to use a different period of significant financial stress in the calculation of own internal estimates for haircuts.

(G) An Enterprise must update its data sets and calculate haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(ii) With respect to debt securities that are investment grade, an Enterprise may calculate haircuts for categories of securities. For a category of securities, the Enterprise must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the Enterprise has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the Enterprise must at a minimum take into account:

(A) The type of issuer of the security;

(B) The credit quality of the security;

(C) The maturity of the security; and

(D) The interest rate sensitivity of the security.

(iii) With respect to debt securities that are not investment grade and equity securities, an Enterprise must calculate a separate haircut for each individual security.

(iv) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the Enterprise must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(v) An Enterprise's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

RISK-WEIGHTED ASSETS FOR UNSETTLED TRANSACTIONS

§ 1240.40 Unsettled transactions.

(a) *Definitions.* For purposes of this section:

(1) Delivery-versus-payment (DvP) transaction means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) Payment-versus-payment (PvP) transaction means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) Positive current exposure of an Enterprise for a transaction is the difference between the transaction value at the agreed settlement price and the

current market price of the transaction, if the difference results in a credit exposure of the Enterprise to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Cleared transactions that are marked-to-market daily and subject to daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions;

(3) One-way cash payments on OTC derivative contracts; or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts as provided in § 1240.36).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement, clearing system or central counterparty, FHFA may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* An Enterprise must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the Enterprise's counterparty has not made delivery or payment within five business days after the settlement date. The Enterprise must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the Enterprise by the appropriate risk weight in table 1 to this paragraph (d).

TABLE 1 TO PARAGRAPH (d)—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

Number of business days after contractual settlement date	Risk weight to be applied to positive current exposure (in percent)
From 5 to 15	100.0
From 16 to 30	625.0
From 31 to 45	937.5
46 or more	1,250.0

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) An Enterprise must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the Enterprise has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The Enterprise must continue to hold risk-based capital against the transaction until the Enterprise has received its corresponding deliverables.

(2) From the business day after the Enterprise has made its delivery until five business days after the counterparty delivery is due, the Enterprise must calculate the risk-weighted asset amount for the transaction by treating the current fair value of the deliverables owed to the Enterprise as an exposure to the counterparty and using the applicable counterparty risk weight under this subpart D.

(3) If the Enterprise has not received its deliverables by the fifth business day after counterparty delivery was due, the Enterprise must assign a 1,250 percent risk weight to the current fair value of the deliverables owed to the Enterprise.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

RISK-WEIGHTED ASSETS FOR CRT AND OTHER SECURITIZATION EXPOSURES

§ 1240.41 Operational requirements for CRT and other securitization exposures.

(a) *Operational criteria for traditional securitizations.* An Enterprise that transfers exposures it has purchased or otherwise acquired to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each condition in this section is satisfied. An Enterprise that meets these conditions must hold risk-based capital against any credit risk it retains in connection with the securitization. An Enterprise that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The exposures are not reported on the Enterprise's consolidated balance sheet under GAAP;

(2) The Enterprise has transferred to one or more third parties credit risk associated with the underlying exposures;

(3) Any clean-up calls relating to the securitization are eligible clean-up calls; and

(4) The securitization does not:

(i) Include one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contain an early amortization provision.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, an Enterprise may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each condition in this paragraph (b) is satisfied. An Enterprise that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the synthetic securitization. An Enterprise that fails to meet these conditions or chooses not to recognize the credit risk mitigant for purposes of this section must instead hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is:

(i) Financial collateral;

(ii) A guarantee that meets all criteria as set forth in the definition of ''eligible guarantee'' in §1240.2, except for the criteria in paragraph (3) of that definition; or

(iii) A credit derivative that meets all criteria as set forth in the definition of ''eligible credit derivative'' in §1240.2, except for the criteria in paragraph (3) of the definition of ''eligible guarantee'' in §1240.2.

(2) The Enterprise transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the Enterprise to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the Enterprise's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the Enterprise in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the Enterprise after the inception of the securitization;

(3) The Enterprise obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

(c) *Operational criteria for credit risk transfers.* For credit risk transfers, an Enterprise may recognize for risk-based capital purposes, the use of a credit risk transfer only if each condition in this paragraph (c) is satisfied (or, for a credit risk transfer entered into before February 16, 2021, only if each condition in paragraphs (c)(2) and (3) of this section is satisfied). An Enterprise that meets these conditions must hold risk-based capital against any credit risk of the exposures it retains in connection with the credit risk transfer. An Enterprise that fails to meet these conditions or chooses not to recognize the credit risk transfer for purposes of this section must instead hold risk-based capital against the underlying exposures as if they had not been subject to the credit risk transfer. The conditions are:

(1) The credit risk transfer is any of the following—

(i) An eligible funded synthetic risk transfer;

(ii) An eligible reinsurance risk transfer;

(iii) An eligible single-family lender risk share;

(iv) An eligible multifamily lender risk share; or

(v) An eligible senior-subordinated structure.

(2) The credit risk transfer has been approved by FHFA as effective in transferring the credit risk of one or more mortgage exposures to another party, taking into account any counterparty, recourse, or other risk to the Enterprise and any capital, liquidity, or other requirements applicable to counterparties;

(3) The Enterprise transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk transfer employed do not include provisions that:

(i) Allow for the termination of the credit risk transfer due to deterioration in the credit quality of the underlying exposures;

(ii) Require the Enterprise to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(iii) Increase the Enterprise's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the Enterprise in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the Enterprise after the inception of the credit risk transfer;

(4) The Enterprise obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk transfer in all relevant jurisdictions;

(5) Any clean-up calls relating to the credit risk transfer are eligible clean-up calls; and

(6) The Enterprise includes in its periodic disclosures under the Federal securities laws, or in other appropriate public disclosures, a reasonably detailed description of—

(i) The material recourse or other risks that might reduce the effectiveness of the credit risk transfer in transferring the credit risk on the underlying exposures to third parties; and

(ii) Each condition under paragraph (a) of this section (governing traditional securitizations) or paragraph (b) of this section (governing synthetic securitizations) that is not satisfied by the credit risk transfer and the reasons that each such condition is not satisfied.

(d) *Due diligence requirements for securitization exposures.* (1) Except for exposures that are deducted from common equity tier 1 capital and exposures subject to §1240.42(h), if an Enterprise is unable to demonstrate to the satisfaction of FHFA a comprehensive understanding of the features of a securitization exposure that would materially affect the performance of the exposure, the Enterprise must assign the securitization exposure a risk weight of 1,250 percent. The Enterprise's analysis must be commensurate

with the complexity of the securitization exposure and the materiality of the exposure in relation to its capital.

(2) An Enterprise must demonstrate its comprehensive understanding of a securitization exposure under paragraph (d)(1) of this section, for each securitization exposure by:

(i) Conducting an analysis of the risk characteristics of a securitization exposure prior to acquiring the exposure, and documenting such analysis within three business days after acquiring the exposure, considering:

(A) Structural features of the securitization that would materially impact the performance of the exposure, for example, the contractual cash flow waterfall, waterfall-related triggers, credit enhancements, liquidity enhancements, fair value triggers, the performance of organizations that service the exposure, and deal-specific definitions of default;

(B) Relevant information regarding the performance of the underlying credit exposure(s), for example, the percentage of loans 30, 60, and 90 days past due; default rates; prepayment rates; loans in foreclosure; property types; occupancy; average credit score or other measures of creditworthiness; average loan-to-value ratio; and industry and geographic diversification data on the underlying exposure(s);

(C) Relevant market data of the securitization, for example, bid-ask spread, most recent sales price and historic price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the securitization; and

(D) For resecuritization exposures, performance information on the underlying securitization exposures, for example, the issuer name and credit quality, and the characteristics and performance of the exposures underlying the securitization exposures; and

(ii) On an on-going basis (no less frequently than quarterly), evaluating, reviewing, and updating as appropriate the analysis required under paragraph (d)(1) of this section for each securitization exposure.

§ 1240.42 Risk-weighted assets for CRT and other securitization exposures.

(a) *Securitization risk weight approaches.* Except as provided elsewhere in this section or in § 1240.41:

(1) An Enterprise must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from a securitization and apply a 1,250 percent risk weight to the portion of a CEIO that does not constitute after-tax gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section, an Enterprise may assign a risk weight to the securitization exposure either using the simplified supervisory formula approach (SSFA) in accordance with § 1240.43(a) through (d) for a securitization exposure that is not a retained CRT exposure or an acquired CRT exposure or using the credit risk transfer approach (CRTA) in accordance with § 1240.44 for a retained CRT exposure, and in either case, subject to the limitation under paragraph (e) of this section.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and the Enterprise cannot, or chooses not to apply the SSFA or the CRTA to the exposure, the Enterprise must assign a risk weight to the exposure as described in § 1240.45.

(4) If a securitization exposure is a derivative contract (other than protection provided by an Enterprise in the form of a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), an Enterprise may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (c) of this section.

(b) *Total risk-weighted assets for securitization exposures.* An Enterprise's total risk-weighted assets for securitization exposures equals the sum of the risk-weighted asset amount for securitization exposures that the Enterprise risk weights under § 1240.41(d), § 1240.42(a)(1), § 1240.43, § 1240.44, or § 1240.45, and paragraphs (e)

through (h) of this section, as applicable.

(c) *Exposure amount of a CRT or other securitization exposure*—(1) *On-balance sheet securitization exposures.* Except as provided for retained CRT exposures in § 1240.44(f), the exposure amount of an on-balance sheet securitization exposure (excluding a repo-style transaction, eligible margin loan, OTC derivative contract, or cleared transaction) is equal to the carrying value of the exposure.

(2) *Off-balance sheet securitization exposures.* Except as provided in paragraph (h) of this section or as provided for retained CRT exposures in § 1240.44(f), the exposure amount of an off-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, cleared transaction (other than a credit derivative), or an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure.

(3) *Repo-style transactions, eligible margin loans, and derivative contracts.* The exposure amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or derivative contract (other than a credit derivative) is the exposure amount of the transaction as calculated under § 1240.36 or § 1240.39, as applicable.

(d) *Overlapping exposures.* If an Enterprise has multiple securitization exposures that provide duplicative coverage to the underlying exposures of a securitization, the Enterprise is not required to hold duplicative risk-based capital against the overlapping position. Instead, the Enterprise may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(e) *Implicit support.* If an Enterprise provides support to a securitization (including a CRT) in excess of the Enterprise's contractual obligation to provide credit support to the securitization (implicit support):

(1) The Enterprise must include in risk-weighted assets all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from common equity tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The Enterprise must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The risk-based capital impact to the Enterprise of providing such implicit support.

(f) *Interest-only mortgage-backed securities.* Regardless of any other provisions in this subpart, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(g) *Nth-to-default credit derivatives*—(1) *Protection provider.* An Enterprise may assign a risk weight using the SSFA in § 1240.43 to an nth-to-default credit derivative in accordance with this paragraph (g). An Enterprise must determine its exposure in the nth-to-default credit derivative as the largest notional amount of all the underlying exposures.

(2) A*ttachment and detachment points.* For purposes of determining the risk weight for an nth-to-default credit derivative using the SSFA, the Enterprise must calculate the attachment point and detachment point of its exposure as follows:

(i) The attachment point (parameter *A*) is the ratio of the sum of the notional amounts of all underlying exposures that are subordinated to the Enterprise's exposure to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one. In the case of a first-to-default credit derivative, there are no underlying exposures that are subordinated to the Enterprise's exposure. In the case of a second-or-subsequent-to-default credit derivative, the smallest (n-1) notional amounts of the underlying exposure(s) are subordinated to the Enterprise's exposure.

(ii) The detachment point (parameter *D*) equals the sum of parameter *A* plus the ratio of the notional amount of the Enterprise's exposure in the nth-to-default credit derivative to the total notional amount of all underlying exposures. The ratio is expressed as a decimal value between zero and one.

(3) *Risk weights.* An Enterprise that does not use the SSFA to determine a

risk weight for its nth-to-default credit derivative must assign a risk weight of 1,250 percent to the exposure.

(4) *Protection purchaser*—(i) *First-to-default credit derivatives.* An Enterprise that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative that meets the rules of recognition of §1240.38(b) must determine its risk-based capital requirement for the underlying exposures as if the Enterprise synthetically securitized the underlying exposure with the smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures. An Enterprise must calculate a risk-based capital requirement for counterparty credit risk according to §1240.36 for a first-to-default credit derivative that does not meet the rules of recognition of §1240.38(b).

(ii) *Second-or-subsequent-to-default credit derivatives.* (A) An Enterprise that obtains credit protection on a group of underlying exposures through a nth-to-default credit derivative that meets the rules of recognition of §1240.38(b) (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The Enterprise also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If an Enterprise satisfies the requirements of paragraph (i)(4)(ii)(A) of this section, the Enterprise must determine its risk-based capital requirement for the underlying exposures as if the Enterprise had only synthetically securitized the underlying exposure with the nth smallest risk-weighted asset amount and had obtained no credit risk mitigant on the other underlying exposures.

(C) An Enterprise must calculate a risk-based capital requirement for counterparty credit risk according to §1240.36 for a nth-to-default credit derivative that does not meet the rules of recognition of §1240.38(b).

(h) *Guarantees and credit derivatives other than nth-to-default credit derivatives*—(1) *Protection provider.* For a guarantee or credit derivative (other than an nth-to-default credit derivative) provided by an Enterprise that covers the full amount or a pro rata share of a securitization exposure's principal and interest, the Enterprise must risk weight the guarantee or credit derivative as if it holds the portion of the reference exposure covered by the guarantee or credit derivative.

(2) *Protection purchaser.* (i) An Enterprise that purchases a guarantee or OTC credit derivative (other than an nth-to-default credit derivative) that is recognized under §1240.46 as a credit risk mitigant (including via collateral recognized under §1240.39) is not required to compute a separate counterparty credit risk capital requirement under §1240.31, in accordance with §1240.36(c).

(ii) If an Enterprise cannot, or chooses not to, recognize a purchased credit derivative as a credit risk mitigant under §1240.46, the Enterprise must determine the exposure amount of the credit derivative under §1240.36.

(A) If the Enterprise purchases credit protection from a counterparty that is not a securitization SPE, the Enterprise must determine the risk weight for the exposure according to this subpart D.

(B) If the Enterprise purchases the credit protection from a counterparty that is a securitization SPE, the Enterprise must determine the risk weight for the exposure according to §1240.42, including §1240.42(a)(4) for a credit derivative that has a first priority claim on the cash flows from the underlying exposures of the securitization SPE (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments).

§1240.43 Simplified supervisory formula approach (SSFA).

(a) *General requirements for the SSFA.* To use the SSFA to determine the risk weight for a securitization exposure, an Enterprise must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently

available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An Enterprise that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the exposure.

(b) *SSFA parameters.* To calculate the risk weight for a securitization exposure using the SSFA, an Enterprise must have accurate information on the following five inputs to the SSFA calculation:

(1) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) adjusted total capital requirement of the underlying exposures calculated using this subpart. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent represents a value of KG equal to 0.08).

(2) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (b)(2)(i) through (vi) of this section to the balance, measured in dollars, of underlying exposures:

(i) Ninety days or more past due;

(ii) Subject to a bankruptcy or insolvency proceeding;

(iii) In the process of foreclosure;

(iv) Held as real estate owned;

(v) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on:

(A) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(B) Consumer loans, including non-federally-guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(vi) Is in default.

(3) Parameter A is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Except as provided in §1240.42(g) for nth-to-default credit derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the Enterprise to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the Enterprise's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(4) Parameter D is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Except as provided in §1240.42(g) for nth-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(5) A supervisory calibration parameter, p, is equal to 0.5 for securitization exposures that are not resecuritization exposures and equal to 1.5 for resecuritization exposures (except p is equal to 0.5 for resecuritization exposures secured by MBS guaranteed by an Enterprise).

(c) Mechanics of the SSFA. K_G and W are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (d) of this section. The values of parameters A and D, relative to K_A determine the risk weight assigned to a securitization exposure as described in paragraph (d) of this section. The risk weight assigned to a securitization exposure, or portion of a securitization exposure, as appropriate, is the larger

of the risk weight determined in accordance with this paragraph (c) or paragraph (d) of this section and a risk weight of 20 percent.

(1) When the detachment point, parameter *D*, for a securitization exposure is less than or equal to K_A, the exposure must be assigned a risk weight of 1,250 percent.

(2) When the attachment point, parameter *A*, for a securitization exposure is greater than or equal to K_A, the Enterprise must calculate the risk weight in accordance with paragraph (d) of this section.

(3) When *A* is less than K_A and *D* is greater than K_A, the risk weight is a weighted-average of 1,250 percent and 1,250 percent times K_{SSFA} calculated in accordance with paragraph (d) of this section. For the purpose of this weighted-average calculation:

(i) The weight assigned to 1,250 percent equals

$$\frac{K_A - A}{D - A}.$$

(ii) The weight assigned to 1,250 percent times K_{SSFA} equals

$$\frac{D - K_A}{D - A}.$$

(iii) The risk weight will be set equal to:

$$RW = \left[\left(\frac{K_A - A}{D - A}\right) * 1{,}250\ percent\right] + \left[\left(\frac{D - K_A}{D - A}\right) * 1{,}250\ percent * K_{SSFA}\right]$$

(d) *SSFA equation.* (1) The Enterprise must define the following parameters:

e = 2.71828, the base of the natural logarithms.

(2) Then the Enterprise must calculate K_{SSFA} according to the following equation:

$$K_{SSFA} = \frac{e^{a*u} - e^{a*l}}{a * (u - l)}$$

(3) The risk weight for the exposure (expressed as a percent) is equal to K_{SSFA} * 1,250.

(e) *Limitations.* Notwithstanding any other provision of this section, an Enterprise must assign a risk weight of

not less than 20 percent to a securitization exposure.

§ 1240.44 Credit risk transfer approach (CRTA).

(a) *General requirements for the CRTA.* To use the CRTA to determine the risk weighted assets for a retained CRT exposure, an Enterprise must have data that enables it to assign accurately the parameters described in paragraph (b) of this section. Data used to assign the parameters described in paragraph (b) of this section must be the most currently available data; if the contracts governing the underlying exposures of the credit risk transfer require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (b) of this section must be no more than 91 calendar days old. An Enterprise that does not have the appropriate data to assign the parameters described in paragraph (b) of this section must assign a risk weight of 1,250 percent to the retained CRT exposure.

(b) *CRTA parameters.* To calculate the risk weighted assets for a retained CRT exposure, an Enterprise must have accurate information on the following ten inputs to the CRTA calculation.

(1) Parameter A is the attachment point for the exposure, which represents the threshold at which credit losses will first be allocated to the exposure. Parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the exposure of the Enterprise to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the Enterprise's exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a value between 0 and 100 percent.

(2) Parameter $AggUPB_{\$}$ is the aggregate unpaid principal balance of the underlying mortgage exposures.

(3) Parameter $CM_{\%}$ is the percentage of a tranche sold in the capital markets. $CM_{\%}$ is expressed as a value between 0 and 100 percent.

(4) Parameter $Collat_{\%RIF}$ is the amount of financial collateral posted by a counterparty under a loss sharing contract expressed as a percentage of the risk in force. For multifamily lender loss sharing transactions where an Enterprise has the contractual right to receive future lender guarantee-fee revenue, the Enterprise may include up to 12 months of estimated lender retained servicing fees in excess of servicing costs on the multifamily mortgage exposures subject to the loss sharing contract. $Collat_{\%RIF}$ is expressed as a value between 0 and 100 percent.

(5) Parameter D is the detachment point for the exposure, which represents the threshold at which credit losses of principal allocated to the exposure would result in a total loss of principal. Parameter D equals parameter A plus the ratio of the current dollar amount of the exposures that are *pari passu* with the exposure (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a value between 0 and 100 percent.

(6) Parameter $EL_{\$}$ is the remaining lifetime net expected credit risk losses of the underlying mortgage exposures. $EL_{\$}$ must be calculated internally by an Enterprise. If the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise must calculate $EL_{\$}$ assuming no counterparty haircuts. Parameter $EL_{\$}$ is expressed in dollars.

(7) Parameter HC is the haircut for the counterparty in contractual loss sharing transactions.

(i) For a CRT with respect to single-family mortgage exposures, the counterparty haircut is set forth in table 12 to paragraph (e)(3)(ii) in § 1240.33, determined as if the counterparty to the CRT were a counterparty to loan-level credit enhancement (as defined in § 1240.33(a)) and considering the counterparty rating and mortgage concentration risk of the counterparty to the CRT and the single-family segment and product of the underlying single-family mortgage exposures.

(ii) For a CRT with respect to multifamily mortgage exposures, the

counterparty haircut is set forth in table 1 to this paragraph (b)(7)(ii), with counterparty rating and mortgage concentration risk having the meaning given in §1240.33(a).

TABLE 1 TO PARAGRAPH (b)(7)(ii): HAIRCUTS FOR MULTIFAMILY LOSS SHARING CRTS

Counterparty Rating	Mortgage Concentration Risk: Not High	Mortgage Concentration Risk: High
1	2.1%	3.4%
2	5.3%	8.5%
3	6.0%	9.6%
4	12.7%	19.2%
5	16.2%	22.9%
6	22.5%	28.5%
7	41.2%	45.1%
8	48.2%	48.2%

(8) Parameter $LS_{\%}$ is the percentage of a tranche that is either insured, reinsured, or afforded coverage through lender reimbursement of credit losses of principal. $LS_{\%}$ is expressed as a value between 0 and 100 percent.

(9) Parameter $LTF_{\%}$ is the loss timing factor which accounts for maturity differences between the CRT and the underlying mortgage exposures. Maturity differences arise when the maturity date of the CRT is before the maturity dates of the underlying mortgage exposures. $LTF_{\%}$ is expressed as a value between 0 and 100 percent.

(i) An Enterprise must have the following information to calculate $LTF_{\%}$ for a CRT with respect to multifamily mortgage exposures:

(A) The remaining months to the contractual maturity of the CRT (CRT_{RMM}).

(B) The UPB-weighted-average remaining months to maturity of the underlying multifamily mortgage exposures that have remaining months to maturity greater than CRT_{RMM} (MME_{RMM}). If the underlying multifamily mortgage exposures all have maturity dates less than or equal to CRT_{RMM}, MME_{RMM} should equal CRT_{RMM}.

(C) The sum of UPB on the underlying multifamily mortgage exposures that have remaining loan terms less than or equal to CRT_{RMM} expressed as a percent of total UPB on the underlying multifamily mortgage exposures ($LTFUPB\%$).

(D) An Enterprise must use the following method to calculate LTF% for multifamily CRTs:

$$LTF_{\%} = (LTFUPB_{\%}) * 100\% + 50\% * (1 - LTFUPB_{\%}) \frac{CRT_{RMM}}{MME_{RMM}}$$

(ii) An Enterprise must have the following information to calculate *LTF%* for a newly issued CRT with respect to single-family mortgage exposures:

(A) The original closing date (or effective date) of the CRT and the maturity date on the CRT.

(B) UPB share of single-family mortgage exposures that have original amortization terms of less than or equal to 189 months (*CRTF15%*).

(C) UPB share of single-family mortgage exposures that have original amortization terms greater than 189 months and OLTVs of less than or equal to 80 percent (*CRT80NotF15%*).

(D) The duration of seasoning.

(E) An Enterprise must use the following method to calculate $LTF_{\%}$ for single-family CRTs: Calculate CRT months to maturity (*CRTMthstoMaturity*) using one of the following methods:

(*1*) For single-family CRTs with reimbursement based upon occurrence or resolution of delinquency, *CRTMthstoMaturity* is the difference between the CRT's maturity date and original closing date, except for the following:

(*i*) If the coverage based upon delinquency is between one and three months, add 24 months to the difference between the CRT's maturity date and original closing date; and

(*ii*) If the coverage based upon delinquency is between four and six months, add 18 months to the difference between the CRT's maturity date and original closing date.

(*2*) For all other single-family CRTs, *CRTMthstoMaturity* is the difference between the CRT's maturity date and original closing date.

(*i*) If *CRTMthstoMaturity* is a multiple of 12, then an Enterprise must use the first column of Table 2 to paragraph (b)(9)(ii)(E)(*2*)(*iii*) of this section to identify the row matching *CRTMthstoMaturity* and take a weighted average of the three loss timing factors in columns 2, 3, and 4 as follows:

$LTF_{\%} = (CRTLT15 * CRTLT15_{\%}) + (CRTLT80Not15 * CRTLT80NotF15_{\%}) + (CRTLTGT80Not15 * (1 - CRT80NotF15_{\%} - CRTF15_{\%}))$

(*ii*) If *CRTMthstoMaturity* is not a multiple of 12, an Enterprise must use the first column of Table 2 to paragraph (b)(9)(ii)(E)(*2*)(*iii*) of this section to identify the two rows that are closest to *CRTMthstoMaturity* and take a weighted average between the two rows of loss timing factors using linear interpolation, where the weights reflect *CRTMthstoMaturity*.

(*iii*) For seasoned single-family CRTs, the *LTF%* is calculated:

$$LTF_{\%} = \left(\frac{CRTLT_M - CRTLT_s}{100\% - CRTLT_s}\right)$$

where:

$CRTLT_M$ is the loss timing factor calculated under (ii) of this subsection.

$CRTLT_S$ is the loss timing factor calculated under (ii) of this subsection replacing *CRTMthstoMaturity* with the duration of seasoning.

CRTMthstoMaturity is calculated as per (E) of this section.

*CRTLT*15 is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms <= 189 months.

*CRTLT*80*Not*15: is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms > 189 months and OLTVs <=80 percent.

*CRTLTGT*80*Not*15 is the CRT loss timing factor for pool groups backed by single-family mortgage exposures with original amortization terms > 189 months and OLTVs > 80 percent.

TABLE 2 TO PARAGRAPH (b)(9)(ii)(E)(*2*)(*iii*): SINGLE-FAMILY CRT LOSS TIMING FACTORS

CRTMthstoMaturity (#1)	*CRTLT*15 (#2)	*CRTLT*80*Not*15 (#3)	*CRTLTGT*80*Not*15 (#4)
0	0%	0%	0%
12	1%	0%	0%
24	6%	3%	2%
36	21%	13%	11%
48	44%	31%	26%
60	66%	49%	43%
72	82%	65%	58%
84	90%	74%	68%
96	94%	80%	76%
108	96%	85%	81%
120	98%	88%	86%
132	99%	91%	89%
144	99%	93%	92%
156	100%	94%	94%
168	100%	96%	95%
180	100%	96%	96%
192	100%	97%	97%
204	100%	98%	98%
216	100%	98%	98%
228	100%	98%	98%
240	100%	99%	99%
252	100%	99%	99%
264	100%	99%	99%
276	100%	99%	99%
288	100%	99%	99%
300	100%	100%	100%
312	100%	100%	100%
324	100%	100%	100%
336	100%	100%	100%
348	100%	100%	100%
360	100%	100%	100%

(10) Parameter $RWA_{\$}$ is the aggregate credit risk-weighted assets associated with the underlying mortgage exposures.

(11) Parameter $CntptyRWA_{\$}$ is the aggregate credit risk-weighted assets due to counterparty haircuts from loan-level credit enhancements. $CntptyRWA_{\$}$ is the difference between:

(i) Parameter $RWA_{\$}$; and

(ii) Aggregate credit risk-weighted assets associated with the underlying mortgage exposures where the counterparty haircuts for loan-level credit enhancements are set to zero.

(c) *Mechanics of the CRTA.* The risk weight assigned to a retained CRT exposure, or portion of a retained CRT exposure, as appropriate, is the larger of $RW\%$ determined in accordance with paragraph (d) of this section and a risk weight of 10 percent.

(1) When the detachment point, parameter D, for a retained CRT exposure

is less than or equal to the sum of K_A and $AggEL\%$, the exposure must be assigned a risk weight of 1,250 percent.

(2) When the attachment point, parameter A, for a retained CRT exposure is greater than or equal to or equal to the sum of K_A and $AggEL_{\%}$,determined in accordance with paragraph (d) of this section, the exposure must be assigned a risk weight of 10 percent.

(3) When parameter A is less than or equal to the sum of K_A and$AggEL_{\%}$, andparameter D is greater than the sum of K_A and $AggEL_{\%,}$ the Enterprise must calculate the risk weight as the sum of:

(i) 1,250 percent multiplied by the ratio of (A) the sum of K_A and$AggEL_{\%}$ minus parameter A to (B) the difference between parameter D and parameter A; and

(ii) 10 percent multiplied by the ratio of (A) parameter D minus the sum of K_A and $AggEL_{\%}$ to (B) the difference between parameter D and parameter A.

(d) *CRTA equations.*

$$RW_{\%,Tranche} = \begin{cases} 1{,}250\% \; if \; K_A + AggEL_{\%} \geq D \\ 10\% \; if \; K_A + AggEL_{\%} \leq A \\ 1250\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) + 10\% * \left(\frac{D - (K_A + AggEL_{\%})}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D \end{cases}$$

$$AggEL_{\%} = 100\% * \frac{EL\$}{AggUPB_{\$}}$$

If the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise shall calculate K_A as follows:

$$K_A = 100\% * \frac{(RWA_{\$} - CntptyRWA_{\$}) * 8\%}{AggUPB_{\$}}$$

Otherwise the Enterprise shall calculate K_A as follows:

$$K_A = 100\% * \frac{RWA_{\$} * 8\%}{AggUPB_{\$}}$$

(e) *Limitations.* Notwithstanding any other provision of this section, an Enterprise must assign an overall risk weight of not less than 10 percent to a retained CRT exposure.

(f) *Adjusted exposure amount (AEA)—*(1) *In general.* The adjusted exposure amount (AEA) of a retained CRT exposure is equal to:

$$AEA_{\$,Tranche} = EAE_{\%,Tranche} * AggUPB_{\$} * (D - A) \ * \left(1 - \left(\frac{ELS_{\%,Tranche}}{RW_{\%,Tranche} * 8\%}\right)\right)$$

(2) *Inputs*—(i) *Enterprise adjusted exposure*. The adjusted exposure (EAE) of an Enterprise with respect to a retained CRT exposure is as follows:

$EAE_{\%,\text{Tranche}} = 100\% - (CM_{\%,\text{Tranche}} * LTEA_{\%,\text{Tranche,CM}} * OEA_{\%}) - (LS_{\%,\text{Tranche}} * LSEA_{\%,\text{Tranche}} * LTEA_{\%,\text{Tranche,LS}} * OEA_{\%})$,

Where the loss timing effectiveness adjustments (LTEA) for a retained CRT exposure are determined under paragraph (g) of this section, the loss sharing effectiveness adjustment (LSEA) for a retained CRT exposure is determine under paragraph (h) of this section, and the overall effectiveness adjustment (OEA) is determined under paragraph (i) of this section.

(ii) *Expected loss share*. The expected loss share is the share of a tranche that is covered by expected loss (ELS):

$$ELS_{\%,Tranche} = \begin{cases} 100\% \ if \ AggEL_{\%} \geq D \\ 0\% \ if \ AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \ if \ A < AggEL_{\%} < D. \end{cases}$$

(iii) *Risk weight*. The risk weight of a retained CRT exposure is determined under paragraph (d) of this section.

(g) *Loss timing effectiveness adjustments*. The loss timing effectiveness adjustments (LTEA) for a retained CRT exposure is calculated according to the following calculation:

if $(SLS_{\%,\text{Tranche}} - ELS_{\%,\text{Tranche}}) > 0$ *then*

$LTEA_{\%,Tranche,CM}$

$$= \frac{100\% * \max\left(0, \min\left(1, \ \frac{LTK_{A,CM} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

$LTEA_{\%,Tranche,LS}$

$$= \frac{100\% * \max\left(0, \min\left(1, \ \frac{LTK_{A,LS} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

Otherwise $LTEA_{\%,Tranche,CM} = 100\%$ *and* $LTEA_{\%,Tranche,LS} = 100\%$

where K_A adjusted for loss timing (LTK_A) is as follows:

$LTK_{A,CM} = \max((K_A + AggEL_{\%}) * LTF_{\%,CM} - AggEL_{\%}, 0\%)$

$LTK_{A,LS} = \max((K_A + AggEL_{\%}) * LTF_{\%,LS} - AggEL_{\%}, 0\%)$

and

$LTF_{\%,CM}$ is $LTF_{\%}$ calculated for the capital markets component of the tranche,

$LTF_{\%,LS}$ is $LTF_{\%}$ calculated for the loss sharing component of the tranche, and the share of the tranche that is covered by expected loss (ELS) and the share of the tranche that is covered by stress loss (SLS) are as follows:

$$ELS_{\%,Tranche} = \begin{cases} 100\% \; if \; AggEL_{\%} \geq D \\ 0\% \; if \; AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \; if \; A < AggEL_{\%} < D \end{cases}$$

$$SLS_{\%,Tranche} = \begin{cases} 100\% \; if \; K_A + AggEL_{\%} \geq D \\ 0\% \; if \; K_A + AggEL_{\%} \leq A \\ 100\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D. \end{cases}$$

(h) *Loss sharing effectiveness adjustment.* The loss sharing effectiveness adjustment (LSEA) for a retained CRT exposure is calculated according to the following calculation:

if $(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%) > 0$ *then*

$$LSEA_{\%,Tranche} = max\left(\left(1 - HC * \frac{\left(UnCollatUL_{\%,Tranche} * 1250\% + SRIF_{\%,Tranche} * 10\%\right)}{\left(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%\right)}\right), 0\%\right)$$

Otherwise

$LSEA_{\%,Tranche} = 100\%$

where

$UnCollatUL_{\%,Tranche} = max(0\%, SLS_{\%,Tranche} - max(Collat_{\%RIF,Tranche}, ELS_{\%,Tranche}))$

$SRIF_{\%,Tranche} = 100\% - max(SLS_{\%,Tranche}, Collat_{\%RIF,Tranche})$

and the share of the tranche that is covered by expected loss (ELS) and the share of the tranche that is covered by stress loss (SLS) are as follows:

$$ELS_{\%,Tranche} = \begin{cases} 100\% \; if \; AggEL_{\%} \geq D \\ 0\% \; if \; AggEL_{\%} \leq A \\ 100\% * \left(\frac{AggEL_{\%} - A}{D - A}\right) \; if \; A < AggEL_{\%} < D \end{cases}$$

$$SLS_{\%,Tranche} = \begin{cases} 100\% \; if \; K_A + AggEL_{\%} \geq D \\ 0\% \; if \; K_A + AggEL_{\%} \leq A \\ 100\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D. \end{cases}$$

(i) *Overall effectiveness adjustment.* The overall effectiveness adjustment (OEA) for a retained CRT exposure is

calculated according to the following calculation:

$$OEA_{\%} = \begin{cases} 100\% \; if \; K_A \leq 1.6\% \\ 100\% * (1.06667 - 4.16667 * K_A) \; if \; 1.6\% < K_A < 4\% \\ 90\% \; if \; K_A \geq 4\% \end{cases}$$

(j) *RWA supplement for retained loan-level counterparty credit risk.* If the Enterprise elects to use the CRTA for a retained CRT exposure and if the contractual terms of the CRT do not provide for the transfer of the counterparty credit risk associated with any loan-level credit enhancement or other loss sharing on the underlying mortgage exposures, then the Enterprise must add the following risk-weighted assets supplement ($RWASup_{\$}$) to risk weighted assets for the retained CRT exposure.

$$RWASup_{\$,Tranche} = CntptyRWA_{\$} * (D - A)$$

Otherwise the Enterprise shall add an $RWASup_{\$,Tranche}$ of $0.

(k) *Retained CRT Exposure.* Credit risk-weighted assets for the retained CRT exposure are as follows:

$$RWA_{\$,Tranche} = AEA_{\$,Tranche} * RW_{\%,Tranche} + RWASup_{\$,Tranche}$$

§ 1240.45 Securitization exposures to which the SSFA and the CRTA do not apply.

An Enterprise must assign a 1,250 percent risk weight to any acquired CRT exposure and all securitization exposures to which the Enterprise does not apply the SSFA under § 1240.43 or the CRTA under § 1240.44.

§ 1240.46 Recognition of credit risk mitigants for securitization exposures.

(a) *General.* (1) An originating Enterprise that has obtained a credit risk mitigant to hedge its exposure to a synthetic or traditional securitization that satisfies the operational criteria provided in § 1240.41 may recognize the credit risk mitigant under § 1240.38 or § 1240.39, but only as provided in this section.

(2) An investing Enterprise that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant under § 1240.38 or § 1240.39, but only as provided in this section.

(b) *Mismatches.* An Enterprise must make any applicable adjustment to the protection amount of an eligible guarantee or credit derivative as required in § 1240.38(d) through (f) for any hedged securitization exposure. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the Enterprise must use the longest residual maturity of any of the hedged exposures as the residual maturity of all hedged exposures.

Risk-Weighted Assets for Equity Exposures

§ 1240.51 Introduction and exposure measurement.

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures, an Enterprise must use the Simple Risk-Weight Approach (SRWA) provided in § 1240.52.

(2) An Enterprise must treat an investment in a separate account (as defined in § 1240.2) as if it were an equity exposure to an investment fund.

(b) *Adjusted carrying value.* For purposes of §§ 1240.51 and 1240.52, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the Enterprise's carrying value of the exposure;

(2) [Reserved]

(3) For the off-balance sheet component of an equity exposure that is not an equity commitment, the effective notional principal amount of the exposure, the size of which is equivalent to

a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) given a small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section; and

(4) For a commitment to acquire an equity exposure (an equity commitment), the effective notional principal amount of the exposure is multiplied by the following conversion factors (CFs):

(i) Conditional equity commitments with an original maturity of one year or less receive a CF of 20 percent.

(ii) Conditional equity commitments with an original maturity of over one year receive a CF of 50 percent.

(iii) Unconditional equity commitments receive a CF of 100 percent.

§ 1240.52 Simple risk-weight approach (SRWA).

(a) *General.* Under the SRWA, an Enterprise's total risk-weighted assets for equity exposures equals the sum of the risk-weighted asset amounts for each of the Enterprise's individual equity exposures as determined under this section.

(b) *SRWA computation for individual equity exposures.* An Enterprise must determine the risk-weighted asset amount for an individual equity exposure by multiplying the adjusted carrying value of the equity exposure by the lowest applicable risk weight in this section.

(1) *Community development equity exposures.* A 100 percent risk weight is assigned to an equity exposure that was acquired with the prior written approval of FHFA and is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or employment, and excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(2) *Other equity exposures.* A 400 percent risk weight is assigned to an equity exposure to an operating company or an investment in a separate account.

§§ 1240.53–1240.60 [Reserved]

Subpart E—Risk-Weighted Assets—Internal Ratings-Based and Advanced Measurement Approaches

§ 1240.100 Purpose, applicability, and principle of conservatism.

(a) *Purpose.* This subpart establishes:

(1) Minimum requirements for using Enterprise-specific internal risk measurement and management processes for calculating risk-based capital requirements; and

(2) Methodologies for the Enterprises to calculate their advanced approaches total risk-weighted assets.

(b) *Applicability.* (1) This subpart applies to each Enterprise.

(2) An Enterprise must also include in its calculation of advanced credit risk-weighted assets under this subpart all covered positions, as defined in subpart F of this part.

(c) *Principle of conservatism.* Notwithstanding the requirements of this subpart, an Enterprise may choose not to apply a provision of this subpart to one or more exposures provided that:

(1) The Enterprise can demonstrate on an ongoing basis to the satisfaction of FHFA that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this subpart;

(2) The Enterprise appropriately manages the risk of each such exposure;

(3) The Enterprise notifies FHFA in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the Enterprise applies this principle are not, in the aggregate, material to the Enterprise.

§ 1240.101 Definitions.

(a) Terms that are set forth in § 1240.2 and used in this subpart have the definitions assigned thereto in § 1240.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Advanced internal ratings-based (IRB) systems means an Enterprise's internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of exposures.

Advanced systems means an Enterprise's advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent used by the Enterprise, the internal models methodology, advanced CVA approach, double default excessive correlation detection process, and internal models approach (IMA) for equity exposures.

Backtesting means the comparison of an Enterprise's internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

Benchmarking means the comparison of an Enterprise's internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

Business environment and internal control factors means the indicators of an Enterprise's operational risk profile that reflect a current and forward-looking assessment of the Enterprise's underlying business risk factors and internal control environment.

Dependence means a measure of the association among operational losses across and within units of measure.

Economic downturn conditions means, with respect to an exposure held by the Enterprise, those conditions in which the aggregate default rates for that exposure's exposure subcategory (or subdivision of such subcategory selected by the Enterprise) in the exposure's jurisdiction (or subdivision of such jurisdiction selected by the Enterprise) are significantly higher than average.

Eligible operational risk offsets means amounts, not to exceed expected operational loss, that:

(i) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(ii) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

Expected operational loss (EOL) means the expected value of the distribution of potential aggregate operational losses, as generated by the Enterprise's operational risk quantification system using a one-year horizon.

External operational loss event data means, with respect to an Enterprise, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the Enterprise.

Internal operational loss event data means, with respect to an Enterprise, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the Enterprise.

Operational loss means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

Operational loss event means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(i) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or company policy excluding diversity- and discrimination-type events.

(ii) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law.

All third-party-initiated credit losses are to be treated as credit risk losses.

(iii) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.

(iv) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).

(v) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.

(vi) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.

(vii) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

Operational risk exposure means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the Enterprise's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

Risk parameter means a variable used in determining risk-based capital requirements for exposures, such as probability of default, loss given default, exposure at default, or effective maturity.

Scenario analysis means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to an Enterprise's operational risk profile and control structure.

Unexpected operational loss (UOL) means the difference between the Enterprise's operational risk exposure and the Enterprise's expected operational loss.

Unit of measure means the level (for example, organizational unit or operational loss event type) at which the Enterprise's operational risk quantification system generates a separate distribution of potential operational losses.

§ 1240.121 Minimum requirements.

(a) *Process and systems requirements.* (1) An Enterprise must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by an Enterprise for risk-based capital purposes under this subpart must be consistent with the Enterprise's internal risk management processes and management information reporting systems.

(3) Each Enterprise must have an appropriate infrastructure with risk measurement and management processes that meet the requirements of this section and are appropriate given the Enterprise's size and level of complexity. The Enterprise must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of long run experience with respect to its credit risk and operational risk exposures.

(b) *Risk rating and segmentation systems for exposures.* (1) An Enterprise

must have an internal risk rating and segmentation system that accurately, reliably, and meaningfully differentiates among degrees of credit risk for the Enterprise's exposures. When assigning an internal risk rating, an Enterprise may consider a third-party assessment of credit risk, provided that the Enterprise's internal risk rating assignment does not rely solely on the external assessment.

(2) If an Enterprise uses multiple rating or segmentation systems, the Enterprise's rationale for assigning an exposure to a particular system must be documented and applied in a manner that best reflects the obligor or exposure's level of risk. An Enterprise must not inappropriately allocate exposures across systems to minimize regulatory capital requirements.

(3) In assigning ratings to exposures, an Enterprise must use all relevant and material information and ensure that the information is current.

(c) *Quantification of risk parameters for exposures.* (1) The Enterprise must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters on a consistent basis for the Enterprise's exposures.

(2) An Enterprise's estimates of risk parameters must incorporate all relevant, material, and available data that is reflective of the Enterprise's actual exposures and of sufficient quality to support the determination of risk-based capital requirements for the exposures. In particular, the population of exposures in the data used for estimation purposes, the underwriting standards in use when the data were generated, and other relevant characteristics, should closely match or be comparable to the Enterprise's exposures and standards. In addition, an Enterprise must:

(i) Demonstrate that its estimates are representative of long run experience, including periods of economic downturn conditions, whether internal or external data are used;

(ii) Take into account any changes in underwriting practice or the process for pursuing recoveries over the observation period;

(iii) Promptly reflect technical advances, new data, and other information as they become available;

(iv) Demonstrate that the data used to estimate risk parameters support the accuracy and robustness of those estimates; and

(v) Demonstrate that its estimation technique performs well in out-of-sample tests whenever possible.

(3) The Enterprise's risk parameter quantification process must produce appropriately conservative risk parameter estimates where the Enterprise has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The Enterprise's risk parameter estimation process should not rely on the possibility of U.S. government financial assistance.

(5) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the Enterprise must adjust its estimates of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(6) If an Enterprise uses internal data obtained prior to becoming subject to this subpart or external data to arrive at risk parameter estimates, the Enterprise must demonstrate to FHFA that the Enterprise has made appropriate adjustments if necessary to be consistent with the Enterprise's definition of default. Internal data obtained after the Enterprise becomes subject to this subpart must be consistent with the Enterprise's definition of default.

(7) The Enterprise must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(8) The Enterprise must, at least annually, conduct a comprehensive review and analysis of reference data to determine relevance of the reference data to the Enterprise's exposures, quality of reference data to support risk parameter estimates, and consistency of reference data to the Enterprise's definition of default.

(d) *Operational risk*—(1) *Operational risk management processes.* An Enterprise must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the Enterprise's operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the Enterprise's operational risk profile) to identify, measure, monitor, and control operational risk in the Enterprise's products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the board of directors (or a designated committee of the board).

(2) *Operational risk data and assessment systems.* An Enterprise must have operational risk data and assessment systems that capture operational risks to which the Enterprise is exposed. The Enterprise's operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the Enterprise's current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) *Internal operational loss event data.* The Enterprise must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(*1*) The Enterprise's operational risk data and assessment systems must include a historical observation period of at least five years for internal operational loss event data (or such shorter period approved by FHFA to address transitional situations, such as integrating a new business line).

(*2*) The Enterprise must be able to map its internal operational loss event data into the seven operational loss event type categories.

(*3*) The Enterprise may refrain from collecting internal operational loss event data for individual operational losses below established dollar threshold amounts if the Enterprise can demonstrate to the satisfaction of FHFA that the thresholds are reasonable, do not exclude important internal operational loss event data, and permit the Enterprise to capture substantially all the dollar value of the Enterprise's operational losses.

(B) *External operational loss event data.* The Enterprise must have a systematic process for determining its methodologies for incorporating external operational loss event data into its operational risk data and assessment systems.

(C) *Scenario analysis.* The Enterprise must have a systematic process for determining its methodologies for incorporating scenario analysis into its operational risk data and assessment systems.

(D) *Business environment and internal control factors.* The Enterprise must incorporate business environment and internal control factors into its operational risk data and assessment systems. The Enterprise must also periodically compare the results of its prior business environment and internal control factor assessments against its actual operational losses incurred in the intervening period.

(3) *Operational risk quantification systems.* The Enterprise's operational risk quantification systems:

(i) Must generate estimates of the Enterprise's operational risk exposure using its operational risk data and assessment systems;

(ii) Must employ a unit of measure that is appropriate for the Enterprise's range of business activities and the variety of operational loss events to which it is exposed, and that does not combine business activities or operational loss events with demonstrably different risk profiles within the same loss distribution;

(iii) Must include a credible, transparent, systematic, and verifiable approach for weighting each of the four elements, described in paragraph (d)(2)(ii) of this section, that an Enterprise is required to incorporate into its

operational risk data and assessment systems;

(iv) May use internal estimates of dependence among operational losses across and within units of measure if the Enterprise can demonstrate to the satisfaction of FHFA that its process for estimating dependence is sound, robust to a variety of scenarios, and implemented with integrity, and allows for uncertainty surrounding the estimates. If the Enterprise has not made such a demonstration, it must sum operational risk exposure estimates across units of measure to calculate its total operational risk exposure; and

(v) Must be reviewed and updated (as appropriate) whenever the Enterprise becomes aware of information that may have a material effect on the Enterprise's estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(e) *Data management and maintenance.* (1) An Enterprise must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements.

(2) An Enterprise must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) An Enterprise must retain sufficient data elements related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(f) *Control, oversight, and validation mechanisms.* (1) The Enterprise's senior management must ensure that all components of the Enterprise's advanced systems function effectively and comply with the minimum requirements in this section.

(2) The Enterprise's board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the Enterprise's advanced systems.

(3) An Enterprise must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the minimum requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the Enterprise's advanced systems; and

(iii) Includes adequate governance and project management processes.

(4) The Enterprise must validate, on an ongoing basis, its advanced systems. The Enterprise's validation process must be independent of the advanced systems' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes backtesting.

(5) The Enterprise must have an internal audit function or equivalent function that is independent of business-line management that at least annually:

(i) Reviews the Enterprise's advanced systems and associated operations, including the operations of its credit function and estimations of risk parameters;

(ii) Assesses the effectiveness of the controls supporting the Enterprise's advanced systems; and

(iii) Documents and reports its findings to the Enterprise's board of directors (or a committee thereof).

(6) The Enterprise must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(g) *Documentation.* The Enterprise must adequately document all material aspects of its advanced systems.

§ 1240.122 Ongoing qualification.

(a) *Changes to advanced systems.* An Enterprise must meet all the minimum requirements in § 1240.121 on an ongoing basis. An Enterprise must notify FHFA when the Enterprise makes any change

to an advanced system that would result in a material change in the Enterprise's advanced approaches total risk-weighted asset amount for an exposure type or when the Enterprise makes any significant change to its modeling assumptions.

(b) *Failure to comply with qualification requirements.* (1) If FHFA determines that an Enterprise fails to comply with the requirements in § 1240.121, FHFA will notify the Enterprise in writing of the Enterprise's failure to comply.

(2) The Enterprise must establish and submit a plan satisfactory to FHFA to return to compliance with the qualification requirements.

(3) In addition, if FHFA determines that the Enterprise's advanced approaches total risk-weighted assets are not commensurate with the Enterprise's credit, market, operational, or other risks, FHFA may require such an Enterprise to calculate its advanced approaches total risk-weighted assets with any modifications provided by FHFA.

§ 1240.123 Advanced approaches credit risk-weighted asset calculations.

(a) An Enterprise must use its advanced systems to determine its credit risk capital requirements for each of the following exposures:

(1) General credit risk (including for mortgage exposures);

(2) Cleared transactions;

(3) Default fund contributions;

(4) Unsettled transactions;

(5) Securitization exposures;

(6) Equity exposures; and

(7) The fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts.

(b) The credit-risk-weighted assets calculated under this subpart E equals the aggregate credit risk capital requirement under paragraph (a) of this section multiplied by 12.5.

§§ 1240.124—1240.160 [Reserved]

§ 1240.161 Qualification requirements for incorporation of operational risk mitigants.

(a) *Qualification to use operational risk mitigants.* An Enterprise may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The Enterprise's operational risk quantification system is able to generate an estimate of the Enterprise's operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the Enterprise's operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The Enterprise's methodology for incorporating the effects of insurance, if the Enterprise uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancelation terms of the policy, where less than one year;

(iii) The policy's timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) *Qualifying operational risk mitigants.* Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that the Enterprise deems to have strong capacity to meet its claims payment obligations and the Enterprise assigns the company a probability of default equal to or less than 10 basis points;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event;

(2) In evaluating an operational risk mitigant other than insurance, FHFA will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding total capital.

§ 1240.162 Mechanics of operational risk risk-weighted asset calculation.

(a) If an Enterprise does not qualify to use or does not have qualifying operational risk mitigants, the Enterprise's dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If an Enterprise qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the Enterprise's dollar risk-based capital requirement for operational risk is the greater of:

(1) The Enterprise's operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The Enterprise's operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The Enterprise's risk-weighted asset amount for operational risk equals the greater of:

(1) The Enterprise's dollar risk-based capital requirement for operational risk determined under paragraphs (a) or (b) multiplied by 12.5; and

(2) The Enterprise's adjusted total assets multiplied by 0.0015 multiplied by 12.5.

(d) After January 1, 2022, and until the compliance date for this section under §1240.4, the Enterprise's risk weighted amount for operational risk will equal the Enterprise's adjusted total assets multiplied by 0.0015 multiplied by 12.5.

Subpart F—Risk-weighted Assets—Market Risk

§ 1240.201 Purpose, applicability, and reservation of authority.

(a) *Purpose.* This subpart F establishes risk-based capital requirements for spread risk and provides methods for the Enterprises to calculate their measure for spread risk.

(b) *Applicability.* This subpart applies to each Enterprise.

(c) *Reservation of authority.* Subject to applicable provisions of the Safety and Soundness Act:

(1) FHFA may require an Enterprise to hold an amount of capital greater than otherwise required under this subpart if FHFA determines that the Enterprise's capital requirement for spread risk as calculated under this subpart is not commensurate with the spread risk of the Enterprise's covered positions.

(2) If FHFA determines that the risk-based capital requirement calculated under this subpart by the Enterprise for one or more covered positions or portfolios of covered positions is not commensurate with the risks associated with those positions or portfolios, FHFA may require the Enterprise to assign a different risk-based capital requirement to the positions or portfolios that more accurately reflects the risk of the positions or portfolios.

(3) In addition to calculating risk-based capital requirements for specific positions or portfolios under this subpart, the Enterprise must also calculate risk-based capital requirements for covered positions under subpart D or subpart E of this part, as appropriate.

(4) Nothing in this subpart limits the authority of FHFA under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

§ 1240.202 Definitions.

(a) Terms set forth in §1240.2 and used in this subpart have the definitions assigned in §1240.2.

(b) For the purposes of this subpart, the following terms are defined as follows:

Backtesting means the comparison of an Enterprise's internal estimates with actual outcomes during a sample period not used in model development. For purposes of this subpart, backtesting is one form of out-of-sample testing.

Covered position means, any asset that has more than *de minimis* spread risk (other than any intangible asset, such as any servicing asset), including:

(i) Any NPL, RPL, reverse mortgage loan, or other mortgage exposure that, in any case, does not secure an MBS guaranteed by the Enterprise;

(ii) Any MBS guaranteed by an Enterprise, MBS guaranteed by Ginnie Mae, reverse mortgage security, PLS, commercial MBS, CRT exposure, or other securitization exposure, regardless of whether the position is held by the Enterprise for the purpose of short-term resale or with the intent of benefiting from actual or expected short-term price movements, or to lock in arbitrage profits; and

(iii) Any other trading asset or trading liability (whether on- or off-balance sheet).[1]

Market risk means the risk of loss on a position that could result from movements in market prices, including spread risk.

Private label security (PLS) means any MBS that is collateralized by a pool or pools of single-family mortgage exposures and that is not guaranteed by an Enterprise or by Ginnie Mae.

Reverse mortgage means a mortgage loan secured by a residential property in which a homeowner relinquishes equity in their home in exchange for regular payments.

Reverse mortgage security means a security collateralized by reverse mortgages.

Spread risk means the risk of loss on a position that could result from a change in the bid or offer price of such position relative to a risk free or funding benchmark, including when due to a change in perceptions of performance or liquidity of the position.

§ 1240.203 Requirements for managing market risk.

(a) *Management of covered positions*—(1) *Active management.* An Enterprise must have clearly defined policies and procedures for actively managing all covered positions. At a minimum, these policies and procedures must require:

(i) Marking covered positions to market or to model on a daily basis;

(ii) Daily assessment of the Enterprise's ability to hedge position and portfolio risks, and of the extent of market liquidity;

(iii) Establishment and daily monitoring of limits on covered positions by a risk control unit independent of the business unit;

(iv) Routine monitoring by senior management of information described in paragraphs (a)(1)(i) through (iii) of this section;

(v) At least annual reassessment of established limits on positions by senior management; and

(vi) At least annual assessments by qualified personnel of the quality of market inputs to the valuation process, the soundness of key assumptions, the reliability of parameter estimation in pricing models, and the stability and accuracy of model calibration under alternative market scenarios.

(2) *Valuation of covered positions.* The Enterprise must have a process for prudent valuation of its covered positions that includes policies and procedures on the valuation of positions, marking positions to market or to model, independent price verification, and valuation adjustments or reserves. The valuation process must consider, as appropriate, unearned credit spreads, close-out costs, early termination costs, investing and funding costs, liquidity, and model risk.

(b) *Requirements for internal models.* (1) A risk control unit independent of the business unit must approve any internal model to calculate its risk-based capital requirement under this subpart.

(2) An Enterprise must meet all of the requirements of this section on an ongoing basis. The Enterprise must promptly notify FHFA when:

(i) The Enterprise plans to extend the use of a model to an additional business line or product type;

(ii) The Enterprise makes any change to an internal model that would result in a material change in the Enterprise's risk-weighted asset amount for a portfolio of covered positions; or

(iii) The Enterprise makes any material change to its modeling assumptions.

(3) FHFA may determine an appropriate capital requirement for the covered positions to which a model would apply, if FHFA determines that the model no longer complies with this subpart or fails to reflect accurately

[1] Securities subject to repurchase and lending agreements are included as if they are still owned by the Enterprise.

the risks of the Enterprise's covered positions.

(4) The Enterprise must periodically, but no less frequently than annually, review its internal models in light of developments in financial markets and modeling technologies, and enhance those models as appropriate to ensure that they continue to meet the Enterprise's standards for model approval and employ risk measurement methodologies that are most appropriate for the Enterprise's covered positions.

(5) The Enterprise must incorporate its internal models into its risk management process and integrate the internal models used for calculating its market risk measure into its daily risk management process.

(6) The level of sophistication of an Enterprise's internal models must be commensurate with the complexity and amount of its covered positions. An Enterprise's internal models may use any of the generally accepted approaches, including variance-covariance models, historical simulations, or Monte Carlo simulations, to measure market risk.

(7) The Enterprise's internal models must properly measure all the material risks in the covered positions to which they are applied.

(8) The Enterprise's internal models must conservatively assess the risks arising from less liquid positions and positions with limited price transparency under realistic market scenarios.

(9) The Enterprise must have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal models to ensure continued applicability and relevance.

(c) *Control, oversight, and validation mechanisms.* (1) The Enterprise must have a risk control unit that reports directly to senior management and is independent from the business units.

(2) The Enterprise must validate its internal models initially and on an ongoing basis. The Enterprise's validation process must be independent of the internal models' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the internal models;

(ii) An ongoing monitoring process that includes verification of processes and the comparison of the Enterprise's model outputs with relevant internal and external data sources or estimation techniques; and

(iii) An outcomes analysis process that includes backtesting.

(3) The Enterprise must stress test the market risk of its covered positions at a frequency appropriate to each portfolio, and in no case less frequently than quarterly. The stress tests must take into account concentration risk (including concentrations in single issuers, industries, sectors, or markets), illiquidity under stressed market conditions, and risks arising from the Enterprise's trading activities that may not be adequately captured in its internal models.

(4) The Enterprise must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the Enterprise's market risk measurement systems, including the activities of the business units and independent risk control unit, compliance with policies and procedures, and calculation of the Enterprise's measures for spread risk under this subpart. At least annually, the internal audit function must report its findings to the Enterprise's board of directors (or a committee thereof).

(d) *Internal assessment of capital adequacy.* The Enterprise must have a rigorous process for assessing its overall capital adequacy in relation to its market risk.

(e) *Documentation.* The Enterprise must adequately document all material aspects of its internal models, management and valuation of covered positions, control, oversight, validation and review processes and results, and internal assessment of capital adequacy.

§ 1240.204 Measure for spread risk.

(a) *General requirement*—(1) *In general.* An Enterprise must calculate its standardized measure for spread risk by following the steps described in paragraph

(a)(2) of this section. An Enterprise also must calculate an advanced measure for spread risk by following the steps in paragraph (a)(2) of this section.

(2) *Measure for spread risk.* An Enterprise must calculate the standardized measure for spread risk, which equals the sum of the spread risk capital requirements of all covered positions using one or more of its internal models except as contemplated by paragraphs (b) or (c) of this section. An Enterprise also must calculate the advanced measure for spread risk, which equals the sum of the spread risk capital requirements of all covered positions calculated using one or more of its internal models.

(b) *Single point approach*—(1) *General.* For purposes of the standardized measure for spread risk, the spread risk capital requirement for a covered position that is an RPL, an NPL, a reverse mortgage loan, or a reverse mortgage security is the amount equal to:

(i) The market value of the covered position; multiplied by

(ii) The applicable single point shock assumption for the covered position under paragraph (b)(2) of this section.

(2) *Applicable single point shock assumption.* The applicable single point shock assumption is:

(i) 0.0475 for an RPL or an NPL;

(ii) 0.0160 for a reverse mortgage loan; and

(iii) 0.0410 for a reverse mortgage security.

(c) *Spread duration approach*—(1) *General.* For purposes of the standardized measure for spread risk, the spread risk capital requirement for a covered position that is a multifamily mortgage exposure, a PLS, or an MBS guaranteed by an Enterprise or Ginnie Mae and secured by multifamily mortgage exposures is the amount equal to:

(i) The market value of the covered position; multiplied by

(ii) The spread duration of the covered position determined by the Enterprise using one or more of its internal models; multiplied by

(iii) The applicable spread shock assumption under paragraph (c)(2) of this section.

(2) *Applicable spread shock assumption.* The applicable spread shock is:

(i) 0.0015 for a multifamily mortgage exposure;

(ii) 0.0265 for a PLS; and

(iii) 0.0100 for an MBS guaranteed by an Enterprise or by Ginnie Mae and secured by multifamily mortgage exposures (other than IO securities guaranteed by an Enterprise or Ginnie Mae).

Subpart G—Stability Capital Buffer

§ 1240.400 Stability capital buffer.

(a) *Definitions.* For purposes of this subpart:

(1) *Mortgage assets* means, with respect to an Enterprise, the dollar amount equal to the sum of:

(i) The unpaid principal balance of its single-family mortgage exposures, including any single-family loans that secure MBS guaranteed by the Enterprise;

(ii) The unpaid principal balance of its multifamily mortgage exposures, including any multifamily mortgage exposures that secure MBS guaranteed by the Enterprise;

(iii) The carrying value of its MBS guaranteed by an Enterprise, MBS guaranteed by Ginnie Mae, PLS, and other securitization exposures (other than its retained CRT exposures); and

(iv) The exposure amount of any other mortgage assets.

(2) *Residential mortgage debt outstanding* means the dollar amount of mortgage debt outstanding secured by one- to four-family residences or multifamily residences that are located in the United States (and excluding any mortgage debt outstanding secured by commercial or farm properties).

(b) *Amount.* An Enterprise must calculate its stability capital buffer under this section on an annual basis by December 31 of each year. The stability capital buffer of an Enterprise is equal to:

(1) The ratio of:

(i) The mortgage assets of the Enterprise as of December 31 of the previous calendar year; to

(ii) The residential mortgage debt outstanding as of December 31 of the previous calendar year, as published by FHFA;

(2) Minus 0.05;

(3) Multiplied by 5;

(4) Divided by 100; and

(5) Multiplied by the adjusted total assets of the Enterprise, as of December 31 of the previous calendar year.

(c) *Effective date of an adjusted stability capital buffer*—(1) *Increase in stability capital buffer*. An increase in the stability capital buffer of an Enterprise under this section will take effect (*i.e.*, be incorporated into the maximum payout ratio under table 1 to paragraph (b)(5) in §1240.11) on January 1 of the year that is one full calendar year after the increased stability capital buffer was calculated.

(2) *Decrease in stability capital buffer*. A decrease in the stability capital buffer of an Enterprise will take effect (*i.e.*, be incorporated into the maximum payout ratio under table 1 to paragraph (b)(5) in §1240.11) on January 1 of the year immediately following the calendar year in which the decreased stability capital buffer was calculated.

(d) *Initial stability capital buffer*. Notwithstanding anything to the contrary in this section, the stability capital buffer of an Enterprise as of January 1, 2021, is equal to—

(1) The ratio of:

(i) The mortgage assets of the Enterprise as of December 31, 2020; to

(ii) The residential mortgage debt outstanding as of December 31, 2020, as published by FHFA;

(2) Minus 0.05;

(3) Multiplied by 5;

(4) Divided by 100; and

(5) Multiplied by the adjusted total assets of the Enterprise as of December 31, 2020.

PART 1242—RESOLUTION PLANNING

Sec.

AUTHORITY: 12 U.S.C. 4511; 12 U.S.C. 4513; 12 U.S.C. 4513b; 12 U.S.C. 4514; 12 U.S.C. 4517; 12 U.S.C. 4526; and 12 U.S.C. 4617.

SOURCE: 86 FR 23587, May 4, 2021, unless otherwise noted.

§1242.1 Purpose; identification as a prudential standard.

(a) *Purpose*. The purpose of this part is to require each Enterprise to develop a plan for submission to FHFA that would assist FHFA in planning for the rapid and orderly resolution of an Enterprise using FHFA's receivership authority at 12 U.S.C. 4617, in a manner that:

(1) Minimizes disruption in the national housing finance markets by providing for the continued operation of the core business lines of an Enterprise in receivership by a newly constituted limited-life regulated entity;

(2) Preserves the value of an Enterprise's franchise and assets;

(3) Facilitates the division of assets and liabilities between the limited-life regulated entity and the receivership estate;

(4) Ensures that investors in mortgage-backed securities guaranteed by the Enterprises and in Enterprise unsecured debt bear losses in accordance with the priority of payments established in the Safety and Soundness Act while minimizing unnecessary losses and costs to these investors; and

(5) Fosters market discipline by making clear that no extraordinary government support will be available to indemnify investors against losses or fund the resolution of an Enterprise.

(b) *Identification as a prudential standard; effect of identification*. This part is a prudential standard pursuant to section 1313B of the Safety and Soundness Act, 12 U.S.C. 4513b, and is subject to 12 CFR part 1236. In its discretion, FHFA may deem:

(1) The determination of a deficiency in a resolution plan; or

(2) The failure to undertake actions or changes identified by FHFA in the notice provided pursuant to §1242.7(b)(1), to be a failure to meet a standard for purposes of §1236.4 of this chapter. In its discretion, FHFA may also deem a revised, resubmitted resolution plan to be a corrective plan for purposes of §1236.4 of this chapter.

§ 1242.2 Definitions.

Unless otherwise indicated, terms used in this part have the meanings that they have in 12 CFR part 1201 and in the Federal Housing Enterprises Financial Safety and Soundness Act (12 U.S.C. 4501 *et seq.*).

Core business line means a business line of the Enterprise that plausibly would continue to operate in a limited-life regulated entity, considering the purposes, mission, and authorized activities of the Enterprise as set forth in its authorizing statute and the Safety and Soundness Act. *Core business line* includes associated operations, services, functions, and supports necessary for any identified core business line to be continued, such as servicing, credit enhancement, securitization support, information technology support and operations, and human resources and personnel.

Credible, with regard to a resolution plan, means a resolution plan that:

(1) Demonstrates consideration of required and prohibited assumptions set forth at § 1242.5(b);

(2) Provides strategic analysis and detailed information as required by § 1242.5(c) through (g) that is well-founded and based on information and data related to the Enterprise that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets; and

(3) Plausibly achieves the purposes of § 1242.1(a).

Material change means an event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on:

(1) The resolvability of the Enterprise;

(2) The Enterprise's resolution strategy; or

(3) How the Enterprise's resolution plan is implemented. Material changes may include the identification of a new core business line or significant increases or decreases in business, operations, funding, or interconnections.

Rapid and orderly resolution means a process for establishing a limited-life regulated entity as successor to the Enterprise under section 1367 of the Safety and Soundness Act (12 U.S.C 4617), including transferring Enterprise assets and liabilities to the limited-life regulated entity, such that succession by the limited-life regulated entity can be accomplished promptly and in a manner that substantially mitigates the risk that the failure of the Enterprise would have serious adverse effects on national housing finance markets.

§ 1242.3 Identification of core business lines.

(a) *Enterprise preliminary identification; notice to FHFA; timing.* (1) Each Enterprise shall conduct periodic reviews of its business lines to identify core business lines, consistent with the requirements of paragraph (a)(2) of this section.

(2) Each Enterprise shall establish and implement a process to identify each of its core business lines. The process shall include a methodology for evaluating the Enterprise's participation in activities and markets that may be critical to the stability of the national housing finance markets or carrying out the statutory mission and purpose of the Enterprise. The methodology shall be designed, taking into account the nature, size, complexity, and scope of the Enterprise's operations, to identify and assess:

(i) The markets and activities in which the Enterprise participates or has operations;

(ii) The significance of those markets and activities with respect to the national housing finance markets or the Enterprise's obligation to carry out its statutory mission and purpose; and

(iii) The significance of the Enterprise as a provider or other participant in those markets and activities.

(3) Enterprise identification of any business line as a core business line is preliminary and is subject to review by FHFA. Each Enterprise must provide a notice of its preliminary identification of core business lines to FHFA, including a description of its methodology and the basis for identification of each core business line.

(4) The board of directors of the Enterprise shall approve each notice of preliminary identification of core business lines before submission to FHFA, with such approval noted in board minutes.

(5) Each Enterprise must conduct its initial identification process and submit its initial identification of core business lines to FHFA by the date that is three months after the effective date of the final rule. Thereafter, each Enterprise shall conduct periodic identification processes, determining the timing of each periodic process to ensure that the process for identification, including FHFA review and determination required by paragraph (b) of this section, can be complete in sufficient time for each succeeding required resolution plan to include the information required under §1242.5 for each core business line. FHFA may also direct an Enterprise as to the timeframe for conducting any subsequent identification process.

(6) Each Enterprise must periodically review its identification process and update it as necessary to ensure its continued effectiveness.

(b) *FHFA identification of core business lines; notice to an Enterprise; timing of inclusion in resolution plan.* (1) Within three months of receiving an Enterprise notice of the preliminary identification of a business line as a core business line, FHFA will provide notice to the Enterprise of its determination of each core business line. FHFA may also identify operations, services, functions, or supports associated with any core business line.

(2) FHFA may identify any business line of the Enterprise as a core business line, considering factors set forth in paragraph (a)(2) of this section or any other factor FHFA deems appropriate, following review of an Enterprise notice of preliminary identification or at any other time, on written notice to an Enterprise.

(3) If FHFA identifies a core business line under paragraph (b)(2) of this section, an Enterprise is not required to include that core business line in a resolution plan if that plan is due within six months after the Enterprise receives notice of identification from FHFA.

(c) *Reconsideration of business line identification*—(1) *Reconsideration initiated by an Enterprise.* (i) An Enterprise may request that FHFA reconsider the identification under paragraph (a) or (b) of this section, by submitting a written request to FHFA that includes a clear and complete statement of all arguments and all material information that the Enterprise believes is relevant to reconsideration as a core business line.

(ii) The board of directors of the Enterprise shall approve each request for reconsideration of identification before submission to FHFA, with such approval noted in board minutes.

(iii) FHFA will respond to an Enterprise request for reconsideration within three months after the date on which a complete request is received.

(2) *Reconsideration initiated by FHFA.* FHFA may reconsider the identification of any business line, including reconsideration of any operation, service, function, or support, at any time and in its discretion, on written notice to an Enterprise.

(3) *FHFA notice of reconsideration.* FHFA will provide a notice of reconsideration to the affected Enterprise, stating the results of the reconsideration. If FHFA determines to change an identification, such notice may also provide an effective date or other delaying or triggering condition for the change to become effective.

(4) *Effect of reconsideration.* For purposes of Enterprise resolution plans, identification as a core business line continues in effect until any notice of reconsideration removing such identification becomes effective.

§1242.4 Credible resolution plan required; other notices to FHFA.

(a) *Credible resolution plan required; frequency and timing of plan submission*—(1) *Credible resolution plan required; resolution plan submission dates.* Each Enterprise is required to submit a credible resolution plan to FHFA in accordance with frequency and timing requirements established by FHFA. Each Enterprise is required to submit its initial resolution plan 18 months after the date on which it is required to submit its initial notice preliminarily identifying core business lines to FHFA in accordance with §1242.3(a)(2). Thereafter, each Enterprise shall submit a resolution plan to FHFA not later than two years following the submission

date for the prior resolution plan, unless otherwise notified by FHFA in accordance with paragraph (a)(2) of this section.

(2) *Altering submission dates.* Notwithstanding anything to the contrary in this part, FHFA may determine that an Enterprise shall submit its resolution plan on a date different from any date provided in paragraph (a)(1) of this section, which may be before or after any date so established. FHFA shall provide an Enterprise with written notice of a determination under this paragraph (a)(2) no later than 12 months before the date by which the Enterprise is required to submit the resolution plan.

(3) *Interim updates.* FHFA may require that an Enterprise submit an update to a resolution plan submitted under this part, within a reasonable time, as determined by FHFA. FHFA shall notify the Enterprise of its requirement to submit an update under this paragraph (a)(3) in writing and shall specify the portions or aspects of the resolution plan the Enterprise shall update. Submission of an interim update does not affect the date for submission of a resolution plan, unless otherwise notified by FHFA in accordance with paragraph (a)(2) of this section.

(b) *Notice of extraordinary events; inclusion in next resolution plan.* Each Enterprise shall provide FHFA with a notice no later than 45 days after any material change, merger, reorganization, sale or divestiture of a business unit or material assets, or similar transaction, or any fundamental change to the Enterprise's resolution strategy. Such notice must describe such extraordinary event and explain how it may plausibly affect the resolution of the Enterprise. The Enterprise shall address any such extraordinary event with respect to which it has provided notice pursuant to this paragraph (b) in the next resolution plan submitted by the Enterprise, provided that plan is required to be submitted more than 90 days after submission of the notice of an extraordinary event to FHFA.

(c) *Board of directors' approval of resolution plan.* The board of directors of the Enterprise shall approve each resolution plan (including any revised resolution plan) before submission to FHFA, with such approval noted in board minutes.

(d) *Point of contact.* Each Enterprise shall identify an Enterprise senior management official and position responsible for serving as a point of contact regarding the resolution plan.

(e) *Incorporation of previously submitted resolution plan information by reference.* Any resolution plan submitted by an Enterprise may incorporate by reference information from a prior resolution plan submitted to FHFA, provided that:

(1) The resolution plan seeking to incorporate information by reference clearly indicates:

(i) The information the Enterprise is incorporating by reference; and

(ii) Which of the Enterprise's previously submitted resolution plan(s) originally contained the information the Enterprise is incorporating by reference, including the specific location of that information in the previously submitted resolution plan; and

(2) The information the Enterprise is incorporating by reference remains accurate in all respects that are material to the Enterprise's resolution plan.

(f) *Extensions of time.* Upon its own initiative or a written request by an Enterprise, FHFA may extend any time period under this part. Each extension request by an Enterprise shall be supported by a written statement describing the basis and justification for the request.

§ 1242.5 Informational content of a resolution plan; required and prohibited assumptions.

(a) *In general.* An Enterprise resolution plan shall reflect required and prohibited assumptions specified in paragraph (b) of this section and include information specified in paragraphs (c) through (h) of this section, as well as analysis, in detail, to facilitate a rapid and orderly resolution of the Enterprise by FHFA as receiver in a manner that minimizes the risk that resolution of an Enterprise would have serious adverse effects on the national housing finance markets, and to the extent possible, the amount of any losses to be realized by the Enterprise's creditors.

Notwithstanding anything to the contrary in this part, FHFA may adjust or tailor the scope or form of information specified in paragraphs (c) through (g) of this section, as FHFA determines appropriate considering the significance of such information to FHFA when reviewing resolution plans, the appropriate level of detail of information, and reduction of burden on an Enterprise or FHFA.

(b) *Required and prohibited assumptions when developing a resolution plan.* In developing a resolution plan, each Enterprise shall:

(1) Take into account that receivership of the Enterprise may occur under the severely adverse economic conditions provided to the Enterprise by FHFA in conjunction with any stress testing required or in another scenario provided by FHFA;

(2) Not assume the provision or continuation of extraordinary support by the United States to the Enterprise to prevent either its becoming in danger of default or in default (including, in particular, support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as supervisor, conservator, or receiver of the Enterprise, including the Senior Preferred Stock Purchase Agreements entered into by FHFA and the U.S. Department of the Treasury on September 7, 2008 and any amendments thereto); and

(3) Reflect statutory provisions that obligations and securities of the Enterprise issued pursuant to its authorizing statute, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof other than the Enterprise.

(c) *Executive summary.* Each resolution plan of an Enterprise shall include an executive summary describing:

(1) Summary of the key elements of the Enterprise's strategic analysis;

(2) A description of each material change experienced by the Enterprise since submission of the Enterprise's prior resolution plan (or affirmation that no such change has occurred);

(3) Changes to the Enterprise's previously submitted resolution plan resulting from any:

(i) Change in law or regulation;

(ii) Guidance or feedback from FHFA; or

(iii) Material change described pursuant to paragraph (c)(2) of this section; and

(4) Any actions taken by the Enterprise since submitting its prior resolution plan to improve the effectiveness of the resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to a rapid and orderly resolution.

(d) *Strategic analysis.* Each resolution plan shall include a strategic analysis describing the Enterprise's plan for facilitating its rapid and orderly resolution by FHFA. Such analysis shall:

(1) Include detailed descriptions of—

(i) Key assumptions and supporting analysis underlying the resolution plan, including any assumptions made concerning the economic or financial conditions that would be present at the time resolution would occur;

(ii) Actions, or ranges of actions, which if taken by the Enterprise could facilitate a rapid and orderly resolution and those actions that the Enterprise intends to take;

(iii) The corporate governance framework that supports determination of the specific actions to be taken to facilitate a rapid and orderly resolution as the Enterprise is becoming in danger of default (including identifying the senior management officials responsible for making those determinations and taking those actions);

(iv) Funding, liquidity, and capital needs of, and resources and loss absorbing capacity available to, the Enterprise, which shall be mapped to its core business lines, in the ordinary course of business and in the event the Enterprise becomes in danger of default or in default;

(v) Considering the Enterprise's core business lines, a strategy for identifying assets and liabilities of the Enterprise to be transferred to a limited-life regulated entity; and for transferring operations of, and funding for, the Enterprise to a limited-life regulated entity, which shall be mapped to core business lines;

(vi) A strategy for preventing the failure or discontinuation of each core business line and its associated operations, services, functions, or supports

as the core business line is transferred to a limited-life regulated entity, and actions that, in the Enterprise's view, FHFA could take to prevent or mitigate any adverse effects of such failure or discontinuation on the national housing finance markets;

(vii) A strategy for mitigating the effect on the Enterprise of another Enterprise becoming in danger of default or in default, on the continuation of each of the Enterprise's core business lines and its associated operations, services, functions, or supports as any assets or operations of the other Enterprise are transferred to the Enterprise;

(viii) The extent to which claims against the Enterprise by creditors and counterparties would be satisfied in accordance with §1237.9 of this chapter and the manner and source of satisfaction of those claims consistent with the continuation of the Enterprise's core business lines by the limited-life regulated entity; and

(ix) A strategy for transferring or unwinding qualified financial contracts, as defined at 12 U.S.C. 4617(d)(8)(D)(i), in a manner consistent with 12 U.S.C. 4617(d)(8) through (11);

(2) Identify the time period(s) the Enterprise expects would be needed to successfully execute each action identified in paragraph (d)(1)(ii) of this section to facilitate rapid and orderly resolution, and any impediments to such actions;

(3) Identify and describe—

(i) Any potential material weaknesses or impediments to rapid and orderly resolution as conceived in the Enterprise's plan;

(ii) Any actions or steps the Enterprise has taken or proposes to take, or which other market participants could take, to remediate or otherwise mitigate the weaknesses or impediments identified by the Enterprise; and

(iii) A timeline for the remedial or other mitigating action that the Enterprise proposes to take; and

(4) Provide a detailed description of the processes the Enterprise employs for—

(i) Determining the current market values and marketability of the core business lines and material asset holdings of the Enterprise;

(ii) Assessing the feasibility of the Enterprise's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the Enterprise's resolution plan; and

(iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding, and operations of the Enterprise and its core business lines.

(e) *Corporate governance relating to resolution planning.* Each resolution plan shall:

(1) Include a detailed description of—

(i) How resolution planning is integrated into the corporate governance structure and processes of the Enterprise;

(ii) The process for identifying core business lines, including a description of the Enterprise's methodology considering the requirements of §1242.3(a);

(iii) Enterprise policies, procedures, and internal controls governing preparation and approval of the resolution plan; and

(iv) The nature, extent, and frequency of reporting to Enterprise senior executive officers and the board of directors regarding the development, maintenance, and implementation of the Enterprise's resolution plan;

(2) Provide the identity and position of the Enterprise senior management official primarily responsible for overseeing the development, maintenance, implementation, and submission of the Enterprise's resolution plan and for the Enterprise's compliance with this part;

(3) Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the Enterprise since the date of the Enterprise's most recently submitted resolution plan to assess the viability of or improve the resolution plan of the Enterprise; and

(4) Identify and describe the relevant risk measures used by the Enterprise to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to FHFA.

(f) *Organizational structure, interconnections, and related information.* Each resolution plan shall:

(1) Provide a detailed description of the Enterprise's organizational structure, including—

(i) A list of all affiliates and trusts within the Enterprise's organization that identifies for each affiliate and trust (legal entity), the following information (provided that, where such information would be identical across multiple legal entities, it may be presented in relation to a group of identified legal entities):

(A) The percentage of voting and nonvoting equity of each legal entity listed; and

(B) The location, jurisdiction of incorporation, licensing, and key management associated with each material legal entity identified;

(ii) A mapping of the Enterprise's operations, services, functions, and supports associated with each of its core business lines, identifying—

(A) The entity, including any third-party providers, responsible for conducting each associated operation or service that supports the functioning of each core business line as well as the Enterprise's material asset holdings; and

(B) Liabilities related to such operations, services, and core business lines;

(2) Provide an unconsolidated balance sheet for the Enterprise and a consolidating schedule for all securitization trusts consolidated by the Enterprise;

(3) Provide a schedule showing all assets and liabilities of unconsolidated Enterprise securitization trusts;

(4) Include a description of the material components of the liabilities of the Enterprise and each identified core business line that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, secured and unsecured liabilities, and subordinated liabilities;

(5) Identify and describe the processes used by the Enterprise to—

(i) Determine to whom the Enterprise has pledged collateral;

(ii) Identify the person or entity that holds such collateral; and

(iii) Identify the jurisdiction in which the collateral is located, and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the Enterprise;

(6) Describe any material off-balance sheet exposures (including guarantees and contractual obligations) of the Enterprise, including a mapping to each of its core business lines;

(7) Describe the practices of the Enterprise and its core business lines related to the booking of trading and derivatives activities;

(8) Identify material hedges of the Enterprise and its core business lines related to trading and derivative activities, including a mapping to legal entity;

(9) Describe the hedging strategies of the Enterprise;

(10) Describe the process undertaken by the Enterprise to establish exposure limits;

(11) Identify the third-party providers with which the Enterprise has significant business connections (including third parties performing or providing operations, services, functions, or supports associated with each core business line) and describe the business connections, dependencies and relationships with such third party;

(12) Report on the counterparty credit risk exposure to—

(i) The 20 largest single-family mortgage sellers and the 20 largest single-family mortgage servicers to the Enterprise (where ''largest'' is determined as of the end of the quarter preceding submission of a resolution plan, and the Enterprise includes an entity that is among the largest in both categories in each separate report category); and

(ii) All multifamily sellers and servicers to the Enterprise, based on purchasing volume during the preceding year.

(13) Report on insurance in force, risk in force, and exposure and potential future exposure related to all providers of loan-level mortgage insurance;

(14) Analyze whether the failure of a third-party provider to an Enterprise would likely have an adverse impact on an Enterprise or result in the Enterprise becoming in danger of default or in default, the availability of alternative providers, and the ability of the Enterprise to change providers when necessary; and

(15) Identify each trading, payment, clearing, or settlement system of which the Enterprise, directly or indirectly, is a member and on which the Enterprise conducts a material number or value amount of trades or transactions, and map membership in each such system to the Enterprise and its core business lines.

(g) *Management information systems.* (1) Each resolution plan shall include:

(i) A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, automated underwriting, valuation, accounting, and financial and regulatory reporting, used by the Enterprise, and systems and applications containing records used to manage all qualified financial contracts. The description of each system or application provided shall identify the legal owner or licensor, the use or function of the system or application, service level agreements related thereto, any software and system licenses, and any intellectual property associated therewith;

(ii) A mapping of the key management information systems and applications to core business lines of the Enterprise that use or rely on such systems and applications;

(iii) An identification of the scope, content, and frequency of the key internal reports that senior management of the Enterprise and core business lines use to monitor the financial health, risks, and operation of the Enterprise and core business lines;

(iv) A description of the process for FHFA to access the management information systems and applications identified in this paragraph (g); and

(v) A description and analysis of—

(A) The capabilities of the Enterprise's management information systems to collect, maintain, and report, in a timely manner to management of the Enterprise and to FHFA, the information and data underlying the resolution plan; and

(B) Any gaps or weaknesses in such capabilities, and a description of the actions the Enterprise intends to take to promptly address such gaps, or weaknesses, and the timeframe for implementing such actions.

(h) *Identification of point of contact.* The Enterprise senior management official responsible for serving as a point of contact regarding the resolution plan shall be identified in the resolution plan.

§ 1242.6 Form of resolution plan; confidentiality.

(a) *Form of resolution plan*—(1) *Generally.* Each resolution plan of an Enterprise shall be divided into a public section and a confidential section. Each Enterprise shall segregate and separately identify the public section from the confidential section.

(2) *Content of public section.* The public section of a resolution plan shall clearly reflect required and prohibited assumptions set forth at §1242.5(b) and consist of an executive summary of the resolution plan that describes the business of the Enterprise and includes, to the extent material to an understanding of the Enterprise:

(i) A description of each core business line, including associated operations and services;

(ii) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(iii) A description of derivative activities, hedging activities, and credit risk transfer instruments;

(iv) A list of memberships in material payment, clearing and settlement systems;

(v) The identities of the principal officers;

(vi) A description of the corporate governance structure and processes related to resolution planning;

(vii) A description of material management information systems; and

(viii) A description, at a high level, of strategies to facilitate resolution, covering such items as the range of potential purchasers of the Enterprise's core business lines and other significant assets, as well as measures that, if taken by the Enterprise, could minimize the risk that its resolution would have serious adverse effects on the national housing finance markets and minimize the amount of potential loss to the Enterprise's investors and creditors.

(b) *Confidential treatment of resolution plan.* (1) The confidentiality of each

resolution plan and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)), 12 CFR part 1202 (FHFA's regulation implementing the Freedom of Information Act), and 12 CFR part 1214 (FHFA's regulation on the availability of non-public information).

(2) An Enterprise submitting a resolution plan or related materials pursuant to this part that desires confidential treatment of the information under 5 U.S.C. 552(b)(4), 12 CFR part 1202 (Freedom of Information Act), and 12 CFR part 1214 (availability of nonpublic information) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the confidential section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. The submission of any nonpublic data or information under this part shall be subject to the examination privilege.

§ 1242.7 Review of resolution plans; resubmission of deficient resolution plans.

(a) *FHFA acceptance of resolution plan; review for completeness.* (1) After receipt of a resolution plan, FHFA will either acknowledge acceptance of the plan for review or return the resolution plan if FHFA determines that it is incomplete or that substantial additional information is required to facilitate review of the resolution plan.

(2) If FHFA determines that a resolution plan is incomplete or that substantial additional information is necessary to facilitate review of the resolution plan:

(i) FHFA shall provide notice to the Enterprise in writing of the area(s) in which the resolution plan is incomplete or with respect to which additional information is required; and

(ii) Within 30 days after receiving such notice (or such other time period as FHFA may establish in the notice), the Enterprise shall resubmit a complete resolution plan or such additional information as requested to facilitate review of the resolution plan.

(b) *FHFA review of complete plan; determination regarding deficient resolution plan.* (1) Following review of a complete resolution plan, FHFA will send a notification to each Enterprise that:

(i) Identifies any deficiencies or shortcomings in the Enterprise's resolution plan (or confirms that no deficiencies or shortcomings were identified);

(ii) Identifies any planned actions or changes set forth by the Enterprise that FHFA agrees could facilitate a rapid and orderly resolution of the Enterprise; and

(iii) Provides any other feedback on the resolution plan (including feedback on timing of actions or changes to be undertaken by the Enterprise). FHFA will send the notification no later than 12 months after accepting a complete plan, unless FHFA determines in its discretion that extenuating circumstances exist that require delay.

(2) For purposes of paragraph (b)(1) of this section, a ''deficiency'' is an aspect of an Enterprise's resolution plan that FHFA determines presents a weakness that, individually or in conjunction with other aspects, could undermine the feasibility of the Enterprise's resolution plan. A ''shortcoming'' is a weakness or gap that raises questions about the feasibility of an Enterprise's resolution plan, but does not rise to the level of a deficiency. If a shortcoming is not satisfactorily explained or addressed before or in the submission of the Enterprise's next resolution plan, it may be found to be a deficiency in the Enterprise's next resolution plan. FHFA may identify an aspect of an Enterprise's resolution plan as a deficiency even if such aspect was not identified as a shortcoming in an earlier resolution plan submission.

(c) *Resubmission of a resolution plan.* Within 90 days of receiving a notice of deficiency, or such shorter or longer

period as FHFA may establish by written notice to the Enterprise, an Enterprise shall submit a revised resolution plan to FHFA that addresses all deficiencies identified by FHFA, and that discusses in detail:

(1) Revisions to the plan made by the Enterprise to address the identified deficiencies;

(2) Any changes to the Enterprise's business operations and corporate structure that the Enterprise proposes to undertake to address a deficiency (including a timeline for completing such changes); and

(3) Why the Enterprise believes that the revised resolution plan is feasible and would facilitate a rapid and orderly resolution by FHFA as receiver.

§ 1242.8 No limiting effect or private right of action.

(a) *No limiting effect on resolution proceedings.* A resolution plan submitted pursuant to this part shall not have any binding effect on FHFA when appointed as conservator or receiver under 12 U.S.C. 4617.

(b) *No private right of action.* Nothing in this part creates or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by FHFA with respect to any resolution plan submitted under this part.

PART 1248—UNIFORM MORTGAGE-BACKED SECURITIES

Sec.

AUTHORITY: 12 U.S.C. 1451 note; 1716; 4511; and 4526.

SOURCE: 84 FR 7799, Mar. 5, 2019, unless otherwise noted.

§ 1248.1 Definitions.

The definitions below are used to define terms for purposes of this part:

Align or alignment means to cause to be sufficiently similar, or have sufficient similarity, as to produce a conditional prepayment rate (CPR) divergence of less than 2 percentage points in the three-month CPR for a cohort, and less than 5 percentage points in the three-month CPR for a the fastest paying quartile of a cohort (or less than the prevailing percentage thresholds for alignment set by FHFA, per § 1248.5(c)).

Cohort means all TBA-eligible securities with the same coupon, maturity, and loan-origination year where the combined unpaid principal balance of such securities issued by both Enterprises exceeds $10 billion.

Conditional Prepayment Rate or CPR, also known as the constant prepayment rate, means the rate at which investors receive outstanding principal in advance of scheduled principal payments. This includes receipts of principal that result from borrower prepayments and for any other reason. The CPR is expressed as a compound annual rate.

Covered Programs, Policies, or Practices means management decisions or actions that have reasonably foreseeable effects on cash flows to TBA-eligible MBS investors (*e.g.*, effects that result from prepayment rates and the circumstances under which mortgage loans are removed from MBS). These generally include management decisions or actions about: Single-family guarantee fees; loan level price adjustments and delivery fee portions of single-family guarantee fees; the spread between the note rate on the mortgage and the pass-through coupon on the TBA-eligible MBS; eligibility standards for sellers and servicers; financial and operational standards for private mortgage insurers; requirements related to the servicing of distressed loans that collateralize TBA-eligible securities; streamlined modification and refinance programs; removal of mortgage loans from securities; servicer compensation; proposals that could materially change the credit risk profile of the single-family mortgages securitized by an Enterprise; selling guide requirements for documenting creditworthiness, ability to repay, and

adherence to collateral standards; refinances of HARP-eligible loans; contract provisions under which certain sellers commit to sell to an Enterprise a minimum share of the mortgage loans they originate that are eligible for sale to the Enterprises; loan modification offerings; loss mitigation practices during disasters; alternatives to repurchase for representation and warranty violations; and other actions.

Fastest paying quartile of a cohort means the quartile of a cohort that has the fastest prepayment speeds as measured by the three-month CPR. The quartiles shall be determined by ranking outstanding TBA-eligible securities with the same coupon, maturity, and loan-origination year by the three-month CPR, excluding *specified pools*, and dividing each cohort into four parts such that the total unpaid principal balance of the pools included in each part is equal.

Material misalignment means divergence of at least 3 percentage points in the three-month CPR for a cohort or at least 8 percentage points in the three-month CPR for a fastest paying quartile of a cohort, or a prolonged misalignment (as determined by FHFA), or divergence greater than either of the corresponding prevailing percentage thresholds set by FHFA, per §1248.5(c).

Misalign or misalignment means to diverge by, or a divergence of, 2 percentage points or more, in the three-month CPR for a cohort or 5 percentage points or more, in the three-month CPR for a fastest paying quartile of a cohort (or more than either of the corresponding prevailing percentage thresholds set by FHFA, per §1248.5(c)).

Mortgage-backed security or MBS means securities collateralized by a pool or pools of single-family mortgages.

Specified pools means pools of mortgages backing TBA-eligible MBS that have a maximum loan size of $200,000, a minimum loan-to-value ratio at the time of loan origination of 80 percent, or a maximum FICO score of 700, or where all mortgages in the pool finance investor-owned properties or properties in the states of New York or Texas or the Commonwealth of Puerto Rico.

Supers means single-class resecuritizations of UMBS.

Three-month conditional prepayment rate (CPR3) means the annualized measure of prepayments for a three month interval calculated as follows:

$$CPR3_t = 1 - ((1 - SMM_{t-2}) * (1 - SMM_{t-1}) * (1 - SMM_t))^4,$$

where t indicates the month andSMM is the single month mortality rate, which equals$(PMT_t - I_t - P_t)/(UPB_t - P_t)$,where PMT_t is the actual payments received in the month,I_t is the scheduled payments of interest, P_t is the scheduled payments of principal, and UPB_t is the beginning unpaid principal balance.

To-Be-Announced Eligible Mortgage-Backed Security (TBA-Eligible MBS) means Enterprise MBS (including Freddie Mac Participation Certificates, Giants, MBS, UMBS, and Supers; and Fannie Mae MBS, Megas, UMBS, and Supers) that meet criteria such that the market considers them sufficiently fungible to be forward traded in the TBA market.

Uniform Mortgage Backed Security or UMBS means a single-class MBS backedby fixed-rate mortgage loans on one-to-four unit (single-family) properties issued byeither Enterprise which has the same characteristics (such as payment delay, poolingprefixes, and minimum pool submission amounts) regardless of which Enterprise is the issuer.

§1248.2 Purpose.

The purpose of this part is to:

(a) Enhance liquidity in the MBS marketplace, and to that end, enable adoption of the UMBS, by achieving sufficient similarity of cash flows on cohorts of TBA-eligible MBS such that investors will accept delivery of UMBS from either issuer in settlement of trades on the TBA market.

(b) Provide transparency and durability into the process for creating alignment.

§1248.3 General alignment.

Each Enterprise's covered programs, policies, and practices must align with the other Enterprise's covered programs, policies, and practices.

(a) When aligning covered programs, policies, and practices, the Enterprises must consider:

(1) The effect of the alignment on TBA-eligible securities' pricing and particularly on the prepayment speeds of mortgages underlying TBA-eligible MBS.

(2) Options that provide the greatest benefit for investors, lenders, and mortgage borrowers.

(b) [Reserved]

§ 1248.4 Enterprise consultation.

When and in the manner instructed by FHFA, the Enterprises shall consult with each other on any issues, including changes to covered programs, policies, and practices that potentially or actually cause cash flows to TBA-eligible MBS investors to misalign. The Enterprises shall report to FHFA on the results of any such consultation.

§ 1248.5 Misalignment.

(a) The Enterprises must report any misalignment to FHFA.

(b) The Enterprises must submit, in a timely manner, a written report to FHFA on any material misalignment describing, at a minimum, the likely cause of material misalignment and the Enterprises' plan to address the material misalignment.

(c) FHFA will *temporarily* adjust the percentages in the definitions of align, misalignment, and material misalignment, if FHFA determines that market conditions dictate that an adjustment is appropriate.

(1) In adjusting the percentages, FHFA will consider:

(i) The prevailing level and volatility of interest rates;

(ii) The level of credit risk embedded in the Enterprises' TBA-eligible MBS; and

(iii) Such other factors as FHFA may, in consultation with the Enterprises, determine to be appropriate to promote market confidence in the alignment of cash flows to TBA-eligible MBS investors and to foster the efficiency and liquidity of the secondary mortgage market.

(2) FHFA will publicly announce any temporary adjustment to the percentages in the definition of align, misalignment, and material misalignment in a timely manner.

(3) If adjusted percentages remain in effect for six months or more, FHFA will amend this part's definitions by FEDERAL REGISTER Notice, with opportunity for public comment.

(4) Temporarily adjusted percentages will remain in effect until six months after the date on which FHFA announced the temporary adjustment unless within six months of that date—

(i) FHFA announces a reversion to the previously prevailing percentages; or

(ii) FHFA initiates the notice and comment process, in which case the temporary percentages will remain in effect until the conclusion of that process.

(d) FHFA will *temporarily* adjust the definitions of cohort, fastest paying quartile of a cohort, and specified pools, if FHFA determines that changes in market practices or conditions dictate that an adjustment is appropriate.

(1) In adjusting those definitions, FHFA will consider:

(i) Changes in prevailing market practices related to the identification of specified pools;

(ii) The prevailing interest rates environment;

(iii) Observed relationships between pool characteristics and prepayment behavior of the Enterprises' TBA-eligible MBS; and

(iv) Such other factors as FHFA may, in consultation with the Enterprises, determine to be appropriate to promote market confidence in the alignment of cash flows to TBA-eligible MBS investors and to foster the efficiency and liquidity of the secondary mortgage market.

(2) FHFA will publicly announce any temporary adjustment to the definitions of cohort and specified pools in a timely manner.

(3) If adjusted definitions remain in effect for six months or more, FHFA will amend this part's definitions by FEDERAL REGISTER Notice, with opportunity for public comment.

(4) Temporarily adjusted definitions will remain in place until six months after the date on which FHFA announced the temporary adjustment unless within six months of that date—

(i) FHFA announces a reversion to the previously prevailing definitions; or

(ii) FHFA initiates the notice and comment process, in which case the temporary definitions will remain in effect until the conclusion of that process.

§ 1248.6 Covered programs, policies, and practices.

(a) *Enterprise Change Management Processes*. Each Enterprise must establish and maintain an Enterprise-wide governance process to ensure that any proposed changes to covered programs, policies, and practices that may cause misalignment are identified, reviewed, escalated, and submitted, in writing, to FHFA for review and approval in a timely manner, including proposed changes to covered programs, policies, and practices that were previously aligned at the direction of FHFA as conservator.

(1) Submissions to FHFA must include projections for prepayment rates and for removals of delinquent loans under a range of interest rate environments and assumptions concerning borrower defaults.

(2) Submissions to FHFA must include an analysis of the impact on borrowers and impact on the fastest paying quartile of each cohort.

(3) Submissions to FHFA must include an analysis of identified risks and may include potential mitigating actions.

(b) *Enterprise Monitoring*. Any changes to covered programs, policies, and practices that an Enterprise reasonably should identify as having been a likely cause of an unanticipated divergence between Enterprises in the three-month CPR of the same cohort shall be reported promptly to FHFA in writing.

(c) *FHFA Monitoring*. FHFA will monitor changes to covered programs, policies, and practices for effects on cash flows to TBA-eligible MBS investors.

§ 1248.7 Remedial actions.

(a) Based on its review of reports submitted by the Enterprises and reports issued by independent parties, if FHFA determines that there is misalignment, or the risk of misalignment, FHFA may:

(1) Require an Enterprise to undertake additional analysis, monitoring, or reporting to further the purposes of this part.

(2) Require an Enterprise to change covered programs, policies, and practices that FHFA determines conflict with the purposes of this part.

(b) To address material misalignment, FHFA may require additional and expedient Enterprise actions based on:

(1) Consultation with the Enterprises regarding the cause of the material misalignment;

(2) Review of Enterprise compliance with previously agreed upon or FHFA-required actions; and

(3) Review of the effectiveness of such actions to determine whether they are achieving the purpose of this part.

(c) Depending on the severity and cause of any material misalignment, FHFA, in its discretion, may:

(1) Require an Enterprise to terminate a program, policy, or practice; or

(2) Require the competing Enterprise to implement a comparable program, policy, or practice.

(d) When requiring an Enterprise to terminate a program, policy, or practice, or implement a comparable program, policy, or practice, FHFA will consider:

(1) The effect on TBA-eligible securities pricing and particularly on the prepayment speeds of mortgages underlying TBA-eligible MBS; and

(2) The costs borne by and the benefits likely to accrue to investors, lenders, and mortgage borrowers.

§ 1248.8 *De minimis* exception.

FHFA may exclude from the requirements of this part covered programs, policies, or practices of an Enterprise as long as those covered programs, policies, or practices do not affect more than $5 billion in unpaid principal balance of that Enterprises' TBA-eligible MBS.

PART 1249—BOOK–ENTRY PROCEDURES

Sec.

AUTHORITY: 12 U.S.C. 4501, 4502, 4511, 4513, 4526.

SOURCE: 75 FR 55928, Sept. 14, 2010, unless otherwise noted.

§ 1249.10 Definitions.

(a) *General.* Unless the context requires otherwise, terms used in this part that are not defined in this part, have the meanings as set forth in 31 CFR 357.2 and in 12 CFR 1282.1. Definitions and terms used in 31 CFR part 357 should read as though modified to effectuate their application to the Enterprises.

(b) *Other terms.* As used in this part, the term:

Book-entry Enterprise Security means an Enterprise Security issued or maintained in the Book-entry System. Book-entry Enterprise Security also means the separate interest and principal components of a Book-entry Enterprise Security if such security has been designated by the Enterprise as eligible for division into such components and the components are maintained separately on the books of one or more Federal Reserve Banks.

Book-entry System means the automated book-entry system operated by the Federal Reserve Banks acting as the fiscal agent for the Enterprises, on which Book-entry Enterprise Securities are issued, recorded, transferred and maintained in book-entry form.

Definitive Enterprise Security means an Enterprise Security in engraved or printed form, or that is otherwise represented by a certificate.

Eligible Book-entry Enterprise Security means a Book-entry Enterprise Security issued or maintained in the Book-entry System which by the terms of its Securities Documentation is eligible to be converted from book-entry form into definitive form.

Enterprise Security means any security or obligation of Fannie Mae or Freddie Mac issued under its respective Charter Act in the form of a Definitive Enterprise Security or a Book-entry Enterprise Security.

Entitlement Holder means a Person or an Enterprise to whose account an interest in a Book-entry Enterprise Security is credited on the records of a Securities Intermediary.

Federal Reserve Bank Operating Circular means the publication issued by each Federal Reserve Bank that sets forth the terms and conditions under which the Reserve Bank maintains Book-entry Securities accounts (including Book-entry Enterprise Securities) and transfers Book-entry Securities (including Book-entry Enterprise Securities).

Participant means a Person or Enterprise that maintains a Participant's Securities Account with a Federal Reserve Bank.

Person, as used in this part, means and includes an individual, corporation, company, governmental entity, association, firm, partnership, trust, estate, representative, and any other similar organization, but does not mean or include the United States, an Enterprise, or a Federal Reserve Bank.

Revised Article 8 has the same meaning as in 31 CFR 357.2.

Securities Documentation means the applicable statement of terms, trust indenture, securities agreement or other documents establishing the terms of a Book-entry Enterprise Security.

Security means any mortgage participation certificate, note, bond, debenture, evidence of indebtedness, collateral-trust certificate, transferable share, certificate of deposit for a security, or, in general, any interest or instrument commonly known as a ''security''.

Transfer message means an instruction of a Participant to a Federal Reserve Bank to effect a transfer of a Book-entry Security (including a Book-entry Enterprise Security) maintained in the Book-entry System, as set forth in Federal Reserve Bank Operating Circulars.

§ 1249.11 Maintenance of Enterprise Securities.

An Enterprise Security may be maintained in the form of a Definitive Enterprise Security or a Book-entry Enterprise Security. A Book-entry Enterprise Security shall be maintained in the Book-entry System.

§ 1249.12 Law governing rights and obligations of United States, Federal Reserve Banks, and Enterprises; rights of any person against United States, Federal Reserve Banks, and Enterprises; law governing other interests.

(a) Except as provided in paragraph (b) of this section, the following rights and obligations are governed solely by the book-entry regulations contained in this part, the Securities Documentation, and Federal Reserve Bank Operating Circulars (but not including any choice of law provisions in the Securities Documentation to the extent such provisions conflict with the Book-entry regulations contained in this part):

(1) The rights and obligations of an Enterprise and the Federal Reserve Banks with respect to:

(i) A Book-entry Enterprise Security or Security Entitlement; and

(ii) The operation of the Book-entry System as it applies to Enterprise Securities; and

(2) The rights of any Person, including a Participant, against an Enterprise and the Federal Reserve Banks with respect to:

(i) A Book-entry Enterprise Security or Security Entitlement; and

(ii) The operation of the Book-entry System as it applies to Enterprise Securities;

(b) A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Participant and that is not recorded on the books of a Federal Reserve Bank pursuant to §1249.13(c)(1), is governed by the law (not including the conflict-of-law rules) of the jurisdiction where the head office of the Federal Reserve Bank maintaining the Participant's Securities Account is located. A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Person that is not a Participant, and that is not recorded on the books of a Federal Reserve Bank pursuant to §1249.13(c)(1), is governed by the law determined in the manner specified in paragraph (d) of this section.

(c) If the jurisdiction specified in the first sentence of paragraph (b) of this section is a State that has not adopted Revised Article 8, then the law specified in paragraph (b) of this section shall be the law of that State as though Revised Article 8 had been adopted by that State.

(d) To the extent not otherwise inconsistent with this part, and notwithstanding any provision in the Securities Documentation setting forth a choice of law, the provisions set forth in 31 CFR 357.11 regarding law governing other interests apply and shall be read as though modified to effectuate the application of 31 CFR 357.11 to the Enterprises.

§ 1249.13 Creation of Participant's Security Entitlement; security interests.

(a) A Participant's Security Entitlement is created when a Federal Reserve Bank indicates by book-entry that a Book-entry Enterprise Security has been credited to a Participant's Securities Account.

(b) A security interest in a Security Entitlement of a Participant in favor of the United States to secure deposits of public money, including without limitation deposits to the Treasury tax and loan accounts, or other security interest in favor of the United States that is required by Federal statute, regulation, or agreement, and that is marked on the books of a Federal Reserve Bank is thereby effected and perfected, and has priority over any other interest in the securities. Where a security interest in favor of the United States in a Security Entitlement of a Participant is marked on the books of a Federal Reserve Bank, such Federal Reserve Bank may rely, and is protected in relying, exclusively on the order of an authorized representative of the United States directing the transfer of the security. For purposes of this paragraph, an ''authorized representative of the United States'' is the official designated in the applicable regulations or agreement to which a

Federal Reserve Bank is a party, governing the security interest.

(c)(1) An Enterprise and the Federal Reserve Banks have no obligation to agree to act on behalf of any Person or to recognize the interest of any transferee of a security interest or other limited interest in favor of any Person except to the extent of any specific requirement of Federal law or regulation or to the extent set forth in any specific agreement with the Federal Reserve Bank on whose books the interest of the Participant is recorded. To the extent required by such law or regulation or set forth in an agreement with a Federal Reserve Bank, or the Federal Reserve Bank Operating Circular, a security interest in a Security Entitlement that is in favor of a Federal Reserve Bank, an Enterprise, or a Person may be created and perfected by a Federal Reserve Bank marking its books to record the security interest. Except as provided in paragraph (b) of this section, a security interest in a Security Entitlement marked on the books of a Federal Reserve Bank shall have priority over any other interest in the securities.

(2) In addition to the method provided in paragraph (c)(1) of this section, a security interest, including a security interest in favor of a Federal Reserve Bank, may be perfected by any method by which a security interest may be perfected under applicable law as described in §1249.12(b) or (d). The perfection, effect of perfection or nonperfection and priority of a security interest are governed by such applicable law. A security interest in favor of a Federal Reserve Bank shall be treated as a security interest in favor of a clearing corporation in all respects under such law, including with respect to the effect of perfection and priority of such security interest. A Federal Reserve Bank Operating Circular shall be treated as a rule adopted by a clearing corporation for such purposes.

§1249.14 Obligations of Enterprises; no adverse claims.

(a) Except in the case of a security interest in favor of the United States or a Federal Reserve Bank or otherwise as provided in §1249.13(c)(1), for the purposes of this part, each Enterprise and the Federal Reserve Banks shall treat the Participant to whose Securities Account an interest in a Book-entry Enterprise Security has been credited as the person exclusively entitled to issue a Transfer Message, to receive interest and other payments with respect thereof and otherwise to exercise all the rights and powers with respect to such Security, notwithstanding any information or notice to the contrary. Neither the Federal Reserve Banks nor an Enterprise shall be liable to a Person asserting or having an adverse claim to a Security Entitlement or to a Book-entry Enterprise Security in a Participant's Securities Account, including any such claim arising as a result of the transfer or disposition of a Book-entry Enterprise Security by a Federal Reserve Bank pursuant to a Transfer Message that the Federal Reserve Bank reasonably believes to be genuine.

(b) The obligation of the Enterprise to make payments (including payments of interest and principal) with respect to Book-entry Enterprise Securities is discharged at the time payment in the appropriate amount is made as follows:

(1) Interest or other payments on Book-entry Enterprise Securities is either credited by a Federal Reserve Bank to a Funds Account maintained at such Federal Reserve Bank or otherwise paid as directed by the Participant.

(2) Book-entry Enterprise Securities are redeemed in accordance with their terms by a Federal Reserve Bank withdrawing the securities from the Participant's Securities Account in which they are maintained and by either crediting the amount of the redemption proceeds, including both redemption proceeds, where applicable, to a Funds Account at such Federal Reserve Bank or otherwise paying such redemption proceeds as directed by the Participant. No action by the Participant ordinarily is required in connection with the redemption of a Book-entry Enterprise Security.

§1249.15 Authority of Federal Reserve Banks.

(a) Each Federal Reserve Bank is hereby authorized as fiscal agent of the Enterprises to perform the following

functions with respect to the issuance of Book-entry Enterprise Securities offered and sold by an Enterprise to which this part applies, in accordance with the Securities Documentation, Federal Reserve Bank Operating Circulars, this part, and any procedures established by the Director consistent with these authorities:

(1) To service and maintain Book-entry Enterprise Securities in accounts established for such purposes;

(2) To make payments with respect to such securities, as directed by the Enterprise;

(3) To effect transfer of Book-entry Enterprise Securities between Participants' Securities Accounts as directed by the Participants;

(4) To effect conversions between Book-entry Enterprise Securities and Definitive Enterprise Securities with respect to those securities as to which conversion rights are available pursuant to the applicable Securities Documentation; and

(5) To perform such other duties as fiscal agent as may be requested by the Enterprise.

(b) Each Federal Reserve Bank may issue Federal Reserve Bank Operating Circulars not inconsistent with this part, governing the details of its handling of Book-entry Enterprise Securities, Security Entitlements, and the operation of the Book-entry System under this part.

§ 1249.16 Withdrawal of Eligible Book-entry Enterprise Securities for conversion to definitive form.

(a) Eligible Book-entry Enterprise Securities may be withdrawn from the Book-entry System by requesting delivery of like Definitive Enterprise Securities.

(b) A Federal Reserve Bank shall, upon receipt of appropriate instructions to withdraw Eligible Book-entry Enterprise Securities from book-entry in the Book-entry System, convert such securities into Definitive Enterprise Securities and deliver them in accordance with such instructions. No such conversion shall affect existing interests in such Enterprise Securities.

(c) All requests for withdrawal of Eligible Book-entry Enterprise Securities must be made prior to the maturity or date of call of the securities.

(d) Enterprise Securities which are to be delivered upon withdrawal may be issued in either registered or bearer form, to the extent permitted by the applicable Securities Documentation.

§ 1249.17 Waiver of regulations.

The Director reserves the right, in the Director's discretion, to waive any provision(s) of this part in any case or class of cases for the convenience of an Enterprise, the United States, or in order to relieve any person(s) of unnecessary hardship, if such action is not inconsistent with law, does not adversely affect any substantial existing rights, and the Director is satisfied that such action will not subject an Enterprise or the United States to any substantial expense or liability.

§ 1249.18 Liability of Enterprises and Federal Reserve Banks.

An Enterprise and the Federal Reserve Banks may rely on the information provided in a Transfer Message, and are not required to verify the information. An Enterprise and the Federal Reserve Banks shall not be liable for any action taken in accordance with the information set out in a Transfer Message, or evidence submitted in support thereof.

§ 1249.19 Additional provisions.

(a) *Additional requirements.* In any case or any class of cases arising under this part, an Enterprise may require such additional evidence and a bond of indemnity, with or without surety, as may in the judgment of the Enterprise be necessary for the protection of the interests of the Enterprise.

(b) *Notice of attachment for Enterprise Securities in Book-entry System.* The interest of a debtor in a Security Entitlement may be reached by a creditor only by legal process upon the Securities Intermediary with whom the debtor's securities account is maintained, except where a Security Entitlement is maintained in the name of a secured party, in which case the debtor's interest may be reached by legal process upon the secured party. These regulations do not purport to establish

whether a Federal Reserve Bank is required to honor an order or other notice of attachment in any particular case or class of cases.

PART 1250—FLOOD INSURANCE

Sec.
1250.1 Purpose.
1250.2 Procedural requirements.
1250.3 Civil money penalties.

AUTHORITY: 12 U.S.C. 4521(a)(4) and 4526; 28 U.S.C. 2461 note; 42 U.S.C. 4001 note; 42 U.S.C. 4012a(f)(3), (4), (5), (8), (9), and (10).

SOURCE: 74 FR 2349, Jan. 15, 2009, unless otherwise noted.

§ 1250.1 Purpose.

The purpose of this part is to set forth the responsibilities of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, Enterprises) under the Flood Disaster Protection Act of 1973 (FDPA), as amended (42 U.S.C. 4002 *et seq.*) and the procedures to be used by the Federal Housing Finance Agency (FHFA) in any proceeding to assess civil money penalties against an Enterprise.

§ 1250.2 Procedural requirements.

(a) *Procedures.* An Enterprise shall implement procedures reasonably designed to ensure for any loan that is secured by improved real estate or a mobile home located in an area that has been identified, at the time of the origination of the loan or at any time during the term of the loan, by the Director of the Federal Emergency Management Agency as an area having special flood hazards and in which flood insurance is available under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 *et seq.*), as amended and purchased by the Enterprise, the building or mobile home and any personal property securing the loan is covered for the term of the loan by flood insurance in an amount at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage made available with respect to the particular type of property under the National Flood Insurance Act of 1968, as amended.

(b) *Applicability.* (1) Paragraph (a) of this section shall apply only with respect to any loan made, increased, extended, or renewed after September 22, 1995.

(2) Paragraph (a) of this section shall not apply to any loan having an original outstanding balance of $5,000 or less and a repayment term of one year or less.

§ 1250.3 Civil money penalties.

(a) *In general.* If an Enterprise is determined by the Director of FHFA, or his or her designee, to have a pattern or practice of purchasing loans in violation of the procedures established pursuant to § 1250.2, the Director of FHFA, or his or her designee, may assess civil money penalties against such Enterprise in such amount or amounts as deemed to be appropriate under paragraph (c) of this section.

(b) *Notice and hearing.* A civil money penalty under this section may be assessed only after notice and an opportunity for a hearing on the record has been provided to the Enterprise.

(c) *Amount.* The maximum civil money penalty amount is $578 for each violation that occurs before January 15, 2021, with total penalties not to exceed $166,661. For violations that occur on or after January 15, 2021, the civil money penalty under this section may not exceed $585 for each violation, with total penalties assessed under this section against an Enterprise during any calendar year not to exceed $168,631.

(d) *Deposit of penalties.* Any penalties under this section shall be paid into the National Flood Mitigation Fund in accordance with section 1367 of the National Flood Insurance Act of 1968 (42 U.S.C. 4104d.), as amended.

(e) *Additional penalties.* Any penalty under this section shall be in addition to, and shall not preclude, any civil remedy, or criminal penalty otherwise available.

(f) *Statute of limitations.* No civil money penalty may be imposed under this section after the expiration of the four-year period beginning on the date of the occurrence of the violation for

which the penalty is authorized under this section.

[74 FR 2349, Jan. 15, 2009, as amended at 81 FR 8642, Feb. 22, 2016; 81 FR 43031, July 1, 2016; 83 FR 43968, Aug. 29, 2018; 84 FR 9704, Mar. 18, 2019; 85 FR 4905, Jan. 28, 2020; 86 FR 7496, Jan. 29, 2021]

PART 1251—CONTRIBUTIONS TO THE HOUSING TRUST AND CAPITAL MAGNET FUNDS

Sec.
1251.1 Purpose.
1251.2 Definitions.
1251.3 Prohibition on pass-through of cost of allocation; enforcement.
1251.4 Submission of information.

AUTHORITY: 12 U.S.C. 1452(c), 1718(b), 4511(b), 4513(a), 4514(a), 4526(a), and 4567.

SOURCE: 79 FR 74597, Dec. 16, 2014, unless otherwise noted.

§ 1251.1 Purpose.

The purpose of this part is to implement a prohibition against an Enterprise redirecting the cost of any allocation to the Housing Trust Fund or the Capital Magnet Fund to originators of mortgages purchased or securitized by an Enterprise.

§ 1251.2 Definitions.

The following definitions apply to the terms used in and related specifically to this part. Definitions of other terms may be found in 12 CFR part 1201, General Definitions Applying to All Federal Housing Finance Agency Regulations:

Capital Magnet Fund means that Fund established at section 1339(a) of the Safety and Soundness Act, 12 U.S.C. 4569(a).

Housing Trust Fund means that Fund established by section 1338(a) of the Safety and Soundness Act, 12 U.S.C. 4568(a).

§ 1251.3 Prohibition on pass-through of cost of allocation; enforcement.

(a) *In general.* No Enterprise shall redirect or pass through the cost of any allocation to the Housing Trust Fund or the Capital Magnet Fund required pursuant to section 1337(a) of the Safety and Soundness Act, 12 U.S.C. 4567(a), through increased charges or fees, or decreased premiums, or in any other manner, to the originators of mortgages purchased or securitized by the Enterprise.

(b) *Enforcement.* Compliance by each Enterprise with the foregoing prohibition shall be enforced under subpart 3 of part B of the Safety and Soundness Act, 12 U.S.C. 4581–89.

§ 1251.4 Submission of information.

The Director may issue guidance, orders, or notices on compliance with section 1337 and this part by the Enterprises, which may include information submissions by the Enterprises.

PART 1252—PORTFOLIO HOLDINGS

Sec.
1252.1 Enterprise portfolio holdings criteria.
1252.2 Effective duration.

AUTHORITY: 12 U.S.C. 4624.

SOURCE: 74 FR 5618, Jan. 30, 2009, unless otherwise noted.

§ 1252.1 Enterprise portfolio holding criteria.

The Enterprises are required to comply with the portfolio holdings criteria set forth in their respective Senior Preferred Stock Purchase Agreements with the Department of the Treasury, as they may be amended from time to time.

§ 1252.2 Effective duration.

This part shall be in effect for each Enterprise so long as—

(a) This part has not been superseded through amendment, and

(b) The Enterprise remains subject to the terms and obligations of the respective Senior Preferred Stock Purchase Agreement.

PART 1253—PRIOR APPROVAL FOR ENTERPRISE PRODUCTS

Sec.
1253.1 Purpose and authority.
1253.2 Definitions.
1253.3 Notice of new activity.
1253.4 New product approval.
1253.5 Confidential information.
1253.6 Certifying and nullifying an approval.
1253.7 Failure to comply.
1253.8 Availability of new product to an Enterprise after it has been approved for the other Enterprise.

AUTHORITY: 12 U.S.C. 4526; 12 U.S.C. 4541.

SOURCE: 74 FR 31604, July 2, 2009, unless otherwise noted.

§ 1253.1 Purpose and authority.

The purpose of this part is to establish policies and procedures implementing the prior approval authority for enterprise products, in accordance with section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) (12 U.S.C. 4541), as amended.

§ 1253.2 Definitions.

For purposes of this part:

Authorizing statute means, in the case of Fannie Mae, the Federal National Mortgage Association Charter Act (12 U.S.C. 1716 *et seq.*) and, in the case of Freddie Mac, the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451 *et seq.*).

Director means the Director of the Federal Housing Finance Agency or his or her designee.

Enterprise means the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac).

FHFA means the Federal Housing Finance Agency.

New activity means with respect to an Enterprise, any business line, business practice, or service, including guarantee, financial instrument, consulting, or marketing, that is proposed to be undertaken by the Enterprise either on a standalone basis or as an incident to providing one or more Enterprise products to the market, and which was—

(a) Not initially engaged in prior to July 30, 2008;

(b) Commenced by the Enterprise prior to July 30, 2008, but which, after July 30, 2008, the Enterprise ceased to engage in, and presently intends to resume; or

(c) Offered or engaged in by the Enterprise after July 30, 2008, at a significantly different level, or in a significantly different manner, in terms of the activity's effect on public interest or risk to the Enterprise or the mortgage finance or financial system.

The term ''new activity'' does not include—

(1) Any Enterprise business practice, transactions, or conduct performed solely as an incident to the administration of the Enterprise's internal affairs to conduct its business; or

(2) Any business practice or service undertaken by an Enterprise that is *de minimis* in scope, volume, risk, or duration.

New product means any activity that the Director determines merits public notice and comment on matters of compliance with the applicable authorizing statute, safety and soundness, or public interest. ''New product'' does not include—

(a) The automated loan underwriting system of an Enterprise in existence as of July 30, 2008, including any upgrade to the technology, operating system, or software to operate the underwriting system;

(b) Any modification to the mortgage terms and conditions or mortgage underwriting criteria relating to the mortgages that are purchased or guaranteed by the Enterprise, provided that such modifications do not alter the underlying transaction so as to include services or financing, other than residential mortgage financing;

(c) Any activity that is substantially similar to the activities described in paragraphs (a) or (b) of this section;

(d) Any activity that is substantially similar to an activity or product that has been approved in accordance with this part for either Enterprise; or

(e) Any activity that is substantially similar to an activity or product continuously undertaken by the other Enterprise since prior to July 30, 2008.

Substantially similar. In considering whether an activity is ''substantially similar'' to any activity described in section 1321(e)(1)(A) and (B) of the Safety and Soundness Act, 12 U.S.C. 4541(e)(1)(A) and in paragraphs (a) or (b) of this section under the definition of new product, or to any activity approved in accordance with this part, or continuously engaged in by the other Enterprise as referenced in paragraphs (d) and (e) of this section under the definition of new product, the Director

may consider if the activity in question—

(1) Is a product;

(2) Is authorized under the applicable authorizing statute;

(3) Represents an upgrade to the way an approved product is delivered;

(4) Poses a significant change in risk to the Enterprise or the mortgage finance system from a previously approved product or activity;

(5) Involves a significant change in terms, conditions, or limitations expressly contained in any prior approval granted under this part;

(6) Poses a significant change in its effect on the public interest compared to a previously approved product or activity;

(7) Poses a significant change from a previously approved product or activity and if so, does a tradeoff exist in the composite of risk, public interest, and safety and soundness elements in the proposed new activity;

(8) Is likely to have significantly more enterprise resources dedicated to it;

(9) Requires approval by regulators other than FHFA, including Federal, State, or local regulators;

(10) Involves new classes or types of borrowers, investors, or counterparties;

(11) Involves new classes or types of collateral; or

(12) Such other factor as the Director determines to be appropriate.

§ 1253.3 Notice of new activity.

(a) Before commencing a new activity, an Enterprise must submit a Notice of New Activity (Notice) to the FHFA, and either receive a determination that the new activity is not a new product, await passage of the 15 business-day period as described in paragraph (d) of this section, or, where FHFA determines the new activity to be a new product, await approval of the new product under § 1253.4. In addition, for any new activity that an Enterprise seeks to engage in which FHFA had previously approved in accordance with this part for the other Enterprise, or in which the other Enterprise had engaged continuously since prior to July 30, 2008, the Enterprise must submit a Notice to FHFA. In support of its Notice, the Enterprise shall submit information sufficient to allow the Director to make a determination on the Notice pursuant to section 1321 of the Safety and Soundness Act (12 U.S.C. 4541), as amended, including any information required by FHFA by regulation or otherwise. The Enterprise shall provide a thorough, meaningful, complete and specific description of the new activity such that the public will be able to provide fully informed comment on the new activity if FHFA determines the new activity to be a new product. Such information shall include that contained in the FHFA Notice Form and the Instructions for the FHFA Notice of New Activity Form (Notice Form Instructions) that appear in the appendix of this part. The Notice Form and Notice Form Instructions may be amended from time to time by written direction of the Director. Requests for confidential treatment for any portion of an Enterprise's submission must be made consistent with § 1253.5.

(b) FHFA will evaluate a Notice to establish whether the submission contains sufficient information for FHFA to make a determination whether the new activity is a new product subject to prior approval. Upon establishing that the Notice contains sufficient information, FHFA shall deem the submission complete and ''received'' for purposes of section 1321(e)(2)(B) of the Safety and Soundness Act (12 U.S.C. 4541(e)(2)(B)), and shall notify the Enterprise accordingly.

(c) No later than 15 business-days after the Notice is deemed completed and ''received'' for purposes of section 1321(e)(2)(B) of the Safety and Soundness Act (12 U.S.C. 4541(e)(2)(B)), the Director will make a written determination on the Notice, and shall notify the Enterprise accordingly. The Director may also approve the new activity subject to such terms, conditions, or limitations on the Enterprise's engagement in the new activity as the Director determines to be appropriate.

(d) If the Director fails to make a determination within the 15 business-day period specified in paragraph (c) of this section, the Enterprise may commence the new activity. The Director's failure to make a determination within the 15-day period does not limit or restrict

the Director's safety and soundness authority or the authority of the Director to review the new activity to determine whether the activity is consistent with the statutory mission of the Enterprise.

§ 1253.4 New product approval.

(a) *Public notice.* If the Director determines that the new activity is a new product, FHFA shall publish a public notice soliciting comments on the proposed product for a 30 calendar-day period.

(1) The public notice will describe the new product and state the closing date of the public comment period. The public notice will provide instructions for submission of public comment.

(2) The Director will consider all public comments received by the closing date of the comment period.

(3) In computing the 30 calendar-day public comment period, FHFA excludes the day on which the public notice is published in the FEDERAL REGISTER, from which the period begins to run, and includes the last day of the period, regardless of whether it is a Saturday, Sunday, or legal holiday.

(b) *Director's determination.* (1) No later than 30 calendar-days after the end of the public comment period, the Director will provide the Enterprise with a written determination on whether it may proceed with the new product. The written determination will specify the grounds for the Director's determination.

(2) The Director will approve the new product if the Director determines that the new product complies with the applicable authorizing statute, is in the public interest, and is consistent with the safety and soundness of the Enterprise and the mortgage finance and financial system. The Enterprise may then offer the new product subject to any terms, conditions, or limitations as may be established by the Director.

(3) Among the factors that the Director may consider when determining whether a new product is in the public interest are—

(i) The degree to which the new product might reasonably be expected to advance any of the purposes of the Enterprise under the applicable authorizing statute;

(ii) The degree to which the new product serves underserved markets as set forth in section 1335 of the Safety and Soundness Act (12 U.S.C. 4565);

(iii) The degree to which the new product is being supplied or could be supplied by non-government-sponsored-enterprise firms;

(iv) Other alternatives for providing the new product;

(v) The degree to which the new product promotes competition in the marketplace or, to the contrary, would result in less competition and greater concentration of economic activity or risk;

(vi) The degree to which Enterprise provision of the new product overcomes natural market barriers or inefficiencies;

(vii) The degree to which Enterprise provision of the new product might raise or mitigate systemic risks to the mortgage, mortgage finance or other financial markets;

(viii) The degree to which the new product furthers fair housing; and

(ix) Such other factors determined appropriate by the Director.

(4) The Director will disapprove the new product if the Director determines that approval is inconsistent with applicable law, regulation, or FHFA policy thereunder, or contrary to public interest or the safety and soundness of the Enterprise or the mortgage finance or financial system. If the Director disapproves the new product, the Enterprise may not offer the new product.

(5) The Director may establish terms, conditions, or limitations on the Enterprise's offering of the new product to ensure that the product offering is consistent with applicable statutory and regulatory standards, FHFA policies, public interest, or the safety and soundness of the Enterprise or the mortgage finance or financial system.

(6) If the Director fails to make a determination within the 30 calendar-day period that begins on the day after the end of the public comment period, the Enterprise may offer the new product. The Director's failure to make a determination within such 30-day period does not limit or restrict the Director's safety and soundness authority or the authority of the Director to review the new product to determine that the

product is consistent with the statutory mission of the Enterprise.

(c) *Temporary approval.* (1) FHFA may approve a new product without first seeking public comments as described in §1253.4(c) if—

(i) The Enterprise submits a specific request for Temporary Approval that describes the exigent circumstances that make the delay associated with the 30-day public comment period contrary to the public interest and the Director determines that exigent circumstances exist and that delay associated with first seeking public comment would be contrary to the public interest; or

(ii) Notwithstanding the absence of a request by the Enterprise for Temporary Approval, the Director determines on his or her own initiative that there are exigent circumstances that make the delay associated with first seeking public comment contrary to the public interest.

(2) The Director may impose terms, conditions, or limitations on the Temporary Approval to ensure that the new product offering is consistent with applicable statutory and regulatory standards, FHFA policies, public interest, and the safety and soundness of the Enterprise or the mortgage finance system.

(3) If the Director grants Temporary Approval, the Director will notify the Enterprise in writing of the Director's decision, and include the period for which it is effective and any terms, conditions or limitations. Upon granting of Temporary Approval, FHFA will also publish the request for public comment to begin the process for permanent approval.

(4) If the Director denies a request for Temporary Approval, the Director will notify the Enterprise in writing of the Director's decision, and will evaluate the new product in accordance with paragraphs (a) through (c) of this section.

(d) *Additional information.* The Director may request any information in addition to that supplied in the completed Notice if, as a result of public comment or otherwise in the course of considering the Notice, the Director believes that the information is necessary for his or her decision. The Director may disapprove a new product if he or she does not receive the information requested from the Enterprise in sufficient time to permit adequate evaluation of the information within the time periods set forth in paragraph (c) of this section.

§1253.5 Confidential information.

(a) *Information presumed public.* FHFA will treat all information an Enterprise submits in a Notice as public information, except as provided in paragraphs (b) through (d) of this section. FHFA will also treat information provided by a commenter, in response to a notice requesting comment on an Enterprise new product, as public information, except as provided in paragraphs (b) through (d) of this section.

(b) *Confidential treatment request.* An Enterprise or commenter may designate specific information as confidential and request that it not be made publicly available. For any information that an Enterprise or commenter seeks confidential treatment, the Enterprise or commenter is required to submit a complete copy of the Notice or comment, with a specific request for confidential treatment. Simultaneously, the Enterprise or commenter is required to submit a copy of the Notice or comment containing only those portions for which no request for confidential treatment is made, and from which those portions for which confidential treatment is requested have been redacted. The Enterprise or commenter must specify the bases for designated information not being made public as set forth in paragraph (c) of this section.

(c) *Required information.* The Enterprise or commenter is required to provide the following information in support of its request for confidential treatment of the designated information—

(1) Identification of the specific information for which confidential treatment is sought, and the specific Notice for which the information is being submitted;

(2) Explanation of the bases for the proposed confidential treatment including, but not limited to, why the information is ''commercial or financial information obtained from a person

and privileged or confidential'' as that phrase is used in Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), and §1202.4(a)(4) of this chapter;

(3) Explanation of the relevance and necessity of the information to whether the Notice should be approved or denied;

(4) Explanation of how disclosure of the information would result in substantial harm to the competitive position of the Enterprise or commenter;

(5) Explanation of whether the information is available to the public and the extent of any previous disclosure to third parties;

(6) Justification of the time period during which the Enterprise or commenter asserts that the material should not be available for public disclosure; and

(7) Any other information that the Enterprise or commenter seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(d) *FHFA determination.* FHFA will determine whether the designated information may be withheld from public disclosure and will notify the Enterprise or commenter of the determination. In the event that FHFA determines the information may not be withheld from public disclosure, the Enterprise or commenter may withdraw the information or consent to public disclosure. Requests for confidential treatment that do not comply with paragraphs (b) and (c) of this section will not be considered.

§1253.6 Certifying and nullifying an approval.

(a) An Enterprise shall certify, through an executive officer, as that term is defined by §1770.3(g) of this title, that any filing or supporting material submitted to FHFA pursuant to regulations in this part contains no material misrepresentations or omissions. FHFA may review and verify any information filed in connection with a Notice. If FHFA discovers a material misrepresentation or omission after the Director has rendered a decision on the filing, FHFA may nullify any approval or modify the terms, conditions, and limitations to such approval. For purposes of this paragraph, an Enterprise's authority to offer a new product or engage in a new activity by reason of the Director's not having made an explicit determination within the statutory time period constitutes an approval.

(b) Any person responsible for any material misrepresentation or omission in a submission or supporting materials may be subject to enforcement action and other penalties, including criminal penalties provided in 18 U.S.C. 1001.

§1253.7 Failure to comply.

(a) Unless the Director otherwise informs the Enterprise in writing, an Enterprise must cease offering a new product or engaging in a new activity immediately upon discovering or receiving notice from the Director that the Enterprise has—

(1) Offered a new product or commenced a new activity without submitting a Notice;

(2) Offered a new product or commenced a new activity after submitting a Notice but before approval is granted, and before the expiration of the time provided for the Director to make a determination under §§1253.3 and 1253.4;

(3) Offered a new product after the Director disapproved it; or

(4) Failed to adhere to any terms, conditions or limitations established by the Director in his or her approval of a new product or activity.

(b) Within five (5) business-days of the discovery or notice of any of the events described in paragraph (a) of this section, the Enterprise must provide the Director a written description of the failure or failures of controls that resulted in the offering of the new product or commencement of the new activity in contravention of this regulation, and the steps that the Enterprise has taken or will take to remediate the control failures. The Enterprise must provide the board of directors of the Enterprise and chief risk officer, internal audit, and compliance officer of the Enterprise with a copy of the written description on the same date the description is provided to the Director of FHFA.

(c) In the event that the Enterprise elects to resubmit the Notice of a new

product or new activity that was undertaken in contravention of this regulation, the resubmission must provide sufficient documentation of the effectiveness of the remediation efforts described in paragraph (b) of this section.

(d) Failure to comply with paragraphs (a) or (b) of this section above may result in FHFA's taking enforcement action, including pursuant to 12 U.S.C. 4631 (orders to cease and desist), 12 U.S.C. 4632 (temporary orders to cease and desist), and 12 U.S.C. 4636 (civil money penalties).

§ 1253.8 Availability of new product to an Enterprise after it has been approved for the other Enterprise.

(a) If the Director approves a new product for one Enterprise or the new product is otherwise available to that Enterprise under §1253.4, the other Enterprise may also undertake that new product, subject to submitting a request to the Director in the form of a Notice under §1253.3 and approval by the Director.

(b) The Director may require such further information from the requesting Enterprise as he or she deems necessary to approve or deny the request. Approving the request does not require public notice and comment.

§ 1253.9 Preservation of authority.

(a) The Director's exercise of his or her authority pursuant to the prior approval authority for products under section 1321 of the Safety and Soundness Act (12 U.S.C. 4541), and this regulation and other issuances in no way restricts—

(1) The safety and soundness authority of the Director over all new and existing products or activities; or

(2) The authority of the Director to review all new and existing products or activities to determine that such products or activities are consistent with the statutory mission of an Enterprise.

APPENDIX TO PART 1253—PRIOR APPROVAL FOR ENTERPRISE PRODUCTS—INSTRUCTIONS AND NOTICE OF NEW ACTIVITY FORM

Appendix to Part 1253

PRIOR APPROVAL FOR ENTERPRISE PRODUCTS

INSTRUCTIONS for the NOTICE of NEW ACTIVITY FORM

INSTRUCTIONS FOR NNA SUBMISSION

GENERAL INSTRUCTIONS

The Notice of New Activity (NNA) submission addresses two functions of the Federal Housing Finance Agency—it provides information on activities that may constitute a new product or new activity under the Housing and Economic Recovery Act of 2008 (12 USC 4541) and on activities that do not constitute a new product subject to the approval provisions of the law, but represent an activity that merits safety and soundness review under multiple provisions of the Federal Housing Enterprises Financial Safety and Soundness Act (12 USC 4501 *et seq.*)

Once the submission is made, FHFA will first determine if the activity is a new product and will direct consideration of such product under the provisions of the statute and regulation, which may involve public comment. If the new activity is determined not to be a new product, then the information contained in the submission will be employed by FHFA for a review of safety and soundness matters as part of its routine supervisory program.

A. Notice of New Activity (NNA) Submission

1. *New Activity.* A new activity for purposes of this submission includes the planned deployment of a new activity that constitutes a new product under the approval provision of FHEFSSA as amended by HERA or a significant expansion or alteration of an existing activity or product that does not require approval under HERA amendments of 2008 but is to be reviewed under safety and soundness provisions of the Act. A new activity may include alteration of an existing activity in such a manner as to affect significantly the risk, management, capital effect, operational controls, legal effect, anticipated business impact on the Enterprise (dollar effect), and accounting or taxation for such activity. This will include a pilot program.

A new activity does not include a minor, non-substantive transaction or activity that does not involve significant credit, interest rate, operational (including internal control and accounting) or reputation risk separate and apart from an existing activity. In general, a new activity would not include an increase in an existing product or activity of less than a 25% investment increase. For

example, if an existing multi-family mortgage purchase activity will be altered to require collection and analysis of additional loan data to facilitate Enterprise purchases, even though the change may be labeled as "new" by the Enterprise in its communications, the Enterprise may inform FHFA that it does not constitute a new activity but rather an activity or product addition or enhancement. The Enterprises will work with examiners to assure clarity regarding whether an activity is new and fits within the Notice of New Activity (NNA) submission requirement.

2. *New Product.* A new product is determined by the Director of the Federal Housing Finance Agency (FHFA) in line with the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 and the FHFA new product regulation at 12 CFR part 1253.

A new product does not include: (a) the automated loan underwriting system of an Enterprise in existence as of July 30, 2008, including any upgrade to the technology, operating system, or software to operate the underwriting system; and (b) any modification to the mortgage terms and conditions or mortgage underwriting criteria relating to the mortgages that are purchased or guaranteed by the Enterprise, provided that such modifications do not alter the underlying transaction so as to include services or financing, other than residential mortgage financing; or (c) any activity that is substantially similar to the activities described in (a) and (b).

3. *Expanded activity or product.* In general, a significant expansion of an activity or product constitutes an expanded existing activity or product, subject to a submission requirement for a safety and soundness review, if it fits one or more of the following criteria:

-- expanded scope of an activity or product, including a significant increase in size, in risk levels (credit, interest rate, market or operational) or a significant change in activity or product limits or marketing;

-- movement from a pilot program or product test to a fully deployed activity or product; or

-- such other criteria as provided in writing by the Director.

4. *Consultation with FHFA.* Prior to submitting a NNA, an Enterprise may seek clarification that while an initiative meets one or more of the criteria for an expanded activity or product, the change does not meet a level of significance to justify filing a NNA or presents timing concerns that are not addressed under procedures set forth below.

B. Exemptions

The exemptions from submitting a NNA included in the definitions provided above do not exempt reporting or other communications to examiners or other offices under separate requests by or reporting requirements of FHFA.

C. Procedures and Content

1. *Submission to FHFA*

(a) *Normal Submission.* Completed notices of new business activities or products, or expansion or alteration of an existing activity or product, should be provided on a NNA to FHFA. If a determination is made that an activity represents a new product and that a public comment period is required, the Director shall so inform the Enterprise as soon as practicable. Unless notified otherwise in writing by FHFA, an Enterprise may not undertake a new activity until more than fifteen (15) business days after a completed notice was submitted to FHFA, or a new product until more than sixty (60) days after a determination that an activity represents a new product.

(b) *Temporary Approval.* An Enterprise may request temporary approval for a new product pursuant to 12 CFR 1253.4(c) upon exigent circumstances that make the delay associated with the 30-day public comment period contrary to the public interest. If an Enterprise requests temporary approval, it shall indicate such request on the NNA along with any supporting information. An Enterprise may request temporary approval for an expanded product or activity where circumstances exist meriting such temporary approval, such as a compelling business need, public interest, judicial order, regulatory directive from another federal agency or other emergency situation. Such request should be made at the time of submitting a NNA.

(c) *Confidentiality.* Information labeled confidential or proprietary contained in a NNA will be considered for such treatment by FHFA pursuant to 12 CFR 1253.5.

(d) *Completing NNA Form.*

(i) Provide a response or comment on every item in the Form. If an item on the Form is not applicable or relevant, state so and briefly explain why.

(ii) Responses or comments should be comprehensive; address all issues contained in an item.

(iii) Provide appropriate supporting documentation. Indicate on the form the number of the supporting item(s) and on the attached item(s) to which requirement the documentation refers.

(iv) If all items are not addressed, or if the information does not provide FHFA with sufficient bases upon which to make a determination, FHFA will not consider the Form received and will not process the Form.

(e) *Submitting the Form*

(i) Submit an electronic copy of the Form and supporting documents to: newproducts@fhfa.gov. Be sure to clearly label supporting documents and reference the item(s) to which they relate; and,

(ii) Submit hard copy of the Form and supporting documents to: Senior Associate Director for Housing Mission and Goals, Office of Housing Mission and Goals, Federal Housing Finance Agency, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

D. Supplemental Instructions

Name of Proposed Activity/New Product	Insert the name by which the Enterprise refers to the proposed new activity/new product.
Item 1	The indication that a new activity is or is not a new product should include detailed information in support of such a determination. Reference should be made to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, and to FHFA regulation on new products. Such supporting information should include a legal analysis and supporting historical information. Even if a new product determination has been previously made by FHFA, the Enterprise should note such determination and why the new activity does or does not fit within such prior determination as well as whether there are safety and soundness or charter matters that require additional consideration for the Enterprise to offer such activity or product. The description should address the factors the Director may consider when determining whether a new activity is "substantially similar" to the activities described in 12 USC 4541(e)(1)(A) and (B) or other activities that have been previously approved in accordance with 12 USC 4541 which include: (1) if the activity in question is a product; (2) whether the new activity is authorized under the Charter Act (Fannie Mae) or Corporation Act (Freddie Mac); (3) whether the activity in question represents an upgrade to the way an approved product is delivered; (4) whether the activity in question poses a significant change in risk to the Enterprise or mortgage finance system from a previously approved product or activity; (5) whether the activity in question involves a significant change in terms, conditions, or limitations expressly contained in any prior approval granted under this part; (6) whether the activity in question poses a significant change in its effect on the public interest compared to a previously approved product or activity; (7) the tradeoff between any combinations of changes in risk, public interest, and safety and soundness; (8) whether the activity in question is likely to require the dedication of significantly more Enterprise resources; (9) whether the activity in question requires approval by regulators other than FHFA; (10) whether the activity in question involves new classes or types of borrowers, investors, or counterparties or new classes or types of collateral; or (12) such other factors as FHFA determines appropriate.

Item 5	Information about the management structure should include names and titles. Organizational charts should be attached. Staffing plans should indicate authorized and on-board levels as of a stated date.
Item 6	The description should address the factors the Director may consider when determining whether the proposed new activity is in the public interest. These factors include: (1) the degree to which the proposed new activity might reasonably be expected to advance any of the four charter purposes of Fannie Mae or Freddie Mac; (2) the degree to which the activity serves underserved markets as set forth at 12 USC 4565; (3) the degree to which the activity is being supplied or could be supplied by non-government-sponsored-enterprise firms; (4) other alternatives for providing the service to the market; (5) the degree to which the new activity promotes competition in the marketplace or, to the contrary, would result in less competition and greater concentration of economic activity or risk; (6) the degree to which Enterprise provision of the service overcomes natural market barriers or inefficiencies; (7) the degree to which Enterprise provision of the activity might raise or mitigate systemic risks to mortgage and financial markets; (8) the degree to which the activity furthers fair housing; and (9) such other factor determined appropriate by FHFA.
Item 8	This includes applications for patents, and requires copies of correspondence FROM the Enterprise TO other regulators or foreign governments. "Foreign governments" includes agencies and regulatory bodies of foreign governments.
Item 15	The description should indicate whether and the extent to which the proposed new activity increases or decreases risk for each risk component (credit, market, model, governance (including reputation), and operational risk).

The instructions provided here and the information required by the FHFA Notice of New Activity Form may be modified by FHFA from time to time, and written notice will be provided in advance to the Enterprises of any such modification.

	FEDERAL HOUSING FINANCE AGENCY	**NNA NUMBER ASSIGNED** **NNA-F[redacted]-200 ☐ – ☐ ☐ ☐**

12 CFR Part 1253 – Appendix
NOTICE OF NEW ACTIVITY FORM
SEE INSTRUCTIONS FOR INFORMATION REQUIRED TO BE SUPPLIED ON THIS FORM

Enterprise: _____

Purpose of the Proposed New Activity/New Product/Expanded Activity Submission

The Notice of New Activity (NNA) submission addresses two functions of the Federal Housing Finance Agency—it provides information on activities that may constitute a new product or new activity under the Housing and Economic Recovery Act of 2008 (12 USC 4541) and on activities that do not constitute a new product subject to the approval provisions of the law, but represent an activity that merits safety and soundness review under multiple provisions of the Federal Housing Enterprises Financial Safety and Soundness Act (12 USC 4501 et seq.)

Once the submission is made, FHFA will first determine if the activity is a new product and will direct consideration of such product under the provisions of the statute and regulation, which may involve public comment. If the new activity is determined not to be a new product, then the information contained in the submission will be employed by FHFA for a review of safety and soundness matters as part of its routine supervisory program.

Enterprise Contact Information:

Name:
Title:
Telephone Number:
Email Address:

Name of the Proposed New Activity/New Product/Expanded Activity:

Description of the Proposed New Activity/New Product/Expanded Activity:

1. *Description of Activity/New Product.* Provide a complete and specific description of the proposed new activity, and provide the Enterprise's view of why this proposed new activity should or should not be considered a new product.

(For example, explain why an activity relates to an upgrade of the automated underwriting system in existence as of July 30, 2008, relates to a modification to mortgage terms and conditions without altering the underlying transaction or relates to any activity substantially similar to any existing activity, as provided under 12 USC 4541(e) and 12 CFR Part 1253).

[If the activity is considered a new product, insure that any information the Enterprise feels should not be made public is so designated with an explanation for such designation. Also, if the activity is considered a new product, please provide the Enterprise's view on whether the new product should be considered for temporary approval.]

NOTE: the term "new activity" as employed here, encompasses "new product." Also see definition of "new activity" in 12 CFR 1253.2.

2. *Business Rationale and intended market.* Describe the business rationale for the proposed new activity. If the proposed new activity represents a business line for the Enterprise, describe the business line, and the rationale for the business line, and what products are being offered or proposed to be offered under such business line. Also describe the intended market for the proposed activity, including any market research performed relating to the proposed activity.

3. *Unusual or Unique Characteristics.* Describe any unusual or unique characteristics of the activity, including those involving reputation risks.

4. *Projected Size and Start Date of the New Activity.* State the anticipated commencement date for the proposed new activity. Describe and provide analysis, including assumptions, development expenses, expectations for the impact of and projections for the projected quarterly size (for example, in terms of cost, personnel, volume of activity, or risk metrics) of the proposed new activity for the first 12 quarterly periods of deployment and projected profit and loss..

5. *Units and Personnel with Responsibility over the New Activity.* Describe the Enterprise business units(s) involved in conducting the proposed new activity, including any non-Enterprise affiliation or subsidiary relationships, and the roles of each. Describe the management structure, including proposed manager(s) of the proposed new activity; reporting lines, planned oversight, and review of the activity; and proposed staffing for the activity.

6. *Impact on Public Interest.* Describe the impact of the proposed new activity on the public interest compared to a previously approved activity. Provide sufficient information to address the factors the Director may consider when determining whether the proposed activity is in the public interest, including: (1) the degree to which the proposed product might reasonably be expected to advance any of the four charter purposes of Fannie Mae or Freddie Mac; (2) the degree to which the proposed product serves underserved markets

as set forth at 12 USC 4565; (3) the degree to which the proposed product is being supplied or could be supplied by non-government-sponsored-enterprise firms; (4) other alternatives for providing the service to the market; (5) the degree to which Enterprise provision of the service overcomes natural market barriers or inefficiencies; (6) the degree to which Enterprise provision of the proposed product might raise or mitigate systemic risks to mortgage and financial markets; and (7) the degree to which the proposed product furthers fair housing.

7. *Legal Analysis.* Provide a legal opinion on whether the proposed activity complies with the Enterprise's authorizing statute, does or does not constitute a new product and other legal matters relating to the deployment and offering of the new product.. Provide copies of legal opinions from in-house or outside counsel relating to the Enterprise's proposed activity. If the Enterprise is relying on the "necessary and incidental" authority, describe in detail how the proposed new activity is necessary and incidental to one or more specific charter authorities. Legal analysis should include other non-charter compliance matters. If legal analysis was provided for a similar activity such analysis may be appended with such additional analysis as is appropriate.

8. *Other Regulatory Applications.* Provide copies of all notice and/or application documents— including any application for patents– the Enterprise has submitted to other regulators (federal, state or local) or to foreign governments relating to the proposed new activity. Include all presentation documents, correspondence with the regulator or government pertaining to the application or notice, and all decisional documents issued by the regulator or foreign government.

9. *Relationships with non-secondary market participants.* Describe the extent to which the proposed new activity includes relationships with non-secondary market participants, including, but not limited to: borrowers, real estate brokers, housing counselors, mortgage brokers and government officials.

10. *Business Requirements.* Describe any business requirements for the proposed new activity, including for example, data processing systems, accounting systems, performance tracking systems, and interface capacity with other Enterprise systems and departments.

11. *Acquisition.* If an acquisition is involved, describe the financial features of the transaction and provide pro forma financials of the acquiree.

12. *Accounting Treatment.* Explain whether the proposed new activity is expected to have an accounting effect; explain any accounting treatment proposed for the new activity.

13. *Tax Implications.* Describe the anticipated tax impact of the proposed new activity, and provide analysis, including assumptions, expectations for the impact of, and projections for tax liabilities (credits) associated with the proposed new activity on a quarterly basis for the first 12 quarterly periods of the new activity's commencement.

14. *Earnings and Capital Implications.* Describe, explain and provide analysis, including assumptions, expectations for the impact of, and projections for the anticipated impact to earnings and capital of the proposed new activity on a quarterly basis for the first 12 quarterly periods of the new activity's commencement.

15. *Risk Implications.* Describe the impact of the proposed new activity on the risk profile of the Enterprise and on the mortgage finance system from a previously approved activity. Provide sufficient information to document whether the impact represents a material change to the Enterprise's risk profile.

16. *Performance reports and Risk Controls.* Describe the type of information that will be contained in the routine reports that will be generated to capture the performance of the proposed activity, and include prototype of such performance reports. Describe any and all routine and special controls in place or planned to be put in place for the proposed new activity. Include in the description: operational risk controls; credit risk controls; market risk controls; model risk controls; and governance (including reputation) risk controls. To the extent possible, quantify the risks associated with the proposed activity.

17. *Other Safety and Soundness Implications.* Describe how the proposed new activity is consistent with the safety and soundness of the Enterprise and the mortgage finance and financial system. Include information about the process the Enterprise went through to develop the proposed new activity and to obtain necessary internal approvals (including at the executive level, the executive committee level and/or Board of Directors level). Provide copies of any: presentations made to executives, executive committees or Board of Directors; minutes of meetings at which such presentations were made; and decision documents. FHFA will automatically consider such Board presentations, minutes, and decisions documents for confidential treatment under 12 CFR 1253.5.

CERTIFICATION:

To the best of my knowledge and belief, the information contained in this filing, including any supporting materials, contains no material misrepresentations or omissions, is true, correct and complete.

Signed: _____

Print Name: _____

Title: _____

Date: _____

PART 1254—VALIDATION AND APPROVAL OF CREDIT SCORE MODELS

Sec.

AUTHORITY: 12 U.S.C. 4511, 4513, 4526 and Sec. 310, Pub. L. 115–174, 132 Stat. 1296.

SOURCE: 84 FR 41904, Aug. 16, 2019, unless otherwise noted.

§ 1254.1 Purpose and scope.

(a) The purpose of this part is to set forth standards and criteria for the process an Enterprise must establish to validate and approve any credit score model that produces any credit score that the Enterprise requires in its mortgage purchase procedures and systems.

(b) The validation and approval process for a credit score model includes the following phases: Solicitation of Applications, Submission of Applications and Initial Review, Credit Score Assessment, and Enterprise Business Assessment.

§ 1254.2 Definitions.

For purposes of this part, the following definitions apply. Definitions of other terms may be found in 12 CFR part 1201, General Definitions Applying to All Federal Housing Finance Agency Regulations.

Credit score means a numerical value or a categorization created by a third party derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default.

Credit score model means a statistical tool or algorithm created by a third party used to produce a numerical value or categorization to predict the likelihood of certain credit behaviors.

Credit score model developer means any person with ownership rights in the intellectual property of a credit score model.

Days means calendar days.

Mortgage means a residential mortgage as that term is defined at 12 U.S.C. 1451(h).

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, or other legal entity.

§ 1254.3 Computation of time.

For purposes of this part, each time period begins on the day after the relevant event occurs *(e.g.*, the day after a submission is made) and continues through the last day of the relevant period. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next business day.

§ 1254.4 Requirements for use of a credit score.

(a) *Enterprise use of a credit score.* An Enterprise is not required to use a credit score for any business purpose. However, if an Enterprise conditions its purchase of a mortgage on the provision of a credit score for the borrower:

(1) The credit score must be derived from a credit score model that has been approved by the Enterprise in accordance with this part; and

(2) The Enterprise must provide for the use of the credit score by any automated underwriting system that uses a credit score and any other procedures and systems used by the Enterprise that use a credit score for mortgage purchases.

(b) *Replacement of credit score model.* An Enterprise may replace any credit score model then in use after a new credit score model has been approved in accordance with this part.

(c) *No right to continuing use.* Enterprise use of a particular credit score model does not create any right to or expectation of continuing, future, or permanent use of that credit score model by an Enterprise.

§ 1254.5 Solicitation of applications.

(a) *Required solicitations.* FHFA periodically will require the Enterprises to solicit applications from credit score model developers. FHFA will determine whether a solicitation should be initiated. FHFA will establish the solicitation requirement by notice to the Enterprises, which will include:

(1) The requirement to submit a Credit Score Solicitation to FHFA for review;

(2) A deadline for submission of the Credit Score Solicitation; and

(3) A timeframe for the solicitation period.

(b) *Credit Score Solicitation.* In connection with each required solicitation, an Enterprise must submit to FHFA a Credit Score Solicitation including:

(1) The opening and closing dates of the solicitation time period during which the Enterprise will accept applications from credit score model developers;

(2) A description of the information that must be submitted with an application;

(3) A description of the process by which the Enterprise will obtain data for the assessment of the credit score model;

(4) A description of the process for the Credit Score Assessment and the Enterprise Business Assessment; and

(5) Any other requirements as determined by the Enterprise.

(c) *Review by FHFA.* Within 45 days of an Enterprise submission of its Credit Score Solicitation to FHFA, FHFA will either approve or disapprove the Enterprise's Credit Score Solicitation. FHFA may extend the time period for its review as needed. FHFA may impose such terms, conditions, or limitations on the approval of a Credit Score Solicitation as FHFA determines to be appropriate.

(d) *Publication.* Upon approval by FHFA, the Enterprise must publish the Credit Score Solicitation on its website for at least 90 days prior to the start of the solicitation time period.

(e) *Initial solicitation.* Each Enterprise must submit its initial Credit Score Solicitation to FHFA within 60 days of the effective date of this regulation. The initial solicitation time period will begin on a date determined by FHFA and will extend for 120 days.

§ 1254.6 Submission and initial review of applications.

(a) *Application requirements.* Each application submitted in response to a Credit Score Solicitation must meet the requirements set forth in the Credit Score Solicitation to which it responds. Each application must include the following elements, and any additional requirements that may be set forth in the Credit Score Solicitation:

(1) *Application fee.* Each application must include an application fee established by the Enterprise. An Enterprise may address conditions for refunding a portion of a fee in the Credit Score Solicitation. The application fee is intended to cover the direct costs to the Enterprise of conducting the Credit Score Assessment.

(2) *Fair lending certification and compliance.* Each application must address compliance of the credit score model and credit scores produced by it with federal fair lending requirements, including information on any fair lending testing and evaluation of the model conducted. Each application must include a certification that no characteristic that is based directly on or is highly correlated solely with a classification prohibited under the Equal Credit Opportunity Act (15 U.S.C. 1691(a)(1)), the Fair Housing Act (42 U.S.C. 3605(a)), or the Safety and Soundness Act (12 U.S.C. 4545(1)) was used in the development of the credit score model or is used as a factor in the credit score model to produce credit scores.

(3) *Use of model by industry.* Each application must demonstrate use of the credit score by creditors to make a decision whether to extend credit to a prospective borrower. An Enterprise may address criteria for such demonstration in the Credit Score Solicitation. An Enterprise may permit such demonstration of use to include submission of testimonials by creditors (mortgage or non-mortgage) who use the applicant's credit score when making a determination to approve the extension of credit.

(4) *Qualification of credit score model developer.* Each application must include any information that an Enterprise may require to evaluate the credit score model developer (*i.e.*, relevant experience and financial capacity). Such information must include a detailed description of the credit score model developer's:

(i) Corporate structure, including any business relationship to any other person through any degree of common ownership or control;

(ii) Governance structure; and

(iii) Past financial performance.

(5) *Other requirements.* Each application must include any other information an Enterprise may require.

(b) *Historical consumer credit data.* An Enterprise may obtain any historical consumer credit data necessary for the Enterprise to test a credit score model's historical record of measuring and predicting default rates and other credit behaviors. An Enterprise may assess the applicant for any costs associated with obtaining or receiving such data unless such costs were included in the up-front application fee.

(c) *Acceptance of applications.* Each application submitted in response to a Credit Score Solicitation within the solicitation time period must be reviewed for acceptance by the Enterprise.

(1) *Notice of status.* Within 60 days of an applicant's submission, the Enterprise must provide the applicant with an Application Status Notice, which will indicate whether the application requires additional information to be provided by the applicant. An applicant may submit additional information through the end of the solicitation period.

(2) *Complete application.* Completeness of an application will be determined by the Enterprise. An application is complete when an Enterprise determines that required information has been received by the Enterprise from the applicant and from any third party. Information from a third party for a specific application may be received by the Enterprise after the solicitation period closes. The Enterprise must notify the applicant upon determining that the application is complete with a Complete Application Notice.

§ 1254.7 Credit Score Assessment.

(a) *Requirement for Credit Score Assessment.* An Enterprise will undertake a Credit Score Assessment of each application that the Enterprise determines to be complete. An Enterprise must determine whether an application passes the Credit Score Assessment.

(b) *Testing for Credit Score Assessment.* An Enterprise must conduct statistical tests for accuracy and reliability that use one or more industry standard statistical tests for demonstrating divergence among borrowers' propensity to repay using the industry standard definition of default, applied to mortgages purchased by an Enterprise (including subgroups), as identified by the Enterprise.

(c) *Criteria for Credit Score Assessment.* The Credit Score Assessment is based on the following criteria:

(1) *Testing for accuracy.* A credit score model is accurate if it produces a credit score that appropriately reflects a borrower's propensity to repay a mortgage loan in accordance with its terms, permitting a credit score user to rank order the risk that the borrower will not repay the obligation in accordance with its terms relative to other borrowers.

(i) *Initial Credit Score Assessment.* For the Credit Score Assessment of applications submitted in response to the initial solicitation under §1254.5(e), a credit score model meets the test for accuracy if it produces credit scores that meet a benchmark established by the Enterprise in the initial Credit Score Solicitation, as demonstrated by appropriate testing.

(ii) *Subsequent Credit Score Assessments.* For the Credit Score Assessment of applications submitted in response to any later solicitation under this part, a credit score model meets the test for accuracy if it produces credit scores that are more accurate than the credit scores produced by any credit score model that is required by the Enterprise at the time the test is conducted, as demonstrated by appropriate testing.

(2) *Testing for reliability.* A credit score model is reliable if it produces credit scores that maintain accuracy through the economic cycle. The Credit Score Assessment must evaluate

whether a new credit score model produces credit scores that are at least as reliable as the credit scores produced by any credit score model that is required by the Enterprise at the time the test is conducted, as demonstrated by appropriate testing. Testing for reliability must demonstrate accuracy at a minimum of two points in the economic cycle when applied to mortgages purchased by an Enterprise (including subgroups), as identified by the Enterprise.

(3) *Testing for integrity.* A credit score model has integrity if, when producing a credit score, it uses relevant data that reasonably encompasses the borrower's credit history and financial performance. The Credit Score Assessment must evaluate whether a credit score model applicant has demonstrated that the model has integrity, based on appropriate testing or requirements identified by the Enterprise (which may address, for example, the level of aggregation of data or whether observable data has been omitted or discounted when producing a credit score).

(4) *Other requirements.* An Enterprise may establish requirements for the Credit Score Assessment in addition to the criteria established by FHFA.

(c) *Third-party testing.* Testing required for the Credit Score Assessment may be conducted by:

(1) An Enterprise; or

(2) An independent third party selected or approved by an Enterprise.

(d) *Timing of Credit Score Assessment.* (1) An Enterprise must notify the applicant when the Enterprise begins the Credit Score Assessment. The Credit Score Assessment will begin no earlier than the close of the solicitation time period, unless FHFA has determined that an Enterprise should begin a Credit Score Assessment sooner. The Credit Score Assessment will extend for 180 days. FHFA may authorize not more than two extensions of time for the Credit Score Assessment, which shall not exceed 30 days each, upon a written request and showing of good cause by the Enterprise.

(2) An Enterprise must provide notice to the applicant within 30 days of a determination that the application has passed the Credit Score Assessment.

§ 1254.8 Enterprise Business Assessment.

(a) *Requirement for Enterprise Business Assessment.* An Enterprise will undertake an Enterprise Business Assessment of each application that the Enterprise determines to have passed the Credit Score Assessment. An Enterprise must determine whether an application passes the Enterprise Business Assessment.

(b) *Criteria for Enterprise Business Assessment.* The Enterprise Business Assessment is based on the following criteria:

(1) *Accuracy; reliability.* The Enterprise Business Assessment must evaluate whether a new credit score model produces credit scores that are more accurate than and at least as reliable as credit scores produced by any credit score model currently in use by the Enterprise. This evaluation must consider credit scores as used by the Enterprise within its systems or processes that use a credit score for mortgage purchases.

(2) *Fair lending assessment.* The Enterprise Business Assessment must evaluate the fair lending risk and fair lending impact of the credit score model in accordance with standards and requirements related to the Equal Credit Opportunity Act (15 U.S.C. 1691(a)(1)), the Fair Housing Act (42 U.S.C. 3605(a)), and the Safety and Soundness Act (12 U.S.C. 4545(1)) (including identification of potential impact, comparison of the new credit score model with any credit score model currently in use, and consideration of potential methods of using the new credit score model). This evaluation must consider credit scores as used by the Enterprise within its systems or processes that use a credit score for mortgage purchases. The fair lending assessment must also consider any impact on access to credit related to the use of a particular credit score model.

(3) *Impact on Enterprise operations and risk management, and impact on industry.* The Enterprise Business Assessment must evaluate the impact using the credit score model would have on Enterprise operations (including any impact on purchase eligibility criteria and loan pricing) and risk management

(including counterparty risk management) in accordance with standards and requirements related to prudential management and operations and governance set forth at parts 1236 and 1239 of this chapter. This evaluation must consider whether the benefits of using credit scores produced by that model can reasonably be expected to exceed the adoption and ongoing costs of using such credit scores, considering projected benefits and costs to the Enterprises. The Enterprise Business Assessment must evaluate the impact of using the credit score model on industry operations and mortgage market liquidity, including costs associated with implementation of a newly approved credit score. This evaluation must consider whether the benefits of using credit scores produced by that model can reasonably be expected to exceed the adoption and ongoing costs of using such credit scores, considering projected benefits and costs to the Enterprises and borrowers, including market liquidity and cost and availability of credit.

(4) *Competitive effects.* The Enterprise Business Assessment must evaluate whether using the credit score model could have an impact on competition in the industry. This evaluation must consider whether use of a credit score model could have an impact on competition due to any ownership or other business relationship between the credit score model developer and any other institution.

(5) *Third-Party Provider Review.* The Enterprise Business Assessment must evaluate the credit score model developer under the Enterprise standards for approval of third-party providers.

(6) *Other requirements.* An Enterprise may establish requirements for the Enterprise Business Assessment in addition to the criteria established by FHFA.

(c) *Timing of Enterprise Business Assessment.* The Enterprise Business Assessment must be completed within 240 days.

(d) *FHFA Evaluation.* FHFA will conduct an independent analysis of the potential impacts of any change to an Enterprise's credit score model. FHFA will initiate its analysis no later than the beginning of the Enterprise Business Assessment. Based on its analysis, FHFA may:

(1) Require an Enterprise to undertake additional analysis, monitoring, or reporting to further the purposes of this part;

(2) Require an Enterprise to permit the use of a single credit score model or multiple credit score models; or

(3) Require any other change to an Enterprise program, policy, or practice related to the Enterprise's use of credit scores.

§ 1254.9 Determinations on applications.

(a) *Enterprise determinations subject to prior review and approval by FHFA.* An Enterprise must submit to FHFA a proposed determination of approval or disapproval for each application. Within 45 days of an Enterprise submission, FHFA must approve or disapprove the Enterprise's proposed determination. FHFA may extend the time period for its review as needed. FHFA may impose such terms, conditions, or limitations on the approval or disapproval of the Enterprise's proposed determination as FHFA determines to be appropriate.

(b) *Approval of a credit score model.* If an Enterprise approves an application for a credit score model following FHFA review of its proposed determination, the Enterprise must implement the credit score model in its mortgage purchase systems that use a credit score for mortgage purchases. The Enterprise must provide written notice to the applicant and the public within 30 days after the FHFA decision on the proposed determination.

(c) *Disapproval of a credit score model.* If an Enterprise disapproves an application for a credit score model following FHFA review of its proposed determination, the Enterprise must provide written notice to the applicant within 30 days after the FHFA decision on the proposed determination. An application may be disapproved under this section at any time during the validation and approval process based on any of the criteria identified in the Credit Score Solicitation. The notice to the applicant must provide a description of the reasons for disapproval.

§ 1254.10 Withdrawal of application.

At any time during the validation and approval process, an applicant may withdraw its application by notifying an Enterprise. The Enterprise may, in its sole discretion, determine whether to return any portion of the application fee paid by the applicant.

§ 1254.11 Pilot programs.

(a) *Pilots permitted; duration of pilots.* An Enterprise may undertake pilot programs to evaluate credit score models. If a pilot program involves a credit score model not in current use by an Enterprise, the credit score model is not required to be approved under this part.

(b) *Prior notice to FHFA.* Before commencing a pilot program, an Enterprise must submit the proposed pilot program to FHFA for review and approval. The Enterprise's submission to FHFA must include a complete and specific description of the pilot program, including its purpose, duration, and scope. FHFA may impose such terms, conditions, or limitations on the pilot program as FHFA determines to be appropriate.

SUBCHAPTER D—FEDERAL HOME LOAN BANKS

PART 1260—SHARING OF INFORMATION AMONG FEDERAL HOME LOAN BANKS

Sec.

AUTHORITY: 12 U.S.C. 1440a, 4511 and 4513.

SOURCE: 78 FR 73413, Dec. 6, 2013, unless otherwise noted.

§ 1260.1 Definitions.

As used in this part:

Non-public information has the meaning set forth in §1214.1 of this chapter.

Proprietary information means trade secrets, or privileged or confidential commercial or financial information that, if shared among the Banks and the Office of Finance as provided under this part, would likely cause substantial competitive harm to the Bank to which the information pertains.

§ 1260.2 Bank information to be shared.

(a) *General.* In order to enable each Bank to evaluate the financial condition of any one or more of the other Banks and the Bank System, FHFA shall distribute to each Bank and to the Office of Finance, or shall require each Bank to distribute directly to each other Bank and the Office of Finance, such categories of financial and supervisory information regarding each Bank and the Bank system as it determines to be appropriate, subject to the requirements of this part.

(b) *Notice.* FHFA shall prepare and issue to each Bank and the Office of Finance a notice setting forth the categories of information to be distributed, which it shall review from time to time and revise as necessary to ensure that the information distributed remains useful to the Banks in evaluating the financial strength of the other Banks and the Bank System. Prior to issuing a new or revised notice, FHFA shall notify each Bank and the Office of Finance of its proposed contents and allow them a reasonable period within which to comment.

(c) *Director's orders.* The Director or his designee may issue such orders as are necessary to effect the distribution of the information set forth in the notice issued under paragraph (b) of this section and to carry out the provisions of this part.

§ 1260.3 Requests to withhold proprietary information.

(a) *General.* A Bank may request in writing that FHFA withhold from distribution, or determine that the Bank may withhold from distribution, particular information relating to the Bank that may otherwise be subject to distribution under §1260.2 on the basis that it is proprietary information and the public interest requires that it not be shared. Any such request shall identify the particular information the Bank believes should not be distributed and provide support for the assertions that it is proprietary information and that withholding it from the other Banks and the Office of Finance is necessary to protect the public interest.

(b) *Timing of requests.* (1) *General.* Unless otherwise specified as described in paragraph (b)(2) of this section, the period within which a Bank may make a request to withhold proprietary information under paragraph (a) of this section shall be as follows:

(i) For information that a Bank submits to FHFA, the request shall be delivered to FHFA no later than the time at which the Bank submits the subject information to FHFA.

(ii) For information that FHFA creates (not including compilations of data submitted by the Banks), prior to distributing any information relating to a particular Bank, FHFA shall provide that Bank with a copy of the information to be distributed, after which the Bank shall have ten (10) business days within which to deliver the request to FHFA.

(iii) For information that a Bank is required to distribute directly to the other Banks and the Office of Finance,

the request shall be delivered to FHFA no later than ten (10) business days prior to the date on which the Bank would otherwise be required to distribute the information.

(2) *As otherwise specified by FHFA.* Any notice issued by FHFA under §1260.2(b) may establish requirements for the timing of requests to withhold proprietary information that are different from those specified under paragraph (b)(1) of this section for any category of information to be distributed thereunder. In establishing such requirements, FHFA shall give due regard to the volume and complexity of the information to be reviewed, the Bank's existing familiarity with the information, the frequency of submission or distribution of the information, the likelihood that the information will contain proprietary information, and the effect that any delay in the distribution of the information would have on the fulfillment of the purposes of section 20A(a) of the Bank Act.

(c) *Determination and notice by FHFA.* After receiving a written request that meets the requirements of paragraphs (a) and (b) of this section, the Director or his designee shall promptly determine whether FHFA will, or the Bank may, withhold any information from distribution pursuant to the request, which determination shall be final. FHFA shall promptly notify the affected Bank of that determination and shall not distribute any information that is the subject of the request until it has provided the required notice to the Bank.

§1260.4 Timing and form of information distribution.

(a) *Timing of distribution by FHFA.* FHFA may distribute information as provided in the notice issued under §1260.2(b) after the expiration of the applicable time period specified in §1260.3(b) unless, within that time period, the affected Bank has filed with FHFA a written request to withhold particular proprietary information that meets the requirements of §1260.3(a). When a Bank has filed such a request, FHFA shall not distribute the information that is the subject of the request until the Director or his designee has made the determination and provided the notice required by §1260.3(c) and shall distribute or withhold the subject information in conformity with that determination.

(b) *Timing of distribution by Banks.* A Bank that is required to distribute information directly to the other Banks and the Office of Finance shall distribute that information at the time specified in the notice issued under §1260.2(b) unless, within the time period specified in §1260.3(b)(1)(iii), the Bank has submitted to FHFA a request to withhold particular proprietary information that meets the requirements of §1260.3(a). If the Bank has filed such a request, it need not distribute the information that is the subject of the request until the Director or his designee has made the determination and provided the notice required by §1260.3(c). Thereafter, the Bank shall distribute or withhold the subject information in conformity with that determination.

(c) *Form.* FHFA may distribute information, or require a Bank to distribute information, under this part in either tangible or electronic form, as it deems appropriate.

§1260.5 Control and disclosure of shared information.

(a) *No waiver of privilege.* The release of information under this part does not constitute a waiver by FHFA of any privilege, or of its right to control, supervise or impose limitations on the subsequent use and disclosure of any information concerning a Bank. To the extent that any information provided to a Bank or the Office of Finance pursuant to this part qualifies as non-public information under part 1214 of this chapter, that information shall continue to qualify as such and shall continue to be subject to the restrictions on disclosure set forth in part 1214, provided that a Bank shall not be deemed to have violated any provision of §1214.3 of this chapter by disclosing in its filings with the SEC non-public information about another Bank that was obtained pursuant to this part if the disclosure is limited to a recital of the relevant factual content of the underlying information and the Bank has provided the notice required by paragraph (b) of this section.

(b) *Disclosures under the Federal securities laws.* If a Bank determines in good faith that it is required by any applicable provision of the 1934 Act or of 17 CFR chapter II to disclose non-public information relating to another Bank that it has received pursuant to this part, it shall provide to FHFA and to the Bank to which the information pertains prior written notice of such determination and of the content and anticipated timing of the disclosure, which notice shall be provided as far in advance of the anticipated disclosure as is feasible under the circumstances.

(c) *Safeguarding of information.* A Bank may use non-public information distributed pursuant to this part only for the purposes described in section 20A(a) of the Bank Act. Except as otherwise provided in this part, neither the Office of Finance, nor any Bank, nor any officer, director or employee thereof, may disclose or permit the use or disclosure of any non-public information regarding another Bank received pursuant to this part in any manner or for any purpose. Each Bank and the Office of Finance shall implement policies and procedures to prevent the improper disclosure of such information and to limit the access of its personnel to such information, which policies and procedures shall be no less stringent than those that apply to the entity's own confidential and supervisory information.

(d) *Information regarding the Office of Finance.* A Bank president that receives any information regarding the Office of Finance in his or her capacity as a member of the board of directors of the Office of Finance may share the information with the board of directors of the Bank at which he or she is employed, as well as with the appropriate officers and employees of the Bank, subject to the limitations of this part.

PART 1261—FEDERAL HOME LOAN BANK DIRECTORS

Subpart A—Definitions

Sec.

Subpart B—Federal Home Loan Bank Boards of Directors: Eligibility and Elections

Subpart C—Federal Home Loan Bank Directors' Compensation and Expenses

Subpart D [Reserved]

AUTHORITY: 12 U.S.C. 1426, 1427, 1432, 4511 and 4526.

SOURCE: 73 FR 55715, Sept. 26, 2008, unless otherwise noted.

Subpart A—Definitions

SOURCE: 75 FR 17039, May 5, 2010, unless otherwise noted.

§ 1261.1 [Reserved]

Subpart B—Federal Home Loan Bank Boards of Directors: Eligibility and Elections

§ 1261.2 Definitions.

As used in this Subpart B:

Advisory Council means the Advisory Council each Bank is required to establish pursuant to section 10(j)(11) of the Bank Act (12 U.S.C. 1430(j)(11)), and part 1291 of this chapter.

Bona fide resident of a Bank district means an individual who:

(1) Maintains a principal residence in the Bank district; or

(2) If serving as an independent director, owns or leases in his or her own name a residence in the Bank district and is employed in a voting state in the Bank district.

FHFA ID number means the number assigned to a member by FHFA and used by FHFA and the Banks to identify a particular member.

Independent directorship means a directorship, as defined by section 7(a)(4)(A) of the Bank Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members at large by an individual having the qualifications specified by section 7(a)(3)(B)(i) or (ii), 12 U.S.C. 1427(a)(3)(B)(i) or (ii).

Member directorship means a directorship, as defined by section 7(a)(4)(A) of the Bank Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members located in a particular State by an individual who is an officer or director of a member located in that State.

Method of equal proportions means the mathematical formula used by FHFA to allocate member directorships among the States in a Bank's district based on the relative amounts of Bank stock required to be held as of the record date by members located in each State.

Public interest director means an individual serving in a public interest directorship.

Public interest directorship means an independent directorship filled by an individual with more than four years of experience representing consumer or community interests in banking services, credit needs, housing or consumer financial protections.

Record date means December 31 of the calendar year immediately preceding the election year.

Voting State means the District of Columbia, Puerto Rico, or the State of the United States in which a member's principal place of business, as determined in accordance with 12 CFR part 1263, or any successor provision, is located as of the record date. The voting State of a member with a principal place of business located in the U.S. Virgin Islands as of the record date is Puerto Rico, and the voting State of a member with a principal place of business located in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands as of the record date is Hawaii.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51460, Oct. 7, 2009. Redesignated and amended at 75 FR 17039, 17040, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.3 General provisions.

(a) *Board size and composition.* Annually, the FHFA Director will determine the size of the board of directors for each Bank and will designate at least a majority, but no more than 60 percent, of the directorships as member directorships and the remainder as independent directorships. Annually, the board of directors of each Bank shall determine how many, if any, of the independent directorships with terms beginning the following January 1 shall be public interest directorships, ensuring that at all times the Bank will have at least two public interest independent directorships.

(b) *Term of directorships.* The term of office of each directorship shall be four years, except as adjusted pursuant to section 7(d) of the Bank Act (12 U.S.C 1427(d)) to achieve a staggered board, and shall commence on January 1 of the calendar year so designated by FHFA.

(c) *Annual elections.* Each Bank annually shall conduct an election the purpose of which is to fill all directorships designated by FHFA as commencing on January 1 of the calendar year immediately following the year in which such election is commenced. Subject to the provisions of the Bank Act and in accordance with the requirements of this subpart, the disinterested members of the board of directors of each Bank, or a committee of disinterested directors, shall administer and conduct the annual election of directors. In so doing, the disinterested directors may use Bank staff or independent contractors to perform ministerial and administrative functions concerning the elections process.

(d) *Location of members.* In accordance with section 7(c) of the Bank Act (12 U.S.C 1427(c)), for purposes of the election of member directors, a member is deemed to be located in its voting state, unless otherwise designated by the Director.

(e) *Dates.* If any date specified in this subpart for action by a Bank, or specified by a Bank pursuant to this subpart, falls on a Saturday, Sunday, or Federal holiday, the relevant time period is deemed to be extended to the next calendar day that is not a Saturday, Sunday, or Federal holiday.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51460, Oct. 7, 2009. Redesignated at 75 FR 17039, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.4 Designation of member directorships.

(a) *Capital stock reports.* (1) On or before April 10 of each year, each Bank shall deliver to FHFA a capital stock report that indicates, as of the record date, the number of members located in each voting State in the Bank's district, the number of shares of Bank stock that each member (identified by its FHFA ID number) was required to hold, and the number of shares of Bank stock that all members located in each voting State were required to hold. If a Bank has issued more than one class of stock, it shall report the total shares of stock of all classes required to be held by the members. The Bank shall certify to FHFA that, to the best of its knowledge, the information provided in the capital stock report is accurate and complete, and that it has notified each member of its minimum capital stock holding requirement as of the record date.

(2) The number of shares of Bank stock that any member was required to hold as of the record date shall be determined in accordance with the minimum investment established by the capital plan for that Bank.

(b) *Designation of member directorships.* Using the method of equal proportions, the Director annually will conduct a designation of member directorships for each Bank based on the number of shares of Bank stock required to be held by the members in each State as of the record date. If a Bank has issued more than one class of stock, the Director will designate the directorships for each State in that Bank district based on the combined number of shares required to be held by the members in that State. For purposes of conducting the designation, the number of shares of Bank stock required to be held by members as of that date shall be determined in accordance with the minimum investment established by the capital plan for that Bank. In all cases, the Director will designate the directorships by using the information provided by each Bank in its capital stock report required by paragraph (a)(1) of this section.

(c) *Allocation of directorships.* The member directorships designated by the Director will be allocated among the States by the Director in accordance with section 7(b) and (c) of the Bank Act.

(d) *Notification.* On or before June 1 of each year, FHFA will notify each Bank in writing of the total number of directorships established for the Bank and the number of member directorships designated as representing the members in each voting state in the Bank district.

(e) *Change of state.* If the annual designation of member directorships results in an existing directorship being redesignated as representing members in a different State, that directorship shall be deemed to terminate in the previous State as of December 31 of that year, and a new directorship to begin in the succeeding State as of January 1 of the next year. The new directorship shall be filled by vote of the members in the succeeding State and, in order to maintain the staggered terms of directorships, shall be adjusted to a term equal to the remaining term of the previous directorship if it had not been redesignated to another State.

[74 FR 51460, Oct. 7, 2009. Redesignated and amended at 75 FR 17039, 17040, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.5 Director eligibility.

(a) *Eligibility requirements for member directors.* Each member director, and each nominee to a member directorship, shall be:

(1) A citizen of the United States; and

(2) An officer or director of a member that is located in the district in which the Bank is located and that meets all minimum capital requirements established by its appropriate Federal banking agency or appropriate State regulator. In the case of a director elected by the members, the institution of

which the director is an officer or director must have been a member as of the record date. In the case of a director elected by a Bank's board of directors to fill a vacancy, the institution of which the director is an officer or director must be a member at the time the board acts.

(b) *State designation for member directors.* Each member director, and each nominee to a member directorship, shall be an officer or director of a member that is located in the State to which the Director has allocated such directorship under §1261.4(c).

(c) *Eligibility requirements for independent directors.* Each independent director, and each nominee to an independent directorship, shall be:

(1) A citizen of the United States; and

(2) A bona fide resident of the district in which the Bank is located.

(d) *Restrictions.* (1) A nominee is not eligible if he or she:

(i) Is an incumbent director, unless:

(A) The incumbent director's term of office would expire before the new term of office would begin; and

(B) The new term of office would not be barred by the term limit provision of section 7(d) of the Bank Act (12 U.S.C. 1427(d)); or

(ii) Is a former director whose service would be barred by the term limit provision of section 7(d) of the Bank Act.

(2) For purposes of applying the term limit provision of section 7(d) of the Bank Act (12 U.S.C. 1427(d)):

(i) A term of office that is adjusted after July 30, 2008 to a period of fewer than four years shall not be deemed to be a full term;

(ii) Any member director's election and service to a directorship with a three year term of office prior to July 30, 2008 shall be deemed to be a full term;

(iii) Any three-year term of office that ends immediately before a term of office that is adjusted after July 30, 2008 to a period of fewer than four years, and any term of office commencing immediately following such adjusted term of office, shall constitute consecutive full terms of office; and

(iv) Any period of time served by a director who has been elected by the board of directors to fill a vacancy shall not be deemed to constitute a full term.

(e) *Loss of eligibility.* A director shall become ineligible to remain in office if, during his or her term of office, the directorship to which he or she has been elected is eliminated. The incumbent director shall become ineligible after the close of business on December 31 of the year in which the directorship is eliminated.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51461, Oct. 7, 2009; 75 FR 17039, 17040, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§1261.6 Determination of member votes.

(a) *In general.* Each Bank shall determine, in accordance with this section, the number of votes that each member of the Bank may cast for each directorship that is to be filled by the vote of the members.

(b) *Number of votes.* For each member directorship and each independent directorship that is to be filled in an election, each member shall be entitled to cast one vote for each share of Bank stock that the member was required to hold as of the record date. Notwithstanding the preceding sentence, the number of votes that any member may cast for any one directorship shall not exceed the average number of shares of Bank stock required to be held as of the record date by all members located in the same State as of the record date. If a Bank has issued more than one class of stock, it shall calculate the average number of shares separately for each class of stock, using the total number of members in a State as the denominator, and shall apply those limits separately in determining the maximum number of votes that any member owning that class of stock may cast in the election. The number of shares of Bank stock that a member was required to hold as of the record date shall be determined in accordance with the minimum investment requirement established by the Bank's capital plan.

(c) *Voting preferences.* If the board of directors of a Bank includes any voting preferences as part of its approved capital plan, those preferences shall supersede the provisions of paragraph (b) of this section that otherwise would allow

a member to cast one vote for each share of Bank stock it was required to hold as of the record date. If a Bank establishes a voting preference for a class of stock, the members with voting rights shall remain subject to the provisions of section 7(b) of the Bank Act (12 U.S.C. 1427(b)) that prohibit any member from casting any vote in excess of the average number of shares of stock required to be held by all members in its state.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51461, Oct. 7, 2009. Redesignated and amended at 75 FR 17039, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.7 Nominations for member and independent directorships.

Within a reasonable time in advance of an election, a Bank shall notify each member in its district of the commencement of the election process. Such notice shall include:

(a) *Election announcement.*

(1) The number of member directorships designated for each voting state in the Bank district and the number of independent directorships for the Bank;

(2) The name of each incumbent Bank director, the name and location of the member at which each member director serves, and the name and location of the organization with which each independent director is affiliated, if any, and the expiration date of each Bank director's term of office;

(3) A brief statement describing the skills and experience the Bank believes are most likely to add strength to the board of directors, provided that the Bank previously has conducted the annual assessment permitted by § 1261.9 and the Bank has elected to provide the results of the assessment to the members;

(4) An attachment indicating the name, location, and FHFA ID number of every member in the member's voting state, and the number of votes each such member may cast for each directorship to be filled by such members, as determined in accordance with § 1261.6; and

(5) If a member directorship is to be filled by members in a State, a nominating certificate for those members.

(b) *Member directorship nominations.* (1) Any member that is entitled to vote in the election may nominate an eligible individual to fill each available member directorship for its voting state by delivering to its Bank, prior to a deadline to be established by the Bank and set forth in the notice required in paragraph (a) of this section, a nominating certificate duly adopted by the member's governing body or by an individual authorized by the member's governing body to act on its behalf.

(2) The nominating certificate shall include the name of the nominee and the name, location, and FHFA ID number of the member the nominee serves as an officer or director.

(3) The Bank shall establish a deadline for delivery of nominating certificates, which shall be no earlier than 30 calendar days after the date on which the Bank delivers the notice required by paragraph (a) of this section, and the Bank shall not accept certificates received after that deadline. The Bank shall retain all accepted nominating certificates for at least two years after the date of the election.

(c) *Accepting member directorship nominations.* Promptly after receipt of any nominating certificate, a Bank shall notify in writing any individual nominated for a member directorship. An individual may accept the nomination only by delivering to the Bank, prior to a deadline established by the Bank and set forth in its notice, an executed director eligibility certification form prescribed by FHFA. A Bank shall allow each nominee at least 30 calendar days after the date the Bank delivered the notice of nomination within which to deliver the executed form. A nominee may decline the nomination by so advising the Bank in writing, or by failing to deliver a properly executed director eligibility certification form prior to the deadline. Each Bank shall retain all information received under this paragraph for at least two years after the date of the election.

(d) *Independent directorship nominations.* (1) Any individual who seeks to be an independent director of the board of directors of a Bank may deliver to the Bank, on or before the deadline set by the Bank for delivery of nominating

certificates, an executed independent director application form prescribed by FHFA that demonstrates that the individual both is eligible and has either of the following qualifications:

(i) More than four years of experience representing consumer or community interests in banking services, credit needs, housing, or consumer financial protections; or

(ii) Knowledge of or experience in one or more of the areas set forth in paragraph (e) of this section.

(2) Any other interested party may recommend to the Bank that it consider a particular individual as a nominee for an independent directorship, but the Bank shall not nominate any individual unless the individual has delivered to the Bank, on or before the date the Bank has set for delivery of nominating certificates, an executed independent director application form prescribed by FHFA. The application form prescribed by FHFA will provide a means by which an individual can indicate an intent to be considered for a public interest directorship. The board of directors of the Bank may consider any individual for any independent directorship nomination, provided it has determined that the individual is eligible and qualified, but the board shall nominate for a public interest directorship only an individual who indicates on the application form a desire to be considered for a public interest directorship. The board of directors of the Bank shall consult with the Bank's Advisory Council before nominating any individual for any independent directorship. Each Bank shall include in its bylaws the procedures it intends to use for the nomination and election of the independent directors, and shall retain all information received under this paragraph for at least two years after the date of the election.

(3) Each Bank shall determine the number of public interest directorships to be included among its authorized independent directorships, provided that each Bank shall at all times have at least two such directorships, and shall announce that number to its members in the notice required by paragraph (a) of this section. In submitting nominations to its members, each Bank shall nominate at least as many individuals as there are independent directorships to be filled in that year's election.

(e) *Independent director qualifications.* (1) Each independent director and each nominee for an independent directorship, other than a public interest directorship, shall have experience in, or knowledge of, one or more of the following areas: auditing and accounting, derivatives, financial management, organizational management, project development, risk management practices, and the law. Before nominating any individual for an independent directorship, other than a public interest directorship, the board of directors of a Bank shall determine that such knowledge or experience of the nominee is commensurate with that needed to oversee a financial institution with a size and complexity that is comparable to that of the Bank.

(2) Each public interest independent director and each nominee for a public interest directorship shall have more than four years of experience representing consumer or community interests in banking services, credit needs, housing or consumer financial protection.

(f) *Eligibility verification.* Using the information provided on member director eligibility forms prescribed by FHFA, each Bank shall verify that each nominee for each member directorship meets all the eligibility requirements for such directorship. Using the information provided on independent director application forms prescribed by FHFA, each Bank shall verify that each nominee for each public interest independent directorship and each other independent directorship meets all eligibility requirements and any knowledge or experience qualifications for such directorship, as set forth in the Bank Act and this subpart. Before announcing any independent director nominee, the Bank shall deliver to FHFA, for the Director's review, a copy of the independent director application forms executed by the individuals nominated for independent directorships. If within two weeks of such delivery FHFA provides comments to the Bank on any independent director nominee, the board of directors of the Bank shall

consider the FHFA's comments in determining whether to proceed with those nominees or to reopen the nomination.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51461, Oct. 7, 2009. Redesignated and amended at 75 FR 17039, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.8 Election process.

(a) *Ballots.* Promptly after fulfilling the requirements of §1261.7(f), each Bank shall prepare and deliver a ballot to each member that was a member as of the record date. The Bank shall include with each ballot a closing date for the Bank's receipt of voted ballots, which date shall be no earlier than 30 calendar days after the date such ballot is delivered to the member.

(1) A ballot shall include at least the following provisions:

(i) For states in which one or more member directorships are to be filled in the election, an alphabetical listing of the names of each nominee for such directorship, the name, location, and FHFA ID number of the member each nominee serves, the nominee's title or position with the member, and the number of member directorships to be filled by the members in that voting state in the election;

(ii) An alphabetical listing of the names of each nominee for a public interest independent directorship and a brief description of each nominee's experience representing consumer and community interests;

(iii) An alphabetical listing of the names of each nominee for the other independent directorships and a brief description of each nominee's qualifications, including his or her knowledge or experience in the areas of financial management, auditing and accounting, risk management practices, derivatives, project development, organizational management, and any other area of knowledge or experience set forth in §1261.7(e);

(iv) A statement that write-in candidates are not permitted; and

(v) A confidentiality statement prohibiting the Bank from disclosing how any member voted.

(2) At the election of the Bank, a ballot also may include, in the body or as an attachment, a brief description of the skills and experience of each nominee for a member directorship.

(b) *Statement on skills and experience.* If a Bank has conducted an annual assessment permitted by §1261.9 and has included the results of the assessment as part of the notice to members required in §1261.7(a), it may include with each ballot a statement of the results of that assessment or any subsequent assessment. If the statement differs from the statement provided under §1261.7(a)(3), the Bank also shall include an explanation of why the statements differ.

(c) *Lack of member directorship nominees.* If, for any voting State, the number of nominees for the member directorships for that State is equal to or fewer than the number of such directorships to be filled in that year's election, the Bank shall deliver a notice to the members in the affected voting State (in lieu of including any member directorship nominees on the ballot for that State) that such nominees shall be deemed elected without further action, due to an insufficient number of nominees to warrant balloting. Thereafter, the Bank shall declare elected all such eligible nominees. The nominees declared elected shall be included as directors-elect in the report of election required under paragraph (g) of this section. Any member directorship that is not filled due to a lack of nominees shall be deemed vacant as of January 1 of the following year and shall be filled by the Bank's board of directors in accordance with §1261.14(a).

(d) *Voting.* For each directorship to be filled, a member may cast the number of votes determined by the Bank pursuant to §1261.6. A member may not split its votes among multiple nominees for a single directorship, and, where there are multiple directorships to be filled, either within the member's voting state or at large, in the case of independent directorships, a member may not cumulatively vote for a single nominee. If any member votes, it shall by resolution of its governing body either authorize the voting for specific nominees or delegate to an individual the authority to vote for specific nominees. To vote, a member shall:

(1) Mark on the ballot the name of not more than one of the nominees for

each directorship to be filled. Each nominee so selected shall receive all of the votes that the member is entitled to cast.

(2) Execute and deliver the ballot to the Bank on or before the closing date. A Bank shall not allow a member to change a ballot after it has been delivered to the Bank.

(e) *Counting ballots.* A Bank shall not review any ballot until after the closing date, and shall not include in the election results any ballot received after the closing date. Promptly after the closing date, each Bank shall tabulate the votes cast in the election: for the member directorships, the Bank shall tabulate votes by each voting state; for the independent directorships, the Bank shall tabulate votes for the district at-large. Any ballots cast in violation of paragraph (d) of this section shall be void.

(f) *Declaring results*— (1) *For member directorships.* The Bank shall declare elected the nominee receiving the highest number of votes. If more than one member directorship is to be filled for a particular State, the Bank shall declare elected each successive nominee receiving the next highest number of votes until all such open directorships are filled.

(2) *For independent directorships.* (i) The bank shall tabulate separately the votes received for public interest independent director nominees and those received for other independent director nominees, in each case in accordance with paragraph (f)(2)(ii) of this section.

(ii) If the number of nominees exceeds the number of directorships to be filled, the Bank shall declare elected the nominee receiving the highest number of votes. If more than one directorship is to be filled, the Bank shall declare elected each successive nominee receiving the next highest number of votes for such directorship until all such open directorships are filled.

(iii) If the number of nominees is no more than the number of directorships to be filled, the Bank shall declare elected each nominee receiving at least 20 percent of the number of votes eligible to be cast in the election. If any directorship is not filled due to any nominee's failure to receive at least 20 percent of the votes eligible to be cast, the Bank shall continue the election process for that directorship under the procedures in paragraph (h) of this section.

(3) *Tie votes.* In the event of a tie for the last available directorship, the disinterested incumbent members of the board of directors of the Bank, by a majority vote, shall declare elected one of the nominees for whom the number of votes cast was tied.

(4) *Eligibility.* A Bank shall not declare elected a nominee that it has reason to know is ineligible to serve, nor shall it seat a director-elect that it has reason to know is ineligible to serve.

(5) *Record retention.* The Bank shall retain all ballots it receives for at least two years after the date of the election, and shall not disclose how any member voted.

(g) *Report of election.* Promptly following the election, each Bank shall deliver a notice to its members, to each nominee, and to FHFA that contains the following information:

(1) For each member directorship, the name of the director-elect, the name and location of the member at which he or she serves, his or her title or position at the member, the voting State represented, and the expiration date of the term of office;

(2) For each independent directorship, the name of the director-elect, whether the director-elect will fill a public interest directorship and, if so, the consumer or community interest represented by such directorship, any qualifications under §1261.7(e), and the expiration date of the term of office;

(3) For member directorships, the total number of eligible votes, the number of members voting in the election, and the total number of votes cast for each nominee, which shall be reported by State; and

(4) For independent directorships, the total number of eligible votes, the number of members voting in the election, and the total number of votes cast for each nominee, which shall be reported for the district at large.

(h) *Failure to fill all independent directorships.* If any independent directorship is not filled due to the failure of any nominee to receive at least 20 percent of the eligible vote, the Bank shall

continue the election process for that directorship under the following procedures:

(1) The Bank's board of directors, after again consulting with the Bank's Advisory Council, shall nominate at least as many individuals as there are independent directorships to be filled. It may nominate individuals who failed to be elected in the initial vote. The Bank thereafter shall deliver to FHFA a copy of the independent director application form executed by each nominee.

(2) The Bank then shall follow the provisions in this section that are applicable to the election process for independent directors, except for the following:

(i) The Bank shall not place the name of any nominee on a ballot without prior approval of FHFA; and

(ii) The Bank may adopt a closing date that is earlier than 30 calendar days after delivery of the ballots to the eligible voting members, provided the Bank determines that an earlier closing date provides a reasonable amount of time to vote the ballots.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51462, Oct. 7, 2009. Redesignated and amended at 75 FR 17039, 17040, Apr. 5, 2010; 81 FR 76296, Nov. 2, 2016]

§ 1261.9 Actions affecting director elections.

(a) *Banks.* Each Bank, acting through its board of directors, may conduct an annual assessment of the skills and experience possessed by the members of its board of directors as a whole and may determine whether the capabilities of the board would be enhanced through the addition of individuals with particular skills and experience. If the board of directors determines that the Bank could benefit by the addition to the board of directors of individuals with particular qualifications, such as auditing and accounting, derivatives, financial management, organizational management, project development, risk management practices, or the law, it may identify those qualifications and so inform the members as part of its announcement of elections pursuant to § 1261.7(a).

(b) *Support for nomination or election.* (1) A Bank director, officer, attorney, employee, or agent, acting in his or her personal capacity, may support the nomination or election of any individual for a member directorship, provided that no such individual shall purport to represent the views of the Bank or its board of directors in doing so.

(2) A Bank director, officer, attorney, employee or agent and the board of directors and Advisory Council (including members of the Council) of a Bank may support the candidacy of any individual nominated by the board of directors for election to an independent directorship.

(c) *Prohibition.* Except as provided in paragraphs (a) and (b) of this section, or § 1223.21(b)(7) of this chapter, no director, officer, attorney, employee, or agent of a Bank shall:

(1) Communicate in any manner that a director, officer, attorney, employee, or agent of a Bank, directly or indirectly, supports or opposes the nomination or election of a particular individual for a directorship; or

(2) Take any other action to influence the voting with respect to any particular individual.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51463, Oct. 7, 2009; 81 FR 76297, Nov. 2, 2016; 83 FR 39326, Aug. 9, 2018]

§ 1261.10 Independent director conflict of interests.

(a) *Employment interests.* During any independent director's term of service, such director shall not serve as an officer, employee, or director of any member of the Bank on whose board the individual sits, or of any recipient of advances from such Bank, and shall not serve as an officer of any Bank. An independent director or nominee for any independent directorship shall disclose all such interests to the Bank on whose board of directors the individual serves or which is considering the individual for nomination to its board of directors.

(b) *Holding companies.* Service as an officer, employee, or director of a holding company that controls one or more members of, or one or more recipients of advances from, the Bank on whose board an independent director serves is not deemed to be service as an officer, employee or director of a member or recipient of advances if the assets of all

such members or all such recipients of advances constitute less than 35 percent of the assets of the holding company, on a consolidated basis.

(c) *Attribution.* For purposes of determining compliance with this section, a Bank shall attribute to the independent director any officer position, employee position, or directorship of the director's spouse.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51463, Oct. 7, 2009]

§ 1261.11 Conflict-of-interests policy for Bank directors.

(a) *Adoption of conflict-of-interests policy.* Each Bank shall adopt a written conflict-of-interests policy that applies to all members of its board of directors. At a minimum, the conflict-of-interests policy of each Bank shall:

(1) Require the directors to administer the affairs of the Bank fairly and impartially and without discrimination in favor of or against any member;

(2) Require independent directors to comply with §1261.10(a);

(3) Prohibit the use of a director's official position for personal gain;

(4) Require directors to disclose actual or apparent conflicts of interests and establish procedures for addressing such conflicts;

(5) Require the establishment of internal controls to ensure that conflict-of-interests reports are made and filed and that conflict-of-interests issues are disclosed and resolved; and

(6) Establish procedures to monitor compliance with the conflict-of-interests policy.

(b) *Disclosure and recusal.* A director shall disclose to the Bank's board of directors any financial interests he or she has, as well as any financial interests known to the director of any immediate family member or business associate of the director, in any matter to be considered by the Bank's board of directors and in any other business matter or proposed business matter involving the Bank and any other person or entity. A director shall disclose fully the nature of his or her interests in the matter and shall provide to the Bank's board of directors any information requested to aid in its consideration of the director's interest. A director shall refrain from considering or voting on any issue in which the director, any immediate family member, or any business associate has any financial interest.

(c) *Confidential Information.* Directors shall not disclose or use confidential information they receive solely by reason of their position with the Bank to obtain any benefit for themselves or for any other individual or entity.

(d) *Gifts.* No Bank director shall accept, and each Bank director shall discourage the director's immediate family members from accepting, any gift that the director believes or has reason to believe is given with the intent to influence the director's actions as a member of the Bank's board of directors, or where acceptance of such gift would have the appearance of intending to influence the director's actions as a member of the board. Any insubstantial gift would not be expected to trigger this prohibition.

(e) *Compensation.* Directors shall not accept compensation for services performed for the Bank from any source other than the Bank for which the services are performed.

(f) *Definitions.* For purposes of this section:

(1) *Immediate family member* means parent, sibling, spouse, child, or dependent, or any relative sharing the same residence as the director.

(2) *Financial interest* means a direct or indirect financial interest in any activity, transaction, property, or relationship that involves receiving or providing something of monetary value, and includes, but is not limited to any right, contractual or otherwise, to the payment of money, whether contingent or fixed. It does not include a deposit or savings account maintained with a member, nor does it include a loan or extension of credit obtained from a member in the normal course of business on terms that are available generally to the public.

(3) *Business associate* means any individual or entity with whom a director has a business relationship, including, but not limited to:

(i) Any corporation or organization of which the director is an officer or partner, or in which the director beneficially owns ten percent or more of

any class of equity security, including subordinated debt;

(ii) Any other partner, officer, or beneficial owner of ten percent or more of any class of equity security, including subordinated debt, of any such corporation or organization; and

(iii) Any trust or other estate in which a director has a substantial beneficial interest or as to which the director serves as trustee or in a similar fiduciary capacity.

[73 FR 55715, Sept. 26, 2008, as amended at 74 FR 51463, Oct. 7, 2009]

§ 1261.12 Reporting requirements for Bank directors.

(a) *Annual reporting.* Annually, each Bank shall require each of its directors to execute and deliver to the Bank the appropriate director eligibility certification form prescribed by FHFA for the type of directorship held by such director. The Bank promptly shall deliver to FHFA a copy of the certification form delivered to it by each director.

(b) *Report of noncompliance.* At any time that any director believes or has reason to believe that he or she no longer meets the eligibility requirements set forth in the Bank Act or this subpart, the director promptly shall so notify the Bank and FHFA in writing. At any time that a Bank believes or has reason to believe that any director no longer meets the eligibility requirements set forth in the Bank Act or this subpart, the Bank promptly shall notify FHFA in writing.

[74 FR 51463, Oct. 7, 2009]

§ 1261.13 Ineligible Bank directors.

Upon a determination by FHFA or a Bank that any director of the Bank no longer satisfies the eligibility requirements set forth in the Bank Act or this subpart, or has failed to comply with the reporting requirements of § 1261.12, the directorship shall immediately become vacant. Any director that is determined to have failed to comply with any of these requirements shall not continue to serve as a Bank director. Whenever a Bank makes such a determination, the Bank promptly shall notify the Bank director and FHFA in writing.

[74 FR 51464, Oct. 7, 2009, as amended at 81 FR 76297, Nov. 2, 2016]

§ 1261.14 Vacant Bank directorships.

(a) *Filling unexpired terms.* (1) When a vacancy occurs on the board of directors of any Bank, the board of directors of the Bank shall elect, by a majority vote of the remaining Bank directors sitting as a board, an individual to fill the unexpired term of office of the vacant directorship, regardless of whether the remaining Bank directors constitute a quorum of the Bank's board of directors.

(2) The board of directors of the Bank may fill an anticipated vacancy prior to the effective date of the vacancy, provided the board does so no sooner than the date of the regularly scheduled board meeting that occurs immediately prior to the effective date of the vacancy.

(3) The board of directors shall elect only an individual who satisfies all the eligibility requirements in the Bank Act and in this subpart that applied to his or her predecessor and, for independent directorships, also satisfies any of the qualifications in the Bank Act or this subpart. If a Bank does not have at least two sitting public interest independent directors, the board of directors of the Bank shall designate the directorship as a public interest directorship and shall elect an individual who satisfies a public interest independent directorship qualification in the Bank Act or in this subpart.

(b) *Verifying eligibility.* Prior to any election by the board of directors, the Bank shall obtain an executed member director eligibility certification form prescribed by FHFA from each individual being considered to fill a member directorship and an executed independent director application form prescribed by FHFA from each individual being considered to fill an independent directorship. Using the executed forms, each Bank shall verify each individual's eligibility and, as to independent directors, also shall verify the individual's qualifications. Before any independent director is elected by the board of directors of a Bank, the Bank shall deliver to FHFA for its review a

copy of the application form of each individual being considered by the board. The Bank shall retain the information it receives in accordance with §1261.7(c) and (d).

(c) *Notification*. Promptly after allowing the individual to assume the directorship, as provided in paragraph (b) of this section, a Bank shall notify FHFA and each member located in the Bank's district in writing of the following:

(1) For each member directorship filled by the board of a Bank, the name of the director, the name, location, and FHFA ID number of the member the director serves, the director's title or position with the member, the voting State that the director represents, and the expiration date of the director's term of office; and

(2) For each independent directorship filled by the board of a Bank, the name of the director, the name and location of the organization with which the director is affiliated, if any, the director's title or position with such organization, and the expiration date of the director's term of office.

[74 FR 51464, Oct. 7, 2009, as amended at 75 FR 17039, Apr. 5, 2010]

§ 1261.15 Minimum number of member directorships.

Except with respect to member directorships of a Bank resulting from the merger of any two or more Banks, the number of member directorships allocated to each state shall not be less than the number of directorships allocated to that state on December 31, 1960. The following table sets forth the states within Bank districts not created from the merger of two or more Banks whose members held more than one directorship on December 31, 1960:

State	Number of elective directorships on December 31, 1960
California	3
Colorado	2
Illinois	4
Indiana	5
Kansas	3
Kentucky	2
Louisiana	2
Massachusetts	3
Michigan	3
New Jersey	4
New York	4
Ohio	4
Oklahoma	2
Pennsylvania	6
Tennessee	2
Texas	3
Wisconsin	4

[81 FR 76297, Nov. 2, 2016]

§ 1261.16 [Reserved]

Subpart C—Federal Home Loan Bank Directors' Compensation and Expenses

SOURCE: 75 FR 17040, Apr. 5, 2010, unless otherwise noted.

§ 1261.20 Definitions.

As used in this subpart C:

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with service as a director. Compensation includes all direct and indirect payments of benefits, both cash and non-cash, granted to or for the benefit of any director.

Expenses means necessary and reasonable travel, subsistence and other related expenses incurred in connection with the performance of official duties as are payable to senior officers of the Bank under the Bank's travel policy, except gift or entertainment expenses.

§ 1261.21 General.

(a) *Standard*. Each Bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, as determined by a resolution adopted by the board of directors of the Bank and subject to the provisions of this subpart.

(b) *Reporting*— (1) *Following calendar year*. By December 31 of each calendar year, each Bank shall report to the Director the compensation it anticipates paying to its directors for the following calendar year.

(2) *Preceding calendar year*. No later than the tenth business day of each calendar year, each Bank shall report to the Director the following information relating to director compensation, expenses and meeting attendance for

the immediately preceding calendar year:

(i) The total compensation paid to each director;

(ii) The total expenses paid to each director;

(iii) The total compensation paid to all directors;

(iv) The total expenses paid to all directors;

(v) The total of all expenses incurred at group functions that are not reimbursed to individual directors, such as the cost of group meals in connection with board and committee meetings;

(vi) The total number of meetings held by the board and its designated committees; and

(vii) The number of board and designated committee meetings each director attended in-person or through electronic means such as video or teleconferencing.

§ 1261.22 Directors' compensation policy.

(a) *General.* Each Bank's board of directors annually shall adopt a written compensation policy to provide for the payment of reasonable compensation and expenses to the directors for the time required of them in performing their duties as directors. Payments under the directors' compensation policy may be based on any factors that the board of directors determines reasonably to be appropriate, subject to the requirements in this subpart.

(b) *Minimum contents.* The compensation policy shall address the activities or functions for which director attendance or participation is necessary and which may be compensated, and shall explain and justify the methodology used to determine the amount of compensation to be paid to the Bank directors. The compensation policy shall require that any compensation paid to a director reflect the amount of time the director has spent on official Bank business, and shall require that compensation be reduced, as necessary to reflect lesser attendance or performance at board or committee meetings during a given year.

(c) *Prohibited payments.* A Bank shall not pay a director who regularly fails to attend board or committee meetings, and shall not pay fees to a director that do not reflect the director's performance of official Bank business conducted prior to the payment of such fees.

(d) *Submission requirements.* No later than the tenth business day after adopting its annual policy for director compensation and expenses, and at least 30 days prior to disbursing the first payment to any director, each Bank shall submit to the Director a copy of the policy, along with all studies or other supporting materials upon which the board relied in determining the level of compensation and expenses to pay to its directors.

§ 1261.23 Director disapproval.

The Director may determine, based upon his or her review of a Bank's director compensation policy, methodology and/or other related materials, that the compensation and/or expenses to be paid to the directors are not reasonable. In such case, the Director may order the Bank to refrain from making any further payments under that compensation policy. Any such order shall apply prospectively only and will not affect either compensation or expenses that have been earned but not yet paid or reimbursed or payments that had been made prior to the date of the Director's determination and order.

§ 1261.24 Board meetings.

(a) *Number of meetings.* The board of directors of each Bank shall hold as many meetings each year as necessary and appropriate to carry out its fiduciary responsibilities with respect to the effective oversight of Bank management and such other duties and obligations as may be imposed by applicable laws, provided the board of directors of a Bank must hold a minimum of six in-person meetings in any year.

(b) *Site of meetings.* The bank usually should hold board of director and committee meetings within the district served by the Bank. The Bank shall not hold board of director or committee meetings in any location that is not within the United States, including its possessions and territories.

Subpart D [Reserved]

PART 1263—MEMBERS OF THE BANKS

Subpart A—Definitions

Subpart B—Membership Application Process

Subpart C—Eligibility Requirements

Subpart D—Stock Requirements

Subpart E—Withdrawal, Termination, and Readmission

Subpart F—Other Membership Provisions

AUTHORITY: 12 U.S.C. 1422, 1423, 1424, 1426, 1430, 1442, 4511, 4513.

SOURCE: 81 FR 3277, Jan. 20, 2016, unless otherwise noted.

Subpart A—Definitions

§ 1263.1 Definitions.

For purposes of this part:

Adjusted net income means net income, excluding extraordinary items such as income received from, or expense incurred in, sales of securities or fixed assets, reported on a regulatory financial report.

Affiliate means any entity that controls, is controlled by, or is under common control with another entity. For purposes of this definition, one entity controls another if it:

(1) Directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote twenty-five (25) percent or more of the outstanding shares of any class of voting securities of the other entity, including shares of common or preferred stock, general or limited partnership shares or interests, or similar interests that entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or individuals exercising similar functions) of that entity; or

(ii) To vote on or to direct the conduct of the operations or other significant policies of that entity;

(2) Controls in any manner the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the other entity; or

(3) Otherwise has the power to exercise, directly or indirectly, a controlling influence over the management or policies of the other entity through a management agreement, common directors or management officials, or by any other means.

Aggregate unpaid loan principal means the aggregate unpaid principal of a subscriber's or member's home mortgage loans, home-purchase contracts and similar obligations.

Allowance for loan and lease losses means a specified balance-sheet account held to fund potential losses on loans or leases, which is reported on a regulatory financial report.

Appropriate regulator means:

(1) In the case of an insured depository institution or a CDFI credit union, an appropriate Federal banking agency or appropriate State regulator, as applicable; or

(2) In the case of an insurance company, an appropriate State regulator accredited by the NAIC.

Captive means an entity that holds an insurance license or charter under the laws of a State, but that does not meet the definition of ''insurance company'' set forth in this section or fall within any other category of institution that may be eligible for membership.

CDFI credit union means a State-chartered credit union that does not have Federal share insurance and that has been certified as a CDFI by the CDFI Fund.

CDFI Fund means the Community Development Financial Institutions Fund established under section 104(a) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(a)).

CFI asset cap means $1 billion, as adjusted annually by FHFA, beginning in 2009, to reflect any percentage increase in the preceding year's Consumer Price Index (CPI) for all urban consumers, as published by the U.S. Department of Labor.

Class A stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(i) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(i)) and applicable FHFA regulations.

Class B stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(ii) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(ii)) and applicable FHFA regulations.

Combination business or farm property means real property for which the total appraised value is attributable to residential, and business or farm uses.

Community development financial institution or *CDFI* means an institution that is certified as a community development financial institution by the CDFI Fund under the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*), other than a bank or savings association insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), a holding company for such a bank or savings association, or a credit union that has Federal share insurance.

Community financial institution or CFI means an institution:

(1) The deposits of which are insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*); and

(2) The total assets of which, as of the date of a particular transaction, are less than the CFI asset cap, with total assets being calculated as an average of total assets over three years, with such average being based on the institution's regulatory financial reports filed with its appropriate regulator for the most recent calendar quarter and the immediately preceding 11 calendar quarters.

Composite regulatory examination rating means a composite rating assigned to an institution following the guidelines of the Uniform Financial Institutions Rating System (issued by the Federal Financial Institutions Examination Council), including a CAMELS rating or other similar rating, contained in a written regulatory examination report.

Consolidation means a combination of two or more business entities, and includes a consolidation of two or more entities into a new entity, a merger of one or more entities into another entity, or a purchase of substantially all of the assets and assumption of substantially all of the liabilities of an entity by another entity.

CRA means the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*).

CRA performance evaluation means, unless otherwise specified, a formal performance evaluation of an institution prepared by its appropriate regulator as required by the CRA or, if such a formal evaluation is unavailable for a particular institution, an informal or preliminary evaluation.

De novo insured depository institution means an insured depository institution with a charter approved by its appropriate regulator within the three years prior to the date the institution applies for Bank membership.

Dwelling unit means a single room or a unified combination of rooms designed for residential use.

Enforcement action means any written notice, directive, order, or agreement initiated by an applicant for Bank membership or by its appropriate regulator to address any operational, financial, managerial, or other deficiencies of the applicant identified by such regulator. An ''enforcement action'' does not include a board of directors' resolution adopted by the applicant in response to examination weaknesses identified by such regulator.

Federal share insurance means insurance coverage of credit union member accounts provided by the National Credit Union Share Insurance Fund under subchapter II of the Federal Credit Union Act (12 U.S.C. 1781 *et seq.*).

Funded residential construction loan means the portion of a loan secured by real property made to finance the on-site construction of dwelling units on one-to-four family property or multifamily property disbursed to the borrower.

Gross revenues means, in the case of a CDFI applicant, total revenues received from all sources, including grants and other donor contributions and earnings from operations.

Home mortgage loan means:

(1) A loan, whether or not fully amortizing, or an interest in such a loan, which is secured by a mortgage, deed of trust, or other security agreement that creates a first lien on one of the following interests in property:

(i) One-to-four family property or multifamily property, in fee simple;

(ii) A leasehold on one-to-four family property or multifamily property under a lease of not less than 99 years that is renewable, or under a lease having a period of not less than 50 years to run from the date the mortgage was executed; or

(iii) Combination business or farm property where at least fifty (50) percent of the total appraised value of the combined property is attributable to the residential portion of the property, or in the case of any community financial institution, combination business or farm property, on which is located a permanent structure actually used as a residence (other than for temporary or seasonal housing), where the residence constitutes an integral part of the property; or

(2) A security representing:

(i) A right to receive a portion of the cash flows from a pool of long-term loans, provided that, at the time of issuance of the security, all of the loans meet the requirements of paragraph (1) of this definition; or

(ii) An interest in other securities, all of which meet the requirements of paragraph (2)(i) of this definition.

Insurance company means an entity that holds an insurance license or charter under the laws of a State and whose primary business is the underwriting of insurance for persons or entities that are not its affiliates.

Insured depository institution means:

(1) An insured depository institution as defined in section 2(9) of the Bank Act, as amended (12 U.S.C. 1422(9)); and

(2) To the extent provided under §1263.19, a non-federally-insured credit union.

Long-term means a term to maturity of five years or greater at the time of origination.

Manufactured housing means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5402(6)).

Multifamily property means:

(1) Real property that is solely residential and includes five or more dwelling units;

(2) Real property that includes five or more dwelling units combined with commercial units, provided that the property is primarily residential; or

(3) Nursing homes, dormitories, or homes for the elderly.

NAIC means the National Association of Insurance Commissioners.

Non-federally-insured credit union means a State-chartered credit union that does not have Federal share insurance and that has not been certified as a CDFI by the CDFI Fund.

Nonperforming loans and leases means the sum of the following, reported on a regulatory financial report:

(1) Loans and leases that have been past due for 90 days (60 days, in the case of credit union applicants) or longer but are still accruing;

(2) Loans and leases on a nonaccrual basis; and

(3) Restructured loans and leases (not already reported as nonperforming).

Nonresidential real property means real property that is not used for residential purposes, including business or industrial property, hotels, motels, churches, hospitals, educational and charitable institution buildings or facilities, clubs, lodges, association buildings, golf courses, recreational facilities, farm property not containing a dwelling unit, or similar types of property.

One-to-four family property means:

(1) Real property that is solely residential, including one-to-four family dwelling units or more than four family dwelling units if each dwelling unit is separated from the other dwelling units by dividing walls that extend from ground to roof, such as row houses, townhouses, or similar types of property;

(2) Manufactured housing if applicable State law defines the purchase or holding of manufactured housing as the purchase or holding of real property;

(3) Individual condominium dwelling units or interests in individual cooperative housing dwelling units that are part of a condominium or cooperative building without regard to the number of total dwelling units therein; or

(4) Real property which includes one-to-four family dwelling units combined with commercial units, provided the property is primarily residential.

Operating expenses means, in the case of a CDFI applicant, expenses for business operations, including, but not limited to, staff salaries and benefits, professional fees, interest, loan loss provision, and depreciation, contained in the applicant's audited financial statements.

Other real estate owned means all other real estate owned (*i.e.*, foreclosed and repossessed real estate), reported on a regulatory financial report, and does not include direct and indirect investments in real estate ventures.

Regulatory examination report means a written report of examination prepared by the applicant's appropriate regulator, containing, in the case of insured depository institution applicants, a composite rating assigned to the institution following the guidelines of the Uniform Financial Institutions Rating System, including a CAMELS rating or other similar rating.

Regulatory financial report means a financial report that an institution is required to file with its appropriate regulator on a specific periodic basis, including the quarterly call report for commercial banks and savings associations, quarterly or semi-annual call report for credit unions, NAIC's annual or quarterly statement for insurance companies, or other similar report, including such report maintained by the appropriate regulator in an electronic database.

Residential mortgage loan means any one of the following types of loans, whether or not fully amortizing:

(1) A home mortgage loan;

(2) A funded residential construction loan;

(3) A loan secured by manufactured housing whether or not defined by State law as secured by an interest in real property;

(4) A loan secured by a junior lien on one-to-four family property or multifamily property;

(5) A security representing:

(i) A right to receive a portion of the cash flows from a pool of loans, provided that, at the time of issuance of the security, all of the loans meet the requirements of one of paragraphs (1) through (4) of this definition; or

(ii) An interest in other securities that meet the requirements of paragraph (5)(i) of this definition;

(6) A home mortgage loan secured by a leasehold interest, as defined in paragraph (1)(ii) of the definition of ''home mortgage loan,'' except that the period of the lease term may be for any duration; or

(7) A loan that finances one or more properties or activities that, if made by a member, would satisfy the statutory requirements for the Community Investment Program established under

section 10(i) of the Bank Act (12 U.S.C. 1430(i)), or the regulatory requirements established for any Community Investment Cash Advance program.

Restricted assets means both permanently restricted assets and temporarily restricted assets, as those terms are used in Financial Accounting Standard No. 117, or any successor publication.

Total assets means the total assets reported on a regulatory financial report or, in the case of a CDFI applicant, the total assets contained in the applicant's audited financial statements.

Unrestricted cash and cash equivalents means, in the case of a CDFI applicant, cash and highly liquid assets that can be easily converted into cash that are not restricted in a manner that prevents their use in paying expenses, as contained in the applicant's audited financial statements.

[81 FR 3277, Jan. 20, 2016, as amended at 82 FR 25722, June 5, 2017]

Subpart B—Membership Application Process

§ 1263.2 Membership application requirements.

(a) *Application.* Except as otherwise specified in this part, no institution may become a member of a Bank unless it has submitted to that Bank an application that satisfies the requirements of this part. The application shall include a written resolution or certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, of the following:

(1) *Applicant review.* The applicant has reviewed the requirements of this part and, as required by this part, has provided to the best of its knowledge the most recent, accurate, and complete information available; and

(2) *Duty to supplement.* The applicant will promptly supplement the application with any relevant information that comes to its attention prior to the Bank's decision on whether to approve or deny the application, and if the Bank's decision is appealed pursuant to § 1263.5, prior to resolution of any appeal by FHFA.

(b) *Digest.* The Bank shall prepare a written digest for each applicant stating whether or not the applicant meets each of the requirements in §§ 1263.6 to 1263.19, the Bank's findings, and the reasons therefor. In preparing a digest for an applicant whose satisfaction of the membership eligibility requirements of § 1263.6(a) is contingent upon its meeting the definition of ''insurance company'' set forth in § 1263.1, the Bank shall state its conclusion as to whether the applicant meets that definition and summarize the bases for that conclusion. In preparing a digest for a non-federally-insured credit union applicant, the Bank shall summarize the manner in which the applicant has complied with the requirements of § 1263.19(a).

(c) *File.* The Bank shall maintain a membership file for each applicant for at least three years after the Bank decides whether to approve or deny membership or, in the case of an appeal to FHFA, for three years after the resolution of the appeal. The membership file shall contain at a minimum:

(1) *Digest.* The digest required by paragraph (b) of this section.

(2) *Required documents.* All documents required by §§ 1263.6 to 1263.19, including documents required to establish or rebut a presumption under this part, shall be described in and attached to the digest. The Bank is not required to retain in the file portions of regulatory financial reports that are not relevant to its decision on the membership application. If an applicant's appropriate regulator requires return or destruction of a regulatory examination report, the date that the report is returned or destroyed shall be noted in the file.

(3) *Additional documents.* Any additional document submitted by the applicant, or otherwise obtained or generated by the Bank, concerning the applicant.

(4) *Decision resolution.* The decision resolution described in § 1263.3(b).

[81 FR 3277, Jan. 20, 2016, as amended at 82 FR 25722, June 5, 2017]

§ 1263.3 Decision on application.

(a) *Authority.* FHFA hereby authorizes the Banks to approve or deny all applications for membership, subject

to the requirements of this part. The authority to approve membership applications may be exercised only by a committee of the Bank's board of directors, the Bank president, or a senior officer who reports directly to the Bank president, other than an officer with responsibility for business development.

(b) *Decision resolution.* For each applicant, the Bank shall prepare a written resolution duly adopted by the Bank's board of directors, by a committee of the board of directors, or by an officer with delegated authority to approve membership applications. The decision resolution shall state:

(1) That the statements in the digest are accurate to the best of the Bank's knowledge, and are based on a diligent and comprehensive review of all available information identified in the digest; and

(2) The Bank's decision and the reasons therefor. Decisions to approve an application should state specifically that:

(i) The applicant is authorized under the laws of the United States and the laws of the appropriate State to become a member of, purchase stock in, do business with, and maintain deposits in, the Bank to which the applicant has applied; and

(ii) The applicant meets all of the membership eligibility criteria of the Bank Act and this part.

(c) *Action on applications.* The Bank shall act on an application within 60 calendar days of the date the Bank deems the application to be complete. An application is ''complete'' when the Bank has obtained all the information required by this part, and any other information the Bank deems necessary, to process the application. If an application that was deemed complete subsequently is deemed incomplete because the Bank determines during the review process that additional information is necessary to process the application, the Bank may suspend the 60-day processing period until the Bank again deems the application to be complete, at which time the processing period shall resume. The Bank shall notify an applicant in writing when it deems the applicant's application to be complete, and shall maintain a copy of the notice in the applicant's membership file. The Bank shall notify an applicant whenever it suspends or resumes the 60-day processing period, and shall maintain a written record of those notifications in the applicant's membership file. Within three business days of a Bank's decision on an application, the Bank shall provide the applicant and FHFA with a copy of the Bank's decision resolution.

[81 FR 3277, Jan. 20, 2016, as amended at 82 FR 25722, June 5, 2017]

§ 1263.4 Automatic membership.

(a) *Automatic membership for certain charter conversions.* An insured depository institution member that converts from one charter type to another automatically shall become a member of the Bank of which the converting institution was a member on the effective date of the conversion, provided that the converted institution continues to be an insured depository institution and the assets of the institution immediately before and immediately after the conversion are not materially different. In such case, all relationships existing between the member and the Bank at the time of such conversion may continue.

(b) *Automatic membership for transfers.* Any member that relocates its principal place of business to another Bank district or that redesignates its principal place of business to another Bank district pursuant to §1263.18(c) automatically shall become a member of the Bank of that district upon the purchase of the minimum amount of Bank stock required for membership in that Bank, as required by §1263.20.

(c) *Automatic membership, in the Bank's discretion, for certain consolidations.* (1) If a member institution (or institutions) and a nonmember institution are consolidated, and the consolidated institution has its principal place of business in a State in the same Bank district as the disappearing institution (or institutions), and the consolidated institution will operate under the charter of the nonmember institution, on the effective date of the consolidation, the consolidated institution may, in the discretion of the Bank of which the disappearing institution (or

institutions) was a member immediately prior to the effective date of the consolidation, automatically become a member of such Bank upon the purchase of the minimum amount of Bank stock required for membership in that Bank, as required by §1263.20, provided that:

(i) 90 percent or more of the consolidated institution's total assets are derived from the total assets of the disappearing member institution (or institutions); and

(ii) The consolidated institution provides written notice to such Bank, within 60 calendar days after the effective date of the consolidation, that it desires to be a member of the Bank.

(2) The provisions of §1263.24(b)(4)(i) shall apply, and upon approval of automatic membership by the Bank, the provisions of §1263.24(c) shall apply.

§1263.5 Appeals.

(a) *Appeals by applicants.*—(1) *Filing procedure.* Within 90 calendar days of the date of a Bank's decision to deny an application for membership, the applicant may file a written appeal of the decision with FHFA.

(2) *Documents.* The applicant's appeal shall be addressed to the Deputy Director for Federal Home Loan Bank Regulation, Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20219, with a copy to the Bank, and shall include the following documents:

(i) *Bank's decision resolution.* A copy of the Bank's decision resolution; and

(ii) *Basis for appeal.* An applicant must provide a statement of the basis for the appeal with sufficient facts, information, analysis, and explanation to rebut any applicable presumptions, or otherwise to support the applicant's position.

(b) *Record for appeal.*—(1) *Copy of membership file.* Upon receiving a copy of an appeal, the Bank whose action has been appealed (appellee Bank) shall provide FHFA with a copy of the applicant's complete membership file. Until FHFA resolves the appeal, the appellee Bank shall supplement the materials provided to FHFA as any new materials are received.

(2) *Additional information.* FHFA may request additional information or further supporting arguments from the appellant, the appellee Bank, or any other party that FHFA deems appropriate.

(c) *Deciding appeals.* FHFA shall consider the record for appeal described in paragraph (b) of this section and shall resolve the appeal based on the requirements of the Bank Act and this part within 90 calendar days of the date the appeal is filed with FHFA. In deciding the appeal, FHFA shall apply the presumptions in this part, unless the appellant or appellee Bank presents evidence to rebut a presumption as provided in §1263.17.

Subpart C—Eligibility Requirements

§1263.6 General eligibility requirements.

(a) *Requirements.* Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, community development financial institution (including a CDFI credit union), or insured depository institution shall be eligible for Bank membership if:

(1) It is duly organized under tribal law, or under the laws of any State or of the United States;

(2) It is subject to inspection and regulation under the banking laws, or under similar laws, of any State or of the United States or, in the case of a CDFI, is certified by the CDFI Fund;

(3) It makes long-term home mortgage loans;

(4) Its financial condition is such that advances may be safely made to it;

(5) The character of its management is consistent with sound and economical home financing;

(6) Its home financing policy is consistent with sound and economical home financing; and

(7) It has complied with any applicable requirement of paragraphs (b) and (c) of this section.

(b) *Additional eligibility requirement for insured depository institutions other than community financial institutions.* In

order to be eligible to become a member of a Bank, an insured depository institution applicant other than a community financial institution also must have at least 10 percent of its total assets in residential mortgage loans.

(c) *Additional eligibility requirement for applicants that are not insured depository institutions.* In order to be eligible to become a member of a Bank, an applicant that is not an insured depository institution also must have mortgage-related assets that reflect a commitment to housing finance, as determined by the Bank in its discretion.

(d) *Ineligibility.* Except as provided in paragraph (e) of this section, an institution that does not satisfy the requirements of this part shall be ineligible for membership.

(e) *Treatment of captives previously admitted to membership.* A Bank that admitted one or more captives to membership prior to February 19, 2016 shall wind down its relationship with, and terminate the membership of, each of those captives as provided in this paragraph (e).

(1) *Captives admitted prior to September 12, 2014.*—(i) A Bank shall have until February 19, 2021 to wind down its business transactions with any captive that it had admitted to membership prior to September 12, 2014, notwithstanding the captive's ineligibility for Bank membership. The Bank may make or renew an advance to such a captive only if:

(A) After making or renewing the advance, its total outstanding advances to that captive would not exceed 40 percent of the captive's total assets; and

(B) The new or renewed advance has a maturity date no later than February 19, 2021.

(ii) A Bank shall terminate the membership of any captive described in paragraph (e)(1)(i) of this section no later than February 19, 2021, as provided under §1263.27. After termination, the Bank shall require the liquidation of any outstanding indebtedness owed by, and the settlement of all other outstanding business transactions with, such terminated captive, and shall redeem or repurchase the Bank stock owned by the captive in accordance with §1263.29; provided that the Bank may allow the captive to repay any outstanding advance made or last renewed in accordance with the applicable requirements then in effect and having a maturity date later than its date of termination in accordance with its terms and delay the repurchase of any Bank stock held in support of that advance until after the advance has been repaid, in accordance with the Bank's capital plan.

(2) *Captives admitted on or after September 12, 2014.*—(i) A Bank shall have until February 19, 2017 to wind down its business transactions with any captive that it had admitted to membership on or after September 12, 2014, notwithstanding the captive's ineligibility for Bank membership. The Bank shall not make or renew any advance to such a captive.

(ii) A Bank shall terminate the membership of any captive described in paragraph (e)(2)(i) of this section no later than February 19, 2017, as provided under §1263.27. Upon termination, the Bank shall require the liquidation of any outstanding indebtedness owed by, and the settlement of all other outstanding business transactions with, such terminated captive, and shall redeem or repurchase the Bank stock owned by the captive in accordance with §1263.29; provided that all advances outstanding to that member must be repaid in full by the termination date.

§1263.7 Duly organized requirement.

An applicant shall be deemed to be duly organized, as required by section 4(a)(1)(A) of the Bank Act (12 U.S.C. 1424(a)(1)(A)) and §1263.6(a)(1), if it is chartered by a State or federal agency as a building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, or insured depository institution or, in the case of a CDFI applicant, is incorporated under State or tribal law.

§1263.8 Subject to inspection and regulation requirement.

An applicant shall be deemed to be subject to inspection and regulation, as required by section 4(a)(1)(B) of the Bank Act (12 U.S.C. 1424 (a)(1)(B)) and §1263.6(a)(2) if, in the case of an insured

depository institution or insurance company applicant, it is subject to inspection and regulation by its appropriate regulator. A CDFI applicant that is certified by the CDFI Fund is not subject to this requirement.

§ 1263.9 Makes long-term home mortgage loans requirement.

An applicant shall be deemed to make long-term home mortgage loans, as required by section 4(a)(1)(C) of the Bank Act (12 U.S.C. 1424(a)(1)(C)) and § 1263.6(a)(3), if, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, or other documentation provided to the Bank, in the case of a CDFI applicant that does not file such reports, the applicant originates or purchases long-term home mortgage loans.

§ 1263.10 Ten percent requirement for certain insured depository institution applicants.

An insured depository institution applicant that is subject to the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b) shall be deemed to comply with that requirement if, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, the applicant has at least 10 percent of its total assets in residential mortgage loans, except that any assets used to secure mortgage-backed securities as described in paragraph (5) of the definition of ''residential mortgage loan'' set forth in § 1263.1 shall not be used to meet this requirement.

§ 1263.11 Financial condition requirement for depository institutions and CDFI credit unions.

(a) *Review requirement.* In determining whether a building and loan association, savings and loan association, cooperative bank, homestead association, savings bank, insured depository institution, or CDFI credit union has complied with the financial condition requirements of section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and § 1263.6(a)(4), the Bank shall obtain as a part of the membership application and review each of the following documents:

(1) *Regulatory financial reports.* The regulatory financial reports filed by the applicant with its appropriate regulator for the last six calendar quarters and three year-ends preceding the date the Bank receives the application;

(2) *Financial statement.* In order of preference—

(i) The most recent independent audit of the applicant conducted in accordance with generally accepted auditing standards by a certified public accounting firm which submits a report on the applicant;

(ii) The most recent independent audit of the applicant's parent holding company conducted in accordance with generally accepted auditing standards by a certified public accounting firm which submits a report on the consolidated holding company but not on the applicant separately;

(iii) The most recent directors' examination of the applicant conducted in accordance with generally accepted auditing standards by a certified public accounting firm;

(iv) The most recent directors' examination of the applicant performed by other external auditors;

(v) The most recent review of the applicant's financial statements by external auditors;

(vi) The most recent compilation of the applicant's financial statements by external auditors; or

(vii) The most recent audit of other procedures of the applicant.

(3) *Regulatory examination report.* The applicant's most recent available regulatory examination report prepared by its appropriate regulator, a summary prepared by the Bank of the applicant's strengths and weaknesses as cited in the regulatory examination report, and a summary prepared by the Bank or applicant of actions taken by the applicant to respond to examination weaknesses;

(4) *Enforcement actions.* A description prepared by the Bank or applicant of any outstanding enforcement actions against the applicant, responses by the applicant, reports as required by the enforcement action, and verbal or written indications, if available, from the appropriate regulator of how the applicant is complying with the terms of the enforcement action; and

(5) *Additional information.* Any other relevant document or information concerning the applicant that comes to the Bank's attention in reviewing the applicant's financial condition.

(b) *Standards.* An applicant of the type described in paragraph (a) of this section shall be deemed to be in compliance with the financial condition requirement of section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and §1263.6(a)(4), if:

(1) *Recent composite regulatory examination rating.* The applicant has received a composite regulatory examination rating from its appropriate regulator within two years preceding the date the Bank receives the application;

(2) *Capital requirement.* The applicant meets all of its minimum statutory and regulatory capital requirements as reported in its most recent quarter-end regulatory financial report filed with its appropriate regulator; and

(3) *Minimum performance standard*—(i) Except as provided in paragraph (b)(3)(iii) of this section, the applicant's most recent composite regulatory examination rating from its appropriate regulator within the past two years was ''1'', or the most recent rating was ''2'' or ''3'' and, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, the applicant satisfied all of the following performance trend criteria—

(A) *Earnings.* The applicant's adjusted net income was positive in four of the six most recent calendar quarters;

(B) *Nonperforming assets.* The applicant's nonperforming loans and leases plus other real estate owned, did not exceed 10 percent of its total loans and leases plus other real estate owned, in the most recent calendar quarter; and

(C) *Allowance for loan and lease losses.* The applicant's ratio of its allowance for loan and lease losses plus the allocated transfer risk reserve to nonperforming loans and leases was 60 percent or greater during four of the six most recent calendar quarters.

(ii) For applicants that are not required to report financial data to their appropriate regulator on a quarterly basis, the information required in paragraph (b)(3)(i) of this section may be reported on a semi-annual basis.

(iii) An applicant that is a CDFI credit union or a non-federally-insured credit union must meet the performance trend criteria in paragraph (b)(3)(i) of this section irrespective of its composite regulatory examination rating.

(c) *Eligible collateral not considered.* The availability of sufficient eligible collateral to secure advances to the applicant is presumed and shall not be considered in determining whether an applicant is in the financial condition required by section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and §1263.6(a)(4).

[81 FR 3277, Jan. 20, 2016, as amended at 82 FR 25722, June 5, 2017]

§1263.12 Character of management requirement.

(a) *General.* A building and loan association, savings and loan association, cooperative bank, homestead association, savings bank, insured depository institution, insurance company, and CDFI credit union shall be deemed to be in compliance with the character of management requirements of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and §1263.6(a)(5) if the applicant provides to the Bank an unqualified written certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, that:

(1) *Enforcement actions.* Neither the applicant nor any of its directors or senior officers is subject to, or operating under, any enforcement action instituted by its appropriate regulator;

(2) *Criminal, civil or administrative proceedings.* Neither the applicant nor any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude since the most recent regulatory examination report; and

(3) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* There are no known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against

the applicant or any of its directors or senior officers since the most recent regulatory examination report, that are significant to the applicant's operations.

(b) *CDFIs other than CDFI credit unions.* A CDFI applicant, other than a CDFI credit union, shall be deemed to be in compliance with the character of management requirement of §1263.6(a)(5), if the applicant provides an unqualified written certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, that:

(1) *Criminal, civil or administrative proceedings.* Neither the applicant nor any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude in the past three years; and

(2) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* There are no known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against the applicant or any of its directors or senior officers arising within the past three years that are significant to the applicant's operations.

§1263.13 Home financing policy requirement.

(a) *Standard.* An applicant shall be deemed to be in compliance with the home financing policy requirements of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and §1263.6(a)(6), if the applicant has received a CRA rating of ''Satisfactory'' or better on its most recent CRA performance evaluation.

(b) *Written justification required.* An applicant that is not subject to the CRA shall file, as part of its application for membership, a written justification acceptable to the Bank of how and why the applicant's home financing policy is consistent with the Bank System's housing finance mission.

§1263.14 De novo insured depository institution applicants.

(a) *Presumptive compliance.* A de novo insured depository institution applicant shall be deemed to meet the duly organized, subject to inspection and regulation, financial condition, and character of management requirements of §§1263.7, 1263.8, 1263.11 and 1263.12, respectively.

(b) *Makes long-term home mortgage loans requirement.* A de novo insured depository institution applicant shall be deemed to make long-term home mortgage loans, as required by section 4(a)(1)(C) of the Bank Act (12 U.S.C. 1424(a)(1)(C)) and §1263.6(a)(3), if it has filed as part of its application for membership a written justification acceptable to the Bank of how its home financing credit policy and lending practices will include originating or purchasing long-term home mortgage loans.

(c) *10 percent requirement.*—(1) *Conditional approval.* If a de novo insured depository institution applicant that commenced its initial business operations less than one year before applying for Bank membership is subject to, but cannot yet meet, the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and §1263.6(b) as provided in §1263.10, a Bank may conditionally approve that applicant for membership if it meets all other applicable requirements.

(2) *Approval may become final.* If, within one year after commencement of its initial business operations, an institution that was conditionally approved for membership under paragraph (c)(1) of this section supplies evidence acceptable to the Bank that it satisfies the 10 percent requirement as provided under §1263.10, its membership approval shall become final.

(3) *Approval may become void.* If an institution that was conditionally approved for membership under paragraph (c)(1) does not satisfy the requirements of paragraph (c)(2) of this section, it shall be deemed to be out of compliance with the 10 percent requirement, and its conditional membership approval shall become void.

(d) *Home financing policy requirement.*—(1) *Conditional approval.* If a de

novo insured depository institution applicant cannot meet the home financing policy requirement of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and §1263.6(a)(6) as provided under §1263.13 because it has not received its first CRA performance evaluation, a Bank may conditionally approve that applicant for membership if it meets all other applicable requirements and has included in its application a written justification acceptable to the Bank of how and why its home financing credit policy and lending practices will meet the credit needs of its community.

(2) *Approval may become final.* If an institution that was conditionally approved for membership under paragraph (d)(1) of this section supplies evidence acceptable to the Bank that it has satisfied the home financing policy requirement as provided under §1263.13 by receiving a CRA rating of ''Satisfactory'' or better on its first CRA performance evaluation, its membership approval shall cease to be conditional.

(3) *Approval may become void.* If an institution that was conditionally approved for membership under paragraph (d)(1) of this section receives a rating of ''Needs to Improve'' or ''Substantial Non-Compliance'' on its first CRA performance evaluation, and fails to rebut the presumption of non-compliance with the home financing policy requirement as provided under §1263.17(f), it shall be deemed to be out of compliance with that requirement and its conditional membership approval shall become void.

(e) *Other rules.* An institution that has been conditionally approved for membership under paragraph (c)(1) or (d)(1) of this section shall be subject to all regulations applicable to members generally, including those relating to stock purchase requirements and or collateral, notwithstanding that its membership may be conditional for some period of time. If an institution's conditional membership approval becomes void as provided in paragraphs (c)(3) or (d)(3) of this section, then the Bank shall liquidate any outstanding indebtedness owed by the institution to the Bank and redeem or repurchase its capital stock in accordance with §1263.29.

§1263.15 Recently consolidated applicants.

An applicant that has recently consolidated with another institution is subject to the requirements of §§1263.7 to 1263.13 except as provided in this section.

(a) *Financial condition requirement.* For purposes of §1263.11(a)(1) and 1263.11(b)(3)(i)(A), a recently consolidated applicant that has not yet filed regulatory financial reports as a consolidated entity for six quarters or three calendar year-ends shall provide to the Bank:

(1) All regulatory financial reports that the applicant has filed as a consolidated entity; and

(2) *Pro forma* combined financial statements for those quarters for which actual combined regulatory financial reports are unavailable.

(b) *Home financing policy requirement.* For purposes of §1263.13, a recently consolidated applicant that has not yet received its first CRA performance evaluation as a consolidated entity shall file as part of its application a written justification acceptable to the Bank of how and why the applicant's home financing credit policy and lending practices will meet the credit needs of its community.

(c) *Makes long-term home mortgage loans requirement; 10 percent requirement.* For purposes of determining compliance with §§1263.9 and 1263.10, a Bank may, in its discretion, permit a recently consolidated applicant that has not yet filed a regulatory financial report as a consolidated entity to provide the *pro forma* financial statement for the consolidated entity that the consolidating entities filed with the regulator that approved the consolidation.

§1263.16 Financial condition requirement for insurance company and certain CDFI applicants.

(a) *Insurance companies.*—(1) An insurance company applicant shall be deemed to meet the financial condition requirement of §1263.6(a)(4) if the Bank determines:

(i) Based on the information contained in the applicant's most recent regulatory financial report filed with

its appropriate regulator, that the applicant meets all of its minimum statutory and regulatory capital requirements and the capital standards established by the NAIC; and

(ii) Based on the applicant's most recent audited financial statements, that the applicant's financial condition is such that the Bank can safely make advances to it.

(2) In making the determination required under paragraph (a)(1)(ii) of this section, the Bank shall use audited financial statements that have been prepared in accordance with generally accepted accounting principles, if they are available. If they are not available, the Bank may use audited financial statements prepared in accordance with statutory accounting principles.

(b) *CDFIs other than CDFI credit unions.*—(1) *Review requirement.* In order for a Bank to determine whether a CDFI applicant, other than a CDFI credit union, has complied with the financial condition requirement of §1263.6(a)(4), the applicant shall submit, as a part of its membership application, each of the following documents, and the Bank shall consider all such information prior to acting on the application for membership:

(i) *Financial statements.* An independent audit conducted within the prior year in accordance with generally accepted auditing standards by a certified public accounting firm, plus more recent quarterly statements, if available, and financial statements for the two years prior to the most recent audited financial statement. At a minimum, all such financial statements must include income and expense statements, statements of activities, statements of financial position, and statements of cash flows. The financial statement for the most recent year must include separate schedules or disclosures of the financial position of each of the applicant's affiliates, descriptions of their lines of business, detailed financial disclosures of the relationship between the applicant and its affiliates (such as indebtedness or subordinate debt obligations), disclosures of interlocking directorships with each affiliate, and identification of temporary and permanently restricted funds and the requirements of these restrictions;

(ii) *CDFI Fund certification.* The certification that the applicant has received from the CDFI Fund. If the certification is more than three years old, the applicant must also submit a written statement attesting that there have been no material events or occurrences since the date of certification that would adversely affect its strategic direction, mission, or business operations; and

(iii) *Additional information.* Any other relevant document or information a Bank requests concerning the applicant's financial condition that is not contained in the applicant's financial statements, as well as any other information that the applicant believes demonstrates that it satisfies the financial condition requirement of §1263.6(a)(4), notwithstanding its failure to meet any of the financial condition standards of paragraph (b)(2) of this section.

(2) *Standards.* A CDFI applicant, other than a CDFI credit union, shall be deemed to be in compliance with the financial condition requirement of §1263.6(a)(4) if it meets all of the following minimum financial standards—

(i) *Net asset ratio.* The applicant's ratio of net assets to total assets is at least 20 percent, with net and total assets including restricted assets, where net assets is calculated as the residual value of assets over liabilities and is based on information derived from the applicant's most recent financial statements;

(ii) *Earnings.* The applicant has shown positive net income, where net income is calculated as gross revenues less total expenses, is based on information derived from the applicant's most recent financial statements, and is measured as a rolling three-year average;

(iii) *Loan loss reserves.* The applicant's ratio of loan loss reserves to loans and leases 90 days or more delinquent (including loans sold with full recourse) is at least 30 percent, where loan loss reserves are a specified balance sheet account that reflects the amount reserved for loans expected to

be uncollectible and are based on information derived from the applicant's most recent financial statements;

(iv) *Liquidity*. The applicant has an operating liquidity ratio of at least 1.0 for the four most recent quarters, and for one or both of the two preceding years, where the numerator of the ratio includes unrestricted cash and cash equivalents and the denominator of the ratio is the average quarterly operating expense.

§ 1263.17 Rebuttable presumptions.

(a) *Rebutting presumptive compliance*. The presumption that an applicant meeting the requirements of §§ 1263.7 to 1263.16 is in compliance with the corresponding eligibility requirements of section 4(a) of the Bank Act (12 U.S.C. 1424(a)) and § 1263.6(a) and (b), may be rebutted, and the Bank may deny membership to an applicant, if the Bank obtains substantial evidence to overcome the presumption of compliance.

(b) *Rebutting presumptive noncompliance*. The presumption that an applicant not meeting a particular requirement of §§ 1263.8, 1263.11, 1263.12, 1263.13, or 1263.16, is not in compliance with the corresponding eligibility requirement of section 4(a) of the Bank Act (12 U.S.C. 1424(a)) and § 1263.6(a) may be rebutted and the applicant shall be deemed to be in compliance with an eligibility requirement, if it satisfies the applicable requirements in this section.

(c) *Presumptive noncompliance by insurance company applicant with ''subject to inspection and regulation'' requirement of § 1263.8*. If an insurance company applicant is not subject to inspection and regulation by an appropriate State regulator accredited by the NAIC, as required by § 1263.8, the applicant or the Bank shall prepare a written justification that provides substantial evidence acceptable to the Bank that the applicant is subject to inspection and regulation as required by § 1263.6(a)(2), notwithstanding the regulator's lack of NAIC accreditation.

(d) *Presumptive noncompliance with financial condition requirements of §§ 1263.11 and 1263.16*—(1) *Applicants subject to § 1263.11*. For applicants subject to § 1263.11, in the case of an applicant's lack of a composite regulatory examination rating within the two-year period required by § 1263.11(b)(1), a variance from the rating required by § 1263.11(b)(3)(i), or a variance from a performance trend criterion required by § 1263.11(b)(3)(i), the applicant or the Bank shall prepare a written justification pertaining to such requirement that provides substantial evidence acceptable to the Bank that the applicant is in the financial condition required by § 1263.6(a)(4), notwithstanding the lack of rating or variance.

(2) *Applicants subject to § 1263.16*. For applicants subject to § 1263.16, in the case of an insurance company applicant's variance from a capital requirement or standard of § 1263.16(a) or, in the case of a CDFI applicant's variance from the standards of § 1263.16(b), the applicant or the Bank shall prepare a written justification pertaining to such requirement or standard that provides substantial evidence acceptable to the Bank that the applicant is in the financial condition required by § 1263.6(a)(4), notwithstanding the variance.

(e) *Presumptive noncompliance with character of management requirement of § 1263.12*—(1) *Enforcement actions*. If an applicant or any of its directors or senior officers is subject to, or operating under, any enforcement action instituted by its appropriate regulator, the applicant shall provide or the Bank shall obtain:

(i) *Regulator confirmation*. Written or verbal confirmation from the applicant's appropriate regulator that the applicant or its directors or senior officers are in substantial compliance with all aspects of the enforcement action; or

(ii) *Written analysis*. A written analysis acceptable to the Bank indicating that the applicant or its directors or senior officers are in substantial compliance with all aspects of the enforcement action. The written analysis shall state each action the applicant or its directors or senior officers are required to take by the enforcement action, the actions actually taken by the applicant or its directors or senior officers, and whether the applicant regards this as substantial compliance with all aspects of the enforcement action.

(2) *Criminal, civil or administrative proceedings.* If an applicant or any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude since the most recent regulatory examination report or, in the case of a CDFI applicant, during the past three years, the applicant shall provide or the Bank shall obtain—

(i) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator that the proceedings will not likely result in an enforcement action; or

(ii) *Written analysis.* A written analysis acceptable to the Bank indicating that the proceedings will not likely result in an enforcement action or, in the case of a CDFI applicant, that the proceedings will not likely have a significantly deleterious effect on the applicant's operations. The written analysis shall state the severity of the charges, and any mitigating action taken by the applicant or its directors or senior officers.

(3) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* If there are any known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against the applicant or any of its directors or senior officers since the most recent regulatory examination report or, in the case of a CDFI applicant, occurring within the past three years, that are significant to the applicant's operations, the applicant shall provide or the Bank shall obtain—

(i) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator that the liabilities, lawsuits or judgments will not likely cause the applicant to fall below its applicable capital requirements set forth in §§ 1263.11(b)(2) and 1263.16(a); or

(ii) *Written analysis.* A written analysis acceptable to the Bank indicating that the liabilities, lawsuits or judgments will not likely cause the applicant to fall below its applicable capital requirements set forth in § 1263.11(b)(2) or § 1263.16(a), or the net asset ratio set forth in § 1263.16(b)(2)(i). The written analysis shall state the likelihood of the applicant or its directors or senior officers prevailing, and the financial consequences if the applicant or its directors or senior officers do not prevail.

(f) *Presumptive noncompliance with home financing policy requirements of §§ 1263.13 and 1263.14(d).* If an applicant received a ''Substantial Non-Compliance'' rating on its most recent CRA performance evaluation, or a ''Needs to Improve'' CRA rating on its most recent CRA performance evaluation and a CRA rating of ''Needs to Improve'' or better on any immediately preceding formal CRA performance evaluation, the applicant shall provide or the Bank shall obtain:

(1) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator of the applicant's recent satisfactory CRA performance, including any corrective action that substantially improved upon the deficiencies cited in the most recent CRA performance evaluation(s); or

(2) *Written analysis.* A written analysis acceptable to the Bank demonstrating that the CRA rating is unrelated to home financing, and providing substantial evidence of how and why the applicant's home financing credit policy and lending practices meet the credit needs of its community.

§ 1263.18 Determination of appropriate Bank district for membership.

(a) *Eligibility.* (1) An institution eligible to be a member of a Bank under the Bank Act and this part may be a member only of the Bank of the district in which the institution's principal place of business is located, except as provided in paragraph (a)(2) of this section. A member shall promptly notify its Bank in writing whenever it relocates its principal place of business to another State and the Bank shall inform FHFA in writing of any such relocation.

(2) An institution eligible to become a member of a Bank under the Bank Act and this part may be a member of the Bank of a district adjoining the district in which the institution's principal place of business is located, if demanded by convenience and then only with the approval of FHFA.

(b) *Principal place of business.* Except as otherwise designated in accordance with this section, the principal place of business of an institution is the State in which the institution maintains its home office established as such in conformity with the laws under which the institution is organized and from which the institution conducts business operations.

(c) *Designation of principal place of business*—(1) A member or an applicant for membership may request in writing to the Bank in the district where the institution maintains its home office that a State other than the State in which it maintains its home office be designated as its principal place of business. Within 90 calendar days of receipt of such written request, the board of directors of the Bank in the district where the institution maintains its home office shall designate a State other than the State where the institution maintains its home office as the institution's principal place of business, provided that, all of the following criteria are satisfied:

(i) At least 80 percent of the institution's accounting books, records, and ledgers are maintained, located or held in such designated State;

(ii) A majority of meetings of the institution's board of directors and constituent committees are conducted in such designated State; and

(iii) A majority of the institution's five highest paid officers have their place of employment located in such designated State.

(2) Written notice of a designation made pursuant to paragraph (c)(1) of this section shall be sent to the Bank in the district containing the designated State, FHFA, and the institution.

(3) The notice of designation made pursuant to paragraph (c)(1) of this section shall include the State designated as the principal place of business and the Bank of which the subject institution is eligible to be a member.

(4) If the board of directors of the Bank in the district where the institution maintains its home office fails to make the designation requested by the member or applicant pursuant to paragraph (c)(1) of this section, then the member or applicant may request in writing that FHFA make the designation.

(d) *Transfer of membership.* (1) In the case of a member whose principal place of business has been designated as a State located in another Bank district in accordance with paragraph (c) of this section, or in the case of a member that has relocated its principal place of business to a State in another Bank district, the transfer of membership from one Bank to another Bank shall not take effect until the Banks involved reach an agreement on a method of orderly transfer.

(2) In the event that the Banks involved fail to agree on a method of orderly transfer, FHFA shall determine the conditions under which the transfer shall take place.

(e) *Effect of transfer.* A transfer of membership pursuant to this section shall be effective for all purposes, but shall not affect voting rights in the year of the transfer and shall not be subject to the provisions on termination of membership set forth in section 6 of the Bank Act (12 U.S.C. 1426) or §§ 1263.26 and 1263.27, nor the restriction on reacquiring Bank membership set forth in § 1263.30.

(f) *Insurance companies and CDFIs.* (1) For an insurance company or CDFI that cannot satisfy the requirements of paragraphs (b) or (c) of this section for designating its principal place of business, a Bank shall designate as the principal place of business the geographic location from which the institution actually conducts the predominant portion of its business activities.

(2) A Bank may deem an institution to conduct the predominant portion of its business activities in a particular State if any two of the following three factors are present:

(i) The institution's largest office, as measured by the number of employees, is located in that State;

(ii) A plurality of the institution's employees are located in that State; or

(iii) The places of employment for a plurality of the institution's senior executives are located in that State.

(3) If a Bank cannot designate a State as the principal place of business under paragraph (f)(1) of this section,

and cannot otherwise identify a geographic location from which the institution actually conducts the predominant portion of its business activities, it shall designate the State of domicile or incorporation as the principal place of business for that institution.

(4) For purposes of paragraph (f)(2) of this section, the term ''senior executive'' means all officers at or above the level of ''senior vice president'' and includes the positions of president, executive vice president, chief executive officer, chief financial officer, chief operating officer, general counsel, as well as any individuals who perform functions similar to those positions whether or not the individual has an official title.

(g) *Records.* A Bank designating the principal place of business for a member under this section shall document the bases for its determination in writing and shall include that documentation in the membership digest and application file for the institution that are required under § 1263.2.

§ 1263.19 Non-federally-insured credit unions.

(a) *Applicants.* Except where otherwise provided, a non-federally-insured credit union applying to become a member of a Bank shall be treated as an insured depository institution for purposes of determining its eligibility for membership under this part, provided that all of the following requirements have been met:

(1) *Notice.* Upon receiving from a non-federally-insured credit union an application for membership, a Bank shall promptly notify the applicant in writing that its application will not be deemed complete or be acted upon by the Bank until the applicant has, in addition to satisfying all other generally applicable requirements, complied with paragraph (a)(2) of this section and subsequently provided one of the items listed in paragraph (a)(3) of this section.

(2) *Request to regulator.* After receiving the notice required under paragraph (a)(1) of this section, a non-federally-insured credit union applicant shall send to its appropriate State regulator a written request for a determination that the applicant met all of the eligibility requirements for Federal share insurance as of the date of the request. The applicant shall provide to the Bank a copy of that request simultaneously with its transmittal to the regulator.

(3) *Completion of application.* A Bank may deem the application of a non-federally-insured credit union to be complete and may act upon the application, as provided under § 1263.3(c), only if it has received from the applicant one of the following items:

(i) A written statement from the applicant's appropriate State regulator that the applicant met all of the eligibility requirements for Federal share insurance as of the date of the request sent pursuant to paragraph (a)(2) of this section;

(ii) A written statement from the applicant's appropriate State regulator that it cannot or will not make a determination regarding the applicant's eligibility for Federal share insurance; or

(iii) A written statement from the applicant, prepared no earlier than the end of the six-month period beginning on the date of the request sent pursuant to paragraph (a)(2) of this section, certifying that the applicant did not receive from its appropriate State regulator within that six-month period either a response as described in paragraph (a)(3)(i) or (ii) of this section or a response stating that the applicant did not meet all of the eligibility requirements for Federal share insurance as of the date of the request sent pursuant to paragraph (a)(2) of this section.

(b) *Members canceling Federal share insurance.* A Bank member that is a federally insured credit union and that subsequently cancels its Federal share insurance may remain a member of the Bank, subject to all regulatory provisions applicable to insured depository institution members, provided that the Bank has determined that the institution has canceled its Federal share insurance voluntarily.

[82 FR 25723, June 5, 2017]

Subpart D—Stock Requirements

§ 1263.20 Stock purchase.

(a) *Minimum purchase requirement.* An institution that has been approved for membership in a Bank as provided in this part shall become a member of that Bank upon purchasing the amount of stock required under the membership stock purchase provisions of that Bank's capital structure plan. If an institution fails to purchase the minimum amount of stock required for membership within 60 calendar days after the date on which it is approved for membership, the membership approval shall become void and that institution may not become a member of that Bank until after it has filed a new application and the Bank has approved that application pursuant to the requirements of this part.

(b) *Issuance of stock.* After approving an institution for membership, and in return for payment in full of the par value, a Bank shall issue to that institution the amount of capital stock required to be purchased under the Bank's capital structure plan.

(c) *Reports.* Each Bank shall report to FHFA information regarding the minimum investment in Bank capital stock made by each new member referred to in paragraph (a) of this section, in accordance with the instructions provided in the Data Reporting Manual.

§ 1263.21 [Reserved]

§ 1263.22 Annual calculation of stock holdings.

A Bank shall calculate annually each member's required minimum holdings of Bank stock using calendar year-end financial data provided by the member to the Bank, pursuant to §1263.31(d), and shall notify each member of the result. The notice shall clearly state that the Bank's calculation of each member's minimum stock holdings is to be used to determine the number of votes that the member may cast in that year's election of directors and shall identify the State within the district in which the member will vote. A member that does not agree with the Bank's calculation of the minimum stock purchase requirement or with the identification of its voting State may request FHFA to review the Bank's determination. FHFA shall promptly determine the member's minimum required holdings and its proper voting State, which determination shall be final.

§ 1263.23 Excess stock.

(a) *Sale of excess stock.* Subject to the restriction in paragraph (b) of this section, a member may purchase excess stock as long as the purchase is approved by the member's Bank and is permitted by the laws under which the member operates.

(b) *Restriction.* Any Bank with excess stock greater than one percent of its total assets shall not declare or pay any dividends in the form of additional shares of Bank stock or otherwise issue any excess stock. A Bank shall not issue excess stock, as a dividend or otherwise, if after the issuance, the outstanding excess stock at the Bank would be greater than one percent of its total assets.

Subpart E—Withdrawal, Termination and Readmission

§ 1263.24 Consolidations involving members.

(a) *Consolidation of members.* Upon the consolidation of two or more institutions that are members of the same Bank into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of each disappearing institution shall terminate on the cancellation of its charter. Upon the consolidation of two or more institutions, at least two of which are members of different Banks, into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of each disappearing institution shall terminate upon cancellation of its charter, provided, however, that if more than 80 percent of the assets of the consolidated institution are derived from the assets of a disappearing

institution, then the consolidated institution shall continue to be a member of the Bank of which that disappearing institution was a member prior to the consolidation, and the membership of the other institutions shall terminate upon the effective date of the consolidation.

(b) *Consolidation into nonmember*—(1) *In general.* Upon the consolidation of a member into an institution that is not a member of a Bank, where the consolidated institution operates under the charter of the nonmember institution, the membership of the disappearing institution shall terminate upon the cancellation of its charter.

(2) *Notification.* If a member has consolidated into a nonmember that has its principal place of business in a State in the same Bank district as the former member, the consolidated institution shall have 60 calendar days after the cancellation of the charter of the former member within which to notify the Bank of the former member that the consolidated institution intends to apply for membership in such Bank. If the consolidated institution does not so notify the Bank by the end of the period, the Bank shall require the liquidation of any outstanding indebtedness owed by the former member, shall settle all outstanding business transactions with the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(3) *Application.* If such a consolidated institution has notified the appropriate Bank of its intent to apply for membership, the consolidated institution shall submit an application for membership within 60 calendar days of so notifying the Bank. If the consolidated institution does not submit an application for membership by the end of the period, the Bank shall require the liquidation of any outstanding indebtedness owed by the former member, shall settle all outstanding business transactions with the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(4) *Outstanding indebtedness.* If a member has consolidated into a nonmember institution, the Bank need not require the former member or its successor to liquidate any outstanding indebtedness owed to the Bank or to redeem its Bank stock, as otherwise may be required under § 1263.29, during:

(i) The initial 60 calendar-day notification period;

(ii) The 60 calendar-day period following receipt of a notification that the consolidated institution intends to apply for membership; and

(iii) The period of time during which the Bank processes the application for membership.

(5) *Approval of membership.* If the application of such a consolidated institution is approved, the consolidated institution shall become a member of that Bank upon the purchase of the amount of Bank stock necessary, when combined with any Bank stock acquired from the disappearing member, to satisfy the minimum stock purchase requirements established by the Bank's capital structure plan.

(6) *Disapproval of membership.* If the Bank disapproves the application for membership of the consolidated institution, the Bank shall require the liquidation of any outstanding indebtedness owed by, and the settlement of all other outstanding business transactions with, the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(c) *Dividends on acquired Bank stock.* A consolidated institution shall be entitled to receive dividends on the Bank stock that it acquires as a result of a consolidation with a member in accordance with applicable FHFA regulations.

§ 1263.25 [Reserved]

§ 1263.26 Voluntary withdrawal from membership.

(a) *In general*—(1) Any institution may withdraw from membership by providing to the Bank written notice of its intent to withdraw from membership. A member that has so notified its Bank shall be entitled to have continued access to the benefits of membership until the effective date of its withdrawal. The Bank need not commit to providing any further services, including advances, to a withdrawing member that would mature or otherwise

terminate subsequent to the effective date of the withdrawal. A member may cancel its notice of withdrawal at any time prior to its effective date by providing a written cancellation notice to the Bank. A Bank may impose a fee on a member that cancels a notice of withdrawal, provided that the fee or the manner of its calculation is specified in the Bank's capital plan.

(2) A Bank shall notify FHFA within 10 calendar days of receipt of any notice of withdrawal or notice of cancellation of withdrawal from membership.

(b) *Effective date of withdrawal.* The membership of an institution that has submitted a notice of withdrawal shall terminate as of the date on which the last of the applicable stock redemption periods ends for the stock that the member is required to hold, as of the date that the notice of withdrawal is submitted, under the terms of a Bank's capital plan as a condition of membership, unless the institution has cancelled its notice of withdrawal prior to the effective date of the termination of its membership.

(c) *Stock redemption periods.* The receipt by a Bank of a notice of withdrawal shall commence the applicable 6-month and 5-year stock redemption periods, respectively, for all of the Class A and Class B stock held by that member that is not already subject to a pending request for redemption. In the case of an institution, the membership of which has been terminated as a result of a merger or other consolidation into a nonmember or into a member of another Bank, the applicable stock redemption periods for any stock that is not subject to a pending notice of redemption shall be deemed to commence on the date on which the charter of the former member is cancelled.

§ 1263.27 Involuntary termination of membership.

(a) *Grounds.* The board of directors of a Bank may terminate the membership of any institution that:

(1) Fails to comply with any requirement of the Bank Act, any regulation adopted by FHFA, or any requirement of the Bank's capital plan;

(2) Becomes insolvent or otherwise subject to the appointment of a conservator, receiver, or other legal custodian under federal or State law; or

(3) Would jeopardize the safety or soundness of the Bank if it were to remain a member.

(b) *Stock redemption periods.* The applicable 6-month and 5-year stock redemption periods, respectively, for all of the Class A and Class B stock owned by a member and not already subject to a pending request for redemption, shall commence on the date that the Bank terminates the institution's membership.

(c) *Membership rights.* An institution whose membership is terminated involuntarily under this section shall cease being a member as of the date on which the board of directors of the Bank acts to terminate the membership, and the institution shall have no right to obtain any of the benefits of membership after that date, but shall be entitled to receive any dividends declared on its stock until the stock is redeemed or repurchased by the Bank.

§ 1263.28 [Reserved]

§ 1263.29 Disposition of claims.

(a) *In general.* If an institution withdraws from membership or its membership is otherwise terminated, the Bank shall determine an orderly manner for liquidating all outstanding indebtedness owed by that member to the Bank and for settling all other claims against the member. After all such obligations and claims have been extinguished or settled, the Bank shall return to the member all collateral pledged by the member to the Bank to secure its obligations to the Bank.

(b) *Bank stock.* If an institution that has withdrawn from membership or that otherwise has had its membership terminated remains indebted to the Bank or has outstanding any business transactions with the Bank after the effective date of its termination of membership, the Bank shall not redeem or repurchase any Bank stock that is required to support the indebtedness or the business transactions until after all such indebtedness and business transactions have been extinguished or settled.

§ 1263.30 Readmission to membership.

(a) *In general.* An institution that has withdrawn from membership or otherwise has had its membership terminated and which has divested all of its shares of Bank stock, may not be readmitted to membership in any Bank, or acquire any capital stock of any Bank, for a period of five years from the date on which its membership terminated and it divested all of its shares of Bank stock.

(b) *Exceptions.* An institution that transfers membership between two Banks without interruption shall not be deemed to have withdrawn from Bank membership or had its membership terminated.

Subpart F—Other Membership Provisions

§ 1263.31 Reports and examinations.

As a condition precedent to Bank membership, each member:

(a) Consents to such examinations as the Bank or FHFA may require for purposes of the Bank Act;

(b) Agrees that reports of examination by local, State, or Federal agencies or institutions, or by any private entity providing share insurance to a member that is a non-federally-insured credit union or a CDFI credit union, may be furnished by such authorities or entities to the Bank or FHFA upon request;

(c) Agrees to give the Bank or the appropriate Federal banking agency, upon request, such information as the Bank or the appropriate Federal banking agency may need to compile and publish cost of funds indices and to publish other reports or statistical summaries pertaining to the activities of Bank members;

(d) Agrees to provide the Bank with calendar year-end financial data each year, for purposes of making the calculation described in § 1263.22; and

(e) To the extent applicable, agrees to provide to the Bank, within 20 days of filing, copies of reports of condition and operations required to be filed with:

(1) The member's appropriate Federal banking agency;

(2) The member's appropriate State regulator; or

(3) Any private entity providing share insurance to a member that is a non-federally-insured credit union or a CDFI credit union.

[81 FR 3277, Jan. 20, 2016, as amended at 82 FR 25723, June 5, 2017]

§ 1263.32 Official membership insignia.

Members may display the approved insignia of membership on their documents, advertising and quarters, and likewise use the words ''Member Federal Home Loan Bank System.''

PART 1264—FEDERAL HOME LOAN BANK HOUSING ASSOCIATES

Sec.

AUTHORITY: 12 U.S.C. 1430b, 4511, 4513 and 4526.

SOURCE: 65 FR 44426, July 18, 2000, unless otherwise noted. Redesignated at 75 FR 8240, Feb. 24, 2010.

EDITORIAL NOTE: Nomenclature changes to part 1264 appear at 78 FR 2324, Jan. 11, 2013.

§ 1264.1 Definitions.

As used in this part:

Governmental agency means the governor, legislature, and any other component of a federal, state, local, tribal, or Alaskan native village government with authority to act for or on behalf of that government.

State housing finance agency or *SHFA* means:

(1) A public agency, authority, or publicly sponsored corporation that serves as an instrumentality of any state or political subdivision of any state, and functions as a source of residential mortgage loan financing in that state; or

(2) A legally established agency, authority, corporation, or organization that serves as an instrumentality of any Indian tribe, band, group, nation,

community, or Alaskan Native village recognized by the United States or any state, and functions as a source of residential mortgage loan financing for the Indian or Alaskan Native community.

[65 FR 44426, July 18, 2000, as amended at 67 FR 12849, Mar. 20, 2002; 75 FR 8240, Feb. 24, 2010; 78 FR 2324, Jan. 11, 2013]

§ 1264.2 Bank authority to make advances to housing associates.

Subject to the provisions of the Bank Act and part 1266 of this chapter, a Bank may make advances to an entity that is not a member of the Bank if the Bank has certified the entity as a housing associate under the provisions of this part.

[65 FR 44426, July 18, 2000, as amended at 75 FR 8240, Feb. 24, 2010; 81 FR 76297, Nov. 2, 2016]

§ 1264.3 Housing associate eligibility requirements.

(a) *General.* A Bank may certify as a housing associate any applicant that meets the following requirements, as determined using the criteria set forth in § 1264.4:

(1) The applicant is approved under title II of the National Housing Act (12 U.S.C. 1707, *et seq.*);

(2) The applicant is a chartered institution having succession;

(3) The applicant is subject to the inspection and supervision of some governmental agency;

(4) The principal activity of the applicant in the mortgage field consists of lending its own funds; and

(5) The financial condition of the applicant is such that advances may be safely made to it.

(b) *State housing finance agencies.* In addition to meeting the requirements in paragraph (a) of this section, any applicant seeking access to advances as a SHFA pursuant to § 1266.17(b)(2) of this chapter shall provide evidence satisfactory to the Bank, such as a copy of, or a citation to, the statutes and/or regulations describing the applicant's structure and responsibilities, that the applicant is a state housing finance agency as defined in § 1264.1.

[65 FR 44426, July 18, 2000, as amended at 75 FR 8240, Feb. 24, 2010; 75 FR 76622, Dec. 9, 2010]

§ 1264.4 Satisfaction of eligibility requirements.

(a) *HUD approval requirement.* An applicant shall be deemed to meet the requirement in section 10b(a) of the Bank Act (12 U.S.C. 1430b(a)) and § 1264.3(a)(1) that it be approved under title II of the National Housing Act if it submits a current HUD Yearly Verification Report or other documentation issued by HUD stating that the Federal Housing Administration of HUD has approved the applicant as a mortgagee.

(b) *Charter requirement.* An applicant shall be deemed to meet the requirement in section 10b(a) of the Bank Actand § 1264.3(a)(2) that it be a chartered institution having succession if it provides evidence satisfactory to the Bank, such as a copy of, or a citation to, the statutes and/or regulations under which the applicant was created, that:

(1) The applicant is a government agency; or

(2) The applicant is chartered under state, federal, local, tribal, or Alaskan Native village law as a corporation or other entity that has rights, characteristics, and powers under applicable law similar to those granted a corporation.

(c) *Inspection and supervision requirement.* (1) An applicant shall be deemed to meet the inspection and supervision requirement in section 10b(a) of the Bank Act (12 U.S.C. 1430b(a)) and § 1264.3(a)(3) if it provides evidence satisfactory to the Bank, such as a copy of, or a citation to, relevant statutes and/or regulations, that, pursuant to statute or regulation, the applicant is subject to the inspection and supervision of a federal, state, local, tribal, or Alaskan native village governmental agency.

(2) An applicant shall be deemed to meet the inspection requirement if there is a statutory or regulatory requirement that the applicant be audited or examined periodically by a governmental agency or by an external auditor.

(3) An applicant shall be deemed to meet the supervision requirement if the governmental agency has statutory or regulatory authority to remove an applicant's officers or directors for

cause or otherwise exercise enforcement or administrative control over actions of the applicant.

(d) *Mortgage activity requirement.* An applicant shall be deemed to meet the mortgage activity requirement in section 10b(a) of the Bank Act (12 U.S.C. 1430b(a)) and §1264.3(a)(4) if it provides documentary evidence satisfactory to the Bank, such as a financial statement or other financial documents that include the applicant's mortgage loan assets and their funding liabilities, that it lends its own funds as its principal activity in the mortgage field. For purposes of this paragraph, lending funds includes, but is not limited to, the purchase of whole mortgage loans. In the case of a federal, state, local, tribal, or Alaskan Native village government agency, appropriated funds shall be considered an applicant's own funds. An applicant shall be deemed to satisfy this requirement notwithstanding that the majority of its operations are unrelated to mortgage lending if its mortgage activity conforms to this requirement. An applicant that acts principally as a broker for others making mortgage loans, or whose principal activity is to make mortgage loans for the account of others, does not meet this requirement.

(e) *Financial condition requirement.* An applicant shall be deemed to meet the financial condition requirement in §1264.3(a)(5) if the Bank determines that advances may be safely made to the applicant. The applicant shall submit to the Bank copies of its most recent regulatory audit or examination report, or external audit report, and any other documentary evidence, such as financial or other information, that the Bank may require to make the determination.

[65 FR 44426, July 18, 2000, as amended at 67 FR 12849, Mar. 20, 2002; 70 FR 9510, Feb. 28, 2005; 75 FR 8240, Feb. 24, 2010]

§1264.5 Housing associate application process.

(a) *Authority.* The Banks are authorized to approve or deny all applications for certification as a housing associate, subject to the requirements of the Bank Act and this part. A Bank may delegate the authority to approve applications for certification as a housing associate only to a committee of the Bank's board of directors, the Bank president, or a senior officer who reports directly to the Bank president other than an officer with responsibility for business development.

(b) *Application requirements.* An applicant for certification as a housing associate shall submit an application that satisfies the requirements of the Bank Act and this part to the Bank of the district in which the applicant's principal place of business, as determined in accordance with part 925 of this title, is located.

(c) *Bank decision process*—(1) *Action on applications.* A Bank shall approve or deny an application for certification as a housing associate within 60 calendar days of the date the Bank deems the application to be complete. A Bank shall deem an application complete, and so notify the applicant in writing, when it has obtained all of the information required by this part and any other information it deems necessary to process the application. If a Bank determines during the review process that additional information is necessary to process the application, the Bank may deem the application incomplete and stop the 60-day time period by providing written notice to the applicant. When the Bank receives the additional information, it shall again deem the application complete, so notify the applicant in writing, and resume the 60-day time period where it stopped.

(2) *Decision on applications.* The Bank or a duly delegated committee of the Bank's board of directors, the Bank president, or a senior officer who reports directly to the Bank president other than an officer with responsibility for business development shall approve, or the board of directors of a Bank shall deny, each application for certification as a housing associate by a written decision resolution stating the grounds for the decision. Within three business days of a Bank's decision on an application, the Bank shall provide the applicant and the FHFA with a copy of the Bank's decision resolution.

(3) *File.* The Bank shall maintain a certification file for each applicant for

at least three years after the date the Bank decides whether to approve or deny certification or the date the FHFA resolves any appeal, whichever is later. At a minimum, the certification file shall include all documents submitted by the applicant or otherwise obtained or generated by the Bank concerning the applicant, all documents the Bank relied upon in making its determination regarding certification, including copies of statutes and regulations, and the decision resolution.

[65 FR 44426, July 18, 2000, as amended at 70 FR 9510, Feb. 28, 2005; 75 FR 8240, Feb. 24, 2010]

§ 1264.6 Appeals.

(a) *General.* Within 90 calendar days of the date of a Bank's decision to deny an application for certification as a housing associate, the applicant may submit a written appeal to FHFA that includes the Bank's decision resolution and a statement of the basis for the appeal with sufficient facts, information, analysis and explanation to support the applicant's position. Send appeals to the Deputy Director for Federal Home Loan Bank Regulation, Federal Housing Finance Agency, 400 7th Street SW., Seventh Floor, Washington, DC 20219, with a copy to the Bank.

(b) *Record for appeal.* Upon receiving a copy of an appeal, the Bank whose action has been appealed shall provide to the FHFA a complete copy of the applicant's certification file maintained by the Bank under §1264.5(c)(3). Until the FHFA resolves the appeal, the Bank shall promptly provide to the FHFA any relevant new materials it receives. The FHFA may request additional information or further supporting arguments from the applicant, the Bank, or any other party that the FHFA deems appropriate.

(c) *Deciding appeals.* Within 90 calendar days of the date an applicant files an appeal with the FHFA, the FHFA shall consider the record for appeal described in paragraph (b) of this section and resolve the appeal based on the requirements of the Bank Act and this part.

[65 FR 44426, July 18, 2000, as amended at 70 FR 9510, Feb. 28, 2005; 75 FR 8240, Feb. 24, 2010; 80 FR 80233, Dec. 24, 2015]

PART 1265—CORE MISSION ACTIVITIES

Sec.
1265.1 Definitions.
1265.2 Mission of the Banks.
1265.3 Core mission activities.

AUTHORITY: 12 U.S.C. 1430, 1430b, 1431, 4511, 4513 and 4526.

SOURCE: 65 FR 25278, May 1, 2000, unless otherwise noted. Redesignated at 75 FR 8240, Feb. 24, 2010.

§ 1265.1 Definitions.

As used in this part:

Advance means a loan from a Bank that is:

(1) Provided pursuant to a written agreement;

(2) Supported by a note or other written evidence of the borrower's obligations; and

(3) Fully secured by collateral in accordance with the Federal Home Loan Bank Act (12 U.S.C. 1421 through 1449) and applicable regulations.

SBIC means a small business investment company formed pursuant to section 301 of the Small Business Investment Act (15 U.S.C. 681).

Targeted income level means:

(1) For rural areas, incomes at or below 115 percent of the median income for the area, as adjusted for family size in accordance with the methodology of the applicable area median income standard or, at the option of the Bank, for a family of four; and

(2) For urban areas, incomes at or below 100 percent of the median income for the area, as adjusted for family size in accordance with the methodology of the applicable area median income standard or, at the option of the Bank, for a family of four.

[75 FR 8240, Feb. 24, 2010, as amended at 78 FR 2324, Jan. 11, 2013]

§ 1265.2 Mission of the Banks.

The mission of the Banks is to provide to their members' and housing associates financial products and services, including but not limited to advances, that assist and enhance such members' and housing associates financing:

(a) Financing of housing, including single-family and multi-family housing

serving consumers at all income levels; and

(b) Community lending.

[65 FR 25278, May 1, 2000, as amended at 67 FR 12850, Mar. 20, 2002; 67 FR 39791, June 10, 2002]

§ 1265.3 Core mission activities.

The following Bank activities qualify as core mission activities:

(a) Advances;

(b) Acquired member assets (AMA), except that United States government-insured or guaranteed whole single-family residential mortgage loans acquired under a commitment entered into after April 12, 2000 shall qualify only in a cumulative dollar amount up to 33 percent of: The cumulative total dollar amount of AMA acquired by a Bank after April 12, 2000, less the cumulative dollar amount of United States government-insured or guaranteed whole single-family residential mortgage loans acquired after April 12, 2000 under commitments entered into on or before April 12, 2000 (which calculation, at the discretion of two or more Banks, may be made based on aggregate transactions among those Banks);

(c) Standby letters of credit;

(d) Intermediary derivative contracts;

(e) Debt or equity investments:

(1) That primarily benefit households having a targeted income level, a significant proportion of which must benefit households with incomes at or below 80 percent of area median income, or areas targeted for redevelopment by local, state, tribal or Federal government (including Federal Empowerment Zones and Enterprise and Champion Communities), by providing or supporting one or more of the following activities:

(i) Housing;

(ii) Economic development;

(iii) Community services;

(iv) Permanent jobs; or

(v) Area revitalization or stabilization;

(2) In the case of mortgage- or asset-backed securities, the acquisition of which would expand liquidity for loans that are not otherwise adequately provided by the private sector and do not have a readily available or well established secondary market; and

(3) That involve one or more members or housing associates in a manner, financial or otherwise, and to a degree to be determined by the Bank;

(f) Investments in SBICs, where one or more members or housing associates of the Bank also make a material investment in the same activity;

(g) SBIC debentures, the short term tranche of SBIC securities, ore other debentures that are guaranteed by the Small Business Administration under title III of the Small Business Investment Act of 1958, as amended (15 U.S.C. 681 *et seq.*);

(h) Section 108 Interim Notes and Participation Certificates guaranteed by the Department of Housing and Urban Development under section 108 of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5308); and

(i) Investments and obligations issued or guaranteed under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*).

[65 FR 43981, July 17, 2000]

PART 1266—ADVANCES

Subpart A—Advances to Members

Subpart B—Advances to Housing Associates

AUTHORITY: 12 U.S.C. 1426, 1429, 1430, 1430b, 1431, 4511(b), 4513, 4526(a).

SOURCE: 58 FR 29469, May 20, 1993, unless otherwise noted. Redesignated at 65 FR 8256, Feb. 18, 2000, and 75 FR 76622, Dec. 9, 2010.

EDITORIAL NOTE: Nomenclature changes to part 1266 appear at 75 FR 76622, Dec. 9, 2010.

Subpart A—Advances to Members

§ 1266.1 Definitions.

As used in this part:

Advance means a loan from a Bank that is:

(1) Provided pursuant to a written agreement;

(2) Supported by a note or other written evidence of the borrower's obligation; and

(3) Fully secured by collateral in accordance with the Bank Act and this part.

Affiliate means any business entity that controls, is controlled by, or is under common control with, a member.

Capital deficient member means a member that fails to meet its minimum regulatory capital requirements as defined or otherwise required by the member's appropriate federal banking agency, insurer or, in the case of members that are not federally insured depository institutions, state regulator.

Cash equivalents means investments that—

(1) Are readily convertible into known amounts of cash;

(2) Have a remaining maturity of 90 days or less at the acquisition date; and

(3) Are held for liquidity purposes.

CFI member means a member that is a Community Financial Institution, as defined in §1263.1 of this chapter, except that, for purposes of this part, the member's average of total assets over three years shall be calculated by the Bank:

(1) Based on the average of total assets drawn from the institution's regulatory financial reports (as defined in §1263.1 of this chapter) filed with its appropriate regulator (as defined in §1263.1 of this chapter) for the three most recent calendar year-ends; and

(2) Annually, and shall be effective April 1 of each year.

Community development has the same meaning as under the definition set forth in the Community Reinvestment rule for the Federal Reserve System (12 CFR part 228), Federal Deposit Insurance Corporation (12 CFR part 345), the Office of Thrift Supervision (12 CFR part 563e) or the Office of the Comptroller of the Currency (12 CFR part 25), whichever is the CFI member's primary Federal regulator.

Community development loan means a loan, or a participation interest in such loan, that has as its primary purpose community development, but such loans shall not include:

(1) Any loan or instrument that qualifies as eligible security for an advance under §1266.7(a) of this part;

(2) Any loan that qualifies as a small agri-business loan, small business loan or small farm loan, under definitions set forth in this section; or

(3) Consumer loans or credit extended to one or more individuals for household, family or other personal expenditures.

Credit union means a credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

Depository institution means a bank, savings association, or credit union.

Dwelling unit means a single room or a unified combination of rooms designed for residential use by one household.

Improved residential real property means residential real property excluding real property to be improved, or in the process of being improved, by the construction of dwelling units.

Insurer means the FDIC for insured depository institutions, as defined section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2)), and the NCUA for federally-insured credit unions.

Long-term advance means an advance with an original term to maturity greater than five years.

Manufactured housing means a manufactured home as defined in section 603(6) of the Manufactured Home Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5402(6)).

Mortgage-backed security means:

(1) An equity security representing an ownership interest in:

(i) Fully disbursed, whole first mortgage loans on improved residential real property; or

(ii) Mortgage pass-through or participation securities which are themselves backed entirely by fully disbursed, whole first mortgage loans on improved residential real property; or

(2) An obligation, bond, or other debt security backed entirely by the assets described in paragraph (1)(i) or (ii) of this definition.

Multifamily property means:

(1)(i) Real property that is solely residential and which includes five or more dwelling units; or

(ii) Real property which includes five or more dwelling units with commercial units combined, provided the property is primarily residential.

(2) Multifamily property as defined in this section includes nursing homes, dormitories and homes for the elderly.

Nonresidential real property means real property not used for residential purposes, including business or industrial property, hotels, motels, churches, hospitals, educational and charitable institutions, clubs, lodges, association buildings, golf courses, recreational facilities, farm property not containing a dwelling unit, or similar types of property, except as otherwise determined by the FHFA in its discretion.

One-to-four family property means any of the following:

(1) Real property containing:

(i) One-to-four dwelling units; or

(ii) More than four dwelling units if each unit is separated from the other units by dividing walls that extend from ground to roof, including row houses, townhouses or similar types of property;

(2) Manufactured housing if:

(i) Applicable state law defines the purchase or holding of manufactured housing as the purchase or holding of real property; and

(ii) The loan to purchase the manufactured housing is secured by that manufactured housing;

(3) Individual condominium dwelling units or interests in individual cooperative housing dwelling units that are part of a condominium or cooperative building without regard to the number of total dwelling units therein; or

(4) Real property containing one-to-four dwelling units with commercial units combined, provided the property is primarily residential.

Residential housing finance assets means any of the following:

(1) Loans secured by residential real property;

(2) Mortgage-backed securities;

(3) Participations in loans secured by residential real property;

(4) Loans or investments providing financing for economic development projects for targeted beneficiaries;

(5) Loans secured by manufactured housing, regardless of whether such housing qualifies as residential real property;

(6) Any loans or investments which FHFA, in its discretion, otherwise determines to be residential housing finance assets; and

(7) For CFI members, and to the extent not already included in categories (1) through (6), small business loans, small farm loans, small agri-business loans, or community development loans.

Residential real property means:

(1) Any of the following:

(i) One-to-four family property;

(ii) Multifamily property;

(iii) Real property to be improved by the construction of dwelling units;

(iv) Real property in the process of being improved by the construction of dwelling units;

(2) The term residential real property does not include nonresidential real property as defined in this section.

Savings association means a savings association as defined in section 3(b) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1813(b)).

Small agri-business loans means loans to finance agricultural production and other loans to farmers that are within the legal lending limit of the reporting CFI member, and that are reported on either: Schedule RC-C, Part I, item 3 of the Report of Condition and Income filed by insured commercial banks and FDIC-supervised savings banks; or Schedule SC300, SC303 or SC306 of the Thrift Financial Report filed by savings associations (or equivalent successor schedules).

Small business loans means commercial and industrial loans that are within the legal lending limit of the reporting CFI member and that are reported on either: Schedule RC-C, Part I, item 1.e or Schedule RC-C, Part I, item 4 of the Report of Condition and Income filed by insured commercial banks and FDIC-supervised savings banks; or Schedule SC300, SC303 or SC306 of the Thrift Financial Report filed by savings associations (or equivalent successor schedules).

Small farm loans means loans secured primarily by farmland that are within the legal lending limit of the reporting CFI member, and that are reported on either: Schedule RC-C, Part I, item 1.a. or 1.b. of the Report of Condition and Income filed by insured commercial banks and FDIC-supervised savings banks; or Schedule SC260 of the Thrift Financial Report filed by savings associations (or equivalent successor schedules).

State housing finance agency or *SHFA* has the meaning set forth in §1264.1 of this chapter.

State regulator means a state insurance commissioner or state regulatory entity with primary responsibility for supervising a member borrower that is not a federally insured depository institution.

Tangible capital means:

(1) Capital, calculated according to GAAP, less ''intangible assets'' except for purchased mortgage servicing rights to the extent such assets are included in a member's core or Tier 1 capital, as reported in a member's Report of Condition and Income for members whose primary federal regulator is the FDIC, the OCC, or the FRB.

(2) Capital calculated according to GAAP, less intangible assets, as defined by a Bank for members that are not regulated by the FDIC, the OCC, or the FRB; provided that a Bank shall include a member's purchased mortgage servicing rights to the extent such assets are included for the purpose of meeting regulatory capital requirements. In addition, for those members that are insurance companies and that do not file or otherwise prepare financial statements based on GAAP, Banks may base this calculation on the member's financial statements prepared using Statutory Accounting Principles as implemented by the insurance company member's appropriate state regulator.

Targeted beneficiaries has the meaning set forth in §952.1 of this title.

[58 FR 29469, May 20, 1993, as amended at 58 FR 29477, May 20, 1993; 59 FR 2949, Jan. 20, 1994; 62 FR 8871, Feb. 27, 1997; 62 FR 12079, Mar. 14, 1997; 63 FR 35128, June 29, 1998; 63 FR 65545, Nov. 27, 1998; 64 FR 16621, Apr. 6, 1999; 65 FR 8262, Feb. 18, 2000; 65 FR 44428, July 18, 2000; 66 FR 50295, Oct. 3, 2001; 67 FR 12850, Mar. 20, 2002; 75 FR 76622, Dec. 9, 2010; 78 FR 2324, Jan. 11, 2013; 81 FR 76297, Nov. 2, 2016]

§1266.2 Authorization and application for advances; obligation to repay advances.

(a) *Application for advances.* A Bank may accept oral or written applications for advances from its members.

(b) *Obligation to repay advances.* (1) A Bank shall require any member to which an advance is made to enter into a primary and unconditional obligation to repay such advance and all other indebtedness to the Bank, together with interest and any unpaid costs and expenses in connection therewith, according to the terms under which such advance was made or other indebtedness incurred.

(2) Such obligations shall be evidenced by a written advances agreement that shall be reviewed by the Bank's legal counsel to ensure such agreement is in compliance with applicable law.

(c) *Secured advances.* (1) Each Bank shall make only fully secured advances to its members as set forth in the Bank Act, the provisions of this part and policy guidelines established by the FHFA.

(2) The Bank shall execute a written security agreement with each borrowing member which establishes the Bank's security interest in collateral securing advances.

(3) Such written security agreement shall, at a minimum, describe the type of collateral securing the advances and give the Bank a perfectible security interest in the collateral.

(d) *Form of applications and agreements.* Applications for advances, advances agreements and security agreements shall be in substantially such form as approved by the Bank's board

of directors, or a committee thereof specifically authorized by the board of directors to approve such forms.

(e) *Status of secured lending.* All secured transactions, regardless of the form of the transaction, for money borrowed from a Bank by a member of any Bank shall be considered an advance subject to the requirements of this part.

[58 FR 29469, May 20, 1993, as amended at 64 FR 71278, Dec. 21, 1999; 65 FR 8262, Feb. 18, 2000. Redesignated at 65 FR 44429, July 18, 2000; 67 FR 12851, Mar. 20, 2002; 75 FR 76623, Dec. 9, 2010]

§ 1266.3 Purpose of long-term advances; Proxy test.

(a) A Bank shall make long-term advances only for the purpose of enabling any member to purchase or fund new or existing residential housing finance assets.

(b)(1) Prior to approving an application for a long-term advance, a Bank shall determine that the principal amount of all long-term advances currently held by the member does not exceed the total book value of residential housing finance assets held by such member. The Bank shall determine the total book value of such residential housing finance assets, using the most recent Thrift Financial Report, Report of Condition and Income, financial statement or other reliable documentation made available by the member.

(2) Applications for CICA advances are exempt from the requirements of paragraph (b)(1) of this section.

[75 FR 76623, Dec. 9, 2010]

§ 1266.4 Limitations on access to advances.

(a) *Credit underwriting.* A Bank, in its discretion, may:

(1) Limit or deny a member's application for an advance if, in the Bank's judgment, such member:

(i) Is engaging or has engaged in any unsafe or unsound banking practices;

(ii) Has inadequate capital;

(iii) Is sustaining operating losses;

(iv) Has financial or managerial deficiencies, as determined by the Bank, that bear upon the member's creditworthiness; or

(v) Has any other deficiencies, as determined by the Bank; or

(2) Make advances and renewals only if the Bank determines that it may safely make such advance or renewal to the member, including advances and renewals made pursuant to this section.

(b) *New advances to members without positive tangible capital.* (1) A Bank shall not make a new advance to a member without positive tangible capital unless the member's appropriate federal banking agency or insurer requests in writing that the Bank make such advance. The Bank shall promptly provide the FHFA with a copy of any such request.

(2) A Bank shall use the most recently available Thrift Financial Report, Report of Condition, and Income or other regulatory report of financial condition to determine whether a member has positive tangible capital.

(c) *Renewals of advances to members without positive tangible capital*—(1) *Renewal for 30-day terms.* A Bank may renew outstanding advances, for successive terms of up to 30 days each, to a member without positive tangible capital; provided, however, that a Bank shall honor any written request of the appropriate federal banking agency or insurer that the Bank not renew such advances.

(2) *Renewal for longer than 30-day terms.* A Bank may renew outstanding advances to a member without positive tangible capital for a term greater than 30 days at the written request of the appropriate federal banking agency or insurer.

(d) *Advances to capital deficient but solvent members.* (1) Except as provided in paragraph (d)(2)(i) of this section, a Bank may make a new advance or renew an outstanding advance to a capital deficient member that has positive tangible capital.

(2)(i) A Bank shall not lend to a capital deficient member that has positive tangible capital if it receives written notice from the appropriate federal banking agency or insurer that the member's use of Bank advances has been prohibited. The Bank shall promptly provide the FHFA with a copy of any such notice.

(ii) A Bank may resume lending to such a capital deficient member if the Bank receives a written statement

from the appropriate federal banking agency or insurer which re-establishes the member's ability to use advances.

(e) *Reporting.* (1) Each Bank shall provide the FHFA with a report of the advances and commitments outstanding to each of its members in accordance with the instructions provided in the Data Reporting Manual issued by the FHFA, as amended from time to time.

(2) Each Bank shall, upon written request from a member's appropriate federal banking agency or insurer, provide to such entity information on advances and commitments outstanding to the member.

(f) *Members without federal regulators.* In the case of members that are not federally insured depository institutions, the references in paragraphs (b), (c), (d) and (e) of this section to ''appropriate federal banking agency or insurer'' shall mean the member's state regulator acting in a capacity similar to an appropriate federal banking agency or insurer.

(g) *Advance commitments.* (1) In the event that a member's access to advances from a Bank is restricted pursuant to this section, the Bank shall not fund outstanding commitments for advances not exercised prior to the imposition of the restriction. This requirement shall apply to all advance commitments made by a Bank after August 25, 1993.

(2) Each Bank shall include the stipulation contained in paragraph (g)(1) of this section as a clause in either:

(i) The written advances agreement required by §1266.2(b)(2) of this part; or

(ii) The written advances application required by §1266.2(a) of this part.

[58 FR 29469, May 20, 1993, as amended at 59 FR 2949, Jan. 20, 1994; 64 FR 71278, Dec. 21, 1999; 65 FR 8263, Feb. 18, 2000. Redesignated at 65 FR 44429, July 18, 2000, as amended at 67 FR 12851, Mar. 20, 2002; 71 FR 35500, June 21, 2006]

§1266.5 Terms and conditions for advances.

(a) *Advance maturities.* Each Bank shall offer advances with maturities of up to ten years, and may offer advances with longer maturities consistent with the safe and sound operation of the Bank.

(b) *Advance pricing*—(1) *General.* A Bank shall not price its advances to members below:

(i) The marginal cost to the Bank of raising matching term and maturity funds in the marketplace, including embedded options; and

(ii) The administrative and operating costs associated with making such advances to members.

(2) *Differential pricing.* (i) Each Bank may, in pricing its advances, distinguish among members based upon its assessment of:

(A) The credit and other risks to the Bank of lending to any particular member; or

(B) Other reasonable criteria that may be applied equally to all members.

(ii) Each Bank shall include in its member products policy required by §917.4 of this title, standards and criteria for such differential pricing and shall apply such standards and criteria consistently and without discrimination to all members applying for advances.

(3) *Exceptions.* The advance pricing policies contained in paragraph (b)(1) of this section shall not apply in the case of:

(i) A Bank's CICA programs; and

(ii) Any other advances programs that are volume limited and specifically approved by the Bank's board of directors.

(c) *Authorization for pricing advances.* (1) A Bank's board of directors, a committee thereof, or the Bank's president, if so authorized by the Bank's board of directors, shall set the rates of interest on advances consistent with paragraph (b) of this section.

(2) A Bank president authorized to set interest rates on advances pursuant to this paragraph (c) may delegate any part of such authority to any officer or employee of the Bank.

(d) *Putable or convertible advances*—(1) *Disclosure.* A Bank that offers a putable or convertible advance to a member shall disclose in writing to such member the type and nature of the risks associated with putable or convertible advance funding. The disclosure should include detail sufficient to describe such risks.

(2) *Replacement funding for putable advances.* If a Bank terminates a putable

advance prior to the stated maturity date of such advance, the Bank shall offer to provide replacement funding to the member, provided the member is able to satisfy the normal credit and collateral requirements of the Bank for the replacement funding requested.

(3) *Definition*. For purposes of this paragraph (d), the term *putable advance* means an advance that a Bank may, at its discretion, terminate and require the member to repay prior to the stated maturity date of the advance.

[58 FR 29469, May 20, 1993, as amended at 61 FR 52687, Oct. 8, 1996; 65 FR 8263, Feb. 18, 2000. Redesignated and amended at 65 FR 44429, July 18, 2000]

§ 1266.6 Fees.

(a) *Fees in member products policy*. All fees charged by each Bank and any schedules or formulas pertaining to such fees shall be included in the Bank's member products policy required by § 917.4 of this title. Any such fee schedules or formulas shall be applied consistently and without discrimination to all members.

(b) *Prepayment fees*. (1) Except where an advance product contains a prepayment option, each Bank shall establish and charge a prepayment fee pursuant to a specified formula which makes the Bank financially indifferent to the borrower's decision to repay the advance prior to its maturity date.

(2) Prepayment fees are not required for:

(i) Advances with original terms to maturity or repricing periods of six months or less;

(ii) Advances funded by callable debt; or

(iii) Advances which are otherwise appropriately hedged so that the Bank is financially indifferent to their prepayment.

(3) The board of directors of each Bank, a designated committee thereof, or officers specifically authorized by the board of directors, may waive a prepayment fee only if such prepayment will not result in an economic loss to the Bank. Any such waiver must subsequently be ratified by the board of directors.

(4) A Bank, in determining whether or not to waive a prepayment fee, shall apply consistent standards to all of its members.

(c) *Commitment fees*. Each Bank may charge a fee for its commitment to fund an advance.

(d) *Other fees*. Each Bank is authorized to charge other fees as it deems necessary and appropriate.

[58 FR 29469, May 20, 1993; 65 FR 8263, Feb. 18, 2000. Redesignated and amended at 65 FR 44429, July 18, 2000]

§ 1266.7 Collateral.

(a) *Eligible security for advances to all members*. At the time of origination or renewal of an advance, each Bank shall obtain from the borrowing member or, in accordance with paragraph (g) of this section, an affiliate of the borrowing member, and thereafter maintain, a security interest in collateral that meets the requirements of one or more of the following categories:

(1) *Mortgage loans and privately issued securities*. (i) Fully disbursed, whole first mortgage loans on improved residential real property not more than 90 days delinquent; or

(ii) Privately issued mortgage-backed securities, excluding the following:

(A) Securities that represent a share of only the interest payments or only the principal payments from the underlying mortgage loans;

(B) Securities that represent a subordinate interest in the cash flows from the underlying mortgage loans;

(C) Securities that represent an interest in any residual payments from the underlying pool of mortgage loans; or

(D) Such other high-risk securities as the FHFA in its discretion may determine.

(2) *Agency securities*. Securities issued, insured or guaranteed by the United States Government, or any agency thereof, including without limitation:

(i) Mortgage-backed securities issued or guaranteed by Freddie Mac, Fannie Mae, Ginnie Mae, or any other agency of the United States Government;

(ii) Mortgages or other loans, regardless of delinquency status, to the extent that the mortgage or loan is insured or guaranteed by the United States or any agency thereof, or otherwise is backed by the full faith and

credit of the United States, and such insurance, guarantee or other backing is for the direct benefit of the holder of the mortgage or loan; and

(iii) Securities backed by, or representing an equity interest in, mortgages or other loans referred to in paragraph (a)(2)(ii) of this section.

(3) *Cash or deposits.* Cash or deposits in a Bank.

(4) *Other real estate-related collateral.* (i) Other real estate-related collateral provided that:

(A) Such collateral has a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, and can be liquidated in due course; and

(B) The Bank can perfect a security interest in such collateral.

(ii) Eligible other real estate-related collateral may include, but is not limited to:

(A) Privately issued mortgage-backed securities not otherwise eligible under paragraph (a)(1)(ii) of this section;

(B) Second mortgage loans, including home equity loans;

(C) Commercial real estate loans; and

(D) Mortgage loan participations.

(5) *Securities representing equity interests in eligible advances collateral.* Any security the ownership of which represents an undivided equity interest in underlying assets, all of which qualify either as:

(i) Eligible collateral under paragraphs (a)(1), (2), (3) or (4) of this section; or

(ii) Cash equivalents.

(b) *Additional collateral eligible as security for advances to CFI members or their affiliates*—(1) *General.* Subject to the requirements set forth in part 1272 of this chapter, a Bank is authorized to accept from CFI members or their affiliates as security for advances small business loans, small farm loans, small agribusiness loans, or community development loans, in each case fully secured by collateral other than real estate, or securities representing a whole interest in such secured loans, provided that:

(i) Such collateral has a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, and can be liquidated in due course; and

(ii) The Bank can perfect a security interest in such collateral.

(2) *Change in CFI status.* If a Bank determines, as of April 1 of each year, that a member that has previously qualified as a CFI no longer qualifies as a CFI, and the member has total advances outstanding that exceed the amount that can be fully secured by collateral under paragraph (a) of this section, the Bank may:

(i) Permit the advances of such member to run to their stated maturities; and

(ii) Renew such member's advances to mature no later than March 31 of the following year; provided that the total of the member's advances under paragraphs (b)(2)(i) and (ii) of this section shall be fully secured by collateral set forth in paragraphs (a) and (b) of this section.

(c) *Bank restrictions on eligible advances collateral.* A Bank at its discretion may further restrict the types of eligible collateral acceptable to the Bank as security for an advance, based upon the creditworthiness or operations of the borrower, the quality of the collateral, or other reasonable criteria.

(d) *Additional advances collateral.* The provisions of paragraph (a) of this section shall not affect the ability of any Bank to take such steps as it deems necessary to protect its secured position on outstanding advances, including requiring additional collateral, whether or not such additional collateral conforms to the requirements for eligible collateral in paragraphs (a) or (b) of this section or section 10 of the Bank Act (12 U.S.C. 1430).

(e) *Bank stock as collateral.* (1) Pursuant to section 10(c) of the Bank Act (12 U.S.C. 1430(c)), a Bank shall have a lien upon, and shall hold, the stock of a member in the Bank as further collateral security for all indebtedness of the member to the Bank.

(2) The written security agreement used by the Bank shall provide that the borrowing member's Bank stock is assigned as additional security by the member to the Bank.

(3) The security interest of the Bank in such member's Bank stock shall be entitled to the priority provided for in

section 10(e) of the Bank Act (12 U.S.C. 1430(e)).

(f) *Advances collateral security requiring formal approval.* No home mortgage loan otherwise eligible to be accepted as collateral for an advance by a Bank under this section shall be accepted as collateral for an advance if any director, officer, employee, attorney or agent of the Bank or of the borrowing member is personally liable thereon, unless the board of directors of the Bank has specifically approved such acceptance by formal resolution, and the FHFA has endorsed such resolution.

(g) *Pledge of advances collateral by affiliates.* Assets held by an affiliate of a member that are eligible as collateral under paragraphs (a) or (b) of this section may be used to secure advances to that member only if:

(1) The collateral is pledged to secure either:

(i) The member's obligation to repay advances; or

(ii) A surety or other agreement under which the affiliate has assumed, along with the member, a primary obligation to repay advances made to the member; and

(2) The Bank obtains and maintains a legally enforceable security interest pursuant to which the Bank's legal rights and privileges with respect to the collateral are functionally equivalent in all material respects to those that the Bank would possess if the member were to pledge the same collateral directly, and such functional equivalence is supported by adequate documentation.

[58 FR 29469, May 20, 1993, as amended at 64 FR 16621, Apr. 6, 1999; 65 FR 8262, Feb. 18, 2000. Redesignated and amended at 65 FR 44429, July 18, 2000; 67 FR 12851, Mar. 20, 2002; 75 FR 76623, Dec. 9, 2010]

§ 1266.8 Banks as secured creditors.

(a) Except as provided in paragraph (b) of this section, notwithstanding any other provision of law, any security interest granted to a Bank by a member, or by an affiliate of a member, shall be entitled to priority over the claims and rights of any party, including any receiver, conservator, trustee or similar party having rights of a lien creditor, to such collateral.

(b) A Bank's security interest as described in paragraph (a) of this section shall not be entitled to priority over the claims and rights of a party that:

(1) Would be entitled to priority under otherwise applicable law; and

(2) Is an actual bona fide purchaser for value of such collateral or is an actual secured party whose security interest in such collateral is perfected in accordance with applicable state law.

[58 FR 29469, May 20, 1993. Redesignated at 65 FR 8256, Feb. 18, 2000 and further redesignated at 65 FR 44429, July 18, 2000, as amended at 67 FR 12851, Mar. 20, 2002]

§ 1266.9 Pledged collateral; verification.

(a) *Collateral safekeeping.* (1) A Bank may permit a member that is a depository institution to retain documents evidencing collateral pledged to the Bank, provided that the Bank and such member have executed a written security agreement pursuant to § 1266.2(c) of this part whereby such collateral is retained solely for the Bank's benefit and subject to the Bank's control and direction.

(2) A Bank shall take any steps necessary to ensure that its security interest in all collateral pledged by non-depository institutions for an advance is as secure as its security interest in collateral pledged by depository institutions.

(3) A Bank may at any time perfect its security interest in collateral securing an advance to a member.

(b) *Collateral verification.* Each Bank shall establish written procedures and standards for verifying the existence of collateral securing the Bank's advances, and shall regularly verify the existence of the collateral securing its advances in accordance with such procedures and standards.

[58 FR 29469, May 20, 1993, as amended at 64 FR 16621, Apr. 6, 1999; 65 FR 8263, Feb. 18, 2000. Redesignated at 65 FR 44430, July 18, 2000; 67 FR 12851, Mar. 20, 2002]

§ 1266.10 Collateral valuation; appraisals.

(a) *Collateral valuation.* Each Bank shall determine the value of collateral securing the Bank's advances in accordance with the collateral valuation procedures set forth in the Bank's

member products policy established pursuant to §1239.30 of this chapter.

(b) *Fair application of procedures.* Each Bank shall apply the collateral valuation procedures consistently and fairly to all borrowing members, and the valuation ascribed to any item of collateral by the Bank shall be conclusive as between the Bank and the member.

(c) *Appraisals.* A Bank may require a member to obtain an appraisal of any item of collateral, and to perform such other investigations of collateral as the Bank deems necessary and proper.

[65 FR 44430, July 18, 2000, as amended at 81 FR 76297, Nov. 2, 2016]

§ 1266.11 [Reserved]

§ 1266.12 Intradistrict transfer of advances.

(a) *Advances held by members.* A Bank may allow one of its members to assume an advance extended by the Bank to another of its members, provided the assumption complies with the requirements of this part governing the issuance of new advances. A Bank may charge an appropriate fee for processing the transfer.

(b) *Advances held by nonmembers.* A Bank may allow one of its members to assume an advance held by a nonmember, provided the advance was originated by the Bank and provided the assumption complies with the requirements of this part governing the issuance of new advances. A Bank may charge an appropriate fee for processing the transfer.

[59 FR 2950, Jan. 20, 1994. Redesignated at 65 FR 44430, July 18, 2000]

§ 1266.13 Special advances to savings associations.

(a) *Eligible institutions.* (1) A Bank, upon receipt of a written request from the OCC, with respect to a federal savings association, or from the FDIC, with respect to a state chartered savings association, may make short-term advances to a savings association member pursuant to section 10(h) of the Bank Act (12 U.S.C. 1430(h)).

(2) Such request must certify that the savings association member:

(i) Is solvent but presents a supervisory concern to the OCC or FDIC, as appropriate, because of the member's financial condition; and

(ii) Has reasonable and demonstrable prospects of returning to a satisfactory financial condition.

(b) *Terms and conditions.* Advances made by a Bank to a member savings association under this section shall:

(1) Be subject to all applicable collateral requirements of the Bank, this part and section 10(a) of the Bank Act (12 U.S.C. 1430(a)); and

(2) Be at the interest rate applicable to advances of similar type and maturity that are made available to other members that do not pose such a supervisory concern.

[58 FR 29469, May 20, 1993. Redesignated at 65 FR 8256, Feb. 18, 2000 and further redesignated at 65 FR 44430, July 18, 2000; 81 FR 76298, Nov. 2, 2016]

§ 1266.14 Advances to the Savings Association Insurance Fund.

(a) *Authority.* Upon receipt of a written request from the FDIC, a Bank may make advances to the FDIC for the use of the Savings Association Insurance Fund. The Bank shall provide a copy of such request to the FHFA.

(b) *Requirements.* Advances to the FDIC for the use of the Savings Association Insurance Fund shall:

(1) Bear a rate of interest not less than the Bank's marginal cost of funds, taking into account the maturities involved and reasonable administrative costs;

(2) Have a maturity acceptable to the Bank;

(3) Be subject to any prepayment, commitment, or other appropriate fees of the Bank; and

(4) Be adequately secured by collateral acceptable to the Bank.

[58 FR 29469, May 20, 1993, as amended at 65 FR 8262, Feb. 18, 2000. Redesignated at 65 FR 44430, July 18, 2000]

§ 1266.15 Liquidation of advances upon termination of membership.

If an institution's membership in a Bank is terminated, the Bank shall determine an orderly schedule for liquidating any indebtedness of such member to the Bank; this section shall not require a Bank to call any such indebtedness prior to maturity of the advance. The Bank shall deem any such

liquidation a prepayment of the member's indebtedness, and the member shall be subject to any fees applicable to such prepayment.

[58 FR 29469, May 20, 1993. Redesignated at 65 FR 8256, Feb. 18, 2000 and further redesignated at 65 FR 44430, July 18, 2000]

Subpart B—Advances to Housing Associates

SOURCE: 62 FR 12079, Mar. 14, 1997, unless otherwise noted.

§ 1266.16 Scope.

Except as otherwise provided in §§ 1266.14 and 1266.17, the requirements of subpart A apply to this subpart.

[58 FR 29469, May 20, 1993. Redesignated at 65 FR 44430, July 18, 2000]

§ 1266.17 Advances to housing associates.

(a) *Authority*. Subject to the provisions of the Bank Act and this subpart, a Bank may make advances only to a housing associate whose principal place of business, as determined in accordance with part 1263 of this chapter, is located in the Bank's district.

(b) *Collateral requirements*—(1) *Advances to housing associates.* A Bank may make an advance to any housing associate upon the security of the following collateral:

(i) Mortgage loans insured by the Federal Housing Administration of HUD under title II of the National Housing Act; or

(ii) Securities representing a whole interest in the principal and interest payments due on a pool of mortgage loans insured by the Federal Housing Administration of HUD under title II of the National Housing Act. A Bank may only accept as collateral the securities described in this paragraph (b)(1)(ii) if the housing associate provides evidence that such securities are backed solely by mortgages of the type described in paragraph (b)(1)(i) of this section.

(2) *Certain advances to SHFAs.* (i) In addition to the collateral described in paragraph (b)(1) of this section, a Bank may make an advance to a housing associate that has satisfied the requirements of §1264.3(b) for the purpose of facilitating residential or commercial mortgage lending that benefits individuals or families meeting the income requirements in section 142(d) or 143(f) of the Internal Revenue Code (26 U.S.C. 142(d) or 143(f)) upon the security of the following collateral:

(A) The collateral described in §1266.7(a)(1) or (2).

(B) The collateral described in §1266.7(a)(3). Solely for the purpose of facilitating acceptance of such collateral, a Bank may establish a cash collateral account for a housing associate that has satisfied the requirements of §1264.3(b).

(C) The other real estate-related collateral described in §1266.7(a)(4), provided that such collateral comprises mortgage loans on one-to-four family or multifamily residential property.

(ii) Prior to making an advance pursuant to this paragraph (b)(2), a Bank shall obtain a written certification from the housing associate that it shall use the proceeds of the advance for the purposes described in paragraph (b)(2)(i) of this section.

(c) *Terms and conditions*—(1) *General.* Subject to the provisions of this paragraph (c), a Bank, in its discretion, shall determine whether, and on what terms, it will make advances to a housing associate.

(2) *Advance pricing.* (i) A Bank shall price advances to housing associates in accordance with the requirements for pricing advances to members set forth in §1266.5(b). Wherever the term ''member'' appears in §1266.5(b) the term shall be construed also to mean ''housing associate.''

(ii) A Bank shall apply the pricing criteria identified in §1266.5(b)(2) equally to all of its member and housing associate borrowers.

(3) *Limit on advances.* The principal amount of any advance made to a housing associate may not exceed 90 percent of the unpaid principal of the mortgage loans or securities pledged as security for the advance. This limit does not apply to an advance made to a housing associate under paragraph (b)(2) of this section.

(d) *Transaction accounts.* Solely for the purpose of facilitating the making of advances to a housing associate, a

Bank may establish a transaction account for each housing associate.

(e) *Loss of eligibility*—(1) *Notification of status changes.* A Bank shall require a housing associate that applies for an advance to agree in writing that it will promptly inform the Bank of any change in its status as a housing associate.

(2) *Verification of eligibility.* A Bank may, from time to time, require a housing associate to provide evidence that it continues to satisfy all of the eligibility requirements of the Bank Act, this subpart and part 1264 of this chapter.

(3) *Loss of eligibility.* A Bank shall not extend a new advance or renew an existing advance to a housing associate that no longer meets the eligibility requirements of the Bank Act, this subpart and part 1264 of this chapter until the entity has provided evidence satisfactory to the Bank that it is in compliance with such requirements.

[58 FR 29469, May 20, 1993, as amended at 65 FR 203, Jan. 4, 2000; 65 FR 8263, Feb. 18, 2000. Redesignated and amended at 65 FR 44430, July 18, 2000; 67 FR 12851, Mar. 20, 2002; 70 FR 9510, Feb. 28, 2005; 81 FR 76298, Nov. 2, 2016]

PART 1267—FEDERAL HOME LOAN BANK INVESTMENTS

Sec.

AUTHORITY: 12 U.S.C. 1429, 1430, 1430b, 1431, 1436, 4511, 4513, 4526.

SOURCE: 76 FR 29151, May 20, 2011, unless otherwise noted.

§ 1267.1 Definitions.

As used in this part:

Asset-backed security means a debt instrument backed by loans, but does not include debt instruments that meet the definition of a mortgage-backed security.

Deposits in banks or trust companies means:

(1) A deposit in another Bank;

(2) A demand account in a Federal Reserve Bank;

(3) A deposit in or sale of Federal funds to:

(i) An insured depository institution, as defined in section 2(9) of the Bank Act, that is designated by the Bank's board of directors;

(ii) A trust company that is a member of the Federal Reserve System or insured by the Federal Deposit Insurance Corporation and is designated by the Bank's board of directors; or

(iii) A U.S. branch or agency of a foreign Bank as defined in the International Banking Act of 1978, as amended, (12 U.S.C. 3101 *et seq.*) that is subject to supervision of the Board of Governors of the Federal Reserve System and is designated by the Bank's board of directors.

Derivative contract means generally a financial contract the value of which is derived from the values of one or more referenced assets, rates, or indices of asset values, or credit-related events. Derivative contracts include interest rate derivative contracts, foreign exchange rate derivative contracts, equity derivative contracts, precious metals derivative contracts, commodity derivative contracts and credit derivatives, and any other instruments that pose similar risks.

Indexed principal swap means an interest rate swap agreement in which the notional principal balance amortizes based upon the prepayment experience of a specified group of mortgage-backed securities or asset-backed securities or the behavior of an interest rate index.

Interest-only stripped security means a class of mortgage-backed or asset-backed security that is allocated only the interest payments made on the underlying mortgages or loans and receives no principal payments.

Investment quality means a determination made by the Bank with respect to a security or obligation that, based on documented analysis, including consideration of the sources for repayment on the security or obligation:

(1) There is adequate financial backing so that full and timely payment of principal and interest on such security or obligation is expected; and

(2) There is minimal risk that the timely payment of principal or interest would not occur because of adverse

changes in economic and financial conditions during the projected life of the security or obligation.

Mortgage-backed security means a security or instrument, including collateralized mortgage obligations (CMOs), and Real Estate Mortgage Investment Trusts (REMICS), that represents an interest in, or is secured by, one or more pools of mortgage loans.

Principal-only stripped security means a class of mortgage-backed or asset-backed security that is allocated only the principal payments made on the underlying mortgages or loans and receives no interest payments.

Total capital shall have the meaning set forth in §1229.1 of this chapter.

[76 FR 29151, May 20, 2011, as amended at 78 FR 2324, Jan. 11, 2013; 78 FR 67008, Nov. 8, 2013; 81 FR 76298, Nov. 2, 2016]

§1267.2 Authorized investments and transactions.

(a) In addition to assets enumerated in parts 1266 and 1268 of this chapter and subject to the applicable limitations set forth in this part, and in part 1272 of this chapter, each Bank may invest in:

(1) Obligations of the United States;

(2) Deposits in banks or trust companies;

(3) Obligations, participations or other instruments of, or issued by, the Federal National Mortgage Association or the Government National Mortgage Association;

(4) Mortgages, obligations, or other securities that are, or ever have been, sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or 306 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454 or 1455);

(5) Stock, obligations, or other securities of any small business investment company formed pursuant to 15 U.S.C. 681, to the extent such investment is made for purposes of aiding members of the Bank; and

(6) Instruments that the Bank has determined are permissible investments for fiduciary or trust funds under the laws of the state in which the Bank is located.

(b) Subject to any applicable limitations set forth in this part and in part 1272 of this chapter, a Bank also may enter into the following types of transactions:

(1) Derivative contracts;

(2) Standby letters of credit, pursuant to the requirements of part 1269 of this title;

(3) Forward asset purchases and sales;

(4) Commitments to make advances; and

(5) Commitments to make or purchase other loans.

[76 FR 29151, May 20, 2011, as amended at 81 FR 91688, Dec. 19, 2016]

§1267.3 Prohibited investments and prudential rules.

(a) *Prohibited investments.* A Bank may not invest in:

(1) Instruments that provide an ownership interest in an entity, except for investments described in §1265.3(e) and (f) of this chapter;

(2) Instruments issued by non-United States entities, except United States branches and agency offices of foreign commercial banks;

(3) Debt instruments that are not investment quality, except:

(i) Investments described in §1265.3(e) of this chapter; and

(ii) Debt instruments that a Bank determined became less than investment quality because of developments or events that occurred after acquisition of the instrument by the Bank;

(4) Whole mortgages or other whole loans, or interests in mortgages or loans, except:

(i) Acquired member assets;

(ii) Investments described in §1265.3(e) of this chapter;

(iii) Marketable direct obligations of state, local, or Tribal government units or agencies, that are investment quality, where the purchase of such obligations by the Bank provides to the issuer the customized terms, necessary liquidity, or favorable pricing required to generate needed funding for housing or community lending;

(iv) Mortgage-backed securities, or asset-backed securities collateralized by manufactured housing loans or home equity loans, that meet the definition of the term ''securities'' under 15 U.S.C. 77b(a)(1) and are not otherwise prohibited under paragraphs (a)(5) through (a)(7) of this section; and

(v) Loans held or acquired pursuant to section 12(b) of the Bank Act (12 U.S.C. 1432(b)).

(5) Residual interest and interest accrual classes of securities;

(6) Interest-only and principal-only stripped securities; and

(7) Fixed rate mortgage-backed securities or eligible asset-backed securities or floating rate mortgage-backed securities or eligible asset-backed securities that on the trade date are at rates equal to their contractual cap, with average lives that vary more than six years under an assumed instantaneous interest rate change of 300 basis points, unless the instrument qualifies as an acquired member asset under part 955 of this title.

(b) *Foreign currency or commodity positions prohibited.* A Bank may not take a position in any commodity or foreign currency. The Banks may issue consolidated obligations denominated in a currency other than U.S. Dollars or linked to equity or commodity prices, provided that the Banks meet the requirements of §1270.9(d) of this chapter, and all other applicable requirements related to issuing consolidated obligations.

(c) *Limits on certain investments.* (1) A purchase, otherwise authorized under this part, of mortgage-backed securities or asset-backed securities, may not cause the aggregate value of all such securities held by the Bank to exceed 300 percent of the Bank's total capital. For purposes of this limitation, such aggregate value will be measured as of the transaction trade date for such purchase, and total capital will be the most recent amount reported by a Bank to FHFA. A Bank will not be required to divest securities solely to bring the level of its holdings into compliance with the limits of this paragraph, provided that the original purchase of the securities complied with the limits in this paragraph.

(2) A Bank's purchase of any mortgage-backed or asset-backed security may not cause the value of its total holdings of mortgage-backed and asset-backed securities, measured as of the transaction trade date for such purchase, to increase in any calendar quarter by more than 50 percent of its total capital as of the beginning of such quarter.

(3) For purposes of applying the limits under this paragraph (c), the value of relevant mortgage-backed or asset-backed securities shall be calculated based on amortized historical costs for securities classified as held-to-maturity or available-for-sale and on fair value for trading securities.

[76 FR 29151, May 20, 2011, as amended at 79 FR 67009, Nov. 8, 2013]

§1267.4 Limitations and prudential requirements on use of derivative instruments.

(a) *Non-speculative use.* Derivative instruments that do not qualify as hedging instruments pursuant to GAAP may be used only if a non-speculative use is documented by the Bank.

(b) *Additional Prohibitions.* (1) A Bank may not enter into interest rate swaps that amortize according to behavior of instruments described in §1267.3(a)(5) or (6) of this part.

(2) A Bank may not enter into indexed principal swaps that have average lives that vary by more than six years under an assumed instantaneous change in interest rates of 300 basis points, unless they are entered into in conjunction with the issuance of consolidated obligations or the purchase of permissible investments or entry into a permissible transaction in which all interest rate risk is passed through to the investor or counterparty.

(c) *Documentation requirements.* (1) Derivative transactions with a single counterparty shall be governed by a single master agreement when practicable.

(2) A Bank's agreement with the counterparty for over-the-counter derivative contracts shall include:

(i) A requirement that market value determinations and subsequent adjustments of collateral be made at least on a monthly basis;

(ii) A statement that failure of a counterparty to meet a collateral call will result in an early termination event;

(iii) A description of early termination pricing and methodology, with the methodology reflecting a reasonable estimate of the market value of

the over-the-counter derivative contract at termination (standard International Swaps and Derivatives Association, Inc. language relative to early termination pricing and methodology may be used to satisfy this requirement); and

(iv) A requirement that the Bank's consent be obtained prior to the transfer of an agreement or contract by a counterparty.

PART 1268—ACQUIRED MEMBER ASSETS

Sec.

AUTHORITY: 12 U.S.C. 1430, 1430b, 1431, 4511, 4513, 4526.

SOURCE: 81 FR 91688, Dec. 19, 2016, unless otherwise noted.

§ 1268.1 Definitions.

As used in this part:

Affiliate means any business entity that controls, is controlled by, or is under common control with, a member.

AMA investment grade means a determination made by the Bank with respect to an asset or pool, based on documented analysis, including consideration of applicable insurance, credit enhancements, and other sources for repayment on the asset or pool, that the Bank has a high degree of confidence that it will be paid principal and interest in all material respects, even under reasonably likely adverse changes to expected economic conditions.

AMA product means a structure that is defined by a specific set of terms and conditions that comply with this part 1268 and that is established by a Bank for purposes of governing the Bank's purchase of AMA-eligible loans.

AMA program means a Bank-established program to buy mortgage loans that meet the requirements of this part, which may comprise multiple AMA products.

Expected losses means the loss on the asset or pool given the expected future economic and market conditions in the model or methodology used by the Bank under § 1268.5 and applicable to an AMA product.

Participating financial institution means a member or housing associate of a Bank that is authorized to sell, credit enhance, or service mortgage loans to or for its own Bank through an AMA program, or a member or housing associate of another Bank that has been authorized to sell, credit enhance, or service mortgage loans to or for the other Bank pursuant to an agreement between the Bank acquiring the AMA product and the Bank of which the selling institution is a member or housing associate.

Pool means a group of loans acquired under one or more loan funding commitments, contractual agreements, or similar arrangements.

Qualified insurer means an insurer that a Bank approves in accordance with § 1268.5(e)(1) to provide any form of mortgage insurance coverage on assets and pools purchased under an AMA program.

Residential real property has the meaning set forth in § 1266.1 of this chapter.

§ 1268.2 Authorization for acquired member assets.

(a) *General.* Each Bank is authorized to invest in assets that qualify as AMA, subject to the requirements of this part and part 1272 of this chapter.

(b) *Grandfathered transactions.* Notwithstanding paragraph (a), a Bank may continue to hold as AMA assets that were previously authorized by the Federal Housing Finance Board or FHFA for purchase as AMA, provided that the assets were purchased, and continue to be held, in compliance with that authorization.

§ 1268.3 Asset requirement.

Assets that qualify as AMA shall be limited to the following:

(a) Whole loans that are eligible to secure advances under § 1266.7(a)(1)(i), (a)(2)(ii), (a)(4), or (b)(1) of this chapter, excluding:

(1) Single-family mortgage loans where the loan amount exceeds the limits established pursuant to 12 U.S.C. 1717(b)(2), unless the loan is guaranteed or insured by an agency or department of the U.S. government, in which case the limits in 12 U.S.C. 1717(b)(2) do not apply; and

(2) Loans made to an entity, or secured by property, not located in a state;

(b) Whole loans secured by manufactured housing, regardless of whether such housing qualifies as residential real property under applicable state law;

(c) State and local housing finance agency bonds; or

(d) Certificates representing interests in whole loans if:

(1) The loans qualify as AMA under paragraphs (a) or (b) of this section and meet the nexus requirement of §1268.4; and

(2) The certificates:

(i) Meet the credit enhancement requirements of §1268.5;

(ii) Are issued pursuant to an agreement between the Bank and a participating financial institution to share risks consistent with the requirements of this part; and

(iii) Are acquired substantially by the initiating Bank or Banks.

§1268.4 Member or housing associate nexus requirement.

(a) *General provision.* To qualify as AMA, any assets described in §1268.3 must be acquired in a purchase or funding transaction only from:

(1) A participating financial institution, provided that the asset was:

(i) Originated or issued by, through, or on behalf of the participating financial institution, or an affiliate thereof; or

(ii) Held for a valid business purpose by the participating financial institution, or an affiliate thereof, prior to acquisition by the Bank; or

(2) Another Bank, provided that the asset was originally acquired by the selling Bank consistent with this section.

(b) *Special provision for housing finance agency bonds.* In the case of housing finance agency bonds acquired by a Bank from a housing associate located in the district of another Bank (local Bank), the arrangement required by the definition of ''participating financial institution'' in §1268.1 between the acquiring Bank and the local Bank may be reached in accordance with the following process:

(1) The housing finance agency shall first offer the local Bank right of first refusal to purchase, or negotiate the terms of, its proposed bond offering;

(2) If the local Bank indicates, within three business days, it will negotiate in good faith to purchase the bonds, the housing finance agency may not offer to sell or negotiate the terms of a purchase with another Bank; and

(3) If the local Bank declines the offer, or has failed to respond within three business days, the acquiring Bank will be considered to have an arrangement with the local Bank for purposes of this section and may offer to buy or negotiate the terms of a bond sale with the housing finance agency.

§1268.5 Credit risk-sharing requirement.

(a) *General credit risk-sharing requirement.* For each AMA product, the Bank shall implement and have in place at all times, a credit risk-sharing structure that:

(1) Requires a participating financial institution to provide the credit enhancement necessary to enhance an eligible asset or pool to the credit quality specified by the terms and conditions of the AMA product, provided, however, that such credit enhancement results in the eligible asset or pool being at least AMA investment grade, as defined in §1268.1; and

(2) Meets the requirements of this section.

(b) *Determination of necessary credit enhancement.* (1) No later than 30 calendar days after the purchase of the asset or after a pool closes, the Bank shall determine the total credit enhancement necessary to enhance the asset or pool to at least AMA investment grade and to be consistent with the terms and conditions of a specific AMA product. The enhancement shall be for the life of the asset or pool. The Bank shall make this determination for each AMA product using a model and methodology that the Bank deems

appropriate, subject to paragraph (f) of this section.

(2) A Bank shall document its basis for concluding that the contractual credit enhancement required from each participating financial institution with regard to a particular asset or pool will equal or exceed the credit enhancement level specified in the terms and conditions of the AMA product and determined in accordance with paragraph (b)(1) of this section.

(c) *Credit risk-sharing structure.* Under any credit risk-sharing structure, the credit enhancement provided by the participating financial institution shall at all times meet the following requirements:

(1) The participating financial institution that is providing the credit enhancement required under this paragraph (c) shall in all cases:

(i) Bear the direct economic consequences of actual credit losses on the asset or pool:

(A) From the first dollar of loss up to the amount of expected losses; or

(B) Immediately following expected losses, but in an amount equal to or exceeding the amount of expected losses; and

(ii) Fully secure its direct credit enhancement obligation in accordance with §1266.7; and

(2) The participating financial institution also may provide all or a portion of the credit enhancement, with the approval of the Bank, by:

(i) Contracting with an insurance affiliate of that participating financial institution to provide an enhancement, but only where such insurance is positioned in the credit risk-sharing structure so as to cover only losses remaining after the participating financial institution has borne losses as required under paragraph (c)(1)(i) of this section;

(ii) Purchasing loan-level insurance only where:

(A) The participating financial institution is legally obligated at all times to maintain such insurance with a qualified insurer; and

(B) Such insurance is positioned in the credit enhancement structure so as to cover only losses remaining after the participating financial institution has borne losses as required under paragraph (c)(1)(i) of this section;

(iii) Purchasing pool-level insurance only where:

(A) The participating financial institution is legally obligated at all times to maintain such insurance with a qualified insurer;

(B) Such insurance insures that portion of the required credit enhancement attributable to the geographic concentration and size of the pool; and

(C) Such insurance is positioned last in the credit enhancement structure so as to cover only those losses remaining after all other elements of the credit enhancement structure have been exhausted;

(iv) Contracting with another participating financial institution in the Bank's district to provide a credit enhancement consistent with this section, in return for compensation; or

(v) Contracting with a participating financial institution in another Bank's district, pursuant to an arrangement between the two Banks, to provide a credit enhancement consistent with this section, in return for compensation.

(d) *Loans guaranteed or insured by a department or agency of the U.S. government.* Instead of the structure set forth in paragraph (c) of this section, a participating financial institution also may provide the required credit enhancement through loan-level insurance that is issued by an agency or department of the U.S. government or is a guarantee from an agency or department of the U.S. government, provided that the government insurance or guarantee remains in place for as long as the Bank owns the loan.

(e) *Qualified insurers.* (1) Within one year of January 18, 2017, each Bank must develop, and subsequently maintain, written financial and operational standards that an insurer must meet for the Bank to approve it as a qualified insurer. A Bank shall review qualified insurers at least once every two years to determine whether they still meet the financial and operational standards set by the Bank. A Bank may delegate responsibility for development of these standards and approval of qualified insurers to another

Bank or group of Banks pursuant to §1268.8.

(2) Only qualified insurers may provide private loan insurance on AMA eligible assets or the loan or pool insurance allowed as part of the credit enhancement structure for AMA products under paragraphs (c)(2)(ii) or (iii) of this section.

(f) *Appropriate methodology for calculating credit enhancement.* A Bank shall use a model and methodology for estimating the amount of credit enhancement for an asset or pool. A Bank shall provide to FHFA upon request information about the model and methodology, including and without limitation results of any model runs and the results of any tests of the model performed by the Bank. FHFA reserves the right to direct a Bank to make changes to its model and methodology, and a Bank promptly shall institute any such FHFA-directed changes.

§1268.6 Servicing of AMA loans.

(a) Servicing of AMA loans may be performed by or transferred to any institution, including an institution that is not a member of the Bank System, provided that the loans, after such transfer, continue to meet all requirements to qualify as AMA under §§1268.3, 1268.4, and 1268.5.

(b) The transfer of mortgage servicing rights and responsibilities must be approved by the Bank or Banks that own the loan or a participation interest in the loan.

(c) A Bank shall have in place policies and procedures to ensure that the transfer of mortgage servicing rights does not negatively affect the credit enhancement on the loans in question or substantially increase the Bank's exposure to the credit risk for the asset or pool.

§1268.7 Reporting requirements for acquired member assets.

Each Bank shall report information related to AMA in accordance with the instructions provided in the Data Reporting Manual issued by FHFA, as amended from time to time.

§1268.8 Administrative transactions and agreements between Banks.

(a) *Delegation of administrative duties.* A Bank may delegate the administration of an AMA program to another Bank whose administrative office has been examined and approved by FHFA, or previously examined and approved by the Federal Housing Finance Board, to process AMA transactions. The existence of such a delegation, or the possibility that such a delegation may be made, must be disclosed to any potential participating financial institution as part of any AMA-related agreements signed with that participating financial institution. A Bank may contract with one or more parties, including without limitation another Bank, to provide services related to the administration of its own AMA program or the AMA program of another Bank for which it has been delegated administrative responsibility, without the necessity for further disclosure to the participating financial institutions.

(b) *Termination of agreements.* Any agreement made between two or more Banks in connection with the administration of any AMA program may be terminated by any party after a reasonable notice period.

(c) *Delegation of pricing authority.* A Bank that has delegated its AMA pricing function to another Bank shall retain a right to refuse to acquire AMA at prices it does not consider appropriate, pursuant to contractual provisions among the parties.

PART 1269—STANDBY LETTERS OF CREDIT

Sec.

AUTHORITY: 12 U.S.C. 1429, 1430, 1430b, 1431, 4511, 4513 and 4526.

SOURCE: 63 FR 65699, Nov. 30, 1998, unless otherwise noted. Redesignated at 65 FR 8256, Feb. 18, 2000, and further redesignated at 67

FR 12853, Mar. 20, 2002, and 75 FR 8240, Feb. 24, 2010.

§ 1269.1 Definitions.

As used in this part:

Applicant means a person or entity at whose request or for whose account a standby letter of credit is issued.

Beneficiary means a person or entity who, under the terms of a standby letter of credit, is entitled to have its complying presentation honored.

Community lending means providing financing for economic development projects for targeted beneficiaries, and, for community financial institutions (as defined in §1263.1 of this title), purchasing or funding small business loans, small farm loans or small agribusiness loans (as defined in §1266.1 of this chapter).

Confirm means to undertake, at the request or with the consent of the issuer, to honor a presentation under a standby letter of credit issued by a member or housing associate.

Document means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion that is presented under the terms of a standby letter of credit.

Issuer means a person or entity that issues a standby letter of credit.

Presentation means delivery of a document to an issuer, or an entity that has undertaken a confirmation at the request or with the consent of the issuer, for the giving of value under a standby letter of credit.

Residential housing finance means:

(1) The purchase or funding of ''residential housing finance assets,'' as that term is defined in §1266.1 of this chapter; or

(2) Other activities that support the development or construction of residential housing.

SHFA associate means a housing associate that is a ''state housing finance agency,'' as that term is defined in §1264.1 of this chapter, and that has met the requirements of §1269.3(b) of this chapter.

Standby letter of credit means a definite undertaking by an issuer on behalf of an applicant that represents an obligation to the beneficiary, pursuant to a complying presentation: to repay money borrowed by, advanced to, or for the account of the applicant; to make payment on account of any indebtedness undertaken by the applicant; or to make payment on account of any default by the applicant in the performance of an obligation. The term *standby letter of credit* does not include a commercial letter of credit, or any short-term self-liquidating instrument used to finance the movement of goods.

[63 FR 65699, Nov. 30, 1998, as amended at 65 FR 8265, Feb. 18, 2000; 65 FR 44431, July 18, 2000. Redesignated and amended at 67 FR 12853, Mar. 20, 2002; 75 FR 8240, Feb. 24, 2010; 75 FR 76623, Dec. 9, 2010; 78 FR 2324, Jan. 11, 2013; 78 FR 67009, Nov. 8, 2013]

§ 1269.2 Standby letters of credit on behalf of members.

(a) *Authority and purposes.* Each Bank is authorized to issue or confirm on behalf of members standby letters of credit that comply with the requirements of this part, for any of the following purposes:

(1) To assist members in facilitating residential housing finance;

(2) To assist members in facilitating community lending;

(3) To assist members with asset/liability management; or

(4) To provide members with liquidity or other funding.

(b) *Fully secured.* A Bank, at the time it issues or confirms a standby letter of credit on behalf of a member, shall obtain and maintain a security interest in collateral that is sufficient to secure fully the member's unconditional obligation described in §1269.4(a)(2) of this part, and that complies with the requirements set forth in paragraph (c) of this section.

(c) *Eligible collateral.* (1) Any standby letter of credit issued or confirmed on behalf of a member may be secured in accordance with the requirements for advances under §1266.7 of this chapter.

(2) A standby letter of credit issued or confirmed on behalf of a member for a purpose described in paragraphs (a)(1) or (a)(2) of this section may, in addition to the collateral described in paragraph (c)(1) of this section, be secured by obligations of state or local government units or agencies, where such obligations have a readily ascertainable

value, can be reliably discounted to account for liquidation and other risks, and can be liquidated in due course.

[63 FR 65699, Nov. 30, 1998, as amended at 65 FR 8265, Feb. 18, 2000; 65 FR 44431, July 18, 2000. Redesignated and amended at 67 FR 12853, Mar. 20, 2002; 75 FR 8240, Feb. 24, 2010; 75 FR 76623, Dec. 9, 2010; 78 FR 67009, Nov. 8, 2013]

§ 1269.3 Standby letters of credit on behalf of housing associates.

(a) *Housing associates.* Each Bank is authorized to issue or confirm on behalf of housing associates standby letters of credit that are fully secured by collateral described in §1266.17(b)(1)(i) or (ii) of this chapter, and that otherwise comply with the requirements of this part, for any of the following purposes:

(1) To assist housing associates in facilitating residential housing finance;

(2) To assist housing associates in facilitating community lending;

(3) To assist housing associates with asset/liability management; or

(4) To provide housing associates with liquidity or other funding.

(b) *SHFA associates.* Each Bank is authorized to issue or confirm on behalf of SHFA associates standby letters of credit that are fully secured by collateral described in §1266.17(b)(2)(i)(A),(B) or (C) of this chapter, and that otherwise comply with the requirements of this part, for the purpose of facilitating residential or commercial mortgage lending that benefits individuals or families meeting the income requirements in section 142(d) or 143(f) of the Internal Revenue Code (26 U.S.C. 142(d) or 143(f)).

[63 FR 65699, Nov. 30, 1998, as amended at 65 FR 8265, Feb. 18, 2000; 65 FR 44431, July 18, 2000; 75 FR 8240, Feb. 24, 2010; 75 FR 76623, Dec. 9, 2010]

§ 1269.4 Obligation to Bank under all standby letters of credit.

(a) *Obligation to reimburse.* A Bank may issue or confirm a standby letter of credit only on behalf of a member or housing associate that has:

(1) Established with the Bank a cash account pursuant to §§1266.17(b)(2)(i)(B), 1266.17(d), or 1270.3 of this chapter; and

(2) Assumed an unconditional obligation to reimburse the Bank for value given by the Bank to the beneficiary under the terms of the standby letter of credit by depositing immediately available funds into the account described in paragraph (a)(1) of this section not later than the date of the Bank's payment of funds to the beneficiary.

(b) *Prompt action to recover funds.* If a member or housing associate fails to fulfill the obligation described in paragraph (a)(2) of this section, the Bank shall take action promptly to recover the funds that such member or housing associate is obligated to repay.

(c) *Obligation financed by advance.* Notwithstanding the obligations and duties of the Bank and its member or housing associate under paragraphs (a) and (b) of this section, the Bank may, at its discretion, permit such member or housing associate to finance repayment of the obligation described in paragraph (a)(2) of this section by receiving an advance that complies with sections 10 or 10b of the Bank Act (12 U.S.C. 1430, 1430(b)) and part 1266 of this title.

[63 FR 65699, Nov. 30, 1998, as amended at 65 FR 8265, Feb. 18, 2000; 65 FR 44431, July 18, 2000. Redesignated and amended at 67 FR 12853, Mar. 20, 2002; 75 FR 8240, Feb. 24, 2010; 75 FR 76623, Dec. 9, 2010; 78 FR 2324, Jan. 11, 2013; 81 FR 76298, Nov. 2, 2016]

§ 1269.5 Additional provisions applying to all standby letters of credit.

(a) *Requirements.* Each standby letter of credit issued or confirmed by a Bank shall:

(1) Contain a specific expiration date, or be for a specific term; and

(2) Require approval in advance by the Bank of any transfer of the standby letter of credit from the original beneficiary to another person or entity.

(b) *Additional collateral provisions.* (1) A Bank may take such steps as it deems necessary to protect its secured position on standby letters of credit, including requiring additional collateral, whether or not such additional collateral conforms to the requirements of §1269.2 or §1269.3.3 of this part.

(2) Collateral pledged by a member or housing associate to secure a letter of

credit issued or confirmed on its behalf by a Bank shall be subject to the provisions of §§1266.7(d), 1266.7(e), 1266.8, 1266.9 and 1266.10 of this chapter.

[63 FR 65699, Nov. 30, 1998, as amended at 65 FR 8265, Feb. 18, 2000; 65 FR 44431, July 18, 2000. Redesignated and amended at 67 FR 12853, Mar. 20, 2002; 75 FR 8240, Feb. 24, 2010]

PART 1270—LIABILITIES

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AUTHORITY: 12 U.S.C. 1431, 1432, 1435, 4511, 4512, 4513, and 4526.

SOURCE: 76 FR 18369, Apr. 4, 2011, unless otherwise noted.

Subpart A—Definitions

§ 1270.1 Definitions.

As used in this part, unless the context otherwise requires or indicates:

Adverse Claim means a claim that a claimant has a property interest in a Book-entry consolidated obligation and that it is a violation of the rights of the claimant for another Person to hold, transfer, or deal with the Security.

Book-entry consolidated obligation means a consolidated obligation maintained in the book-entry system of the Federal Reserve Banks.

Consolidated obligation means any bond, debenture or note on which the Banks are jointly and severally liable and which was issued under section 11 of the Bank Act (12 U.S.C. 1431) and in accordance with any implementing regulations, whether or not such instrument was originally issued jointly by the Banks or by the Federal Housing Finance Board on behalf of the Banks.

Deposits in banks or trust companies means:

(1) A deposit in another Bank;

(2) A demand account in a Federal Reserve Bank;

(3) A deposit in, or a sale of Federal funds to:

(i) An insured depository institution, as defined in section 2(9)(A) of the Bank Act (12 U.S.C. 1422(9)(A)), that is designated by a Bank's board of directors;

(ii) A trust company that is a member of the Federal Reserve System or insured by the FDIC, and is designated by a Bank's board of directors; or

(iii) A U.S. branch or agency of a foreign bank, as defined in the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*), that is subject to the supervision of the Federal Reserve Board, and is designated by a Bank's board of directors.

Entitlement Holder means a Person or a Bank to whose account an interest in a Book-entry consolidated obligation is credited on the records of a Securities Intermediary.

Federal Reserve Bank means a Federal Reserve Bank or branch, acting as fiscal agent for the Office of Finance, unless otherwise indicated.

Federal Reserve Bank Operating Circular means the publication issued by each Federal Reserve Bank that sets forth the terms and conditions under which the Federal Reserve Bank maintains Book-entry Securities accounts and transfers Book-entry Securities.

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

Funds account means a reserve and/or clearing account at a Federal Reserve Bank to which debits or credits are posted for transfers against payment, Book-entry Securities transaction fees, or principal and interest payments.

Non-complying Bank means a Bank that has failed to provide the liquidity certification as required under §1270.10(b)(1).

Office of Finance means the Office of Finance, a joint office of the Banks established under part 1273 of this chapter and referenced in the Bank Act and the Safety and Soundness Act, including the Office of Finance acting as agent of the Banks in all matters relating to the issuance of Book-entry consolidated obligations and in the performance of all other necessary and proper functions relating to Book-entry consolidated obligations, including the payment of principal and interest due thereon.

Participant means a Person or a Bank that maintains a Participant's Securities Account with a Federal Reserve Bank.

Participant's Securities Account means an account in the name of a Participant at a Federal Reserve Bank to which Book-entry consolidated obligations held for a Participant are or may be credited.

Person means and includes an individual, corporation, company, governmental entity, association, firm, partnership, trust, estate, representative, and any other similar organization, but does not mean or include a Bank, the Director, FHFA, the Office of Finance, the United States, or a Federal Reserve Bank.

Repurchase agreement means an agreement in which a Bank sells securities and simultaneously agrees to repurchase those securities or similar securities at an agreed upon price, with or without a stated time for repurchase.

Revised Article 8 means Uniform Commercial Code, Revised Article 8, Investment Securities (with Conforming and Miscellaneous Amendments to Articles 1, 3, 4, 5, 9, and 10) 1994 Official Text. Copies of this publication are available from the Executive Office of the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, IL 60611.

SBIC means a small business investment company formed pursuant to section 301 of the Small Business Investment Act (15 U.S.C. 681).

Securities Intermediary means:

(1) A Person that is registered as a ''clearing agency'' under the Federal securities laws; a Federal Reserve Bank; any other person that provides clearance or settlement services with respect to a Book-entry consolidated obligation that would require it to register as a clearing agency under the Federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a Federal or State governmental authority; or (2) A Person (other than an individual, unless such individual is registered as a broker or dealer under the Federal securities laws), including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

Security Entitlement means the rights and property interest of an Entitlement Holder with respect to a Book-entry consolidated obligation.

Transfer Message means an instruction of a Participant to a Federal Reserve Bank to effect a transfer of a Book-entry consolidated obligation, as set forth in Federal Reserve Bank Operating Circulars.

[76 FR 18369, Apr. 4, 2011, as amended at 78 FR 2324, Jan. 11, 2013; 78 FR 67009, Nov. 8, 2013]

Subpart B—Sources of Funds

§ 1270.2 Authorized liabilities.

As a source of funds for business operations, each Bank is authorized to incur liabilities by:

(a) Accepting proceeds from the issuance of consolidated obligations issued in accordance with this part;

(b) Accepting time or demand deposits from members, other Banks or instrumentalities of the United States, and cash accounts from associates or members pursuant to §§ 1266.17(b)(2)(i)(B), 1266.17(d) and 1269.4(a)(1) of this chapter, or § 1270.3 of this part, or from other institutions for which the Bank is providing correspondent services pursuant to section 11(e) of the Bank Act (12 U.S.C. 1431(e));

(c) Purchasing Federal funds; and

(d) Entering into repurchase agreements.

§ 1270.3 Deposits from members.

(a) Banks may accept demand and time deposits from members, reserving the right to require notice of intention to withdraw any part of time deposits. Rates of interest paid on all deposits shall be set by the Bank's board of directors (or, between regular meetings thereof, by a committee of directors selected by the board) or by the Bank President, if so authorized by the board. Unless otherwise specified by the board, a Bank President may delegate to any officer or employee of the Bank any authority he possesses under this section.

(b) Each Bank shall at all times have at least an amount equal to the current deposits received from its members invested in:

(1) Obligations of the United States;

(2) Deposits in banks or trust companies; or

(3) Advances with a remaining maturity not to exceed five years that are made to members in conformity with part 1266 of this chapter.

Subpart C—Consolidated Obligations

§ 1270.4 Issuance of consolidated obligations.

(a) *Consolidated obligations issued by the Banks*—(1) Subject to the provisions of this part and such other rules, regulations, terms, and conditions as the Director may prescribe, the Banks may issue joint debt under section 11(c) of the Bank Act (12 U.S.C. 1431(c)), which shall be consolidated obligations, on which the Banks shall be jointly and severally liable in accordance with § 1270.10 of this part.

(2) Consolidated obligations shall be issued only through the Office of Finance, as agent of the Banks pursuant to this part and part 1273 of this chapter.

(3) All consolidated obligations shall be issued in *pari passu*.

(b) *Negative pledge requirement*. Each Bank shall at all times maintain assets described in paragraphs (b)(1) through (b)(5) of this section free from any lien or pledge, in an amount at least equal to a *pro rata* share of the total amount of currently outstanding consolidated obligations and equal to such Bank's participation in all such consolidated obligations outstanding, provided that any assets that are subject to a lien or pledge for the benefit of the holders of any issue of consolidated obligations shall be treated as if they were assets free from any lien or pledge for purposes of compliance with this paragraph (b). Eligible assets are:

(1) Cash;

(2) Obligations of or fully guaranteed by the United States;

(3) Secured advances;

(4) Mortgages as to which one or more Banks have any guaranty or insurance, or commitment therefor, by the United States or any agency thereof; and

(5) Investments described in section 16(a) of the Bank Act (12 U.S.C. 1436(a)).

[76 FR 18369, Apr. 4, 2011, as amended at 78 FR 67009, Nov. 8, 2013]

§ 1270.5 Bank operations.

The Banks, individually and collectively, shall operate in such manner

and take any actions necessary, including without limitation reducing leverage, to ensure that consolidated obligations maintain a high level of acceptance by financial markets and are generally perceived by investors as presenting a low level of credit risk.

[78 FR 67009. Nov. 8, 2013]

§ 1270.6 Transactions in consolidated obligations.

The general regulations of the Department of the Treasury now or hereafter in force governing transactions in United States securities, except 31 CFR part 357 regarding book-entry procedure, are hereby incorporated into this subpart C of this part, so far as applicable and as necessarily modified to relate to consolidated obligations, as the regulations of FHFA for similar transactions on consolidated obligations. The book-entry procedure for consolidated obligations is contained in subpart D of this part.

§ 1270.7 Lost, stolen, destroyed, mutilated or defaced consolidated obligations.

United States statutes and regulations of the Department of the Treasury now or hereafter in force governing relief on account of the loss, theft, destruction, mutilation or defacement of United States securities, so far as applicable and as necessarily modified to relate to consolidated obligations, are hereby adopted as the regulations of FHFA for the issuance of substitute consolidated obligations or the payment of lost, stolen, destroyed, mutilated or defaced consolidated obligations.

§ 1270.8 Administrative provision.

The Secretary of the Treasury or the Acting Secretary of the Treasury is hereby authorized and empowered, as the agent of FHFA and the Banks, to administer §§ 1270.6 and 1270.7, and to delegate such authority at their discretion to other officers, employees, and agents of the Department of the Treasury. Any such regulations may be waived on behalf of FHFA and the Banks by the Secretary of the Treasury, the Acting Secretary of the Treasury, or by an officer of the Department of the Treasury authorized to waive similar regulations with respect to United States securities, but only in any particular case in which a similar regulation with respect to United States securities would be waived. The terms ''securities'' and ''bonds'' as used in this section shall, unless the context otherwise requires, include and apply to coupons and interim certificates.

§ 1270.9 Conditions for issuance of consolidated obligations.

(a) The Office of Finance board of directors shall authorize the offering for current and forward settlement (up to 12 months) or the reopening of consolidated obligations, as necessary, and authorize the maturities, rates of interest, terms and conditions thereof, subject to the provisions of 31 U.S.C. 9108.

(b) Consolidated obligations may be offered for sale only to the extent that Banks are committed to take the proceeds.

(c) Consolidated obligations shall not be purchased by any Bank as part of an initial issuance whether such consolidated obligation is purchased directly from the Office of Finance or indirectly from an underwriter.

(d) If the Banks issue consolidated obligations denominated in a currency other than U.S. Dollars or linked to equity or commodity prices, then any Bank accepting proceeds from those consolidated obligations shall meet the following requirements with regard to such consolidated obligations:

(1) The relevant foreign exchange, equity price or commodity price risks associated with the consolidated obligation must be hedged in accordance with § 1267.4 of this chapter;

(2) If there is a default on the part of a counterparty to a contract hedging the foreign exchange, equity or commodity price risk associated with a consolidated obligation, the Bank shall enter into a replacement contract in a timely manner and as soon as market conditions permit.

[76 FR 18369, Apr. 4, 2011, as amended at 81 FR 76298, Nov. 2, 2016]

§ 1270.10 Joint and several liability.

(a) *In general*—(1) Each and every Bank, individually and collectively, has an obligation to make full and

timely payment of all principal and interest on consolidated obligations when due.

(2) Each and every Bank, individually and collectively, shall ensure that the timely payment of principal and interest on all consolidated obligations is given priority over, and is paid in full in advance of, any payment to or redemption of shares from any shareholder.

(3) The provisions of this part shall not limit, restrict or otherwise diminish, in any manner, the joint and several liability of all of the Banks on any consolidated obligation.

(b) *Certification and reporting*—(1) Before the end of each calendar quarter, and before declaring or paying any dividend for that quarter, the President of each Bank shall certify in writing to FHFA that, based on known current facts and financial information, the Bank will remain in compliance with the liquidity requirements set forth in section 11(g) of the Act (12 U.S.C. 1431(g)), and any regulations (as the same may be amended, modified or replaced), and will remain capable of making full and timely payment of all of its current obligations, including direct obligations, coming due during the next quarter.

(2) A Bank shall immediately provide written notice to FHFA if at any time the Bank:

(i) Is unable to provide the certification required by paragraph (b)(1) of this section;

(ii) Projects at any time that it will fail to comply with statutory or regulatory liquidity requirements, or will be unable to timely and fully meet all of its current obligations, including direct obligations, due during the quarter;

(iii) Actually fails to comply with statutory or regulatory liquidity requirements or to timely and fully meet all of its current obligations, including direct obligations, due during the quarter; or

(iv) Negotiates to enter or enters into an agreement with one or more other Banks to obtain financial assistance to meet its current obligations, including direct obligations, due during the quarter; the notice of which shall be accompanied by a copy of the agreement, which shall be subject to the approval of FHFA.

(c) *Consolidated obligation payment plans*—(1) A Bank promptly shall file a consolidated obligation payment plan for FHFA approval:

(i) If the Bank becomes a non-complying Bank as a result of failing to provide the certification required in paragraph (b)(1) of this section;

(ii) If the Bank becomes a non-complying Bank as a result of being required to provide the notice required pursuant to paragraph (b)(2) of this section, except in the event that a failure to make a principal or interest payment on a consolidated obligation when due was caused solely by a temporary interruption in the Bank's debt servicing operations resulting from an external event such as a natural disaster or a power failure; or

(iii) If FHFA determines that the Bank will cease to be in compliance with the statutory or regulatory liquidity requirements, or will lack the capacity to timely and fully meet all of its current obligations, including direct obligations, due during the quarter.

(2) A consolidated obligation payment plan shall specify the measures the non-complying Bank will undertake to make full and timely payments of all of its current obligations, including direct obligations, due during the applicable quarter.

(3) A non-complying Bank may continue to incur and pay normal operating expenses incurred in the regular course of business (including salaries, benefits, or costs of office space, equipment and related expenses), but shall not incur or pay any extraordinary expenses, or declare, or pay dividends, or redeem any capital stock, until such time as FHFA has approved the Bank's consolidated obligation payment plan or inter-Bank assistance agreement, or ordered another remedy, and all of the non-complying Bank's direct obligations have been paid.

(d) *FHFA payment orders; Obligation to reimburse*—(1) FHFA, in its discretion and notwithstanding any other provision in this section, may at any time order any Bank to make any principal or interest payment due on any consolidated obligation.

(2) To the extent that a Bank makes any payment on any consolidated obligation on behalf of another Bank, the paying Bank shall be entitled to reimbursement from the non-complying Bank, which shall have a corresponding obligation to reimburse the Bank providing assistance, to the extent of such payment and other associated costs (including interest to be determined by FHFA).

(e) *Adjustment of equities*—(1) Any non-complying Bank shall apply its assets to fulfill its direct obligations.

(2) If a Bank is required to meet, or otherwise meets, the direct obligations of another Bank due to a temporary interruption in the latter Bank's debt servicing operations (*e.g.*, in the event of a natural disaster or power failure), the assisting Bank shall have the same right to reimbursement set forth in paragraph (d)(2) of this section.

(3) If FHFA determines that the assets of a non-complying Bank are insufficient to satisfy all of its direct obligations as set forth in paragraph (e)(1) of this section, then FHFA may allocate the outstanding liability among the remaining Banks on a *pro rata* basis in proportion to each Bank's participation in all consolidated obligations outstanding as of the end of the most recent month for which FHFA has data, or otherwise as FHFA may prescribe.

(f) *Reservation of authority*. Nothing in this section shall affect the Director's authority to adjust equities between the Banks in a manner different than the manner described in paragraph (e) of this section, or to take enforcement or other action against any Bank pursuant to the Director's authority under the Safety and Soundness Act or the Bank Act, or otherwise to supervise the Banks and ensure that they are operated in a safe and sound manner.

(g) *No rights created*—(1) Nothing in this part shall create or be deemed to create any rights in any third party.

(2) Payments made by a Bank toward the direct obligations of another Bank are made for the sole purpose of discharging the joint and several liability of the Banks on consolidated obligations.

(3) Compliance, or the failure to comply, with any provision in this section shall not be deemed a default under the terms and conditions of the consolidated obligations.

§ 1270.11 Savings clause.

Any agreements or other instruments entered into in connection with the issuance of consolidated obligations prior to the amendments made to this part shall continue in effect with respect to all consolidated obligations issued under the authority of section 11 of the Bank Act (12 U.S.C. 1431) and pursuant to this part. References to consolidated obligations in such agreements and instruments shall be deemed to refer to all joint and several obligations of the Banks.

Subpart D—Book-Entry Procedure for Consolidated Obligations

§ 1270.12 Law governing rights and obligations of Banks, FHFA, Office of Finance, United States and Federal Reserve Banks; rights of any Person against Banks, FHFA, Office of Finance, United States and Federal Reserve Banks.

(a) Except as provided in paragraph (b) of this section, the rights and obligations of the Banks, FHFA, the Director, the Office of Finance, the United States and the Federal Reserve Banks with respect to: A Book-entry consolidated obligation or Security Entitlement and the operation of the Book-entry system, as it applies to consolidated obligations; and the rights of any Person, including a Participant, against the Banks, FHFA, the Director, the Office of Finance, the United States and the Federal Reserve Banks with respect to: A Book-entry consolidated obligation or Security Entitlement and the operation of the Book-entry system, as it applies to consolidated obligations; are governed solely by regulations of FHFA, including the regulations of this part 1270, the applicable offering notice, applicable procedures established by the Office of Finance, and Federal Reserve Bank Operating Circulars.

(b) A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Participant and that is not recorded on the books of a Federal Reserve Bank pursuant to

§ 1270.14(c)(1), is governed by the law (not including the conflict-of-law rules) of the jurisdiction where the head office of the Federal Reserve Bank maintaining the Participant's Securities Account is located. A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Person that is not a Participant, and that is not recorded on the books of a Federal Reserve Bank pursuant to § 1270.14(c)(1), is governed by the law determined in the manner specified in § 1270.13.

(c) If the jurisdiction specified in the first sentence of paragraph (b) of this section is a State that has not adopted Revised Article 8, then the law specified in the first sentence of paragraph (b) of this section shall be the law of that State as though Revised Article 8 had been adopted by that State.

§ 1270.13 Law governing other interests.

(a) To the extent not inconsistent with this part 1270, the law (not including the conflict-of-law rules) of a Securities Intermediary's jurisdiction governs:

(1) The acquisition of a Security Entitlement from the Securities Intermediary;

(2) The rights and duties of the Securities Intermediary and Entitlement Holder arising out of a Security Entitlement;

(3) Whether the Securities Intermediary owes any duties to an adverse claimant to a Security Entitlement;

(4) Whether an Adverse Claim can be asserted against a Person who acquires a Security Entitlement from the Securities Intermediary or a Person who purchases a Security Entitlement or interest therein from an Entitlement Holder; and

(5) Except as otherwise provided in paragraph (c) of this section, the perfection, effect of perfection or non-perfection, and priority of a security interest in a Security Entitlement.

(b) The following rules determine a ''Securities Intermediary's jurisdiction'' for purposes of this section:

(1) If an agreement between the Securities Intermediary and its Entitlement Holder specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the Securities Intermediary's jurisdiction.

(2) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify the governing law as provided in paragraph (b)(1) of this section, but expressly specifies that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the Securities Intermediary's jurisdiction.

(3) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify a jurisdiction as provided in paragraphs (b)(1) or (b)(2) of this section, the Securities Intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the Entitlement Holder's account.

(4) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify a jurisdiction as provided in paragraphs (b)(1) or (b)(2) of this section and an account statement does not identify an office serving the Entitlement Holder's account as provided in paragraph (b)(3) of this section, the Securities Intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the Securities Intermediary.

(c) Notwithstanding the general rule in paragraph (a)(5) of this section, the law (but not the conflict-of-law rules) of the jurisdiction in which the Person creating a security interest is located governs whether and how the security interest may be perfected automatically or by filing a financing statement.

(d) If the jurisdiction specified in paragraph (b) of this section is a State that has not adopted Revised Article 8, then the law for the matters specified in paragraph (a) of this section shall be the law of that State as though Revised Article 8 had been adopted by that State. For purposes of the application of the matters specified in paragraph (a) of this section, the Federal Reserve Bank maintaining the Securities Account is a clearing corporation, and the Participant's interest in a Bank Book-entry Security is a Security Entitlement.

§ 1270.14 Creation of Participant's Security Entitlement; security interests.

(a) A Participant's Security Entitlement is created when a Federal Reserve Bank indicates by book entry that a Book-entry consolidated obligation has been credited to a Participant's Securities Account.

(b) A security interest in a Security Entitlement of a Participant in favor of the United States to secure deposits of public money, including, without limitation, deposits to the Treasury tax and loan accounts, or other security interest in favor of the United States that is required by Federal statute, regulation, or agreement, and that is marked on the books of a Federal Reserve Bank is thereby effected and perfected, and has priority over any other interest in the Securities. Where a security interest in favor of the United States in a Security Entitlement of a Participant is marked on the books of a Federal Reserve Bank, such Federal Reserve Bank may rely, and is protected in relying, exclusively on the order of an authorized representative of the United States directing the transfer of the Security. For purposes of this paragraph (b), an ''authorized representative of the United States'' is the official designated in the applicable regulations or agreement to which a Federal Reserve Bank is a party, governing the security interest.

(c)(1) The Banks, FHFA, the Director, the Office of Finance, the United States and the Federal Reserve Banks have no obligation to agree to act on behalf of any Person or to recognize the interest of any transferee of a security interest or other limited interest in a Security Entitlement in favor of any Person except to the extent of any specific requirement of Federal law or regulation or to the extent set forth in any specific agreement with the Federal Reserve Bank on whose books the interest of the Participant is recorded. To the extent required by such law or regulation or set forth in an agreement with a Federal Reserve Bank, or the Federal Reserve Bank Operating Circular, a security interest in a Security Entitlement that is in favor of a Federal Reserve Bank or a Person may be created and perfected by a Federal Reserve Bank marking its books to record the security interest. Except as provided in paragraph (b) of this section, a security interest in a Security Entitlement marked on the books of a Federal Reserve Bank shall have priority over any other interest in the Securities.

(2) In addition to the method provided in paragraph (c)(1) of this section, a security interest in a Security Entitlement, including a security interest in favor of a Federal Reserve Bank, may be perfected by any method by which a security interest may be perfected under applicable law as described in §1270.12(b) or §1270.13. The perfection, effect of perfection or nonperfection, and priority of a security interest are governed by that applicable law. A security interest in favor of a Federal Reserve Bank shall be treated as a security interest in favor of a clearing corporation in all respects under that law, including with respect to the effect of perfection and priority of the security interest. A Federal Reserve Bank Operating Circular shall be treated as a rule adopted by a clearing corporation for such purposes.

§ 1270.15 Obligations of the Banks and the Office of Finance; no Adverse Claims.

(a) Except in the case of a security interest in favor of the United States or a Federal Reserve Bank or otherwise as provided in §1270.14(c)(1), for the purposes of this part 1270, the Banks, the Office of Finance and the Federal Reserve Banks shall treat the Participant to whose Securities Account an interest in a Book-entry consolidated obligations has been credited as the person exclusively entitled to issue a Transfer Message, to receive interest and other payments with respect thereof and otherwise to exercise all the rights and powers with respect to the Security, notwithstanding any information or notice to the contrary. Neither the Banks, FHFA, the Director, the Office of Finance, the United States, nor the Federal Reserve Banks are liable to a Person asserting or having an Adverse Claim to a Security Entitlement or to Book-entry consolidated obligations in a Participant's Securities Account, including any such claim arising as a result of the transfer

or disposition of a Book-entry consolidated obligation by a Federal Reserve Bank pursuant to a Transfer Message that the Federal Reserve Bank reasonably believes to be genuine.

(b) The obligation of the Banks and the Office of Finance to make payments of interest and principal with respect to Book-entry consolidated obligations is discharged at the time payment in the appropriate amount is made as follows:

(1) Interest on Book-entry consolidated obligations is either credited by a Federal Reserve Bank to a Funds Account maintained at the Federal Reserve Bank or otherwise paid as directed by the Participant.

(2) Book-entry consolidated obligations are paid, either at maturity or upon redemption, in accordance with their terms by a Federal Reserve Bank withdrawing the securities from the Participant's Securities Account in which they are maintained and by either crediting the amount of the proceeds, including both principal and interest, where applicable, to a Funds Account at the Federal Reserve Bank or otherwise paying such principal and interest as directed by the Participant. No action by the Participant is required in connection with the payment of a Book-entry consolidated obligation, unless otherwise expressly required.

§ 1270.16 Authority of Federal Reserve Banks.

(a) Each Federal Reserve Bank is hereby authorized as fiscal agent of the Office of Finance: To perform functions with respect to the issuance of Book-entry consolidated obligations, in accordance with the terms of the applicable offering notice and with procedures established by the Office of Finance; to service and maintain Book-entry consolidated obligations in accounts established for such purposes; to make payments of principal, interest and redemption premium (if any), as directed by the Office of Finance; to effect transfer of Book-entry consolidated obligations between Participants' Securities Accounts as directed by the Participants; and to perform such other duties as fiscal agent as may be requested by the Office of Finance.

(b) Each Federal Reserve Bank may issue Operating Circulars not inconsistent with this part 1270, governing the details of its handling of Book-entry consolidated obligations, Security Entitlements, and the operation of the Book-entry system under this part 1270.

§ 1270.17 Liability of Banks, FHFA, Office of Finance and Federal Reserve Banks.

The Banks, FHFA, the Director, the Office of Finance and the Federal Reserve Banks may rely on the information provided in a tender, transaction request form, other transaction documentation, or Transfer Message, and are not required to verify the information. Neither the Banks, FHFA, the Director, the Office of Finance, the United States, nor the Federal Reserve Banks shall be liable for any action taken in accordance with the information set out in a tender, transaction request form, other transaction documentation, or Transfer Message, or evidence submitted in support thereof.

§ 1270.18 Additional requirements; notice of attachment for Book-entry consolidated obligations.

(a) *Additional requirements.* In any case or any class of cases arising under the regulations in this part 1270, the Office of Finance may require such additional evidence and a bond of indemnity, with or without surety, as may in its judgment, or in the judgment of the Banks or FHFA, be necessary for the protection of the interests of the Banks, FHFA, the Office of Finance or the United States.

(b) *Notice of attachment.* The interest of a debtor in a Security Entitlement may be reached by a creditor only by legal process upon the Securities Intermediary with whom the debtor's securities account is maintained, except where a Security Entitlement is maintained in the name of a secured party, in which case the debtor's interest may be reached by legal process upon the secured party. The regulations in this part 1270 do not purport to establish whether a Federal Reserve Bank is required to honor an order or other notice of attachment in any particular case or class of cases.

§ 1270.19 Reference to certain Department of Treasury commentary and determinations.

Notwithstanding provisions in § 1270.6 regarding Department of Treasury regulations set forth in 31 CFR part 357:

(a) The Department of Treasury TRADES Commentary (31 CFR part 357, appendix B) addressing the Department of Treasury regulations governing book-entry procedure for Treasury Securities is hereby referenced, so far as applicable and as necessarily modified to relate to Book-entry consolidated obligations, as an interpretive aid to this subpart D of this part.

(b) Determinations of the Department of Treasury regarding whether a State shall be considered to have adopted Revised Article 8 for purposes of 31 CFR part 357, as published in the FEDERAL REGISTER or otherwise, shall also apply to this subpart D of this part.

§ 1270.20 Consolidated obligations are not obligations of the United States or guaranteed by the United States.

Consolidated obligations are not obligations of the United States and are not guaranteed by the United States.

PART 1271—MISCELLANEOUS FEDERAL HOME LOAN BANK OPERATIONS AND AUTHORITIES

Subpart A—Collection, Settlement, and Processing of Payment Instruments

Sec.

Subpart B—Miscellaneous Bank Authorities

Subpart C—Bank Requests for Information

Subpart D—Financing Corporation Operations

Subpart E—Authority for Bank Assistance of the Resolution Funding Corporation

AUTHORITY: 12 U.S.C. 1430, 1431, 1432, 1441(b)(8), (c), (j), 1442, 4511(b), 4513(a), 4526.

SOURCE: 78 FR 2324, Jan. 11, 2013, unless otherwise noted.

Subpart A—Collection, Settlement, and Processing of Payment Instruments

§ 1271.1 Definitions.

Unless otherwise defined in this subpart, the terms used in this subpart shall conform, in the following order, to: Regulations of FHFA, the Uniform Commercial Code, regulations of the Federal Reserve System, and general banking usage. As used in this subpart:

Account processing includes charging, crediting, and settling of member or eligible institution accounts, excluding individual customer accounts.

Assets includes furniture and equipment, leasehold improvements, and capitalized start-up costs.

Data communication means transmitting and receiving of data to or from Banks, Federal Reserve offices, clearinghouse associations, depository institutions or their service bureaus, and other direct sending entities; arrangement for delivery of information; and telephone inquiry service.

Data processing includes capture, storage, and assembling of, and computation of, data from payment instruments received from Federal Reserve offices, Banks, clearinghouse associations, depository institutions, and other direct lending entities.

Eligible institution means any institution that is eligible to make application to become a member of a Bank under section 4 of the Bank Act (12 U.S.C. 1424), including any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, community development financial institution, or any insured depository institution (as defined in section 2(9) of the Bank Act (12 U.S.C. 1422(9))), regardless of whether the institution applies for or would be approved for membership.

Issuance of forms means the designation and distribution of standardized forms for use in collection, processing, and settlement services.

Presentment means a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder, and may involve the use of electronic transmission of an instrument or item or transmission of data from the instrument or item by electronic or mechanical means.

Statement packaging includes receiving statement information from members or eligible institutions or their service bureaus on respective customer cycle dates; printing statements; matching customer account statements; packaging the statements with appropriate items and informational materials, as authorized by individual members and eligible institutions, for distribution to their customers; sending the packages to the members or eligible institutions or mailing the packages directly to their customers.

Storage services includes filing, storage, and truncation of items.

Transportation of items includes transporting items from Federal Reserve offices, other Banks' clearinghouse associations, depository institutions, and other direct sending entities to a Bank; forwarding items to financial institutions after sorting; and forwarding cash items or return items to Federal Reserve offices and other sending entities.

§ 1271.2 Authority and scope.

(a) Pursuant to section 11(e)(2) of the Bank Act (12 U.S.C. 1431(e)(2)), FHFA has promulgated this subpart governing the collection, processing, and settlement, and services incidental thereto, of drafts, checks, and other negotiable and nonnegotiable items and instruments by Banks. Settlement, collection, and processing include the following activities as defined in this subpart: Account processing, data processing, data communication, issuance of forms, transportation of items, and storage services.

(b) Any activity authorized by section 11(e)(2) of the Bank Act (12 U.S.C. 1431(e)(2)) shall be governed by the provisions of this subpart.

§ 1271.3 General provisions.

The Banks are authorized to:

(a) Engage in, be agents or intermediaries for, or otherwise participate or assist in, the processing, collection, and settlement of checks, drafts, or any other negotiable or nonnegotiable items and instruments of payment drawn on eligible institutions or Bank members; and

(b) Be drawees of checks, drafts, and other negotiable and nonnegotiable items and instruments issued by eligible institutions or Bank members.

§ 1271.4 Incidental powers.

In connection with the collection, processing, and settlement of items and instruments drawn on or issued by eligible institutions or Bank members, a Bank may also perform the following services:

(a) Statement packaging; and

(b) Any other activity that FHFA shall, from time to time, after notice and comment, find necessary for the exercise of the authority of this subpart.

§ 1271.5 Operations.

A Bank may utilize the services of a Federal Reserve Bank and may become a member or use the services of a clearinghouse, public or private financial institution, or agency in the exercise of

any powers or functions under this subpart.

§ 1271.6 Pricing of services.

(a) *General.* Banks shall charge for services authorized in this subpart in a manner consistent with the principles of section 11A(c) of the Federal Reserve Act (12 U.S.C. 248a(c)), as interpreted by this subpart.

(b) *Payment instrument account services.* (1) In determining the fees for services provided under this subpart, a Bank must take into account all direct and indirect costs of providing the services.

(2) Prices must reflect the imputed rate of return that would have been earned and the taxes that would have been paid if the Bank were a private corporation, by using a cost of capital adjustment factor applied to those assets used in providing services authorized under this subpart.

(c) *Review and publication.* For any year during which any Bank actually provides services authorized by this subpart:

(1) FHFA shall from time to time and at least annually review the cost of capital adjustment factor and review prices for services authorized in this subpart for compliance with the principles set forth in paragraphs (a) and (b) of this section, and

(2) FHFA shall annually publish in the FEDERAL REGISTER all prices for Bank services authorized in this subpart except those for fees charged to an applicant for draws made by a beneficiary under a standby letter of credit.

§ 1271.7 Rights, powers, responsibilities, duties, and liabilities.

To the extent it is not inconsistent with other provisions of this subpart, the Uniform Commercial Code governs the rights, powers, responsibilities, duties, and liabilities of Banks in the exercise of their authority under this subpart. For purposes of this paragraph, the term ''bank,'' as used in the Uniform Commercial Code and clearinghouse rules, includes Banks and their members and eligible institutions.

Subpart B—Miscellaneous Bank Authorities

§ 1271.10 Transfer of funds between Banks.

Inter-Bank borrowing shall be through unsecured deposits bearing interest at rates negotiated between Banks.

§ 1271.11 Trustee powers.

A Bank may act, and make reasonable charges for doing so, as trustee of any trust affecting the business of any member or any institution or group applying for membership, if:

(a) Such trust is created or arises for the benefit of the institution or its depositors, investors, or borrowers, or for the promotion of sound and economical home financing; and

(b) In the case of applicants, the Bank ceases to act as trustee if the application is withdrawn or rejected.

Subpart C—Bank Requests for Information

§ 1271.15 Definitions.

As used in this subpart:

Confidential regulatory information means any record, data, or report, including but not limited to examination reports, or any part thereof, that is non-public, privileged or otherwise not intended for public disclosure which is in the possession or control of a financial regulatory agency and which contains information regarding members of a Bank or financial institutions with which a Bank has had or contemplates having transactions under the Bank Act.

Financial regulatory agency means any of the following:

(1) The Department of the Treasury, including the Comptroller of the Currency;

(2) The Board of Governors of the Federal Reserve System;

(3) The National Credit Union Administration; or

(4) The Federal Deposit Insurance Corporation.

Third party means any person or entity except a director, officer, employee or agent of either:

(1) A Bank in possession of any particular confidential regulatory information; or

(2) The financial regulatory agency that supplied the particular confidential regulatory information to such Bank.

§ 1271.16 Scope.

This subpart governs the procedure by which a Bank will request and receive confidential regulatory information pursuant to section 22 of the Bank Act (12 U.S.C. 1442).

§ 1271.17 Request for confidential regulatory information.

A Bank shall make all requests for confidential regulatory information to a financial regulatory agency, or to a regional office of such agency if mutually agreeable, in accordance with the procedures contained in this subpart as well as any procedures of general applicability for requesting information promulgated by such financial regulatory agency. This subpart and its procedures may be supplemented by a confidentiality agreement between a Bank and a financial regulatory agency.

§ 1271.18 Form of request.

A request by a Bank to a financial regulatory agency for confidential regulatory information shall be made in writing or by such other means as may be agreed upon between the Bank and the financial regulatory agency. The request shall reference section 22 of the Bank Act (12 U.S.C. 1442), as amended, and this regulation, and shall describe the confidential regulatory information requested and identify its intended use pursuant to the Bank Act. The request shall be signed or otherwise made by any duly authorized Bank officer or employee.

§ 1271.19 Storage of confidential regulatory information.

Each Bank shall:

(a) Store all identified confidential regulatory information in secure storage areas or filing cabinets or other secured facilities generally used by such Bank and limit access thereto in the same manner as it maintains the confidentiality of its own members' privileged or non-public information;

(b) Have in place a written set of procedures and policies designed to ensure the confidentiality of confidential regulatory information in its possession; and

(c) Establish an internal review of its procedures for storing confidential regulatory information and maintaining its confidentiality, as a part of its internal audit process.

§ 1271.20 Access to confidential regulatory information.

Each Bank shall ensure that access to the confidential regulatory information stored at its facility is limited to those with a need to know such information and that employees with access maintain the confidentiality of the confidential regulatory information in accordance with the Bank's own procedures for maintaining the confidentiality of its members' privileged or non-public information.

§ 1271.21 Third party requests for confidential regulatory information.

(a) *General.* In the event a Bank receives a request for confidential regulatory information in its possession from any third party, the Bank shall forward such request to the financial regulatory agency from which the confidential regulatory information was obtained.

(b) *Subpoena.* In the event a Bank receives a subpoena for confidential regulatory information issued by a Federal, state or local government department, agency, court or bureau, the Bank shall give timely written notice of such subpoena to the financial regulatory agency from which the confidential regulatory information was obtained, unless such notice is prohibited by applicable law. Except as limited in this subpart, the Bank may disclose confidential regulatory information pursuant to the subpoena, after giving timely written notice, when:

(1) The financial regulatory agency gives written approval to the disclosure; or

(2) A binding order to produce the confidential regulatory information has become final with all rights of appeal either exhausted or lapsed.

(c) *Nondisclosure to third parties.* Except as provided in paragraph (b) of this section, a Bank shall not disclose confidential regulatory information to any third party. A Bank shall refer all third party requests for such confidential regulatory information to the financial regulatory agency that released the confidential regulatory information to the Bank.

(d) *Disclosure to FHFA.* (1) Neither this subpart nor any confidentiality agreement executed between a Bank and a financial regulatory agency shall prevent a Bank from disclosing confidential regulatory information in its possession to FHFA whenever disclosure is necessary to accomplish FHFA's supervision of Bank membership applications or Bank director eligibility issues, or disclosing any confidential regulatory information in its possession if such disclosure is made pursuant to an audit conducted pursuant to §1271.19 or section 20 of the Bank Act (12 U.S.C. 1440).

(2) FHFA shall keep all confidential regulatory information received under this paragraph (d) in strict confidence.

§ 1271.22 Computer data.

Nothing in this subpart shall preclude a Bank from arranging with any financial regulatory agency to transmit or allow access to confidential regulatory information with the consent of such agency by means of an electronic computer system. Any such arrangement shall ensure the security of the computerized data stored in a Bank's computer and restrict access to such data in order to preserve confidentiality in a manner agreed upon by the Bank and the financial regulatory agency.

Subpart D—Financing Corporation Operations

§ 1271.30 Definitions.

As used in this subpart:

Administrative expenses. (1) Include general office and operating expenses such as telephone and photocopy charges, printing, legal, and professional fees, postage, courier services, and office supplies; and

(2) Do not include any form of employee compensation, custodian fees, issuance costs, or any interest on (and any redemption premium with respect to) any Financing Corporation obligations.

Custodian fees means any fee incurred by the Financing Corporation in connection with the transfer of any security to, or maintenance of any security in, the segregated account established under section 21(g)(2) of the Bank Act (12 U.S.C. 1441(g)(2)), and any other expense incurred by the Financing Corporation in connection with the establishment or maintenance of such account.

Directorate means the board established under section 21(b) of the Bank Act (12 U.S.C. 1441(b)) to manage the Financing Corporation.

Insured depository institution has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Issuance costs means issuance fees and commissions incurred by the Financing Corporation in connection with the issuance or servicing of Financing Corporation obligations, including legal and accounting expenses, trustee, fiscal, and paying agent charges, securities processing charges, joint collection agent charges, advertising expenses, and costs incurred in connection with preparing and printing offering materials to the extent the Financing Corporation incurs such costs in connection with issuing any obligations.

Non-administrative expenses means custodian fees, issuance costs, and interest on Financing Corporation obligations.

Obligations means debentures, bonds, and similar debt securities issued by the Financing Corporation under sections 21(c)(3) and (e) of the Bank Act (12 U.S.C. 1441(c)(3) and (e)).

Receivership proceeds means the liquidating dividends and payments made on claims received by the Federal Savings and Loan Insurance Corporation Resolution Fund established under section 11A of the Federal Deposit Insurance Act (12 U.S.C. 1821a) from receiverships, that are not required by the Resolution Funding Corporation to provide funds for the Funding Corporation Principal Fund established under

section 21B of the Bank Act (12 U.S.C. 1441b).

§ 1271.31 General authority.

Subject to the limitations and interpretations in this subpart and such orders and directions as FHFA may prescribe, the Financing Corporation shall have authority to exercise all powers and authorities granted to it by the Bank Act and by its charter and bylaws regardless of whether the powers and authorities are specifically implemented in regulation.

§ 1271.32 Authority to establish investment policies and procedures.

The Directorate shall have authority to establish investment policies and procedures with respect to Financing Corporation funds provided that the investment policies and procedures are consistent with the requirements of section 21(g) of the Bank Act (12 U.S.C. 1441(g)). The Directorate shall promptly notify FHFA in writing of any changes to the investment policies and procedures.

§ 1271.33 Book-entry procedure for Financing Corporation obligations.

(a) *Authority.* Any Federal Reserve Bank shall have authority to apply book-entry procedure to Financing Corporation obligations.

(b) *Procedure.* The book-entry procedure for Financing Corporation obligations shall be governed by the book-entry procedure established for Bank consolidated obligations, codified at part 1270 of this chapter. Wherever the terms ''Bank(s),'' ''consolidated obligation(s)'' or ''Book-entry consolidated obligation(s)'' appear in part 1270, the terms shall be construed also to mean ''Financing Corporation,'' ''Financing Corporation obligation(s),'' or ''Book-entry Financing Corporation obligation(s),'' respectively, if appropriate to accomplish the purposes of this section.

§ 1271.34 Bank and Office of Finance employees.

Without further approval of FHFA, the Financing Corporation shall have authority to utilize the officers, employees, or agents of any Bank or the Office of Finance in such manner as may be necessary to carry out its functions.

§ 1271.35 Budget and expenses.

(a) *Directorate approval.* The Financing Corporation shall submit annually to the Directorate for approval, a budget of proposed expenditures for the next calendar year that includes administrative and non-administrative expenses.

(b) *FHFA approval.* The Directorate shall submit annually to FHFA for approval, the budget of the Financing Corporation's proposed expenditures it approved pursuant to paragraph (a) of this section.

(c) *Spending limitation.* The Financing Corporation shall not exceed the amount provided for in the annual budget approved by FHFA pursuant to paragraph (b) of this section, or as it may be amended by the Directorate within limits set by FHFA.

(d) *Amended budgets.* Whenever the Financing Corporation projects or anticipates that it will incur expenditures, other than interest on Financing Corporation obligations, that exceed the amount provided for in the annual budget approved by FHFA or the Directorate pursuant to paragraph (b) or (c) of this section, the Financing Corporation shall submit an amended annual budget to the Directorate for approval, and the Directorate shall submit such amended budget to FHFA for approval.

§ 1271.36 Administrative expenses.

(a) *Payment by Banks.* The Banks shall pay all administrative expenses of the Financing Corporation approved pursuant to § 1271.35.

(b) *Amount.* The Financing Corporation shall determine the amount of administrative expenses each Bank shall pay in the manner provided by section 21(b)(7)(B) of the Bank Act (12 U.S.C. 1441(b)(7)(B)). The Financing Corporation shall bill each Bank for such amount periodically.

(c) *Adjustments.* The Financing Corporation shall adjust the amount of administrative expenses the Banks are required to pay in any calendar year pursuant to paragraphs (a) and (b) of this section, by deducting any funds that remain from the amount paid by

the Banks for administrative expenses in the prior calendar year.

§ 1271.37 Non-administrative expenses; assessments.

(a) *Interest expenses.* The Financing Corporation shall determine anticipated interest expenses on its obligations at least semiannually.

(b) *Assessments on insured depository institutions*—(1) *Authority.* To provide sufficient funds to pay the non-administrative expenses of the Financing Corporation approved under §1271.35, the Financing Corporation shall, with the approval of the board of directors of the FDIC, assess against each insured depository institution an assessment in the same manner as assessments are made by the FDIC under section 7 of the Federal Deposit Insurance Act (12 U.S.C. 1817).

(2) *Assessment rate*—(i) *Determination.* The Financing Corporation at least semiannually shall establish an assessment rate formula, which may include rounding methodology, to determine the rate or rates of the assessment it will assess against insured depository institutions pursuant to section 21(f)(2) of the Bank Act (12 U.S.C. 1441(f)(2)) and paragraph (b)(1) of this section.

(ii) *Notice.* The Financing Corporation shall notify the FDIC and the collection agent, if any, of the formula established under paragraph (b)(2)(i) of this section.

(3) *Collecting assessments*—(i) *Collection agent.* The Financing Corporation shall have authority to collect assessments made under section 21(f)(2) of the Bank Act (12 U.S.C. 1441(f)(2)) and paragraph (b)(1) of this section through a collection agent of its choosing.

(ii) *Accounts.* Each Bank shall permit any insured depository institution whose principal place of business is in its district to establish and maintain at least one demand deposit account to facilitate collection of the assessments made under section 21(f)(2) of the Bank Act (12 U.S.C. 1441(f)(2)) and paragraph (b)(1) of this section.

(c) *Receivership proceeds*—(1) *Authority.* To the extent the amounts collected under paragraph (b) of this section are insufficient to pay the non-administrative expenses of the Financing Corporation approved under §1271.35, the Financing Corporation shall have authority to require the FDIC to transfer receivership proceeds to the Financing Corporation in accordance with section 21(f)(3) of the Bank Act (12 U.S.C. 1441(f)(3)).

(2) *Procedure.* The Directorate shall request in writing that the FDIC transfer the receivership proceeds to the Financing Corporation. Such request shall specify the estimated amount of funds required to pay the non-administrative expenses of the Financing Corporation approved under §1271.35.

(d)(1) *Final assessments.* All Financing Corporation assessments collected during 2019 shall be final. Subsequent to March 29, 2019, no insured depository institution shall have any right to receive refunds for any overpayment of any prior Financing Corporation assessments nor shall it be billed for any underpayment of any prior Financing Corporation assessments that arise as a result of an amendment to any Consolidated Reports of Condition and Income on which the prior Financing Corporation assessment had been based.

(2) *Amendments to call reports.* Amendments to an institution's Consolidated Reports of Condition and Income for quarters prior to and including the fourth quarter of 2018 shall not affect an institution's Financing Corporation assessments after March 26, 2019.

(3) *June 2019 assessment.* In the event Financing Corporation assessments are collected in June 2019, amendments to an institution's first quarter 2019 Consolidated Reports of Condition and Income that are submitted after June 25, 2019 shall not affect the institution's Financing Corporation assessment.

[78 FR 2324, Jan. 11, 2013, as amended at 83 FR 63058, Dec. 7, 2018]

§ 1271.38 Reports to FHFA.

The Financing Corporation shall file such reports as FHFA shall direct.

§ 1271.39 Review of books and records.

FHFA shall examine the Financing Corporation at least annually to determine whether the Financing Corporation is performing its functions in accordance with the requirements of section 21 of the Bank Act (12 U.S.C. 1441) and this subpart.

Subpart E—Authority for Bank Assistance of the Resolution Funding Corporation

§ 1271.41 Bank employees.

Upon the request of the Directorate of the Resolution Funding Corporation, established pursuant to section 21B(b) of the Bank Act (12 U.S.C. 1441b(b)), officers, employees, or agents of the Banks are authorized to act for and on behalf of the Resolution Funding Corporation in such manner as may be necessary to carry out the functions of the Resolution Funding Corporation as provided in section 21B(c)(6)(B) of the Bank Act (12 U.S.C. 1441b(c)(6)(B)).

PART 1272—NEW BUSINESS ACTIVITIES

Sec.

AUTHORITY: 12 U.S.C. 1431(a), 1432(a), 4511(b), 4513, 4526(a).

SOURCE: 81 FR 91694, Dec. 19, 2016, unless otherwise noted.

§ 1272.1 Definitions.

As used in this part:

Business Day means any calendar day other than a Saturday, Sunday, or legal public holiday listed in 5 U.S.C. 6103.

NBA Notice Date means the date on which FHFA receives a new business activity notice.

New business activity (NBA) means any business activity undertaken, transacted, conducted, or engaged in by a Bank that entails material risks not previously managed by the Bank. A Bank's acceptance of a new type of advance collateral does not constitute an NBA.

§ 1272.2 Limitation on Bank authority to undertake new business activities.

No Bank shall undertake an NBA except in accordance with the procedures set forth in this part.

§ 1272.3 New business activity notice requirement.

Prior to undertaking an NBA, a Bank shall submit a written notice of the proposed NBA that provides a thorough, meaningful, complete, and specific description of the activity such that FHFA will be able to make an informed decision regarding the proposed activity. At a minimum, the notice should include the following information:

(a) A written opinion of counsel identifying the specific statutory, regulatory, or other legal authorities under which the NBA is authorized and, for submissions raising legal questions of first impression, a reasoned analysis explaining how the cited authorities can be construed to authorize the new activity;

(b) A full description of the proposed activity, including, when applicable, infographics and definitions of key terms. In addition, the Bank shall indicate whether the proposed activity represents a modification to a previously approved activity in which the Bank is engaged or is an activity that FHFA has approved for any other Banks, if known to the requesting Bank, and if applicable;

(c) A discussion of why the Bank proposes to engage in the new activity and how the activity supports the housing finance and community investment mission of the Bank;

(d) A discussion of the risks presented by the new activity and how the Bank will manage these risks; and

(e) A good faith estimate of the anticipated dollar volume of the activity, and the income and expenses associated with implementing and operating the new activity, over the initial three years of operation.

§ 1272.4 Review process.

(a) Within 30 business days of the NBA Notice Date, FHFA will take one of the following actions:

(1) Approve the proposed NBA;

(2) Deny the proposed activity; or

(3) Inform the Bank that the activity raises policy, legal, or supervisory issues that require further evaluation. If FHFA fails to take any of those actions by the 30th business day following the NBA Notice Date, the NBA notice shall be deemed to have been approved and the Bank may commence the activity for which the notice was submitted.

(b) In the case of any notice that FHFA has determined requires further evaluation, FHFA will approve or deny the notice by no later than the 80th business day following the NBA Notice Date. If FHFA fails to approve or deny a NBA notice by that date, and the Director has not extended the review period, the NBA notice shall be deemed to have been approved and the Bank may commence the activity for which the notice was submitted.

(c) For purposes of calculating the review period, no days will be counted between the date that FHFA has requested additional information from the Bank pursuant to §1272.5 and the date that the Bank responds to all questions communicated.

(d) Notwithstanding anything contained in this part, the Director may extend the 80 business-day review period by an additional 60 business days if the Director determines that additional time is required to consider the notice. In such a case, FHFA will inform the Bank of any such extension before the 80th business day following the NBA Notice Date, and the Bank may not commence the NBA until FHFA has affirmatively approved the notice.

(e) In considering any NBA notice, FHFA will assess whether the proposed activity will be conducted in a safe and sound manner and is consistent with the housing finance, community investment, and liquidity missions of the Banks and the cooperative nature of the Bank System. FHFA may deny an NBA notice or may approve the notice, which approval may be made subject to the Bank's compliance with any conditions that FHFA determines are appropriate to ensure that the Bank conducts the new activity in a safe and sound manner and in compliance with applicable laws or regulations and the Bank's mission.

§ 1272.5 Additional information.

FHFA may request additional information from a Bank necessary to issue a determination regarding an NBA. After an initial request for information, FHFA may make subsequent requests for information only to the extent that the information provided by the Bank does not fully respond to a previous request, the subsequent request seeks information needed to clarify the Bank's previous response, or the information provided by the Bank raises new legal, policy, or supervisory issues not evident based on the Bank's NBA notice or responses to previous requests for information. Nothing contained in this paragraph shall limit the Director's authority to request additional information from a Bank regarding an NBA for which the Director has extended the review period.

§ 1272.6 Examinations.

Nothing in this part shall limit in any manner the right of FHFA to conduct any examination of any Bank relating to its implementation of an NBA, including pre- or post-implementation safety and soundness examinations, or review of contracts or other agreements between the Bank and any other party.

§ 1272.7 Approval of notices.

The Deputy Director for Federal Home Loan Bank Regulation may approve requests from a Bank seeking approval of any NBA notice submitted in accordance with this part. The Director reserves the right to modify, rescind, or supersede any such approval granted by the Deputy Director, with such action being effective only on a prospective basis.

PART 1273—OFFICE OF FINANCE

Sec.

AUTHORITY: 12 U.S.C. 1431, 1440, 4511(b), 4513, 4514(a), 4526(a).

SOURCE: 75 FR 23161, May 3, 2010, unless otherwise noted.

§ 1273.1 Definitions.

For purposes of this part:

Audit Committee means the OF Independent Directors acting as the committee established in accordance with § 1273.9 of this part.

Chair means the chairperson of the board of directors of the Office of Finance.

Chief Executive Officer or *CEO* means the chief executive officer of the Office of Finance.

Independent Director means a member of the OF board of directors who meets the qualifications set forth in § 1273.7(a)(2) of this part.

[75 FR 23161, May 3, 2010, as amended at 78 FR 2328, Jan. 13, 2013; 81 FR 76298, Nov. 2, 2016]

§ 1273.2 Authority of the OF.

(a) *General.* The OF shall enjoy such incidental powers under section 12(a) of the Bank Act (12 U.S.C. 1432(a)), as are necessary, convenient and proper to accomplish the efficient execution of its duties and functions pursuant to this part, including the authority to contract with a Bank or Banks for the use of Bank facilities or personnel in order to perform its functions or duties.

(b) *Agent.* The OF, in the performance of its duties, shall have the power to act on behalf of the Banks in issuing consolidated obligations and in paying principal and interest due on the consolidated obligations, or other obligations of the Banks.

(c) *Assessments.* The OF shall have authority to assess the Banks for the funding of its operations in accordance with § 1273.5 of this part.

§ 1273.3 Functions of the OF.

(a) *Joint debt issuance.* Subject to part 1270, subparts B and C, of this chapter, and this part, the OF, as agent for the Banks, shall offer, issue, and service (including making timely payments on principal and interest due) consolidated obligations.

(b) *Preparation of combined financial reports.* The OF shall prepare and issue the combined annual and quarterly financial reports for the Bank System in accordance with the requirements of § 1273.6(b) and appendix A of this part, using consistent accounting policies and procedures as provided in § 1273.9(b) of this part.

(c) *Fiscal agent.* The OF shall function as the fiscal agent of the Banks.

(d) *Financing Corporation and Resolution Funding Corporation.* The OF shall perform such duties and responsibilities for FICO as may be required under part 1271, subpart D, of this chapter, or for REFCORP as may be required under part 1271, subpart E, of this chapter or authorized by FHFA pursuant to section 21B(c)(6)(B) of the Bank Act (12 U.S.C. 1441b(c)(6)(B)).

[75 FR 23161, May 3, 2010, as amended at 81 FR 76298, Nov. 2, 2016]

§ 1273.4 FHFA oversight.

(a) *Oversight and enforcement actions.* FHFA shall have such oversight authority over the OF, the OF board of directors, the officers, employees, agents, attorneys, accountants, or other OF staff as set forth in the Bank Act, the Safety and Soundness Act, and FHFA regulations issued thereunder.

(b) *Examinations.* Pursuant to section 20 of the Bank Act (12 U.S.C. 1440), FHFA shall examine the OF, all funds and accounts that may be established pursuant to this part 1273, and the operations and activities of the OF, as provided for in the Bank Act, the Safety and Soundness Act, or any regulations promulgated pursuant thereto.

(c) *Combined financial reports.* FHFA shall determine whether a combined Bank System annual or quarterly financial report complies with the standards of this part.

§ 1273.5 Funding of the OF.

(a) *Generally.* The Banks are responsible for jointly funding all the expenses of the OF, including the costs of indemnifying the members of the OF board of directors, the Chief Executive Officer, and other officers and employees of the OF, as provided for in this part.

(b) *Funding policies.* (1) At the direction of and pursuant to policies and procedures adopted by the OF board of directors, the Banks shall periodically reimburse the OF in order to maintain sufficient operating funds under the budget approved by the OF board of directors. The OF operating funds shall be:

(i) Available for expenses of the OF and the OF board of directors, according to their approved budgets; and

(ii) Subject to withdrawal by check, wire transfer or draft signed by the Chief Executive Officer or other persons designated by the OF board of directors.

(2) Each Bank's respective *pro rata* share of the reimbursement described in paragraph (b)(1) of this section shall be based on a reasonable formula approved by the OF board of directors. Such formula shall be subject to the review of FHFA, and the OF board of directors shall make any changes to the formula as may be ordered by FHFA from time to time.

(c) *Alternative funding method.* With the prior approval of FHFA, the OF board of directors may, by contract with a Bank or Banks, choose to be reimbursed through a fee structure, in lieu of or in addition to assessment, for services provided to the Bank or Banks.

(d) *Prompt reimbursement.* Each Bank from time to time shall promptly forward funds to the OF in an amount representing its share of the reimbursement described in paragraph (b) of this section when directed to do so by the Chief Executive Officer pursuant to the procedures of the OF board of directors.

(e) *Indemnification expenses.* All expenses incident to indemnification of the members of the OF board of directors, the Chief Executive Officer, and other officers and employees of the OF shall be treated as an expense of the OF to be reimbursed by the Banks under the provisions of this part.

(f) *Operating funds segregated.* Any funds received by the OF from the Banks pursuant to this section for OF operating expenses promptly shall be deposited into one or more accounts and shall not be commingled with any proceeds from the sale of consolidated obligations in any manner.

§ 1273.6 Debt management duties of the OF.

(a) *Issuing and servicing of consolidated obligations.* The OF, as agent for the Banks, shall issue and service (including making timely payments on principal and interest due, subject to §§ 1270.9 and 1270.10 of this chapter) consolidated obligations pursuant to and in accordance with the policies and procedures established by the OF board of directors under this part.

(b) *Combined financial reports requirements.* The OF, under the oversight of the Audit Committee, shall prepare and distribute the combined annual and quarterly financial reports for the Bank System in accordance with the following requirements:

(1) The scope, form, and content of the disclosure generally shall be consistent with the requirements of the Securities and Exchange Commission Regulations S–K and S–X (17 CFR parts 229 and 210).

(2) Information about each Bank shall be presented as a segment of the Bank System as if generally accepted accounting principles regarding business segment disclosure applied to the combined annual and quarterly financial reports of the Bank System, and shall be presented using consistent accounting policies and procedures as provided in § 1273.9(b) of this part.

(3) The standards set forth in paragraphs (b)(1) and (b)(2) of this section are subject to the exceptions set forth in Appendix A to this part.

(4) The combined Bank System annual financial reports shall be filed with FHFA and distributed to each Bank and Bank member within 90 days after the end of the fiscal year. The combined Bank System quarterly financial reports shall be filed with FHFA and distributed to each Bank and Bank member within 45 days after the end of the of the first three fiscal quarters of each year.

(5) The Audit Committee shall ensure that the combined Bank System annual or quarterly financial reports comply with the standards of this part.

(6) The OF and the OF board of directors, including the Audit Committee,

shall comply promptly with any directive of FHFA regarding the preparation, filing, amendment, or distribution of the combined Bank System annual or quarterly financial reports.

(7) Nothing in this section shall create or be deemed to create any rights in any third party.

(c) *Capital markets data.* The OF shall provide capital markets information concerning debt to the Banks.

(d) *NRSROs.* The OF shall manage the relationships with NRSROs in connection with their rating of consolidated obligations.

(e) *Research.* The OF shall conduct research reasonably related to the issuance or servicing of consolidated obligations.

(f) *Monitor Banks' credit exposure.* The OF shall timely monitor, and compile relevant data on, each Bank's and the Bank System's unsecured credit exposure to individual counterparties.

[75 FR 23161, May 3, 2010, as amended at 81 FR 76298, Nov. 2, 2016]

§ 1273.7 Structure of the OF board of directors.

(a) *Membership.* The OF board of directors shall consist of part-time members as follows:

(1) Each of the Bank presidents, *ex officio*, provided that if the presidency of any Bank becomes vacant, the person designated by the Bank's board of directors to temporarily fulfill the duties of president of that Bank shall serve on the OF board of directors until the presidency is filled permanently; and

(2) Five Independent Directors who—

(i) Each shall be a citizen of the United States;

(ii) As a group, shall have substantial experience in financial and accounting matters; and

(iii) Shall not have any material relationship with a Bank, or the OF (directly or as a partner, shareholder, or officer of an organization), as determined under criteria set forth in a policy adopted by the OF board of directors. At a minimum, such policy shall provide that an Independent Director may not:

(A) Be an officer, director, or employee of any Bank or member of a Bank, or have been an officer, director, or employee of a Bank or member of a Bank during the previous three years;

(B) Be an officer or employee of the OF, or have been an officer or employee of the OF during the previous three years; or

(C) Be affiliated with any consolidated obligations selling or dealer group under contract with OF, or hold shares or any other financial interest in any entity that is part of a consolidated obligations seller or dealer group in an amount greater than the lesser of $250,000 or 0.01% of the market capitalization of the seller or dealer group, or in an amount that exceeds $1,000,000 for all entities that are part of any consolidated obligations seller dealer group, combined. For purposes of this paragraph (a)(2)(iii)(C), a holding company of an entity that is part of a consolidated obligations seller or dealer group shall be deemed to be part of the consolidated obligations selling or dealer group if the assets of the holding company's subsidiaries that are part of a consolidated obligation seller or dealer group constitute 35% or more of the consolidated assets of the holding company.

(b) *Terms.* (1) Except as provided in paragraph (b)(2) of this section, each Independent Director shall serve for five-year terms (which shall be staggered so that no more than one Independent Director seat would be scheduled to become vacant in any one year), and shall be subject to removal or suspension in accordance with §1273.4(a). An Independent Director may not serve more than two full, consecutive terms, provided that any partial term served by an Independent Director pursuant to paragraph (b)(2) of this section shall not count as a term for purposes of this restriction.

(2) The OF board of directors shall fill any vacancy among the Independent Directors occurring prior to the scheduled end of a term by majority vote, subject to FHFA's review of, and non-objection to, the new Independent Director. The OF board of directors shall provide FHFA with the same biographic and background information about the new Independent Director required under paragraph (c) of this section, and FHFA shall have the same rights of non-objection to the

Independent Director (and to appoint a different Independent Director) as set forth in paragraph (c) of this section. A person shall be elected (or otherwise appointed by FHFA) under this paragraph (b)(2) to serve only for the remainder of the term associated with the vacant directorship.

(c) *Election of Independent Directors.* The Independent Directors shall be elected by majority vote of the OF board of directors, subject to FHFA's review of, and non-objection to, each Independent Director. The OF board of directors shall provide FHFA with relevant biographic and background information, including information demonstrating that the new Independent Director meets the requirements of paragraph (a)(2) of this section, at least 20 business days before the person assumes any duties as a member of the OF board of directors. If the OF board of directors, in FHFA's judgment, fails to elect a suitably qualified person, FHFA may appoint some other person who meets the requirements of paragraph (a)(2) of this section. FHFA will provide notice of its objection to a particular Independent Director prior to the date that such Director is to assume duties as a member of the OF board of directors. Such notice shall indicate whether, given FHFA's objection, FHFA intends to fill the seat through appointment or a new election should be held by the OF board of directors.

(d) *Election of Chair and Vice-Chair.* (1) The Chair shall be elected by majority vote of the OF board of directors from among the Independent Directors then serving on the OF board of directors, and the Vice Chair shall be elected by majority vote of the OF board of directors from among all directors.

(2) The OF board of directors shall promptly inform FHFA of the election of a Chair or Vice Chair. If FHFA objects to any Chair or Vice Chair elected by the OF board of directors, FHFA shall provide written notice of its objection within 20 business days of the date that FHFA first receives the notice of the election of the Chair and or Vice Chair, and the OF board of directors must then promptly elect a new Chair or Vice Chair, as appropriate.

(e) *By-laws and Committees.* (1) The OF board of directors shall adopt by-laws governing the manner in which the board conducts its affairs, which shall be consistent with the requirements of this part and other applicable laws and regulations as administered by FHFA. The by-laws of the board of directors shall be subject to review and approval by FHFA.

(2) In addition to the Audit Committee required under §1273.9, the OF board of directors may establish other committees, including an Executive Committee. The duties and powers of such committee, including any powers delegated by the OF board of directors, shall be specified in the by-laws of the board of directors or the charter of the committee.

(f) *Compensation.* (1) The Bank presidents shall not receive any additional compensation or reimbursement as a result of their service as a director of the OF board.

(2) The OF shall pay reasonable compensation and expenses to the Independent Directors in accordance with the requirements for payment of compensation and expenses to Bank directors as set forth in part 1261 of this chapter.

(g) *Corporate Governance and Indemnification*—(1) *General.* The corporate governance practices and procedures of the OF, and practices and procedures related to indemnification (including advancement of expenses) shall comply with applicable Federal law, rules, and regulations.

(2) *Election and designation of body of law.* (i) To the extent not inconsistent with paragraph (g)(1) of this section, the OF shall elect to follow the corporate governance and indemnification practices and procedures set forth in one of the following:

(A) The law of the jurisdiction in which the principal office of the OF is located;

(B) The Delaware General Corporation Law (Del. Code Ann. Title 8); or

(C) The Revised Model Business Corporation Act.

(ii) The OF board of directors shall designate in its by-laws the body of law elected pursuant to this paragraph (g)(2).

(3) *Indemnification.* Subject to paragraphs (g)(1) and (2) of this section, to the extent applicable, the OF shall indemnify (and advance the expenses of) its directors, officers, and employees under such terms and conditions as are determined by the OF board of directors. The OF shall be authorized to maintain insurance for its directors, the CEO, and any other officer or employee of the OF. Nothing in this paragraph (g)(3) shall affect any rights to indemnification (including the advancement of expenses) that a director, the CEO, or any other officer or employee of the OF had with respect to any actions, omissions, transactions, or facts occurring prior to December 2, 2016.

(h) *Delegation.* In addition to any delegation to a committee allowed under paragraph (e) of this section, the OF board of directors may delegate any of its authority or duties to any employee of the OF in order to enable OF to carry out its functions.

(i) *Outside staff and consultants.* In carrying out its duties and responsibilities, the OF board of directors, or any committee thereof, shall have authority to retain staff and outside counsel, independent accountants, or other outside consultants at the expense of the OF.

[81 FR 76298, Nov. 2, 2016]

§ 1273.8 General duties of the OF board of directors.

(a) *General.* Each director shall have the duty to:

(1) Carry out his or her duties as director in good faith, in a manner such director believes to be in the best interests of the OF and the Bank System, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances;

(2) Administer the affairs of the OF fairly and impartially and without discrimination in favor of or against any Bank;

(3) At the time of appointment or election, or within a reasonable time thereafter, have a working familiarity with basic finance and accounting practices, including the ability to read and understand the Banks' combined balance sheets and income statements and the relevant financial statements of the OF and to ask substantive questions of management and the internal and external auditors with regard to both the combined financial statements of the Bank System and the operations and financial statements of the OF, as appropriate; and

(4) Direct the operations of the OF in conformity with the requirements set forth in the Bank Act, Safety and Soundness Act, and this chapter.

(b) *Meetings and quorum.* The OF board of directors shall conduct its business by majority vote of its members at meetings convened in accordance with its by-laws, and shall hold no fewer than six in-person meetings annually. Due notice shall be given to FHFA by the Chair prior to each meeting. A quorum, for purposes of meetings of the OF board of directors, shall require a majority of sitting board members, which must include a majority of sitting Independent Directors.

(c) *Duties regarding COs.* The OF board of directors shall oversee the establishment of policies regarding COs that shall:

(1) Govern the frequency and timing of issuance, issue size, minimum denomination, CO concessions, underwriter qualifications, currency of issuance, interest-rate change or conversion features, call features, principal indexing features, selection and retention of outside counsel, selection of clearing organizations, and the selection and compensation of underwriters for consolidated obligations, which shall be in accordance with the requirements and limitations set forth in paragraph (c)(4) of this section;

(2) Prohibit the issuance of COs intended to be privately placed with or sold without the participation of an underwriter to retail investors, or issued with a concession structure designed to facilitate the placement of the COs in retail accounts, unless the OF has given notice to the board of directors of each Bank describing a policy permitting such issuances, soliciting comments from each Bank's board of directors, and considering the comments received before adopting a policy permitting such issuance activities;

(3) Require all broker-dealers or underwriters under contract to the OF to have and maintain adequate suitability sales practices and policies, which shall be acceptable to, and subject to review by, the OF;

(4) Require that COs shall be issued efficiently and at the lowest all-in funding costs over time, consistent with—

(i) Prudent risk-management practices, prudential debt parameters, short and long-term market conditions, and the Banks' role as GSEs;

(ii) Maintaining reliable access to the short-term and long-term capital markets; and

(iii) Positioning the issuance of debt to take advantage of current and future capital market opportunities.

(d) *Other duties.* The OF board of directors shall:

(1) Set policies for management and operation of the OF;

(2) Approve a strategic business plan for the OF in accordance with the provisions of §1239.14 of this chapter, as appropriate;

(3) Select, employ, determine the compensation for, and assign the duties and functions of a Chief Executive Officer of the OF who shall—

(i) Be head of the OF and direct the implementation of the OF board of directors' policies;

(ii) Serve as a member of the Directorate of the FICO, pursuant to section 21(b)(1)(A) of the Bank Act (12 U.S.C. 1441(b)(1)(A)); and

(iii) Serve as a member of the Directorate of the REFCORP, pursuant to section 21B(c)(1)(A) of the Bank Act (12 U.S.C. 1441b(c)(1)(A)).

(4) Review and approve all contracts of the OF, except for contracts for which exclusive authority is provided to the Audit Committee by paragraphs (b)(5) and (b)(6) of §1273.9; and

(5) Assume any other responsibilities that may from time to time be assigned to it by FHFA.

(e) *No rights created.* Nothing in this part shall create or be deemed to create any rights in any third party.

[75 FR 23161, May 3, 2010, as amended at 81 FR 76299, Nov. 2, 2016; 83 FR 52954, Oct. 19, 2018]

§1273.9 Audit Committee.

(a) *Composition.* The Independent Directors shall serve as the Audit Committee. The Audit Committee shall elect its chairperson from among its members. The Chairperson of the OF may also serve as chairperson of the Audit Committee, if the Audit Committee members so decide.

(b) *Responsibilities.* (1) The Audit Committee shall be responsible for overseeing the audit function of the OF and the preparation and the accurate and meaningful combination of information submitted by the Banks in the Bank System's combined financial reports.

(2) For purposes of the combined financial reports, the Audit Committee shall ensure that the Banks adopt consistent accounting policies and procedures to the extent necessary for information submitted by the Banks to the OF to be combined to create accurate and meaningful combined financial reports.

(3) The Audit Committee, in consultation with FHFA, may establish common accounting policies and procedures for the information submitted by the Banks to the OF for the combined financial reports where the Committee determines such information provided by the several Banks is inconsistent and that consistent policies and procedures regarding that information are necessary to create accurate and meaningful combined financial reports.

(4) To the extent possible the Audit Committee shall operate consistent with the requirements pertaining to audit committee reports set forth in Item 407(d)(3) of Regulation S–K promulgated by the Securities and Exchange Commission.

(5) The Audit Committee shall oversee internal audit activities, including the selection, evaluation, compensation, and, where appropriate, replacement of the internal auditor. The internal auditor shall report directly to the Audit Committee on substantive matters, and is ultimately accountable to the Audit Committee and the board of directors.

(6) The Audit Committee shall have the exclusive authority to employ and contract for the services of an independent, external auditor for the

Banks' annual and quarterly combined financial statements and of an independent, external auditor for OF.

(7) The Audit Committee shall direct senior management to maintain the reliability and integrity of the accounting policies and financial reporting of the OF.

(8) The Audit Committee shall review the basis for the OF's financial statements and the external auditor's opinion rendered with respect to such financial statements.

(9) The Audit Committee shall ensure that senior management has established and is maintaining an adequate internal control system within the OF by:

(i) Reviewing the OF's internal control system and the resolution of identified material weaknesses and reportable conditions in the internal control system, including the prevention or detection of management override or compromise of the internal control system; and

(ii) Reviewing the programs and policies of the OF designed to ensure compliance with applicable laws, regulations, and policies and monitoring the results of these compliance efforts.

(10) The Audit Committee shall review the policies and procedures established by senior management to assess and monitor implementation of the OF strategic business plan and the operating goals and objectives contained therein.

(11) The Audit Committee shall provide an independent, direct channel of communication between the OF's board of directors and the internal and external auditors.

(12) The Audit Committee shall conduct or authorize investigations into any matters within the Audit Committee's scope of responsibilities.

(13) The Audit Committee shall report periodically its findings to the OF's board of directors.

(14) The Audit Committee shall prepare written minutes of each Audit Committee meeting.

(c) *Charter.* (1) The Audit Committee shall adopt, and the OF board of directors shall approve, a formal written charter, consistent with the duties and authority set forth in this section, that specifies the scope of the Audit Committee's powers and responsibilities. The Audit Committee and the OF board of directors shall:

(i) Review, and assess the adequacy of and, where appropriate, amend the Audit Committee charter on an annual basis; and

(ii) Re-adopt and re-approve, respectively, the Audit Committee charter not less often than every three years.

(2) The charter of the Audit Committee shall be subject to review and approval by FHFA.

(d) *No delegation.* The Audit Committee may not delegate the responsibilities assigned to it under this section to any person, or to any other committee or sub-committee of the OF board of directors.

[75 FR 23161, May 3, 2010, as amended at 81 FR 76299, Nov. 2, 2016]

APPENDIX A TO PART 1273—EXCEPTIONS TO THE GENERAL DISCLOSURE STANDARDS

A. Related-party transactions. Item 404 of Regulation S–K, 17 CFR 229.404, requires the disclosure of certain relationships and related party transactions. In light of the cooperative nature of the Bank System, related-party transactions are to be expected, and a disclosure of all related-party transactions that meet the threshold would not be meaningful. Instead, the combined annual report will disclose the percent of advances to members an officer of which serves as a Bank director, and list the top ten holders of advances in the Bank System and the top five holders of advances by Bank, with a further disclosure indicating which of these members had an officer that served as a Bank director. The combined financial report will also disclose the top ten holders of advances in the Bank System by holding company, where the advances of all affiliates within a holding company are aggregated.

B. Biographical information. The biographical information required by Items 401 and 405 of Regulation S–K, 17 CFR 229.401 and 405, will be provided only for members of the OF board of directors, including the Bank presidents, the Chair and Vice-Chair of the board of directors of each Bank, and the Chief Executive Officer of OF.

C. Compensation. The information on compensation required by Item 402 of Regulation S–K, 17 CFR 229.402, will be provided only for Bank presidents and the CEO of the OF.

D. Submission of matters to a vote of stockholders. No information will be presented on matters submitted to shareholders for a vote, as otherwise required by Item 4 of the SEC's form 10–K, 17 CFR 249.310.

E. Exhibits. The exhibits required by Item 601 of Regulation S–K, 17 CFR 229.601, are not applicable and will not be provided.

F. Per share information. The statement of financial information required by Items 301 and 302 of Rule S–K, 17 CFR 229.301 and 302, is inapplicable because the shares of the Banks are subscription capital that trades at par, and the shares expand or contract with changes in member assets or advance levels.

G. Beneficial ownership. Item 403 of Rule S–K, 17 CFR 229.403, requires the disclosure of security ownership of certain beneficial owners and management. The combined financial report will provide a listing of the ten largest holders of capital stock in the Bank System and a listing of the five largest holders of capital stock by Bank. This listing will also indicate which members had an officer that served as a director of a Bank. The combined financial report will also disclose the top ten holders of Bank stock in the Bank System by holding company, where the Bank stock of all affiliates within a holding company is aggregated.

[75 FR 23161, May 3, 2010, as amended at 81 FR 76299, Nov. 2, 2016]

PART 1274—FINANCIAL STATEMENTS OF THE BANKS

Sec.

AUTHORITY: 12 U.S.C. 1426, 1431, 4511(b), 4513, 4526(a).

SOURCE: 75 FR 23166, May 3, 2010, unless otherwise noted.

§ 1274.1 Definitions.

For purposes of this part:

Audit means an examination of the financial statements by an independent accountant in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon.

Audit report means a document in which an independent accountant indicates the scope the audit made and sets forth an opinion regarding the financial statement taken as a whole, or an assertion to the effect that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefor shall be stated.

[75 FR 23166, May 3, 2010, as amended at 78 FR 2328, Jan. 11, 2013; 81 FR 76300, Nov. 2, 2016]

§ 1274.2 Audit requirements.

(a) Each Bank, the OF, and the FICO shall obtain annually an independent external audit of and an audit report on its individual financial statement.

(b) The OF audit committee shall obtain an audit and an audit report on the combined annual financial statements for the Bank System.

(c) All audits must be conducted in accordance with generally accepted auditing standards and in accordance with the most current government auditing standards issued by the Office of the Comptroller General of the United States.

(d) An independent, external auditor must meet at least twice each year with the audit committee of each Bank, the audit committee of OF, and the FICO Directorate.

(e) FHFA examiners shall have unrestricted access to all auditors' work papers and to the auditors to address substantive accounting issues that may arise during the course of any audit.

§ 1274.3 Requirements to provide financial and other information to FHFA and the OF.

In order to facilitate the preparation by the OF of combined Bank System annual and quarterly reports, each Bank shall provide to the OF in such form and within such timeframes as FHFA or the OF shall specify, all financial and other information and assistance that the OF shall request for that purpose. Nothing in this section shall contravene or be deemed to circumscribe in any manner the authority of FHFA to obtain any information from any Bank related to the preparation or review of any financial report.

PART 1277—FEDERAL HOME LOAN BANK CAPITAL REQUIREMENTS, CAPITAL STOCK AND CAPITAL PLANS

Subpart A—Definitions

Subpart B—Bank Capital Requirements

Subpart C—Bank Capital Stock

Subpart D—Bank Capital Plans

AUTHORITY: 12 U.S.C. 1426, 1436(a), 1440, 1443, 1446, 4511, 4513, 4514, 4526, 4612.

SOURCE: 80 FR 12755, Mar. 11, 2015, unless otherwise noted.

Subpart A—Definitions

§ 1277.1 Definitions.

As used in this part:

Affiliated counterparty means a counterparty of a Bank that controls, is controlled by, or is under common control with another counterparty of the Bank. For the purposes of this definition only, direct or indirect ownership (including beneficial ownership) of more than 50 percent of the voting securities or voting interests of an entity constitutes control.

Bankruptcy remote means, in the context of any asset that a Bank has posted as collateral to a counterparty, that the asset would be excluded from that counterparty's estate in receivership, insolvency, liquidation, or similar proceeding.

Class A stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified by § 1277.20(a).

Class B stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified by § 1277.20(b).

Collateralized mortgage obligation, or *CMO*, means any instrument backed or collateralized by residential mortgages or residential mortgage securities, that includes two or more tranches or classes, or is otherwise structured in any manner other than as a pass-through security.

Commitment to make an advance or acquire a loan subject to certain drawdown means a legally binding agreement that commits the Bank to make an advance or acquire a loan, at or by a specified future date.

Credit derivative means a derivative contract that transfers credit risk.

Credit risk means the risk that the market value, or estimated fair value if market value is not available, of an obligation will decline as a result of deterioration in the creditworthiness of the obligor.

Derivatives clearing organization means an organization that clears derivative contracts and is registered with the Commodity Futures Trading Commission as a derivatives clearing organization pursuant to section 5b(a) of the Commodity Exchange Act (7 U.S.C. 7a–1), or that the Commodity Futures Trading Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Commodity Exchange Act (7 U.S.C. 7a–1(h)), or is registered with the Securities and Exchange Commission as a clearing agency pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1), or that the SEC has exempted from registration as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1(k)).

Derivative contract means generally a financial contract the value of which is derived from the values of one or more underlying assets, reference rates, or

indices of asset values, or credit-related events. Derivative contracts include interest rate, foreign exchange rate, equity, precious metals, commodity, and credit derivative contracts, and any other instruments that pose similar counterparty credit risks.

Eligible master netting agreement has the same meaning as set forth in §1221.2 of this chapter.

Exchange rate contracts include cross-currency interest-rate swaps, forward foreign exchange rate contracts, currency options purchased, and any similar instruments that give rise to similar risks.

Former member means an institution for which the membership in a Bank has been terminated but which continues to hold stock in the Bank as required by the Bank's capital plan, and includes any successor to such institution that continues to hold the stock in the Bank that had been issued to the acquired institution.

General allowance for losses means an allowance established by the Bank in accordance with GAAP for losses, but which does not include any amounts held against specific assets of the Bank.

Government Sponsored Enterprise, or *GSE*, means a United States Government-sponsored agency or instrumentality established or chartered to serve public purposes specified by the United States Congress, but whose obligations are not obligations of the United States and are not guaranteed by the United States.

Internal cash-flow model means a model developed and used by a Bank to estimate the potential evolving changes in the cash flows and market values of a portfolio for each month, extending out for a period of years, subject to a variety of plausible time paths of changes in interest rates, volatilities, and option adjusted spreads, and that incorporates assumptions about new or revolving business, including the roll-off and possible replacement of assets and liabilities as required.

Internal market-risk model means a model developed and used by a Bank to estimate the potential change in the market value of a portfolio subject to an instantaneous change in interest rates, volatilities, and option-adjusted spreads.

Market risk means the risk that the market value, or estimated fair value if market value is not available, of a Bank's portfolio will decline as a result of changes in interest rates, foreign exchange rates, or equity or commodity prices.

Market value-at-risk is the loss in the market value of a Bank's portfolio measured from a base line case, where the loss is estimated in accordance with §1277.5.

Minimum investment means the minimum amount of stock that an institution is required to own in order to be a member of a Bank and in order to obtain advances and to engage in other business activities with the Bank in accordance with §1277.22.

Non-mortgage asset means an asset held by a Bank other than an advance, a non-rated asset, a residential mortgage asset, a collateralized mortgage obligation, or a derivative contract.

Non-rated asset means a Bank's cash, premises, plant and equipment, and investments authorized pursuant to §1265.3(e) and (f) of this chapter.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people and systems, or from external events.

Permanent capital means the retained earnings of a Bank, determined in accordance with GAAP, plus the amount paid-in for the Bank's Class B stock.

Redeem or Redemption means the acquisition by a Bank of its outstanding Class A or Class B stock at par value following the expiration of the six-month or five-year statutory redemption period, respectively, for the stock.

Regulatory capital requirements means the minimum amounts of permanent and total capital that a Bank is required to maintain under section 6(a) of the Bank Act (12 U.S.C. 1426(a)) and any related regulations, as such requirements may be modified by the Director, or any similar requirement established for a Bank by regulation, order, written agreement or other action.

Repurchase means the acquisition by a Bank of excess stock prior to the expiration of the six-month or five-year

statutory redemption period for the stock.

Residential mortgage means a loan secured by a residential structure that contains one-to-four dwelling units, regardless of whether the structure is attached to real property. The term encompasses, among other things, loans secured by individual condominium or cooperative units and manufactured housing, whether or not the manufactured housing is considered real property under state law, and participation interests in such loans.

Residential mortgage asset, or *RMA,* means any residential mortgage, residential mortgage pool, or residential mortgage security.

Residential mortgage security means any instrument representing an undivided interest in a pool of residential mortgages.

Sales of federal funds subject to a continuing contract means an overnight federal funds loan that is automatically renewed each day unless terminated by either the lender or the borrower.

Total assets mean the total assets of a Bank, as determined in accordance with generally accepted accounting principles (GAAP).

Total capital of a Bank means the sum of permanent capital, the amounts paid-in for Class A stock, the amount of any general allowance for losses, and the amount of other instruments identified in a Bank's capital plan that the Director has determined to be available to absorb losses incurred by such Bank.

[80 FR 12755, Mar. 11, 2015, as amended at 84 FR 5325, Feb. 20, 2019]

Subpart B—Bank Capital Requirements

SOURCE: 84 FR 5326, Feb. 20, 2019, unless otherwise noted.

§ 1277.2 Total capital requirement.

Each Bank shall maintain at all times:

(a) Total capital in an amount at least equal to 4.0 percent of the Bank's total assets; and

(b) A leverage ratio of total capital to total assets of at least 5.0 percent of the Bank's total assets. For purposes of determining this leverage ratio, total capital shall be computed by multiplying the Bank's permanent capital by 1.5 and adding to this product all other components of total capital.

§ 1277.3 Risk-based capital requirement.

Each Bank shall maintain at all times permanent capital in an amount at least equal to the sum of its credit risk capital requirement, its market risk capital requirement, and its operational risk capital requirement, calculated in accordance with §§ 1277.4, 1277.5, and 1277.6, respectively.

§ 1277.4 Credit risk capital requirement.

(a) *General requirement.* Each Bank's credit risk capital requirement shall equal the sum of the Bank's individual credit risk capital charges for all advances, residential mortgage assets, CMOs, non-mortgage assets, non-rated assets, off-balance sheet items, and derivative contracts, as calculated in accordance with this section.

(b) *Credit risk capital charge for residential mortgage assets and collateralized mortgage obligations.* The credit risk capital charge for residential mortgages, residential mortgage pools, residential mortgage securities, and collateralized mortgage obligations shall be determined as set forth in paragraph (g) of this section.

(c) *Credit risk capital charge for advances, non-mortgage assets, and non-rated assets.* Except as provided in paragraph (j) of this section, each Bank's credit risk capital charge for advances, non-mortgage assets, and non-rated assets shall be equal to the amortized cost of the asset multiplied by the credit risk percentage requirement assigned to that asset pursuant to paragraph (f)(1) or (2) of this section. For any such asset carried at fair value where any change in fair value is recognized in the Bank's income, the Bank shall calculate the capital charge based on the fair value of the asset rather than its amortized cost.

(d) *Credit risk capital charge for off-balance sheet items.* Each Bank's credit risk capital charge for an off-balance sheet item shall be equal to the credit

equivalent amount of such item, as determined pursuant to paragraph (h) of this section, multiplied by the credit risk percentage requirement assigned to that item pursuant to paragraph (f)(1) of this section and Table 2 to this section, except that the credit risk percentage requirement applied to the credit equivalent amount for a standby letter of credit shall be that for an advance with the same remaining maturity as that of the standby letter of credit, as specified in Table 1 to this section.

(e) *Derivative contracts.* (1) Except as provided in paragraphs (e)(4) (transactions with members) and (5) (cleared transactions and foreign exchange rate contracts) of this section, the credit risk capital charge for a derivative contract entered into by a Bank shall equal, after any adjustment allowed under paragraph (e)(2) of this section, the sum of:

(i) The current credit exposure for the derivative contract, calculated in accordance with paragraph (i)(1) of this section, multiplied by the credit risk percentage requirement assigned to that derivative contract pursuant to Table 2 to this section, provided that a Bank shall use the credit risk percentages from the column for instruments with maturities of one year or less for all such derivative contracts; plus

(ii) The potential future credit exposure for the derivative contract, calculated in accordance with paragraph (i)(2) of this section, multiplied by the credit risk percentage requirement assigned to that derivative contract pursuant to Table 2 to this section, where a Bank uses the actual remaining maturity of the derivative contract for the purpose of applying Table 2 to this section; plus

(iii) A credit risk capital charge applicable to the undiscounted amount of collateral posted by the Bank with respect to a derivative contract that exceeds the Bank's current payment obligation under that derivative contract, where the charge equals the amount of such excess collateral multiplied by the credit risk percentage requirement assigned under Table 2 to this section for the custodian or other party that holds the collateral, and where a Bank deems the exposure to have a remaining maturity of one year or less when applying Table 2 to this section.

(2)(i) A Bank may reduce the credit risk capital charge calculated under paragraph (e)(1) of this section by the amount of the discounted value of any collateral that is held by or on behalf of the Bank against an exposure from the derivative contract, and that satisfies the requirements of paragraph (e)(3) of this section. If the total amount of the discounted value of the collateral is less than the credit risk capital charge calculated under paragraph (e)(1) of this section for a particular derivative contract, then the credit risk capital charge for the derivative contract shall equal the amount of the initial charge that remains after having been reduced by the collateral. A Bank that uses a counterparty's pledged collateral to reduce the capital charge against a derivative contract under this provision, shall also apply a capital charge to the amount of the pledged collateral that it has used to reduce its credit exposure on the derivative contract. The amount of that capital charge shall be equal to the capital charge that would be required under paragraph (b) or (c) of this section, whichever applies to the type of collateral, as if the Bank were to own the collateral directly. In reducing the capital charge on a particular derivative contract, the Bank shall apply the discounted value of the collateral for that derivative contract in the following manner:

(A) First, to reduce the current credit exposure of the derivative contract subject to the capital charge; and

(B) Second, and only if the total discounted value of the collateral held exceeds the current credit exposure of the contract, any remaining amounts may be applied to reduce the amount of the potential future credit exposure of the derivative contract subject to the capital charge.

(ii) If a counterparty's payment obligations to a Bank under a derivative contract are unconditionally guaranteed by a third-party, then the credit risk percentage requirement applicable to the derivative contract may be that associated with the guarantor, rather than the Bank's counterparty.

(3) The credit risk capital charge may be reduced as described in paragraph (e)(2)(i) of this section for collateral held against the derivative contract exposure only if the collateral is:

(i) Held by, or has been paid to, the Bank or held by an independent, third-party custodian on behalf of the Bank pursuant to a custody agreement that meets the requirements of §1221.7(c) and (d) of this chapter;

(ii) Legally available to absorb losses;

(iii) Of a readily determinable value at which it can be liquidated by the Bank; and

(iv) Subject to an appropriate discount to protect against price decline during the holding period and the costs likely to be incurred in the liquidation of the collateral, provided that such discount shall equal at least the minimum discount required under appendix B to part 1221 of this chapter for collateral listed in that appendix, or shall be estimated by the Bank based on appropriate assumptions about the price risks and liquidation costs for collateral not listed in appendix B to part 1221.

(4) The credit risk capital charge for any derivative contracts entered into between a Bank and its members shall be calculated in accordance with paragraph (e)(1) of this section, except that the Bank shall use the credit risk percentage requirements from Table 1 to this section, which sets forth the credit risk percentage requirements for advances.

(5) Notwithstanding any other provision in this paragraph (e), the credit risk capital charge for:

(i) A foreign exchange rate contract (excluding gold contracts) with an original maturity of 14 calendar days or less shall be zero; and

(ii) A derivative contract cleared by a derivatives clearing organization shall equal 0.16 percent times the sum of the following:

(A) The current credit exposure for the derivative contract, calculated in accordance with paragraph (i)(1)(i) of this section;

(B) The potential future credit exposure for the derivative contract calculated in accordance with paragraph (i)(2) of this section; and

(C) The amount of collateral posted by the Bank and held by the derivatives clearing organization, clearing member, or custodian in a manner that is not bankruptcy remote, but only to the extent the amount exceeds the Bank's current credit exposure to the derivatives clearing organization.

(f) *Determination of credit risk percentage requirements*—(1) *General.* (i) Each Bank shall determine the credit risk percentage requirement applicable to each advance and each non-rated asset by identifying the appropriate category from Table 1 or 3 to this section, respectively, to which the advance or non-rated asset belongs. Except as provided in paragraphs (f)(2) and (3) of this section, each Bank shall determine the credit risk percentage requirement applicable to each non-mortgage asset, off-balance sheet item, and derivative contract by identifying the appropriate category set forth in Table 2 to this section to which the asset, item, or contract belongs as determined in accordance with paragraph (f)(1)(ii) of this section, and remaining maturity. Each Bank shall use the applicable credit risk percentage requirement to calculate the credit risk capital charge for each asset, item, or contract in accordance with paragraph (c), (d), or (e) of this section, respectively. The relevant categories and credit risk percentage requirements are provided in the following Tables 1 through 3 to this section—

TABLE 1 TO § 1277.4—REQUIREMENT FOR ADVANCES

Maturity of advances	Percentage applicable to advances
Advances with:	
Remaining maturity <=4 years	0.09
Remaining maturity >4 years to 7 years	0.23
Remaining maturity >7 years to 10 years	0.35
Remaining maturity >10 years	0.51

TABLE 2 TO § 1277.4—REQUIREMENT FOR INTERNALLY RATED NON-MORTGAGE ASSETS, OFF-BALANCE SHEET ITEMS, AND DERIVATIVE CONTRACTS

[Based on remaining contractual maturity]

FHFA Credit Rating	Applicable percentage				
	<=1 year	>1 yr to 3 yrs	>3 yrs to 7 yrs	>7 yrs to 10 yrs	>10 yrs
U.S. Government Securities	0.00	0.00	0.00	0.00	0.00
FHFA 1	0.20	0.59	1.37	2.28	3.32
FHFA 2	0.36	0.87	1.88	3.07	4.42
FHFA 3	0.64	1.31	2.65	4.22	6.01
FHFA 4	3.24	4.79	7.89	11.51	15.64
FHFA 5	9.24	11.46	15.90	21.08	27.00
FHFA 6	15.99	18.06	22.18	26.99	32.49
FHFA 7	100.00	100.00	100.00	100.00	100.00

TABLE 3 TO § 1277.4—REQUIREMENT FOR NON-RATED ASSETS

Type of unrated asset	Applicable percentage
Cash	0.00
Premises, Plant and Equipment	8.00
Investments Under 12 CFR 1265.3(e) & (f)	8.00

(ii) Each Bank shall develop a methodology to be used to assign an internal credit risk rating to each counterparty, asset, item, and contract that is subject to Table 2 to this section. The methodology shall involve an evaluation of counterparty or asset risk factors, and may incorporate, but must not rely solely on, credit ratings prepared by credit rating agencies. Each Bank shall align its various internal credit ratings to the appropriate categories of FHFA Credit Ratings included in Table 2 to this section. In doing so, FHFA Categories 7 through 1 shall include assets of progressively higher credit quality. After aligning its internal credit ratings to the appropriate categories of Table 2 to this section, each Bank shall assign each counterparty, asset, item, and contract to the appropriate FHFA Credit Rating category based on the applicable internal credit rating.

(2) *Exception for assets subject to a guarantee or secured by collateral.* (i) When determining the applicable credit risk percentage requirement from Table 1 to this section for a non-mortgage asset that is subject to an unconditional guarantee by a third-party guarantor or is secured as set forth in paragraph (f)(2)(ii) of this section, the Bank may substitute the credit risk percentage requirement associated with the guarantor or the collateral, as appropriate, for the credit risk percentage requirement associated with that portion of the asset subject to the guarantee or covered by the collateral.

(ii) For purposes of paragraph (f)(2)(i) of this section, a non-mortgage asset shall be considered to be secured if the collateral is:

(A) Actually held by the Bank, or an independent third-party custodian on the Bank's behalf, or, if posted by a Bank member and permitted under the Bank's collateral agreement with that member, by the Bank's member or an affiliate of that member where the term ''affiliate'' has the same meaning as in § 1266.1 of this chapter;

(B) Legally available to absorb losses;

(C) Of a readily determinable value at which it can be liquidated by the Bank;

(D) Held in accordance with the provisions of the Bank's member products policy established pursuant to § 1239.30 of this chapter, if the collateral has been posted by a member or an affiliate of a member; and

(E) Subject to an appropriate discount to protect against price decline during the holding period and the costs likely to be incurred in the liquidation of the collateral.

(3) *Exception for obligations of the Enterprises.* A Bank may use a credit risk capital charge of zero for any debt instrument or obligation issued by an Enterprise, other than a residential mortgage security or a collateralized mortgage obligation, provided that, and only for so long as, the Enterprise receives capital support or other form of direct financial assistance from the United States government that enables

the Enterprise to repay those obligations.

(4) *Methodology and model review.* A Bank shall provide to FHFA upon request the methodology, model, and any analyses used by the Bank to assign any non-mortgage asset, off-balance sheet item, or derivative contract to an FHFA Credit Rating category. FHFA may direct a Bank to promptly revise its methodology or model to address any deficiencies identified by FHFA.

(g) *Credit risk capital charges for residential mortgage assets*—(1) *Bank determination of credit risk percentage.* (i) Each Bank's credit risk capital charge for a residential mortgage, residential mortgage pool, residential mortgage security, or collateralized mortgage obligation shall be equal to the asset's amortized cost multiplied by the credit risk percentage requirement assigned to that asset pursuant to paragraph (g)(1)(ii) or (g)(2) of this section. For any such asset carried at fair value where any change in fair value is recognized in the Bank's income, the Bank shall calculate the capital charge based on the fair value of the asset rather than its amortized cost.

(ii) Each Bank shall determine the credit risk percentage requirement applicable to each residential mortgage, residential mortgage pool, and residential mortgage security by identifying the appropriate FHFA RMA category set forth in the following Table 4 to this section to which the asset belongs, and shall determine the credit risk percentage requirement applicable to each collateralized mortgage obligation by identifying the appropriate FHFA CMO category set forth in Table 4 to this section to which the asset belongs, with the appropriate categories being determined in accordance with paragraph (g)(1)(iii) of this section.

(iii) Each Bank shall develop a methodology to estimate the potential future stress losses on its residential mortgages, residential mortgage pools, residential mortgage securities, and collateralized mortgage obligations, as may yet occur from the current amortized cost (or fair value) of those assets, and that converts those loss estimates into a stress loss percentage for each asset, expressed as a percentage of its amortized cost (or fair value). A Bank shall use the stress loss percentage for each asset to determine the appropriate FHFA RMA or CMO ratings category for that asset, as set forth in Table 4 to this section. A Bank shall do so by assigning each such asset to the category whose credit risk percentage requirement equals the asset's stress loss percentage, or to the category with the next highest credit risk percentage requirement. For residential mortgages and residential mortgage pools, the methodology shall involve an evaluation of the residential mortgages and residential mortgage pools and any credit enhancements or guarantees, including an assessment of the creditworthiness of the providers of such enhancements or guarantees. In the case of a residential mortgage security or collateralized mortgage obligation, the methodology shall involve an evaluation of the underlying mortgage collateral, the structure of the security, and any credit enhancements or guarantees, including an assessment of the creditworthiness of the providers of such enhancements or guarantees.

TABLE 4 TO § 1277.4—REQUIREMENT FOR RESIDENTIAL MORTGAGE ASSETS AND CMOS

	Credit risk percentage
Categories for residential mortgage assets:	
FHFA RMA 1	0.37
FHFA RMA 2	0.60
FHFA RMA 3	0.86
FHFA RMA 4	1.20
FHFA RMA 5	2.40
FHFA RMA 6	4.80
FHFA RMA 7	34.00
Categories for Collateralized Mortgage Obligations:	
FHFA CMO 1	0.37
FHFA CMO 2	0.60
FHFA CMO 3	1.60
FHFA CMO 4	4.45
FHFA CMO 5	13.00
FHFA CMO 6	34.00
FHFA CMO 7	100.00

(2) *Exceptions.* (i) A Bank may use a credit risk capital charge of zero for any residential mortgage asset or collateralized mortgage obligation, or portion thereof, guaranteed by an Enterprise as to payment of principal and interest, provided that, and only for so long as, the Enterprise receives capital support or other form of direct financial assistance from the United States

government that enables the Enterprise to repay those obligations;

(ii) A Bank may use a credit risk capital charge of zero for any residential mortgage asset or collateralized mortgage obligation, or any portion thereof, guaranteed or insured as to payment of principal and interest by a department or agency of the United States government that is backed by the full faith and credit of the United States; and

(iii) A Bank shall provide to FHFA upon request the methodology, model, and any analyses used to estimate the potential future stress losses on its residential mortgages, residential mortgage pools, residential mortgage securities, and collateralized mortgage obligations, and to determine a stress loss percentage for each such asset. FHFA may direct a Bank to promptly revise its methodology or model to address any deficiencies identified by FHFA.

(h) *Calculation of credit equivalent amount for off-balance sheet items*—(1) *General requirement*. The credit equivalent amount for an off-balance sheet item shall be determined by an FHFA-approved model or shall be equal to the face amount of the instrument multiplied by the credit conversion factor assigned to such risk category of instruments by the following Table 5 to this section, subject to the exceptions in paragraph (h)(2) of this section.

TABLE 5 TO § 1277.4—CREDIT CONVERSION FACTORS FOR OFF-BALANCE SHEET ITEMS

Instrument	Credit conversion factor (in percent)
Asset sales with recourse where the credit risk remains with the Bank	100
Commitments to make advances subject to certain drawdown.	
Commitments to acquire loans subject to certain drawdown.	
Standby letters of credit	50
Other commitments with original maturity of over one year.	
Other commitments with original maturity of one year or less	20

(2) *Exceptions*. The credit conversion factor shall be zero for ''Other Commitments With Original Maturity of Over One Year'' and ''Other Commitments With Original Maturity of One Year or Less'' for which Table 5 to this section would otherwise apply credit conversion factors of 50 percent or 20 percent, respectively, if the commitments are unconditionally cancelable, or effectively provide for automatic cancellation due to the deterioration in a borrower's creditworthiness, at any time by the Bank without prior notice.

(i) *Calculation of credit exposures for derivative contracts*—(1) *Current credit exposure*—(i) *Single derivative contract*. The current credit exposure for derivative contracts that are not subject to an eligible master netting agreement shall be:

(A) If the mark-to-market value of the contract is positive, the mark-to-market value of the contract; or

(B) If the mark-to-market value of the contract is zero or negative, zero.

(ii) *Derivative contracts subject to an eligible master netting agreement*. The current credit exposure for multiple uncleared derivative contracts executed with a single counterparty and subject to an eligible master netting agreement shall be calculated on a net basis and shall equal:

(A) The net sum of all positive and negative mark-to-market values of the individual derivative contracts subject to the eligible master netting agreement, if the net sum of the mark-to-market values is positive; or

(B) Zero, if the net sum of the mark-to-market values is zero or negative.

(2) *Potential future credit exposure*. The potential future credit exposure for derivative contracts, including derivative contracts with a negative mark-to-market value, shall be calculated:

(i) Using an internal initial margin model that meets the requirements of § 1221.8 of this chapter and is approved by FHFA for use by the Bank, or using an initial margin model that has been approved under regulations similar to § 1221.8 of this chapter for use by the

Bank's counterparty to calculate initial margin for those derivative contracts for which the calculation is being done; or

(ii) By applying the standardized approach in appendix A to part 1221 of this chapter; or

(iii) Using an initial margin model that is employed by a derivatives clearing organization.

(j) *Credit risk capital charge for non-mortgage assets hedged with credit derivatives*—(1) *Credit derivatives with a remaining maturity of one year or more.* The credit risk capital charge for a non-mortgage asset that is hedged with a credit derivative that has a remaining maturity of one year or more may be reduced only in accordance with paragraph (j)(3) or (4) of this section and only if the credit derivative provides substantial protection against credit losses.

(2) *Credit derivatives with a remaining maturity of less than one year.* The credit risk capital charge for a non-mortgage asset that is hedged with a credit derivative that has a remaining maturity of less than one year may be reduced only in accordance with paragraph (j)(3) of this section and only if the remaining maturity on the credit derivative is identical to or exceeds the remaining maturity of the hedged non-mortgage asset and the credit derivative provides substantial protection against credit losses.

(3) *Credit risk capital charge reduced to zero.* The credit risk capital charge for a non-mortgage asset shall be zero if a credit derivative is used to hedge the credit risk on that asset in accordance with paragraph (j)(1) or (2) of this section, provided that:

(i) The remaining maturity for the credit derivative used for the hedge is identical to or exceeds the remaining maturity for the hedged non-mortgage asset, and either:

(A) The non-mortgage asset referenced in the credit derivative is identical to the hedged non-mortgage asset; or

(B) The non-mortgage asset referenced in the credit derivative is different from the hedged non-mortgage asset, but only if the asset referenced in the credit derivative and the hedged non-mortgage asset have been issued by the same obligor, the asset referenced in the credit derivative ranks pari passu to, or more junior than, the hedged non-mortgage asset and has the same maturity as the hedged non-mortgage asset, and cross-default clauses apply; and

(ii) The credit risk capital charge for the credit derivative contract calculated pursuant to paragraph (e) of this section is still applied.

(4) *Capital charge reduction in certain other cases.* The credit risk capital charge for a non-mortgage asset hedged with a credit derivative in accordance with paragraph (j)(1) of this section shall equal the sum of the credit risk capital charges for the hedged and unhedged portion of the non-mortgage asset provided that:

(i) The remaining maturity for the credit derivative is less than the remaining maturity for the hedged non-mortgage asset and either:

(A) The non-mortgage asset referenced in the credit derivative is identical to the hedged non-mortgage asset; or

(B) The non-mortgage asset referenced in the credit derivative is different from the hedged non-mortgage asset, but only if the asset referenced in the credit derivative and the hedged non-mortgage asset have been issued by the same obligor, the asset referenced in the credit derivative ranks pari passu to, or more junior than, the hedged non-mortgage asset and has the same maturity as the hedged non-mortgage asset, and cross-default clauses apply; and

(ii) The credit risk capital charge for the unhedged portion of the non-mortgage asset equals:

(A) The credit risk capital charge for the non-mortgage asset, calculated as the amortized cost, or fair value, of the non-mortgage asset multiplied by that asset's credit risk percentage requirement assigned pursuant to paragraph (f)(1) of this section where the appropriate credit rating is that for the non-mortgage asset and the appropriate maturity is the remaining maturity of the non-mortgage asset; minus

(B) The credit risk capital charge for the non-mortgage asset, calculated as the amortized cost, or fair value, of the non-mortgage asset multiplied by that

asset's credit risk percentage requirement assigned pursuant to paragraph (f)(1) of this section where the appropriate credit rating is that for the non-mortgage asset but the appropriate maturity is deemed to be the remaining maturity of the credit derivative; and

(iii) The credit risk capital charge for the hedged portion of the non-mortgage asset is equal to the credit risk capital charge for the credit derivative, calculated in accordance with paragraph (e) of this section.

(k) *Frequency of calculations.* Each Bank shall perform all calculations required by this section at least quarterly, unless otherwise directed by FHFA, using the advances, residential mortgages, residential mortgage pools, residential mortgage securities, collateralized mortgage obligations, non-rated assets, non-mortgage assets, off-balance sheet items, and derivative contracts held by the Bank, and, if applicable, the values of, or FHFA Credit Ratings categories for, such assets, off-balance sheet items, or derivative contracts as of the close of business of the last business day of the calendar period for which the credit risk capital charge is being calculated.

§ 1277.5 Market risk capital requirement.

(a) *General requirement.* (1) Each Bank's market risk capital requirement shall equal the market value of the Bank's portfolio at risk from movements in interest rates, foreign exchange rates, commodity prices, and equity prices that could occur during periods of market stress, where the market value of the Bank's portfolio at risk is determined using an internal market-risk model that fulfills the requirements of paragraph (b) of this section and that has been approved by FHFA.

(2) A Bank may substitute an internal cash-flow model to derive a market risk capital requirement in place of that calculated using an internal market-risk model under paragraph (a)(1) of this section, provided that:

(i) The Bank obtains FHFA approval of the internal cash-flow model and of the assumptions to be applied to the model; and

(ii) The Bank demonstrates to FHFA that the internal cash-flow model subjects the Bank's assets and liabilities, off-balance sheet items, and derivative contracts, including related options, to a comparable degree of stress for such factors as will be required for an internal market-risk model.

(b) *Measurement of market value-at-risk under a Bank's internal market-risk model.* (1) Except as provided under paragraph (a)(2) of this section, each Bank shall use an internal market-risk model that estimates the market value of the Bank's assets and liabilities, off-balance sheet items, and derivative contracts, including any related options, and measures the market value of the Bank's portfolio at risk of its assets and liabilities, off-balance sheet items, and derivative contracts, including related options, from all sources of the Bank's market risks, except that the Bank's model need only incorporate those risks that are material.

(2) The Bank's internal market-risk model may use any generally accepted measurement technique, such as variance-covariance models, historical simulations, or Monte Carlo simulations, for estimating the market value of the Bank's portfolio at risk, provided that any measurement technique used must cover the Bank's material risks.

(3) The measures of the market value of the Bank's portfolio at risk shall include the risks arising from the non-linear price characteristics of options and the sensitivity of the market value of options to changes in the volatility of the options' underlying rates or prices.

(4) The Bank's internal market-risk model shall use interest rate and market price scenarios for estimating the market value of the Bank's portfolio at risk, but at a minimum:

(i) The Bank's internal market-risk model shall provide an estimate of the market value of the Bank's portfolio at risk such that the probability of a loss greater than that estimated shall be no more than one percent;

(ii) The Bank's internal market-risk model shall incorporate scenarios that reflect changes in interest rates, interest rate volatility, option-adjusted spreads, and shape of the yield curve,

and changes in market prices, equivalent to those that have been observed over 120-business day periods of market stress. For interest rates, the relevant historical observations should be drawn from the period that starts at the end of the previous month and goes back to the beginning of 1998;

(iii) The total number of, and specific historical observations identified by the Bank as, stress scenarios shall be:

(A) Satisfactory to FHFA;

(B) Representative of the periods of the greatest potential market stress given the Bank's portfolio; and

(C) Comprehensive given the modeling capabilities available to the Bank; and

(iv) The measure of the market value of the Bank's portfolio at risk may incorporate empirical correlations among interest rates.

(5) For any consolidated obligations denominated in a currency other than U.S. Dollars or linked to equity or commodity prices, each Bank shall, in addition to fulfilling the criteria of paragraph (b)(4) of this section, calculate an estimate of the market value of its portfolio at risk resulting from material foreign exchange, equity price or commodity price risk, such that, at a minimum:

(i) The probability of a loss greater than that estimated shall not exceed one percent;

(ii) The scenarios reflect changes in foreign exchange, equity, or commodity market prices that have been observed over 120-business day periods of market stress, as determined using historical data that is from an appropriate period;

(iii) The total number of, and specific historical observations identified by the Bank as, stress scenarios shall be:

(A) Satisfactory to FHFA;

(B) Representative of the periods of the greatest potential stress given the Bank's portfolio; and

(C) Comprehensive given the modeling capabilities available to the Bank; and

(iv) The measure of the market value of the Bank's portfolio at risk may incorporate empirical correlations within or among foreign exchange rates, equity prices, or commodity prices.

(c) *Independent validation of Bank internal market-risk model or internal cash-flow model.* (1) Each Bank shall conduct an independent validation of its internal market-risk model or internal cash-flow model within the Bank that is carried out by personnel not reporting to the business line responsible for conducting business transactions for the Bank. Alternatively, the Bank may obtain independent validation by an outside party qualified to make such determinations. Validations shall be done periodically, commensurate with the risk associated with the use of the model, or as frequently as required by FHFA.

(2) The results of such independent validations shall be reviewed by the Bank's board of directors and provided promptly to FHFA.

(d) *FHFA approval of Bank internal market-risk model or internal cash-flow model.* (1) Each Bank shall obtain FHFA approval of an internal market-risk model or an internal cash-flow model, including subsequent material adjustments to the model made by the Bank, prior to the use of any model. Each Bank shall make such adjustments to its model as may be directed by FHFA.

(2) A model and any material adjustments to such model that were approved by FHFA or the Federal Housing Finance Board shall be deemed to meet the requirements of paragraph (d)(1) of this section, unless such approval is revoked or amended by FHFA.

(e) *Frequency of calculations.* Each Bank shall perform any calculations or estimates required under this section at least quarterly, unless otherwise directed by FHFA, using the assets, liabilities, and off-balance sheet items (including derivative contracts and options) held by the Bank, and if applicable, the values of any such holdings, as of the close of business of the last business day of the calendar period for which the market risk capital requirement is being calculated.

§ 1277.6 Operational risk capital requirement.

(a) *General requirement.* Except as authorized under paragraph (b) of this section, each Bank's operational risk

capital requirement shall at all times equal 30 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement.

(b) *Alternative requirements.* With the approval of FHFA, each Bank may have an operational risk capital requirement equal to less than 30 percent but no less than 10 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement if:

(1) The Bank provides an alternative methodology for assessing and quantifying an operational risk capital requirement; or

(2) The Bank obtains insurance to cover operational risk from an insurer acceptable to FHFA and on terms acceptable to FHFA.

§ 1277.7 Limits on unsecured extensions of credit; reporting requirements.

(a) *Unsecured extensions of credit to a single counterparty.* A Bank shall not extend unsecured credit to any single counterparty (other than a GSE described in and subject to the requirements of paragraph (c) of this section) in an amount that would exceed the limits of this paragraph (a). If a third-party provides an irrevocable, unconditional guarantee of repayment of a credit (or any part thereof), the third-party guarantor may be considered the counterparty for purposes of calculating and applying the unsecured credit limits of this section with respect to the guaranteed portion of the transaction.

(1) *General limits.* All unsecured extensions of credit by a Bank to a single counterparty that arise from the Bank's on- and off-balance sheet and derivative transactions (but excluding the amount of sales of federal funds with a maturity of one day or less and sales of federal funds subject to a continuing contract) shall not exceed the product of the maximum capital exposure limit applicable to such counterparty, as determined in accordance with the following Table 1 to this section, multiplied by the lesser of:

(i) The Bank's total capital; or

(ii) The counterparty's Tier 1 capital, or if Tier 1 capital is not available, total capital (in each case as defined by the counterparty's principal regulator) or some similar comparable measure identified by the Bank.

(2) *Overall limits including sales of overnight federal funds.* All unsecured extensions of credit by a Bank to a single counterparty that arise from the Bank's on- and off-balance sheet and derivative transactions, including the amounts of sales of federal funds with a maturity of one day or less and sales of federal funds subject to a continuing contract, shall not exceed twice the limit calculated pursuant to paragraph (a)(1) of this section.

(3) *Limits for certain obligations issued by state, local, or tribal governmental agencies.* The limit set forth in paragraph (a)(1) of this section, when applied to the marketable direct obligations of state, local, or tribal government units or agencies that are excluded from the prohibition against investments in whole mortgage loans or other types of whole loans, or interests in such loans, by §1267.3(a)(4)(iii) of this chapter, shall be calculated based on the Bank's total capital and the internal credit rating assigned to the particular obligation, as determined in accordance with paragraph (a)(4) of this section. If a Bank owns series or classes of obligations issued by a particular state, local, or tribal government unit or agency, or has extended other forms of unsecured credit to such entity falling into different rating categories, the total amount of unsecured credit extended by the Bank to that government unit or agency shall not exceed the limit associated with the highest-rated obligation issued by the entity and actually purchased by the Bank.

(4) *Bank determination of applicable maximum capital exposure limits.* A Bank shall determine the maximum capital exposure limit for each counterparty by assigning the counterparty to the appropriate FHFA Credit Rating category of Table 1 to this section, based upon the Bank's internal credit rating for that counterparty. In all cases, a Bank shall use the same FHFA Credit Rating category for a particular counterparty when determining its unsecured credit limit under this section as it would use under Table 2 to §1277.4 for determining the risk-based capital

charge for obligations issued by that counterparty under § 1277.4(f).

TABLE 1 TO § 1277.7—MAXIMUM LIMITS ON UNSECURED EXTENSIONS OF CREDIT TO A SINGLE COUNTER-PARTY BY FHFA CREDIT RATING CATEGORY

FHFA Credit Rating	Maximum capital exposure limit (in percent)
FHFA 1	15
FHFA 2	14
FHFA 3	9
FHFA 4	3
FHFA 5 and Below	1

(b) *Unsecured extensions of credit to affiliated counterparties*—(1) *In general.* The total amount of unsecured extensions of credit by a Bank to a group of affiliated counterparties that arise from the Bank's on- and off-balance sheet and derivative transactions, including sales of federal funds with a maturity of one day or less and sales of federal funds subject to a continuing contract, shall not exceed 30 percent of the Bank's total capital.

(2) *Relation to individual limits.* The aggregate limits calculated under paragraph (b)(1) of this section shall apply in addition to the limits on extensions of unsecured credit to a single counterparty imposed by paragraph (a) of this section.

(c) *Special limits for certain GSEs.* Unsecured extensions of credit by a Bank that arise from the Bank's on- and off-balance sheet and derivative transactions, including from the purchase of any debt or from any sales of federal funds with a maturity of one day or less and from sales of federal funds subject to a continuing contract, with a GSE that is operating with capital support or another form of direct financial assistance from the United States government that enables the GSE to repay those obligations, shall not exceed the Bank's total capital.

(d) *Extensions of unsecured credit after reduced rating.* If a Bank revises its internal credit rating for any counterparty or obligation, it shall assign the counterparty or obligation to the appropriate FHFA Credit Rating category based on the revised rating. If the revised internal rating results in a lower FHFA Credit Rating category, then any subsequent extensions of unsecured credit shall comply with the maximum capital exposure limit applicable to that lower rating category, but a Bank need not unwind or liquidate any existing transaction or position that complied with the limits of this section at the time it was entered. For purposes of this paragraph (d), the renewal of an existing unsecured extension of credit, including any decision not to terminate any sales of federal funds subject to a continuing contract, shall be considered a subsequent extension of unsecured credit that can be undertaken only in accordance with the lower limit.

(e) *Reporting requirements*—(1) *Total unsecured extensions of credit.* Each Bank shall report monthly to FHFA the amount of the Bank's total unsecured extensions of credit arising from on- and off-balance sheet and derivative transactions to any single counterparty or group of affiliated counterparties that exceeds 5 percent of:

(i) The Bank's total capital; or

(ii) The counterparty's, or affiliated counterparties' combined, Tier 1 capital, or if Tier 1 capital is not available, total capital (in each case as defined by the counterparty's principal regulator), or some similar comparable measure identified by the Bank.

(2) *Total secured and unsecured extensions of credit.* Each Bank shall report monthly to FHFA the amount of the Bank's total secured and unsecured extensions of credit arising from on- and off-balance sheet and derivative transactions to any single counterparty or group of affiliated counterparties that exceeds 5 percent of the Bank's total assets.

(3) *Extensions of credit in excess of limits.* A Bank shall report promptly to FHFA any extension of unsecured credit that exceeds any limit set forth in paragraph (a), (b), or (c) of this section. In making this report, a Bank shall provide the name of the counterparty or group of affiliated counterparties to which the excess unsecured credit has been extended, the dollar amount of the applicable limit which has been exceeded, the dollar amount by which the Bank's extension of unsecured credit exceeds such limit, the dates for which the Bank was not in compliance with

the limit, and a brief explanation of the circumstances that caused the limit to be exceeded.

(f) *Measurement of unsecured extensions of credit*—(1) *In general.* For purposes of this section, unsecured extensions of credit will be measured as follows:

(i) For on-balance sheet transactions (other than a derivative transaction addressed by paragraph (f)(1)(iii) of this section), an amount equal to the sum of the amortized cost of the item plus net payments due the Bank. For any such item carried at fair value where any change in fair value would be recognized in the Bank's income, the Bank shall measure the unsecured extension of credit based on the fair value of the item, rather than its amortized cost;

(ii) For off-balance sheet transactions, an amount equal to the credit equivalent amount of such item, calculated in accordance with §1277.4(h); and

(iii) For derivative transactions not cleared by a derivatives clearing organization, an amount equal to the sum of:

(A) The Bank's current and potential future credit exposures under the derivative contract, where those values are calculated in accordance with §1277.4(i)(1) and (2) respectively, reduced by the amount of any collateral held by or on behalf of the Bank against the credit exposure from the derivative contract, as allowed in accordance with the requirements of §1277.4(e)(2) and (3); and

(B) The value of any collateral posted by the Bank that exceeds the current amount owed by the Bank to its counterparty under the derivative contract, where the collateral is held by a person or entity other than a third-party custodian that is acting under a custody agreement that meets the requirements of §1221.7(c) and (d) of this chapter.

(2) *Status of debt obligations purchased by the Bank.* Any debt obligation or debt security (other than mortgage-backed or other asset-backed securities or acquired member assets) purchased by a Bank shall be considered an unsecured extension of credit for the purposes of this section, except for:

(i) Any amount owed the Bank against which the Bank holds collateral in accordance with §1277.4(f)(2)(ii); or

(ii) Any amount which FHFA has determined on a case-by-case basis shall not be considered an unsecured extension of credit.

(g) *Exceptions to unsecured credit limits.* The following items are not subject to the limits of this section:

(1) Obligations of, or guaranteed by, the United States;

(2) A derivative transaction accepted for clearing by a derivatives clearing organization, including collateral posted by the Bank with the derivatives clearing organization associated with that derivative transaction;

(3) Any extension of credit from one Bank to another Bank; and

(4) A bond issued by a state housing finance agency, if the Bank documents that the obligation in question is:

(i) Principally secured by high quality mortgage loans or high quality mortgage-backed securities (or funds derived from payments on such assets or from payments from any guarantees or insurance associated with such assets);

(ii) The most senior class of obligation, if the bond has more than one class; and

(iii) Determined by the Bank to be rated no lower than FHFA 2, in accordance with this section.

§1277.8 Reporting requirements.

Each Bank shall report information related to capital and other matters addressed by this part in accordance with instructions provided in the Data Reporting Manual issued by FHFA, as amended from time to time.

Subpart C—Bank Capital Stock

§1277.20 Classes of capital stock.

The authorized capital stock of a Bank shall consist of the following instruments:

(a) Class A stock, which shall:

(1) Have a par value as determined by the board of directors of the Bank and stated in the Bank's capital plan;

(2) Be issued, redeemed, and repurchased only at its stated par value; and

(3) Be redeemable in cash only on six-months written notice to the Bank.

(b) Class B stock, which shall:

(1) Have a par value as determined by the board of directors of the Bank and stated in the Bank's capital plan;

(2) Be issued, redeemed, and repurchased only at its stated par value;

(3) Be redeemable in cash only on five-years written notice to the Bank; and

(4) Confer an ownership interest in the retained earnings, surplus, undivided profits, and equity reserves of the Bank.

(c) Any one or more subclasses of Class A or Class B stock, each of which may have different rights, terms, conditions, or preferences as may be authorized in the Bank's capital plan, provided, however, that each subclass of stock shall have all of the characteristics of its respective class, as specified in paragraph (a) or (b) of this section.

§ 1277.21 Issuance of capital stock.

A Bank may issue either one or both classes of its capital stock (including subclasses), as authorized by § 1277.20, and shall not issue any other class of capital stock. A Bank shall issue its stock only to its members, or to former members to the extent those institutions are required to maintain a minimum stock investment for existing activities under the capital plan, and only in book-entry form. The Bank shall act as its own transfer agent. All capital stock shall be issued in accordance with the Bank's capital plan.

§ 1277.22 Minimum investment in capital stock.

(a) A Bank shall require each member to maintain a minimum investment in the capital stock of the Bank, both as a condition to becoming and remaining a member of the Bank and as a condition to transacting business with the Bank or obtaining advances and other services from the Bank. The amount of the required minimum investment shall be determined in accordance with the Bank's capital plan and shall be sufficient to ensure that the Bank remains in compliance with its regulatory capital requirements. A Bank shall require each member to maintain its minimum investment for as long as the institution remains a member of the Bank and shall require each member and former member to maintain its minimum investment for as long as the institution engages in any activity with the Bank for which the capital plan requires the institution to maintain capital stock.

(b) A Bank may establish the minimum investment as a percentage of the total assets of an institution, as a percentage of the advances outstanding to that institution, as a percentage of any other business activity conducted with the institution, on any other basis that is approved by the Director, or any combination thereof.

(c) A Bank may require that the minimum investment requirement be satisfied through the purchase of either Class A or Class B stock, or through the purchase of one or more combinations of Class A and Class B stock that have been authorized by the board of directors of the Bank in its capital plan. A Bank, in its discretion, may establish a lower minimum investment to the extent the requirement is met through investment in Class B stock than if the requirement is met through investment in Class A stock, provided that such reduced investment provides sufficient capital for the Bank to remain in compliance with its regulatory capital requirements.

(d) Each member, or if applicable, former member, of a Bank shall at all times maintain an investment in the capital stock of the Bank in an amount that is sufficient to satisfy the minimum investment required under the Bank's capital plan.

§ 1277.23 Dividends.

(a) *In general.* A Bank may pay dividends on Class A or Class B stock, including any subclasses of such stock, only out of previously retained earnings or current net earnings, and shall declare and pay dividends only as provided by its capital plan. The capital plan may establish different dividend rates or preferences for each class or subclass of stock, which may include a dividend that tracks the economic performance of certain Bank assets, such as Acquired Member Assets. A member, including a member that has provided

the Bank with a notice of intent to withdraw from membership, or a former member shall be entitled to receive any dividends that a Bank declares on its capital stock while such institution owns the stock.

(b) *Limitation on payment of dividends.* In no event shall a Bank declare or pay any dividend on its capital stock if after doing so the Bank would fail to meet any of its regulatory capital requirements, nor shall a Bank that is not in compliance with any of its regulatory capital requirements declare or pay any dividend on its capital stock.

§ 1277.24 Liquidation, merger, or consolidation.

The respective rights of the Class A and Class B stockholders, in the event that the Bank is liquidated, merged, or otherwise consolidated with another Bank, shall be determined in accordance with the capital plan of the Bank, provided, however, that nothing in the capital plan shall be construed to limit any rights or authority granted FHFA under the Bank Act or the Safety and Soundness Act to issue any regulation or order or to take any other action that may affect or otherwise alter the rights or privileges of stock holders in a liquidation, merger, or consolidation of a Bank.

§ 1277.25 Transfer of capital stock.

A Bank in its capital plan may allow a member or former member to transfer any excess stock to a member of that Bank or to an institution that has been approved for membership in that Bank and that has satisfied all conditions for becoming a member, other than the purchase of the minimum amount of Bank stock that it is required to hold as a condition of membership. Any such stock transfers shall be at par value and shall be effective upon being recorded on the appropriate books and records of the Bank. The Bank may, in its capital plan, require that the transfer be approved by the Bank before such transfer can occur.

§ 1277.26 Redemption and repurchase of capital stock.

(a) *Redemption.* (1) A member or former member may have its stock in a Bank redeemed by providing written notice to the Bank in accordance with this section. A member or former member shall provide six-months written notice for Class A stock and five-years written notice for Class B stock. The notice shall indicate the number of shares of Bank stock that are to be redeemed. No more than one notice of redemption may be outstanding at one time for the same shares of Bank stock. At the expiration of the applicable notice period, the Bank shall pay to the member or other institution holding the stock the stated par value of that stock in cash.

(2) A member may cancel a notice of redemption by so informing the Bank in writing, and the Bank may impose a fee (to be specified in its capital plan) with respect to any cancellation of a pending notice of redemption. A request by a member (whose membership has not been terminated) to redeem specific shares of stock shall automatically be cancelled if the Bank is prevented from redeeming the member's stock by paragraph (c) of this section within five business days from the end of the expiration of the applicable redemption notice period because the member would fail to maintain its minimum investment in the stock of the Bank after such redemption. The automatic cancellation of a member's redemption request shall have the same effect as if the member had cancelled its notice to redeem stock prior to the end of the redemption notice period, and a Bank may impose a fee (to be specified in its capital plan) for automatic cancellation of a redemption request.

(3) A Bank shall not be obligated to redeem its capital stock other than in accordance with this paragraph.

(b) *Repurchase.* A Bank, in its discretion and without regard to the applicable redemption periods, may repurchase excess stock in accordance with the capital plan of that Bank. A Bank undertaking such a stock repurchase at its own initiative shall provide reasonable notice prior to repurchasing any excess stock, with the period of such notice to be specified in the Bank's capital plan, and shall pay the stated par value of that stock in cash. A member's submission of a notice of intent to withdraw from membership, or its

termination of membership in any other manner, shall not, in and of itself, cause any Bank stock to be deemed excess stock for purposes of this section.

(c) *Limitation.* In no event may a Bank redeem or repurchase any stock if, following the redemption or repurchase, the Bank would fail to meet its regulatory capital requirements, or if the member or former member would fail to maintain its minimum investment in the stock of the Bank, as required by § 1277.22.

§ 1277.27 Other restrictions on the repurchase or redemption of Bank stock.

(a) *Capital impairment.* A Bank may not redeem or repurchase any capital stock without the prior written approval of the Director if the Director or the board of directors of the Bank has determined that the Bank has incurred or is likely to incur losses that result in or are likely to result in charges against the capital of the Bank. This prohibition shall apply even if a Bank is currently in compliance with its regulatory capital requirements, and shall remain in effect for however long the Bank continues to incur such charges or until the Director determines that such charges are not expected to continue.

(b) *Bank discretion to suspend redemption.* A Bank, upon the approval of its board of directors, or of a subcommittee thereof, may suspend redemption of stock if the Bank reasonably believes that continued redemption of stock would cause the Bank to fail to meet its regulatory capital requirements, would prevent the Bank from maintaining adequate capital against a potential risk that may not be adequately reflected in its regulatory capital requirements, or would otherwise prevent the Bank from operating in a safe and sound manner. A Bank shall notify the Director in writing within two business days of the date of the decision to suspend the redemption of stock, providing the reasons for the suspension and the Bank's strategies and time frames for addressing the conditions that led to the suspension. The Director may require the Bank to re-institute the redemption of stock. A Bank shall not repurchase any stock without the written permission of the Director during any period in which the Bank has suspended redemption of stock under this paragraph.

Subpart D—Bank Capital Plans

§ 1277.28 Bank capital plans.

Each Bank shall have in place a capital plan approved by the Bank's board of directors and the Director. The capital plan shall include, at a minimum, provisions addressing the following matters:

(a) *Minimum investment.* (1) The capital plan shall require each member, and if applicable each former member, to purchase and maintain a minimum investment in the capital stock of the Bank and prescribe the manner for calculating the minimum investment, in accordance with § 1277.22.

(2) The capital plan shall specify the amount and class (or classes) of Bank stock that an institution is required to own in order to become and remain a member of the Bank, and to obtain advances from, or to engage in other business transactions with, the Bank. If a Bank requires that the minimum investment be satisfied through the purchase of one or more combinations of Class A and Class B stock, the authorized combinations of stock shall be specified in the capital plan, which shall afford the option of satisfying the minimum investment through the purchase of any such combination of stock.

(3) The capital plan shall require the board of directors of the Bank to monitor and, as necessary, to adjust, the minimum investment to ensure that outstanding stock remains sufficient for the Bank to comply with its regulatory capital requirements. The plan shall require each member or, where required by the plan, former member, to comply promptly with any adjusted minimum investment established by the board of directors of the Bank, but may allow a reasonable time to do so and may allow a reduction in outstanding business with the Bank as an alternative to purchasing additional stock.

(b) *Classes of capital stock.* The capital plan shall specify the class or classes of

stock (including subclasses, if any) that the Bank will issue, and shall establish the par value, rights, terms, and preferences associated with each class (or subclass) of stock. A Bank may establish preferences relating to, but not limited to, the dividend, voting, or liquidation rights for each class or subclass of Bank stock. Any voting preferences established by the Bank pursuant to §1261.6 of this chapter shall expressly state the voting rights of each class of stock with regard to the election of Bank directors. The capital plan shall provide that the owners of the Class B stock own the retained earnings, surplus, undivided profits, and equity reserves of the Bank, but shall have no right to receive any portion of those items, except through declaration of a dividend or capital distribution approved by the board of directors or through the liquidation of the Bank.

(c) *Dividends.* The capital plan shall establish the manner in which the Bank will pay dividends, if any, on each class or subclass of stock, and shall provide that the Bank may not declare or pay any dividends if it is not in compliance with any regulatory capital requirement or if after paying the dividend it would not be in compliance with any regulatory capital requirement.

(d) *Stock transactions.* The capital plan shall establish the criteria for the issuance, redemption, repurchase, transfer, and retirement of stock issued by the Bank. The capital plan also:

(1) Shall provide that the Bank may not issue stock other than in accordance with §1277.21;

(2) Shall provide that the stock of the Bank may be issued only to and held only by the members of that Bank, and by former members to the extent necessary to meet requirements set forth in a capital plan;

(3) Shall specify whether the stock of the Bank may be transferred, as allowed under §1277.25, and, if such transfer is allowed, shall specify the procedures to effect such transfer, and provide that the transfer shall be undertaken only in accordance with §1277.25;

(4) Shall specify that the stock of the Bank may be traded only among the Bank and its members, and former members;

(5) May provide for a minimum investment based on investment in Class B stock that is lower than a minimum investment based on investment in Class A stock, provided that the level of investment is sufficient for the Bank to comply with its regulatory capital requirements;

(6) Shall specify the fee, if any, to be imposed upon cancellation of a request to redeem Bank stock or upon cancellation of a request to withdraw from membership; and

(7) Shall specify the period of notice that the Bank will provide before the Bank, on its own initiative, determines to repurchase any excess Bank stock.

(e) *Termination of membership.* The capital plan shall address the manner in which the Bank will provide for the disposition of its capital stock that is held by institutions that terminate their membership, and the manner in which the Bank will liquidate claims against such institutions, including claims resulting from prepayment of advances prior to their stated maturity.

§1277.29 Amendments to a Bank's capital plan.

(a) *In general.* A Bank's board of directors shall approve any amendments to the Bank's capital plan and submit such amendment to the Director for approval. No such amendment may take effect until it has been approved by the Director.

(b) *Submission of amendments for approval.* Any request for approval of capital plan amendments should be submitted to the Deputy Director for the Division of Federal Home Loan Bank Regulation and should include the following:

(1) The name of the Bank making the request and the name, title, and contact information of the official filing the request;

(2) The name, title and contact information of the staff member(s) whom FHFA may contact for additional information;

(3) A certification by an executive officer of the Bank with knowledge of the facts that the representations made in the request are accurate and complete.

The following form of certification may be used: ''I hereby certify that the statements contained in the submission are true and complete to the best of my knowledge. [Name and Title]'';

(4) A written, narrative description of the proposed amendments to the Bank's capital plan and a discussion of the Bank's reasons for the proposed changes;

(5) The amended capital plan as approved by the Bank's board of directors;

(6) A version of the Bank's capital plan showing all proposed changes to its previously approved capital plan;

(7) Resolutions of the Bank's board of directors:

(i) Approving the proposed capital plan amendments; and

(ii) Authorizing the filing of the application for approval of the amendments and concurring in substance with the supporting documentation provided;

(8) An opinion of counsel demonstrating that the proposed amendments comply with the Bank Act, FHFA regulations and any other applicable law or regulation. If the amendments would be identical in substance to provisions approved for other Banks' capital plans, a Bank's legal analysis may reference the other capital plans that contain the provisions in question;

(9) An analysis of the effect of the proposed amendments, if any, on the Bank's capital levels and the Bank's ability to meet its regulatory capital requirements;

(10) *Pro forma* financial statements from the end of the quarter immediately prior to the date of submission of the request for approval through at least the end of the next two years, showing the impact of the proposed changes, if any, on capital levels; and

(11) A discussion of and an explanation for changes to the Bank's strategic plan, if any, which may be related to the capital plan amendments.

(c) *FHFA consideration of the amendment.* The Director may approve any amendment to a Bank's capital plan as submitted or may condition approval on the Bank's compliance with certain stated conditions.

PART 1278—VOLUNTARY MERGERS OF FEDERAL HOME LOAN BANKS

Sec.

AUTHORITY: 12 U.S.C. 1432(a), 1446, 4511.

SOURCE: 76 FR 72833, Nov. 28, 2011, unless otherwise noted.

§ 1278.1 Definitions.

Constituent Bank means a Bank that is proposing to merge with one or more other Banks. Each Bank entering into a merger is a Constituent Bank, regardless of whether it is also a Continuing Bank.

Continuing Bank means a Bank that will exist as the result of a merger of two or more Constituent Banks, and when used in the singular shall include the plural.

Disclosure Statement means a written document that contains, to the extent applicable, all of the items that a Bank would be required to include in a Form S–4 Registration Statement under the Securities Act of 1933 (or any successor form promulgated by the United States Securities and Exchange Commission governing disclosure required for securities issued in business combination transactions) when prepared as a prospectus as directed in Part I of the form, if the Bank were required to provide such a prospectus to its shareholders in connection with a merger.

Effective Date means the date on which the organization certificate of the Continuing Bank becomes effective as provided under § 1278.7.

Financial Statements means statements of condition, income, capital, and cash flows, with explanatory notes, in such form as the Banks are required to include in their filings made under the Securities and Exchange Act of 1934.

Merge or *Merger* means:

(1) A merger of one or more Banks into another Bank;

(2) A consolidation of two or more Banks resulting in a new Bank;

(3) A purchase of substantially all of the assets, and assumption of substantially all of the liabilities, of one or more Banks by another Bank or Banks; or

(4) Any other business combination of two or more Banks into one or more resulting Banks.

Record Date means the date established by a Bank's board of directors for determining the members that are entitled to vote on the ratification of the merger agreement and the number of ballots that may be cast by each in the election.

[76 FR 72833, Nov. 28, 2011, as amended at 78 FR 2328, Jan. 11, 2013; 81 FR 76300, Nov. 2, 2016]

§ 1278.2 Authority.

Any two or more Banks may merge voluntarily under authority of section 26(b) of the Bank Act, provided that each of the following requirements has been satisfied:

(a) The Constituent Banks have executed a written merger agreement that satisfies all requirements of § 1278.3;

(b) The Constituent Banks have jointly filed a merger application with FHFA that satisfies all requirements of § 1278.4;

(c) The Director has approved the merger application in accordance with the requirements of § 1278.5;

(d) The members of each Constituent Bank have ratified the merger agreement as provided under § 1278.6; and

(e) The Director has determined that the Constituent Banks have satisfied all conditions imposed in connection with the approval of the merger application, and has accepted the properly executed organization certificate of the Continuing Bank, as provided under § 1278.7.

§ 1278.3 Merger agreement.

A merger of Banks under the authority of § 1278.2 shall require a written merger agreement that:

(a) Has been authorized by the affirmative vote of a majority of a quorum of the board of directors of each Constituent Bank at a meeting on the record and has been executed by authorized signing officers of each Constituent Bank; and

(b) Sets forth all material terms and conditions of the merger, including, without limitation, provisions addressing each of the following matters—

(1) The proposed Effective Date and the proposed acquisition date for purposes of accounting for the transaction under GAAP, if that date is to be different from the Effective Date;

(2) The proposed organization certificate and bylaws of the Continuing Bank;

(3) The proposed capital structure plan for the Continuing Bank;

(4) The proposed size and structure of the board of directors for the Continuing Bank;

(5) The formula to be used to exchange the stock of the Constituent Banks for the stock of the Continuing Bank, and a provision prohibiting the issuance of fractional shares of stock;

(6) Any conditions that must be satisfied prior to the Effective Date, which must include approval by the Director and ratification by the members of the Constituent Banks;

(7) A statement of the representations or warranties, if any, made or to be made by any Constituent Bank;

(8) A description of the legal or accounting opinions or rulings, if any, that are required to be obtained or furnished by any party in connection with the proposed merger; and

(9) A statement that the board of directors of a Constituent Bank may terminate the merger agreement before the Effective Date upon a determination that:

(i) The information disclosed to members contained material errors or omissions;

(ii) Material misrepresentations were made to members regarding the impact of the merger;

(iii) Fraudulent activities were used to obtain members' approval; or

(iv) An event occurred subsequent to the members' vote that would have a significant adverse impact on the future viability of the Continuing Bank.

§ 1278.4 Merger application.

(a) *Contents of application.* Any two or more Banks that wish to merge shall submit to FHFA a merger application that addresses all material aspects of the proposed merger. As provided in

§ 1202.8 of this chapter, a Bank may submit separately any portions of the application that it believes contain confidential or privileged trade secrets or commercial or financial information, which portions will be handled in accordance with FHFA's Freedom of Information Act regulations set forth in part 1202 of this chapter. The application shall include, at a minimum, the following:

(1) A written statement that includes—

(i) A summary of the material features of the proposed merger;

(ii) The reasons for the proposed merger;

(iii) The effect of the proposed merger on the Constituent Banks and their members;

(iv) The proposed Effective Date, the proposed acquisition date for purposes of accounting for the transaction under GAAP, if that date is to be different from the Effective Date (including the reasons for designating a different acquisition date), and the Record Date established by each Constituent Bank's board of directors;

(v) If the Constituent Banks contemplate that the proposed merger will be one of two or more related transactions, a summary of the material features of any related transactions and the bearing that the consummation of, or failure to consummate, the related transactions is expected to have upon the proposed merger;

(vi) If not addressed by the merger agreement, the Banks' proposal for the ultimate size and composition of the board of directors for the Continuing Bank and their plan for reducing the board to its ultimate size and composition, as well as the names of the persons proposed to serve as directors and senior executive officers of the Continuing Bank immediately after the merger;

(vii) A description of all proposed material operational changes including, but not limited to, reductions in the existing staffs of the Constituent Banks (to the extent such information is known), whether and how Bank operations will be combined, and whether any Constituent Bank will continue to operate as a branch of the Continuing Bank;

(viii) Information demonstrating that the Continuing Bank will comply with all applicable capital requirements after the Effective Date;

(ix) A statement explaining all officer and director indemnification provisions; and

(x) An undertaking that the Constituent Banks will continue to disclose all material information, and update all items of the application, as appropriate;

(2) A copy of the executed merger agreement and a certified copy of the resolution of the board of directors of each Constituent Bank authorizing the merger agreement;

(3) A copy of the proposed organization certificate of the Continuing Bank;

(4) A copy of the proposed bylaws of the Continuing Bank;

(5) A copy of the proposed capital structure plan of the Continuing Bank;

(6) The most recent annual audited Financial Statements, and any interim quarterly financial statements for the year-to-date, for each Constituent Bank; and

(7) Pro forma Financial Statements for the Continuing Bank as of the date of the most recent statement of condition supplied under paragraph (a)(6) of this section, and forecasted pro forma Financial Statements for each of at least two years following such date.

(b) *Additional information.* FHFA may require the Constituent Banks to submit any additional information FHFA deems necessary to evaluate the proposed merger. If FHFA has determined a merger application to be complete as provided in paragraph (c) of this section, FHFA may require the Constituent Banks to submit additional information only with respect to matters derived from or prompted by the materials already submitted, or matters of a material nature that were not reasonably apparent previously, including matters concealed by the Constituent Banks or relating to developments that arose after the determination of completeness. If the Constituent Banks fail to provide the additional information in a timely manner, the Director may deem the failure to provide the required information as grounds to deny the application.

(c) *Completion of application.* Within 30 days of the receipt of a merger application, FHFA shall determine whether the application is complete and whether FHFA has all information necessary for the Director to evaluate the proposed merger.

(1) If FHFA determines that the application is complete and that it has all information necessary to evaluate the proposed merger, it shall so inform the Constituent Banks in writing.

(2) If FHFA determines that the application is incomplete, or that it requires additional information in order to evaluate the application, it shall so inform the Constituent Banks in writing, and shall specify the number of days within which the Constituent Banks must provide any additional information or materials. Within 15 days of receipt of the additional information or materials, FHFA shall inform the Constituent Banks in writing whether the merger application is complete.

§ 1278.5 Approval by Director.

(a) *Standards.* In determining whether to approve a merger of Banks under the authority of § 1278.2, the Director shall take into consideration the financial and managerial resources of the Constituent Banks, the future prospects of the Continuing Bank, and the effect of the proposed merger on the safety and soundness of the Continuing Bank and the Bank system.

(b) *Determination by Director.* After FHFA determines that a merger application is complete, as provided in § 1278.4(c), the Director shall, within 30 days, either approve or deny the merger application. An approval of a merger application may include any conditions the Director determines to be appropriate, and shall in all cases be conditioned on each Constituent Bank demonstrating that it has obtained its members' ratification of the merger agreement in accordance with the requirements of § 1278.6 by submitting to FHFA:

(1) A certified copy of the members' resolution ratifying the merger agreement, on which the members cast their votes; and

(2) A certification of the member vote from the Bank's corporate secretary or from an independent third party.

(c) *Notice.* If the Director approves the merger application, FHFA shall provide written notice of the approval and any conditions to each Constituent Bank, as well as to each other Bank and the Office of Finance. If the Director denies the merger application, FHFA shall provide written notice of the denial to each Constituent Bank, as well as to each other Bank and the Office of Finance, and the notice to the Constituent Banks shall include a statement of the reasons for the denial.

§ 1278.6 Ratification by Bank Members.

(a) *Requirements for member vote.* No merger of Banks under the authority of § 1278.2 may be consummated unless a merger agreement meeting the requirements of § 1278.3 has been ratified by the affirmative vote of the members of each Constituent Bank in a voting process that meets the following requirements:

(1) *Notice of vote.* Each Constituent Bank shall submit the authorized merger agreement to its members for ratification by delivering to each institution that was a member as of the Record Date—

(i) A ballot that permits the member to vote for or against the ratification of the merger agreement, or to abstain from such vote; and

(ii) A Disclosure Statement that establishes a closing date for the Bank's receipt of completed ballots that is no earlier than 30 days after the date that the ballot and Disclosure Statement are delivered to its members.

(2) *Voting rights and requirements.* In the vote to ratify the merger agreement, each member of each Constituent Bank shall be entitled to cast one vote for each share of Bank stock that the member was required to own as of the Record Date, provided that the number of votes that any member may cast shall not exceed the average number of shares of Bank stock required to be held by all members of that Bank, calculated on a district-wide basis, as of the Record Date. A member must cast all of its votes either for or against the ratification of the merger agreement, or may abstain

with respect to all of its votes. Each member's vote shall be made by resolution of its governing body, either authorizing the specific vote, or delegating to an individual the authority to vote.

(3) *Determination of result.* No Constituent Bank shall review any ballot until after the closing date established in the Disclosure Statement or include in the tabulation any ballot received after the closing date. A Constituent Bank shall tabulate the votes cast immediately after the closing date. The members of a Constituent Bank shall be considered to have ratified a merger agreement if a majority of votes cast in the election have been cast in favor of the ratification of the merger agreement. The Constituent Bank, or the Continuing Bank, as appropriate, shall retain all ballots received for at least two years after the date of the election, and shall not disclose how any member voted.

(4) *Notice of result.* Within 10 days of the closing date, a Constituent Bank shall deliver to its members, to each Constituent Bank with which it proposes to merge, and to FHFA a statement of—

(i) The total number of eligible votes;

(ii) The number of members voting in the election; and

(iii) The total number of votes cast both for and against ratification of the merger agreement, as well as those that were eligible to be cast by members that abstained and by members who failed to return completed ballots.

(b) *False and misleading statements.* In connection with a proposed merger, no Bank, nor any director, officer, or employee thereof, shall make any statement, written or oral, which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statement not false or misleading, or necessary to correct any earlier statement that has become false or misleading.

§ 1278.7 Consummation of the merger.

(a) *Post-approval submissions.* After the members of each Constituent Bank have voted to ratify the merger agreement, the Constituent Banks shall submit to FHFA:

(1) Evidence acceptable to the Director that all conditions imposed in connection with the approval of the merger application under § 1278.5 have been satisfied, including the items specified in §§ 1278.5(b)(1) and (2); and

(2) An organization certificate for the Continuing Bank, in such form as FHFA may specify, that has been executed by the individuals who will constitute the board of directors of the Continuing Bank.

(b) *Acceptance of organization certificate.* Upon determining that all conditions have been satisfied and that the organization certificate meets the requirements of § 1278.7(a)(2), the Director shall accept the organization certificate of the Continuing Bank by endorsing thereon the date of acceptance and the Effective Date, which date shall be:

(1) The proposed Effective Date set forth in the merger agreement or, if the merger agreement expresses the proposed Effective Date in terms of a range of dates, a date within the applicable range of dates; or

(2) If the proposed Effective Date set forth in the merger agreement has passed, the earlier of:

(i) The 10th business day following the date of acceptance of the organization certificate by the Director; or

(ii) The last business day preceding any date specified in the merger agreement by which the merger agreement will terminate if the merger has not become effective.

(c) *Effectiveness of merger.* After the Director has accepted the organization certificate of the Continuing Bank as provided in § 1278.7(b), and as of the commencement of the Effective Date specified on such organization certificate:

(1) The Continuing Bank shall become or remain a body corporate (depending on the type of transaction) operating under such organization certificate with all powers granted to a Bank under the Bank Act;

(2) The Continuing Bank shall succeed to all rights, titles, powers, privileges, books, records, assets, and liabilities of the Constituent Banks, as provided in the merger agreement; and

(3) The corporate existence of any Constituent Bank that is not a Continuing Bank shall cease, unless otherwise provided in the merger agreement.

(d) *Notice.* After accepting the organization certificate for the Continuing Bank, the Director shall provide to the Constituent Banks, and to each other Bank and the Office of Finance, prompt written notice of that fact, which shall include the date of acceptance and the Effective Date of the organization certificate.

SUBCHAPTER E—HOUSING GOALS AND MISSION

PART 1281—FEDERAL HOME LOAN BANK HOUSING GOALS

Subpart A—General

Sec.

Subpart B—Housing Goals

Subpart C—Reporting Requirements

AUTHORITY: 12 U.S.C. 1430, 1430b, 1430c, 1431.

SOURCE: 75 FR 81105, Dec. 27, 2010, unless otherwise noted.

Subpart A—General

§ 1281.1 Definitions.

As used in this part:

AMA mortgage means a mortgage that was purchased by a Bank under an AMA program.

AMA program has the meaning set forth in § 1268.1 of this chapter.

AMA user means any participating financial institution, as defined in § 1268.1 of this chapter, from which the Bank purchased at least one AMA mortgage during the year for which the housing goals are being measured.

Balloon mortgage means a mortgage providing for payments at regular intervals, with a final payment (balloon payment) that is at least 5 percent more than the periodic payments. The periodic payments may cover some or all of the periodic principal or interest. Typically, the periodic payments are level monthly payments that would fully amortize the mortgage over a stated term and the balloon payment is a single payment due after a specific period (but before the mortgage would fully amortize) and pays off or satisfies the outstanding balance of the mortgage.

Borrower income means the total gross income relied on in making the credit decision.

Community-based AMA user means any AMA user whose average total assets over the three-year period culminating in the year preceding the one being measured are no greater than the applicable community-based AMA user asset cap.

Community-based AMA user asset cap means $1,224,000,000, subject to annual adjustments by FHFA, beginning in 2021, to reflect any percentage increase in the preceding year's Consumer Price Index (CPI) for all urban consumers, as published by the U.S. Department of Labor.

Conventional mortgage means a mortgage other than a mortgage as to which a Bank has the benefit of any guaranty, insurance or other obligation by the United States or any of its agencies or instrumentalities.

Day means a calendar day.

Designated disaster area means any census tract that is located in a county designated by the federal government as adversely affected by a declared major disaster administered by FEMA, where individual assistance payments were authorized by FEMA. A census tract shall be treated as a ''designated disaster area'' for purposes of this part beginning on the January 1 after the FEMA designation of the county, or such earlier date as determined by FHFA, and continuing through December 31 of the third full calendar year following the FEMA designation. This time period may be adjusted for a particular disaster area by notice from FHFA to the Banks.

Dwelling unit means a room or unified combination of rooms with plumbing and kitchen facilities intended for use, in whole or in part, as a dwelling by one or more persons, and includes a dwelling unit in a single-family property, multifamily property, or other residential or mixed-use property.

Families in low-income areas means:

(1) Any family that resides in a census tract in which the median income does not exceed 80 percent of the area median income;

(2) Any family with an income that does not exceed area median income that resides in a minority census tract; and

(3) Any family with an income that does not exceed area median income that resides in a designated disaster area.

Family means one or more individuals who occupy the same dwelling unit.

FEMA means the Federal Emergency Management Agency.

Low-income means income not in excess of 80 percent of area median income.

Median income means, with respect to an area, the unadjusted median family income for the area as determined by FHFA. FHFA will provide the Banks annually with information specifying how the median family income estimates for metropolitan and non-metropolitan areas are to be applied for purposes of determining median income.

Metropolitan area means a metropolitan statistical area (MSA), or a portion of such an area, including Metropolitan Divisions, for which median incomes are determined by FHFA.

Minority means any individual who is included within any one or more of the following racial and ethnic categories:

(1) American Indian or Alaskan Native—a person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment;

(2) Asian—a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam;

(3) Black or African American—a person having origins in any of the black racial groups of Africa;

(4) Hispanic or Latino—a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race; and

(5) Native Hawaiian or Other Pacific Islander—a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

Minority census tract means a census tract that has a minority population of at least 30 percent and a median income of less than 100 percent of the area median income.

Moderate-income means income not in excess of area median income.

Mortgage means a member of such classes of liens, including subordinate liens, as are commonly given or are legally effective to secure advances on, or the unpaid purchase price of, real estate under the laws of the State in which the real estate is located, or a manufactured home that is personal property under the laws of the State in which the manufactured home is located, together with the credit instruments, if any, secured thereby, and includes interests in mortgages. *Mortgage* includes a mortgage, lien, including a subordinate lien, or other security interest on the stock or membership certificate issued to a tenant-stockholder or resident-member by a cooperative housing corporation, as defined in section 216 of the Internal Revenue Code of 1986, and on the proprietary lease, occupancy agreement, or right of tenancy in the dwelling unit of the tenant-stockholder or resident-member in such cooperative housing corporation.

Mortgage purchase means a transaction in which a Bank bought or otherwise acquired a mortgage.

Non-metropolitan area means a county, or a portion of a county, including those counties that comprise Micropolitan Statistical Areas, located outside any metropolitan area, for which median incomes are determined by FHFA.

Purchase money mortgage means a mortgage given to secure a loan used for the purchase of a single-family residential property.

Refinancing mortgage means a mortgage undertaken by a borrower that satisfies or replaces an existing mortgage of such borrower. The term does not include:

(1) A renewal of a single payment obligation with no change in the original terms;

(2) A reduction in the annual percentage rate of the mortgage as computed under the Truth in Lending Act, with a corresponding change in the payment schedule;

(3) An agreement involving a court proceeding;

(4) A workout agreement, in which a change in the payment schedule or collateral requirements is agreed to as a result of the mortgagor's default or delinquency, unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charges and premiums for the continuation of insurance;

(5) The renewal of optional insurance purchased by the mortgagor and added to an existing mortgage; or

(6) A conversion of a balloon mortgage note on a single-family property to a fully amortizing mortgage note where the Bank already owns or has an interest in the balloon note at the time of the conversion.

Residence means a property where one or more families reside.

Seasoned mortgage means a mortgage on which the date of the mortgage note is more than one year before the Bank purchased the mortgage.

Secondary residence means a dwelling where the mortgagor maintains (or will maintain) a part-time place of abode and typically spends (or will spend) less than the majority of the calendar year. A person may have more than one secondary residence at a time.

Single-family housing means a residence consisting of one to four dwelling units. Single-family housing includes condominium dwelling units and dwelling units in cooperative housing projects.

Very low-income means income not in excess of 50 percent of area median income.

[75 FR 81105, Dec. 27, 2010, as amended at 78 FR 2328, Jan. 11, 2013; 81 FR 76300, Nov. 2, 2016; 81 FR 91690, Dec. 19, 2016; 85 FR 38050, June 25, 2020]

Subpart B—Housing Goals

§ 1281.10 General.

Pursuant to the requirements of the Bank Act, as amended (12 U.S.C. 1430c), this subpart establishes:

(a) A prospective mortgage purchase housing goal;

(b) A small member participation housing goal;

(c) Requirements for measuring performance under the housing goals; and

(d) Procedures for monitoring and enforcing the housing goals.

[75 FR 81105, Dec. 27, 2010, as amended at 85 FR 38051, June 25, 2020]

§ 1281.11 Bank housing goals.

(a) *Prospective mortgage purchase housing goal*—(1) *Target levels.* For each calendar year, the percentage of a Bank's AMA mortgages acquired during the calendar year that are for very low-income families, low-income families, or families in low-income areas must meet or exceed either:

(i) A target level of 20 percent; or

(ii) An alternative target level proposed by the Bank and approved by FHFA under paragraph (c) of this section.

(2) *Cap on low-income areas loans counted toward goal.* No more than 25 percent of the mortgages that are counted toward a Bank's achievement of the prospective mortgage purchase housing goal may be mortgages for families with incomes above 80 percent of area median income. Any purchases of mortgages for families with incomes above 80 percent of area median income in excess of the 25 percent cap shall be treated as mortgage purchases for purposes of the housing goals and shall be included in the denominator for the housing goal, but such mortgages shall not be included in the numerator in calculating a Bank's performance under the housing goal.

(b) *Small member participation housing goal.* For each calendar year, the percentage of a Bank's total AMA users that are community-based AMA users must meet or exceed one of the following:

(1) A target level of 50 percent;

(2) A percentage that is three percentage points greater than the percentage from the preceding calendar year; or

(3) An alternative target level proposed by the Bank and approved by FHFA under paragraph (c) of this section.

(c) *Alternative target levels*—(1) *Submission of Bank requests.* A Bank, upon approval of its board of directors, may submit a written request to FHFA for approval of different target levels for the prospective mortgage purchase

housing goal, the small member participation housing goal, or both. A Bank's request under this paragraph must include proposed target levels for three consecutive years following the calendar year in which the request is submitted. A Bank is not required to propose the same target level for each of the three years.

(2) *Content of Bank request.* A Bank's request under paragraph (c)(1) of this section for an alternative target level must include a detailed explanation of:

(i) Why the target level for the goal in paragraphs (a) and (b) of this section, as applicable, is infeasible;

(ii) Why the Bank's proposed alternative target level is achievable; and

(iii) How the Bank's proposed alternative target level will meaningfully further affordable housing mortgage lending in its district.

(3) *Frequency of Bank requests*—(i) *Three-year period.* A Bank may not submit a request under paragraph (c)(1) of this section for an alternative target level more frequently than once every three years, except as provided in paragraphs (c)(3)(ii) or (c)(3)(iii) of this section. The deadline for submitting a request under paragraph (c)(1) of this section is September 15 of the calendar year preceding the calendar year in which the alternative target level would apply. FHFA will review each Bank request that is received by the deadline and will notify the Bank in writing if its request is approved. If FHFA does not notify a Bank that its request is approved, the Bank will remain subject to the target levels in paragraphs (a) and (b) of this section, as applicable.

(ii) *Exception for changes in AMA products or programs.* FHFA may require a Bank to submit a request under paragraph (c)(1) of this section for an alternative target level to address discontinuation of an AMA product or program or approval of a new AMA product or program.

(iii) *Exception for special circumstances.* A Bank may submit a request under paragraph (c)(1) of this section for an alternative target level more frequently than once every three years if warranted given economic, operational, or other circumstances.

(4) *Public comment.* FHFA will publish each request that is submitted under paragraph (c)(1) of this section for an alternative target level on FHFA's public website for a period of at least 30 days, to provide the public an opportunity to comment on the request. FHFA will publish each request without redactions or other changes, except that FHFA will not publish any confidential or proprietary material. A Bank must submit any material supporting its request under paragraph (c)(1) of this section that it considers to be confidential or proprietary as a separate document, clearly designated as confidential or proprietary.

[85 FR 38051, June 25, 2020]

§ 1281.12 General counting requirements.

(a) *General.* Mortgage purchases financing single-family properties shall be evaluated based on the income of the mortgagors and the area median income at the time the mortgage was originated. To determine whether mortgages may be counted under a particular family income level (*e.g.*, low- or very low-income), the income of the mortgagor is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under § 1281.1.

(b) *No double-counting.* A mortgage may be counted only once toward the achievement of the prospective mortgage purchase housing goal, even if it satisfies multiple criteria for the prospective mortgage purchase housing goal.

(c) *Application of median income.* For purposes of determining an area's median income under § 1281.1, the area is:

(1) The metropolitan area, if the residence that secures the mortgage is in a metropolitan area; and

(2) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(d) *Sampling not permitted.* Performance under the housing goals for each year shall be based on a tabulation of

each mortgage during that year; a sampling of such purchases is not acceptable.

[85 FR 38051, June 25, 2020]

§ 1281.13 Special counting requirements.

(a) *General.* FHFA shall determine whether a Bank shall receive full, partial, or no credit toward achievement of any of the housing goals for a transaction that otherwise qualifies under this part.

(b) *Not counted.* The following transactions or activities shall not be counted for purposes of the housing goals, meaning that in calculating the applicable percentage target level, they shall be excluded from both the numerator (*i.e.,* AMA mortgages acquired during the calendar year that are for very low-income families, low-income families, or families in low-income areas) and the denominator (*i.e.,* total AMA mortgages acquired during the calendar year), even if the transaction or activity would otherwise be counted under paragraph (c) of this section:

(1) Purchases of participation interests in AMA mortgages from another Bank, except as provided in paragraph (e) of this section;

(2) Commitments to buy mortgages at a later date or time;

(3) Options to acquire mortgages;

(4) Rights of first refusal to acquire mortgages;

(5) Any interests in mortgages that the Director determines, in writing, shall not be treated as interests in mortgages;

(6) Mortgage purchases to the extent they finance any dwelling units that are secondary residences;

(7) Single-family refinancing mortgages that result from conversion of balloon notes to fully amortizing notes, if a Bank already owns, or has an interest in, the balloon note at the time conversion occurs;

(8) Purchases of subordinate lien mortgages;

(9) Purchases of mortgages that were previously counted by a Bank under any current or previous housing goal within the five years immediately preceding the current performance year;

(10) Purchases of mortgages where the property has not been approved for occupancy; and

(11) Any combination of factors in paragraphs (b)(1) through (b)(10) of this section.

(c) *Other special rules.* Subject to FHFA's determination of whether a Bank shall receive full, partial, or no credit for a transaction toward achievement of any of the housing goals as provided in paragraph (a) of this section, the transactions and activities identified in this paragraph (c) shall be treated as mortgage purchases as described. A transaction or activity that is covered by more than one paragraph below must satisfy the requirements of each such paragraph. The mortgages from each such transaction or activity shall be included in the denominator in calculating a Bank's performance under the housing goals, and shall be included in the numerator, as appropriate.

(1) *Cooperative housing and condominiums.* The purchase by a Bank of a mortgage on a cooperative housing unit (''a share loan'') or a mortgage on a condominium unit shall be treated as a mortgage purchase for purposes of the housing goals.

(2) *Seasoned mortgages.* The purchase of a seasoned mortgage by a Bank shall be treated as a mortgage purchase for purposes of the housing goals, except where the Bank has already counted the mortgage under any current or previous housing goal within the five years immediately preceding the current performance year.

(3) *Purchase of refinancing mortgages.* The purchase of a refinancing mortgage by a Bank shall be treated as a mortgage purchase for purposes of the housing goals only if the refinancing is an arms-length transaction that is borrower-driven.

(4) *Non-conventional mortgages.* The purchase of a non-conventional single-family mortgage shall be treated as a mortgage purchase for purposes of the housing goals only if the mortgage was acquired from a community-based AMA user.

(d) *FHFA review of transactions.* FHFA may determine whether and how any transaction or class of transactions shall be counted for purposes of the

housing goals. FHFA will notify each Bank in writing of any determination regarding the treatment of any transaction or class of transactions under the housing goals.

(e) *Mortgage participation transactions.* Where two or more Banks acquire a participation interest in the same mortgage simultaneously, the mortgage will be counted on a *pro rata* basis for the prospective mortgage purchase housing goal for each Bank with a participation interest.

[75 FR 81105, Dec. 27, 2010, as amended at 85 FR 38052, June 25, 2020]

§ 1281.14 Determination of compliance with housing goals; notice of determination.

(a) *Determination of compliance with housing goals.* On an annual basis, FHFA will determine each Bank's performance under each housing goal and will publish the final determinations. FHFA will publish its final determination including the numbers and percentages for each Bank's AMA purchases that meet each of the housing goals criteria, including loans to low-income families, loans to very low-income families, and loans to families in low-income areas, including by each of the defined categories. FHFA's determination will include these numbers in total and separated into purchase money mortgages, refinancing mortgages, conventional mortgages, and non-conventional mortgages.

(b) *Failure to meet a housing goal.* If the Director determines that a Bank has failed to meet any housing goal, the Director shall notify the Bank in writing of such preliminary determination. Any notification to a Bank of a preliminary determination under this section shall provide the Bank with an opportunity to respond in writing in accordance with the following procedures:

(1) *Notice.* The Director shall provide written notice to a Bank of a preliminary determination under this section, the reasons for such determination, and the information on which the Director based the determination.

(2) *Response period*—(i) *In general.* During the 30-day period beginning on the date on which notice is provided under paragraph (b)(1) of this section, the Bank may submit to the Director any written information that the Bank considers appropriate for consideration by the Director in finally determining whether such failure has occurred or whether the achievement of such goal was feasible.

(ii) *Extended period.* The Director may extend the period under paragraph (b)(2)(i) of this section for good cause for not more than 30 additional days.

(iii) *Shortened period.* The Director may shorten the period under paragraph (b)(2)(i) of this section for good cause.

(iv) *Failure to respond.* The failure of a Bank to provide information during the 30-day period under this paragraph (b)(2), as extended or shortened, shall waive any right of the Bank to comment on the proposed determination or action of the Director.

(3) *Consideration of information and final determination*— (i) *In general.* After the expiration of the response period under paragraph (b)(2) of this section or receipt of information provided during such period by a Bank, the Director shall issue a final determination on:

(A) Whether the Bank has failed to meet the housing goal; and

(B) Whether, taking into consideration market and economic conditions and the financial condition of the Bank, the achievement of the housing goal was feasible.

(ii) *Considerations.* In making a final determination under paragraph (b)(3)(i) of this section, the Director shall take into consideration any relevant information submitted by a Bank during the response period.

[75 FR 81105, Dec. 27, 2010, as amended at 85 FR 38052, June 25, 2020]

§ 1281.15 Housing plans.

(a) *Housing plan requirement.* For any year after 2023, if the Director determines that a Bank has failed to meet any housing goal and that the achievement of the housing goal was feasible, the Director may require the Bank to submit a housing plan for approval by the Director.

(b) *Nature of plan.* If the Director requires a housing plan, the housing plan shall:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Bank will take to achieve the housing goal for the next calendar year;

(4) Address any additional matters relevant to the housing plan as required, in writing, by the Director; and

(5) Address any alternative target levels for which the Bank has submitted a request under §1281.11(c)(1).

(c) *Deadline for submission.* The Bank shall submit the housing plan to the Director within 45 days after issuance of a notice requiring the Bank to submit a housing plan. The Director may extend the deadline for submission of a plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) *Review of housing plan.* The Director shall review and approve or disapprove a housing plan as follows:

(1) *Approval.* The Director shall review each submission by a Bank, including a housing plan submitted under this section and, not later than 30 days after submission, approve or disapprove the plan or other action. The Director may extend the period for approval or disapproval for a single additional 30-day period if the Director determines it necessary. The Director shall approve any plan that the Director determines is likely to succeed, and conforms with the Bank Act, this part, and any other applicable provision of law.

(2) *Notice of approval and disapproval.* The Director shall provide written notice to a Bank submitting a housing plan of the approval or disapproval of the plan, which shall include the reasons for any disapproval of the plan, and of any extension of the period for approval or disapproval.

(e) *Resubmission.* If the Director disapproves an initial housing plan submitted by a Bank, the Bank shall submit an amended plan acceptable to the Director not later than 15 days after the Director's disapproval of the initial plan; the Director may extend the deadline if the Director determines an extension is in the public interest. If the amended plan is not acceptable to the Director, the Director may afford the Bank 15 days to submit a new plan.

(f) *Enforcement of housing plan.* If the Director finds that a Bank has failed to meet any housing goal, and that the achievement of the housing goal was feasible, and has required the Bank to submit a housing plan under this section, the Director may issue a cease and desist order, or impose civil money penalties, if the Bank refuses to submit such a plan, fails to submit an acceptable plan, or fails to comply with the approved plan. In taking such action, the Director shall follow procedures consistent with those provided in 12 U.S.C. 4581 through 4588 with respect to actions to enforce the housing goals.

[75 FR 81105, Dec. 27, 2010, as amended at 85 FR 38052, June 25, 2020]

Subpart C—Reporting Requirements

SOURCE: 85 FR 38052, June 25, 2020, unless otherwise noted.

§1281.20 Reporting requirements.

(a) *General.* Each Bank must collect and submit to FHFA any data that FHFA determines to be necessary for FHFA to evaluate transactions and activities under the Bank housing goals.

(b) *Reporting for prospective mortgage purchase housing goal.* Each Bank must collect data on each AMA mortgage purchased by the Bank. The data must include any data elements specified by FHFA. On no less frequent than an annual basis, each Bank must submit such data to FHFA in accordance with the Data Reporting Manual.

(c) *Reporting for small member participation housing goal.* Each Bank must collect data on AMA user asset size. On no less frequent than an annual basis, each Bank must submit such data to FHFA in accordance with the Data Reporting Manual.

(d) *Other reporting.* Each Bank must provide to FHFA such additional reports, information, and data as FHFA may request from time to time.

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

Subpart A—General

Sec.

Subpart B—Housing Goals

Subpart C—Duty to Serve Underserved Markets

Subpart D—Reporting Requirements

AUTHORITY: 12 U.S.C. 4501, 4502, 4511, 4513, 4526, 4561–4566.

SOURCE: 75 FR 55930, Sept. 14, 2010, unless otherwise noted.

Subpart A—General

§ 1282.1 Definitions.

(a) *Statutory terms.* All terms defined in the Safety and Soundness Act are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section.

(b) *Other terms.* As used in this part, the term:

Additional Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is not a Statutory Activity or Regulatory Activity.

Agricultural worker, for purposes of subpart C of this part, means any person that meets the definition of an agricultural worker under a federal, state, tribal or local program.

AHAR means the Annual Housing Activities Report that an Enterprise submits to the Director under section 309(n) of the Fannie Mae Charter Act or section 307(f) of the Freddie Mac Act.

AHAR information means data or information contained in the AHAR.

Area of concentrated poverty, for purposes of subpart C of this part, means a census tract designated by HUD as a Qualified Census Tract, pursuant to 26 U.S.C. 42(d)(5)(B)(ii), or as a Racially- or Ethnically-Concentrated Area of Poverty, pursuant to 24 CFR 5.152, during any year covered by an Underserved Markets Plan or in the year prior to a Plan's effective date.

Balloon mortgage means a mortgage providing for payments at regular intervals, with a final payment (''balloon payment'') that is at least 5 percent more than the periodic payments. The periodic payments may cover some or all of the periodic principal or interest. Typically, the periodic payments are level monthly payments that would fully amortize the mortgage over a stated term and the balloon payment is a single payment due after a specified period (but before the mortgage would fully amortize) and pays off or satisfies the outstanding balance of the mortgage.

Borrower income means the total gross income relied on in making the credit decision.

Charter Act means the Fannie Mae Charter Act, as amended, or the Freddie Mac Act, as amended.

Colonia, for purposes of subpart C of this part, means an identifiable community that meets the definition of a colonia under a federal, State, tribal, or local program.

Community development financial institution, for purposes of subpart C of this part, has the meaning in 12 CFR 1263.1.

Conventional mortgage means a mortgage other than a mortgage as to

which an Enterprise has the benefit of any guaranty, insurance or other obligation by the United States or any of its agencies or instrumentalities.

Day means a calendar day.

Designated disaster area means any census tract that is located in a county designated by the federal government as adversely affected by a declared major disaster administered by FEMA, where individual assistance payments were authorized by FEMA. A census tract shall be treated as a ''designated disaster area'' for purposes of this part beginning on the January 1 after the FEMA designation of the county, or such earlier date as determined by FHFA, and continuing through December 31 of the third full calendar year following the FEMA designation. This time period may be adjusted for a particular disaster area by notice from FHFA to the Enterprises.

Dwelling unit means a room or unified combination of rooms with plumbing and kitchen facilities intended for use, in whole or in part, as a dwelling by one or more persons, and includes a dwelling unit in a single-family property, multifamily property, or other residential or mixed-use property.

Efficiency means a dwelling unit having no separate bedrooms or 0 bedrooms.

Evaluation Guidance, for purposes of subpart C of this part, means separate FHFA-prepared guidance that includes the information required under this subpart, as well as additional guidance on the Underserved Markets Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit for extra-credit eligible activities such as residential economic diversity, how final ratings will be determined, and other matters as may be appropriate.

Extremely low-income means:

(i) In the case of owner-occupied units, income not in excess of 30 percent of area median income; and

(ii) In the case of rental units, income not in excess of 30 percent of area median income, with adjustments for smaller and larger families in accordance with this part.

Families in low-income areas means:

(i) Any family that resides in a census tract in which the median income does not exceed 80 percent of the area median income;

(ii) Any family with an income that does not exceed area median income that resides in a minority census tract; and

(iii) Any family with an income that does not exceed area median income that resides in a designated disaster area.

Family means one or more individuals who occupy the same dwelling unit.

Fannie Mae Charter Act means the Federal National Mortgage Association Charter Act, as amended (12 U.S.C. 1715 *et seq.*).

Federally insured credit union, for purposes of subpart C of this part, has the meaning in 12 U.S.C. 1752(7).

Federally recognized Indian tribe, for purposes of subpart C of this part, has the meaning in 25 CFR 83.1.

FEMA means the Federal Emergency Management Agency.

FOIA means the Freedom of Information Act, as amended (5 U.S.C. 552).

Freddie Mac Act means the Federal Home Loan Mortgage Corporation Act, as amended (12 U.S.C. 1451 *et seq.*).

High-needs rural population, for purposes of subpart C of this part, means any of the following populations provided the population is located in a rural area:

(i) Members of a Federally recognized Indian tribe located in an Indian area; or

(ii) Agricultural workers.

High-needs rural region, for purposes of subpart C of this part, means any of the following regions provided the region is located in a rural area:

(i) Middle Appalachia;

(ii) The Lower Mississippi Delta;

(iii) A colonia; or

(iv) A tract located in a persistent poverty county and not included in Middle Appalachia, the Lower Mississippi Delta, or a colonia.

High opportunity area, for purposes of subpart C of this part, means:

(i) An area designated by HUD as a ''Difficult Development Area,'' pursuant to 26 U.S.C. 42(d)(5)(B)(iii), during any year covered by an Underserved Markets Plan or in the year prior to an Underserved Markets Plan's effective date, whose poverty rate is lower than

the rate specified by FHFA in the Evaluation Guidance; or

(ii) An area designated by a state or local Qualified Allocation Plan as a high opportunity area and which meets a definition FHFA has identified as eligible for duty to serve credit in the Evaluation Guidance.

HOEPA mortgage means a mortgage covered by section 103(bb) of the Home Ownership and Equity Protection Act (HOEPA) (15 U.S.C. 1602(bb)), as implemented by the Bureau of Consumer Financial Protection.

Indian area, for purposes of subpart C of this part, has the meaning in 24 CFR 1000.10.

Insured depository institution, for purposes of subpart C of this part, means an institution whose deposits are insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

Lender means any entity that makes, originates, sells, or services mortgages, and includes the secured creditors named in the debt obligation and document creating the mortgage.

Low-income means:

(i) In the case of owner-occupied units, income not in excess of 80 percent of area median income; and

(ii) In the case of rental units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families in accordance with this part.

Lower Mississippi Delta, for purposes of subpart C of this part, means the Lower Mississippi Delta counties designated by Public Laws 100–460, 106–554, and 107–171, along with any future updates made by Congress.

Manufactured home, for purposes of subpart C of this part, means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5401 *et seq.*, and implementing regulations.

Manufactured housing community, for purposes of subpart C of this part, means a tract of land under unified ownership and developed for the purposes of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

Median income means, with respect to an area, the unadjusted median family income for the area as determined by FHFA. FHFA will provide the Enterprises annually with information specifying how the median family income estimates for metropolitan and nonmetropolitan areas are to be applied for purposes of determining median income.

Metropolitan area means a metropolitan statistical area (MSA), or a portion of such an area, including Metropolitan Divisions, for which median incomes are determined by FHFA.

Middle Appalachia, for purposes of subpart C of this part, means the ''central'' Appalachian subregion under the Appalachian Regional Commission's subregional classification of Appalachia.

Minority means any individual who is included within any one or more of the following racial and ethnic categories:

(i) American Indian or Alaskan Native—a person having origins in any of the original peoples of North and South America (including Central America), and who maintains Tribal affiliation or community attachment;

(ii) Asian—a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam;

(iii) Black or African American—a person having origins in any of the black racial groups of Africa;

(iv) Hispanic or Latino—a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race; and

(v) Native Hawaiian or Other Pacific Islander—a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

Minority census tract means a census tract that has a minority population of at least 30 percent and a median income of less than 100 percent of the area median income.

Mixed-income housing, for purposes of subpart C of this part, means a multifamily property or development that may include or comprise single-family

units that serves very low-, low-, or moderate-income families where:

(i) A minimum percentage of the units are unaffordable to low-income families, or to families at higher income levels, as specified in the Evaluation Guide; and

(ii) A minimum percentage of the units are affordable to low-income families, or to families at lower income levels, as specified in the Evaluation Guide.

Moderate-income means:

(i) In the case of owner-occupied units, income not in excess of area median income; and

(ii) In the case of rental units, income not in excess of area median income, with adjustments for smaller and larger families in accordance with this part.

Mortgage means a member of such classes of liens, including subordinate liens, as are commonly given or are legally effective to secure advances on, or the unpaid purchase price of, real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby, and includes interests in mortgages. ''Mortgage'' includes a mortgage, lien, including a subordinate lien, or other security interest on the stock or membership certificate issued to a tenant-stockholder or resident-member by a cooperative housing corporation, as defined in section 216 of the Internal Revenue Code of 1986, and on the proprietary lease, occupancy agreement, or right of tenancy in the dwelling unit of the tenant-stockholder or resident-member in such cooperative housing corporation.

Mortgage data means data obtained by the Director from the Enterprises under section 309(m) of the Fannie Mae Charter Act and section 307(e) of the Freddie Mac Act.

Mortgage purchase means a transaction in which an Enterprise bought or otherwise acquired a mortgage or an interest in a mortgage for portfolio, resale, or securitization.

Mortgage revenue bond means a tax-exempt bond or taxable bond issued by a State or local government or agency where the proceeds from the bond issue are used to finance residential housing.

Multifamily housing means a residence consisting of more than four dwelling units. The term includes cooperative buildings and condominium projects.

Non-metropolitan area means a county, or a portion of a county, including those counties that comprise Micropolitan Statistical Areas, located outside any metropolitan area, for which median incomes are determined by FHFA.

Owner-occupied housing means single-family housing in which a mortgagor resides, including two- to four-unit owner-occupied properties where one or more units are used for rental purposes.

Participation means a fractional interest in the principal amount of a mortgage.

Persistent poverty county, for purposes of subpart C of this part, means a county in a rural area that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the most recent successive decennial censuses.

Private label security means any mortgage-backed security that is neither issued nor guaranteed by Fannie Mae, Freddie Mac, Ginnie Mae, or any other government agency.

Proprietary information means all mortgage data and all AHAR information that the Enterprises submit to the Director in the AHARs that contain trade secrets or privileged or confidential, commercial, or financial information that, if released, would be likely to cause substantial competitive harm.

Public data means all mortgage data and all AHAR information that the Enterprises submit to the Director in the AHARs that the Director determines are not proprietary and may appropriately be disclosed consistent with other applicable laws and regulations.

Purchase money mortgage means a mortgage given to secure a loan used for the purchase of a single-family residential property.

Refinancing mortgage means a mortgage undertaken by a borrower that satisfies or replaces an existing mortgage of such borrower. The term does not include:

(i) A renewal of a single payment obligation with no change in the original terms;

(ii) A reduction in the annual percentage rate of the mortgage as computed under the Truth in Lending Act (15 U.S.C. 1601 *et seq.*), with a corresponding change in the payment schedule;

(iii) An agreement involving a court proceeding;

(iv) A workout agreement, in which a change in the payment schedule or collateral requirements is agreed to as a result of the mortgagor's default or delinquency, unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charges and premiums for the continuation of insurance;

(v) The renewal of optional insurance purchased by the mortgagor and added to an existing mortgage;

(vi) A renegotiated balloon mortgage on a multifamily property where the balloon payment was due within 1 year after the date of the closing of the renegotiated mortgage; and

(vii) A conversion of a balloon mortgage note on a single-family property to a fully amortizing mortgage note where the Enterprise already owns or has an interest in the balloon note at the time of the conversion.

Regulatory Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is designated as a Regulatory Activity in §§1282.33(c), 1282.34(d), or 1282.35(c).

Rent means the actual rent or average rent by unit size for a dwelling unit.

(i) Rent is determined based on the total combined rent for all bedrooms in the dwelling unit, including fees or charges for management and maintenance services and any utility charges that are included.

(A) Rent concessions shall not be considered, *i.e.*, the rent is not decreased by any rent concessions.

(B) Rent is net of rental subsidies, *i.e.*, the rent is decreased by any rental subsidy.

(ii) When the rent does not include all utilities, the rent shall also include:

(A) The actual cost of utilities not included in the rent;

(B) The nationwide average utility allowance, as issued periodically by FHFA;

(C) The utility allowance established under the HUD Section 8 Program (42 U.S.C. 1437f) for the area where the property is located; or

(D) The utility allowance for the area in which the property is located, as established by the state or local housing finance agency for determining the affordability of low-income housing tax credit properties under section 42 of the Internal Revenue Code (26 U.S.C. 42).

Rental unit means a dwelling unit that is not owner-occupied and is rented or available to rent.

Residence means a property where one or more families reside.

Resident-owned manufactured housing community, for purposes of subpart C of this part, means a manufactured housing community for which the terms and conditions of residency, policies, operations and management are controlled by at least 51 percent of the residents, either directly or through an entity formed under the laws of the state.

Residential economic diversity activity, for purposes of subpart C of this part, means an eligible Enterprise activity, other than an energy or water efficiency improvement activity or other activity that FHFA determines to be ineligible, in connection with mortgages on:

(i) Affordable housing in a high opportunity area; or

(ii) Mixed-income housing in an area of concentrated poverty.

Residential mortgage means a mortgage on single-family or multifamily housing.

Rural area, for purposes of subpart C of this part, means:

(i) A census tract outside of a metropolitan statistical area as designated by the Office of Management and Budget; or

(ii) A census tract in a metropolitan statistical area as designated by the Office of Management and Budget that is outside of the metropolitan statistical area's Urbanized Areas as designated by the U.S. Department of Agriculture's (USDA) Rural-Urban Commuting Area (RUCA) Code #1, and outside of tracts with a housing density of over 64 housing units per square mile for USDA's RUCA Code #2.

Seasoned mortgage means a mortgage on which the date of the mortgage note is more than 1 year before the Enterprise purchased the mortgage.

Second mortgage means any mortgage that has a lien position subordinate only to the lien of the first mortgage.

Secondary residence means a dwelling where the mortgagor maintains (or will maintain) a part-time place of abode and typically spends (or will spend) less than the majority of the calendar year. A person may have more than one secondary residence at a time.

Single-family housing means a residence consisting of one to four dwelling units. Single-family housing includes condominium dwelling units and dwelling units in cooperative housing projects.

Small financial institution, for purposes of subpart C of this part, means a financial institution with less than $304 million in assets.

Small multifamily property means any multifamily property with at least 5 dwelling units but no more than 50 dwelling units.

Small multifamily rental property, for purposes of subpart C of this part, means any property of 5 to 50 rental units.

Statutory Activity, for purposes of subpart C of this part, means an Enterprise activity relating to housing projects under the programs set forth in 12 U.S.C. 4565(a)(1)(B) and §1282.34(c).

Underserved Markets Plan, for purposes of subpart C of this part, means a plan prepared by an Enterprise describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets.

Utilities means charges for electricity, piped or bottled gas, water, sewage disposal, fuel (oil, coal, kerosene, wood, solar energy, or other), and garbage and trash collection. Utilities do not include charges for subscription-based television, telephone, or internet service.

Very low-income means:

(i) In the case of owner-occupied units, income not in excess of 50 percent of area median income; and

(ii) In the case of rental units, income not in excess of 50 percent of area median income, with adjustments for smaller and larger families in accordance with this part.

[75 FR 55930, Sept. 14, 2010, as amended at 78 FR 2328, Jan. 11, 2013; 80 FR 53430, Sept. 3, 2015; 81 FR 76300, Nov. 2, 2016; 81 FR 96292, Dec. 29, 2016; 83 FR 5899, Feb. 12, 2018]

EFFECTIVE DATE NOTE: At 86 FR 73657, Dec. 28, 2021, §1282.1 was amended by revising the definition of ''Designated disaster area'', effective Feb. 28, 2022. For the convenience of the user, the revised text is set forth as follows:

§1282.1 Definitions.

* * * * *

Designated disaster area means any census tract that is located in a county designated by the Federal Government as adversely affected by a declared major disaster administered by FEMA, where housing assistance payments were authorized by FEMA. A census tract shall be treated as a ''designated disaster area'' for purposes of this part beginning on the January 1 after the FEMA designation of the county, or such earlier date as determined by FHFA, and continuing through December 31 of the third full calendar year following the FEMA designation. This time period may be adjusted for a particular disaster area by notice from FHFA to the Enterprises.

Subpart B—Housing Goals

§1282.11 General.

(a) *General.* Pursuant to the requirements of the Safety and Soundness Act (12 U.S.C. 4561–4564, 4566), this subpart establishes:

(1) Three single-family owner-occupied purchase money mortgage housing goals, a single-family owner-occupied purchase money mortgage housing subgoal, a single-family refinancing mortgage housing goal, a multifamily special affordable housing goal, and two multifamily special affordable housing subgoals;

(2) Requirements for measuring performance under the goals; and

(3) Procedures for monitoring and enforcing the goals.

(b) *Annual goals.* Each housing goal shall be established by regulation no later than December 1 of the preceding year, except that any housing goal may be adjusted by regulation to reflect

subsequent available data and market developments.

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53430, Sept. 3, 2015]

§ 1282.12 Single-family housing goals.

(a) *Single-family housing goals.* An Enterprise shall be in compliance with a single-family housing goal if its performance under the housing goal meets or exceeds either:

(1) The share of the market that qualifies for the goal; or

(2) The benchmark level for the goal.

(b) *Size of market.* The size of the market for each goal shall be established annually by FHFA based on data reported pursuant to the Home Mortgage Disclosure Act for a given year. Unless otherwise adjusted by FHFA, the size of the market shall be determined based on the following criteria:

(1) Only owner-occupied, conventional loans shall be considered;

(2) Purchase money mortgages and refinancing mortgages shall only be counted for the applicable goal or goals;

(3) All mortgages flagged as HOEPA loans or subordinate lien loans shall be excluded;

(4) All mortgages with original principal balances above the conforming loan limits for single unit properties for the year being evaluated (rounded to the nearest $1,000) shall be excluded;

(5) All mortgages with rate spreads of 150 basis points or more above the applicable average prime offer rate as reported in the Home Mortgage Disclosure Act data shall be excluded; and

(6) All mortgages that are missing information necessary to determine appropriate counting under the housing goals shall be excluded.

(c) *Low-income families housing goal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that consists of mortgages for low-income families shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) The benchmark level, which for 2021 shall be 24 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(d) *Very low-income families housing goal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that consists of mortgages for very low-income families shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) The benchmark level, which for 2021 shall be 6 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(e) *Low-income areas housing goal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that consists of mortgages for families in low-income areas shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) A benchmark level which shall be set annually by FHFA notice based on the benchmark level for the low-income areas housing subgoal, plus an adjustment factor reflecting the additional incremental share of mortgages for moderate-income families in designated disaster areas in the most recent year for which such data is available.

(f) *Low-income areas housing subgoal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that consists of mortgages for families in low-income census tracts or for moderate-income families in minority census tracts shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) The benchmark level, which for 2021 shall be 14 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(g) *Refinancing housing goal.* The percentage share of each Enterprise's

total purchases of refinancing mortgages on owner-occupied single-family housing that consists of refinancing mortgages for low-income families shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) The benchmark level, which for 2021 shall be 21 percent of the total number of refinancing mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

[80 FR 53430, Sept. 3, 2015, as amended at 83 FR 5899, Feb. 12, 2018; 85 FR 82895, Dec. 21, 2020]

EFFECTIVE DATE NOTE: At 86 FR 73658, Dec. 28, 2021, §1282.12 was amended by revising paragraphs (c)(2), (d)(2), (e)(2), and (f), redesignating paragraph (g) as paragraph (h), adding new paragraph (g) and revising newly redesignated paragraph (h)(2), effective Feb. 28, 2022. For the convenience of the user, the added and revised text is set forth as follows:

§ 1282.12 Single-family housing goals.

* * * * *

(c) * * *

(2) The benchmark level, which for 2022, 2023, and 2024 shall be 28 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(d) * * *

(2) The benchmark level, which for 2022, 2023, and 2024 shall be 7 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(e) * * *

(2) A benchmark level which shall be set annually by FHFA notice based on the sum of the benchmark levels for the low-income census tracts housing subgoal and the minority census tracts housing subgoal, plus an adjustment factor reflecting the additional incremental share of mortgages for moderate-income families in designated disaster areas in the most recent year for which such data is available.

(f) *Low-income census tracts housing subgoal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that—

(1) Consists of:

(i) Mortgages in low-income census tracts that are not minority census tracts; and

(ii) Mortgages for families with incomes in excess of 100 percent of the area median income in low-income census tracts that are also minority census tracts;

(2) Shall meet or exceed either:

(i) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(ii) The benchmark level, which for 2022, 2023, and 2024 shall be 4 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(g) *Minority census tracts housing subgoal.* The percentage share of each Enterprise's total purchases of purchase money mortgages on owner-occupied single-family housing that consists of mortgages for moderate-income families in minority census tracts shall meet or exceed either:

(1) The share of such mortgages in the market as defined in paragraph (b) of this section in each year; or

(2) The benchmark level, which for 2022, 2023, and 2024 shall be 10 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(h) * * *

(2) The benchmark level, which for 2022, 2023, and 2024 shall be 26 percent of the total number of refinancing mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

§ 1282.13 Multifamily special affordable housing goal and subgoals.

(a) *Multifamily housing goal and subgoals.* An Enterprise shall be in compliance with a multifamily housing goal or subgoal if its performance under the housing goal or subgoal meets or exceeds the benchmark level for the goal or subgoal, respectively.

(b) *Multifamily low-income housing goal.* The benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to low-income families shall be at least 315,000 dwelling units affordable to low-income families in multifamily residential housing financed by mortgages purchased by the Enterprise for 2021.

(c) *Multifamily very low-income housing subgoal.* The benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to very low-income families shall be at least 60,000 dwelling units affordable to very low-income

families in multifamily residential housing financed by mortgages purchased by the Enterprise for 2021.

(d) *Small multifamily low-income housing subgoal.* The benchmark level for each Enterprise's purchases of mortgages on small multifamily properties affordable to low-income families shall be at least 10,000 dwelling units affordable to low-income families in small multifamily properties financed by mortgages purchased by the Enterprise for 2021.

[83 FR 5899, Feb. 12, 2018, as amended at 85 FR 82896, Dec. 21, 2020]

EFFECTIVE DATE NOTE: At 86 FR 73658, Dec. 28, 2021, §1282.13 was amended by revising paragraphs (b) through (d), effective Feb. 28, 2022. For the convenience of the user, the revised text is set forth as follows:

§ 1282.13 Multifamily special affordable housing goal and subgoals.

* * * * *

(b) *Multifamily low-income housing goal.* For the year 2022, the benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to low-income families shall be at least 415,000 dwelling units affordable to low-income families in multifamily residential housing financed by mortgages purchased by the Enterprise in 2022.

(c) *Multifamily very low-income housing subgoal.* For the year 2022, the benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to very low-income families shall be at least 88,000 dwelling units affordable to very low-income families in multifamily residential housing financed by mortgages purchased by the Enterprise in 2022.

(d) *Small multifamily low-income housing subgoal.* For the year 2022, the benchmark level for each Enterprise's purchases of mortgages on small multifamily properties affordable to low-income families shall be, for Freddie Mac, at least 23,000 dwelling units affordable to low-income families in small multifamily properties financed by mortgages purchased by that Enterprise in 2022, and for Fannie Mae, at least 17,000 such dwelling units.

§ 1282.14 Discretionary adjustment of housing goals.

(a) An Enterprise may petition the Director in writing during any year to reduce any goal or subgoal for that year.

(b) The Director shall seek public comment on any such petition for a period of 30 days.

(c) The Director shall make a determination regarding the petition within 30 days after the end of the public comment period. If the Director requests additional information from the Enterprise after the end of the public comment period, the Director may extend the period for a final determination for a single additional 15-day period.

(d) The Director may reduce a goal or subgoal pursuant to a petition for reduction only if:

(1) Market and economic conditions or the financial condition of the Enterprise require such a reduction; or

(2) Efforts to meet the goal or subgoal would result in the constraint of liquidity, over-investment in certain market segments, or other consequences contrary to the intent of the Safety and Soundness Act or the purposes of the Charter Acts (12 U.S.C. 1716; 12 U.S.C. 1451 note).

§ 1282.15 General counting requirements.

(a) *Calculating the numerator and denominator for single-family housing goals.* Performance under each of the single-family housing goals shall be measured using a fraction that is converted into a percentage. Neither the numerator nor the denominator shall include Enterprise transactions or activities that are not mortgage purchases as defined by FHFA or that are specifically excluded as ineligible under §1282.16(b).

(1) *The numerator.* The numerator of each fraction is the number of mortgage purchases of an Enterprise in a particular year that finance owner-occupied single-family properties that count toward achievement of a particular single-family housing goal.

(2) *The denominator.* The denominator of each fraction is the total number of mortgage purchases of an Enterprise in a particular year that finance owner-occupied single-family properties. A separate denominator shall be calculated for purchase money mortgages and for refinancing mortgages.

(b) *Counting owner-occupied units.* (1) Mortgage purchases financing owner-occupied single-family properties shall be evaluated based on the income of

the mortgagors and the area median income at the time the mortgage was originated. To determine whether mortgages may be counted under a particular family income level, *i.e.*, low- or very low-income, the income of the mortgagors is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under § 1282.17.

(2) Mortgage purchases financing owner-occupied single-family properties for which the income of the mortgagors is not available shall be included in the denominator for the single-family housing goals and subgoal, but such mortgages shall not be counted in the numerator of any single-family housing goal or subgoal.

(c) *Counting dwelling units for multifamily housing goal and subgoals.* Performance under the multifamily housing goal and subgoals shall be measured by counting the number of dwelling units that count toward achievement of a particular housing goal or subgoal in all multifamily properties financed by mortgages purchased by an Enterprise in a particular year. Only dwelling units that are financed by mortgage purchases, as defined by FHFA, and that are not specifically excluded as ineligible under § 1282.16(b), may be counted for purposes of the multifamily housing goal and subgoals.

(d) *Counting rental units*—(1) *Use of rent.* For purposes of counting rental units toward achievement of the multifamily housing goal and subgoals, mortgage purchases financing such units shall be evaluated based on rent and whether the rent is affordable to the income group targeted by the housing goal and subgoals. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

(2) *Affordability of rents based on housing program requirements.* Where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units. If using income, the maximum income level must be no greater than the maximum income level for each goal, adjusted for family or unit size as provided in § 1282.17 or § 1282.18, as appropriate. If using rent, the maximum rent level must be no greater than the maximum rent level for each goal, adjusted for unit size as provided in § 1282.19.

(3) *Unoccupied units.* Anticipated rent for unoccupied units may be the market rent for similar units in the neighborhood as determined by the lender or appraiser for underwriting purposes. A unit in a multifamily property that is unoccupied because it is being used as a model unit or rental office may be counted for purposes of the multifamily housing goal and subgoals only if an Enterprise determines that the number of such units is reasonable and minimal considering the size of the multifamily property.

(4) *Timeliness of information.* In evaluating affordability under the multifamily housing goal and subgoals, each Enterprise shall use tenant and rental information as of the time of mortgage acquisition.

(e) *Missing data or information for multifamily housing goal and subgoals.* (1) Rental units for which bedroom data are missing shall be considered efficiencies for purposes of calculating unit affordability.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a property securing a multifamily mortgage purchased by an Enterprise counts toward achievement of the multifamily housing goal or subgoals because rental data is not available, an Enterprise's performance with respect to such unit may be evaluated using estimated affordability information by multiplying the number of rental units with missing affordability information in properties securing multifamily mortgages purchased by the Enterprise in each census tract by the percentage of all rental dwelling units in the respective tracts that would count toward achievement of each goal and subgoal, as determined by FHFA.

(3) The estimation methodology in paragraph (e)(2) of this section may be

used up to a nationwide maximum of 5 percent of the total number of rental units in properties securing multifamily mortgages purchased by the Enterprise in the current year. Multifamily rental units in excess of this maximum, and any units for which estimation information is not available, shall not be counted for purposes of the multifamily housing goal and subgoals.

(f) *Credit toward multiple goals.* A mortgage purchase (or dwelling unit financed by such purchase) by an Enterprise in a particular year shall count toward the achievement of each housing goal for which such purchase (or dwelling unit) qualifies in that year.

(g) *Application of median income.* For purposes of determining an area's median income under §§1282.17 through 1282.19 and the definitions in §1282.1, the area is:

(1) The metropolitan area, if the property which is the subject of the mortgage is in a metropolitan area; and

(2) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(h) *Sampling not permitted.* Performance under the housing goals for each year shall be based on a complete tabulation of mortgage purchases (or dwelling units) for that year; a sampling of such purchases (or dwelling units) is not acceptable.

(i) *Newly available data.* When an Enterprise uses data to determine whether a mortgage purchase (or dwelling unit) counts toward achievement of any goal and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53431, Sept. 3, 2015; 83 FR 5899, Feb. 12, 2018]

EFFECTIVE DATE NOTE: At 86 FR 73658, Dec. 28, 2021, §1282.15 was amended by removing paragraph (i), effective Feb. 28, 2022.

§1282.16 Special counting requirements.

(a) *General.* FHFA shall determine whether an Enterprise shall receive full, partial, or no credit toward achievement of any of the housing goals for a transaction that otherwise qualifies under this part. In this determination, FHFA will consider whether a transaction or activity of the Enterprise is substantially equivalent to a mortgage purchase and either creates a new market or adds liquidity to an existing market, provided however that such mortgage purchase actually fulfills the Enterprise's purposes and is in accordance with its Charter Act.

(b) *Not counted.* The following transactions or activities shall not be counted for purposes of the housing goals and shall not be included in the numerator or the denominator in calculating either Enterprise's performance under the housing goals, even if the transaction or activity would otherwise be counted pursuant to paragraph (c) of this section:

(1) Equity investments in low-income housing tax credits;

(2) Purchases of State and local government housing bonds except as provided in paragraph (c)(8) of this section;

(3) Purchases of single-family non-conventional mortgages and multifamily non-conventional mortgages, except:

(i) Multifamily mortgages acquired under a risk-sharing arrangement with a Federal agency;

(ii) Multifamily mortgages under other multifamily mortgage programs involving Federal guarantees, insurance or other Federal obligation where FHFA determines in writing that the financing needs addressed by the particular mortgage program are not well served and that the mortgage purchases under such program should count under the housing goals;

(4) Commitments to buy mortgages at a later date or time;

(5) Options to acquire mortgages;

(6) Rights of first refusal to acquire mortgages;

(7) Any interests in mortgages that the Director determines, in writing, shall not be treated as interests in mortgages;

(8) Mortgage purchases to the extent they finance any dwelling units that are secondary residences;

(9) Single-family refinancing mortgages that result from conversion of

balloon notes to fully amortizing notes, if the Enterprise already owns or has an interest in the balloon note at the time conversion occurs;

(10) Purchases of subordinate lien mortgages (second mortgages);

(11) Purchases of mortgages or interests in mortgages that were previously counted by the Enterprise under any current or previous housing goal within the five years immediately preceding the current performance year;

(12) Purchases of mortgages where the property, or any units within the property, have not been approved for occupancy;

(13) Purchases of private label securities;

(14) Enterprise contributions to the Housing Trust Fund (12 U.S.C. 4568) or the Capital Magnet Fund (12 U.S.C. 4569), and mortgage purchases funded with such grant amounts; and

(15) Any combination of factors in paragraphs (b)(1) through (b)(14) of this section.

(c) *Other special rules.* Subject to FHFA's determination of whether an Enterprise shall receive full, partial, or no credit for a transaction toward achievement of any of the housing goals as provided in paragraph (a) of this section, the transactions and activities identified in this paragraph (c) shall be treated as mortgage purchases as described. A transaction or activity that is covered by more than one paragraph below must satisfy the requirements of each such paragraph. The mortgages (or dwelling units, for the multifamily housing goals) from each such transaction or activity shall be included in the denominator in calculating the Enterprise's performance under the housing goals, and shall be included in the numerator, as appropriate.

(1) *Credit enhancements.* (i) Mortgages (or dwelling units) financed under a credit enhancement entered into by an Enterprise shall be treated as mortgage purchases for purposes of the housing goals only when:

(A) The Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under a mortgage or mortgages financed by the issuance of housing bonds (such bonds may be issued by any entity, including a State or local housing finance agency); and

(B) The Enterprise assumes a credit risk in the transaction substantially equivalent to the risk that would have been assumed by the Enterprise if it had securitized the mortgages financed by such bonds.

(ii) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek approval from the Director for such activities to count toward achievement of the housing goals.

(2) [Reserved]

(3) *Risk-sharing.* Mortgages purchased under risk-sharing arrangements between an Enterprise and any Federal agency under which the Enterprise is responsible for a substantial amount of the risk shall be treated as mortgage purchases for purposes of the housing goals.

(4) *Participations.* Participations purchased by an Enterprise shall be treated as mortgage purchases for purposes of the housing goals only when the Enterprise's participation in the mortgage is 50 percent or more.

(5) *Cooperative housing and condominiums.* (i) The purchase of a mortgage on a cooperative housing unit (''a share loan'') or a mortgage on a condominium unit shall be treated as a mortgage purchase for purposes of the housing goals. Such a purchase shall be counted in the same manner as a mortgage purchase of single-family owner-occupied units.

(ii) The purchase of a blanket mortgage on a cooperative building or a mortgage on a condominium project shall be treated as a mortgage purchase for purposes of the housing goals. The purchase of a blanket mortgage on a cooperative building shall be counted in the same manner as a mortgage purchase of a multifamily rental property, except that affordability must be determined based solely on the comparable market rents used in underwriting the blanket loan. If the underwriting rents are not available, the loan shall not be treated as a mortgage purchase for purposes of the housing

goals. The purchase of a mortgage on a condominium project shall be counted in the same manner as a mortgage purchase of a multifamily rental property.

(iii) Where an Enterprise purchases both a blanket mortgage on a cooperative building and share loans for units in the same building, both the mortgage on the cooperative building and the share loans shall be treated as mortgage purchases for purposes of the housing goals. Where an Enterprise purchases both a mortgage on a condominium project and mortgages on individual dwelling units in the same project, both the mortgage on the condominium project and the mortgages on individual dwelling units shall be treated as mortgage purchases for purposes of the housing goals.

(6) *Seasoned mortgages.* An Enterprise's purchase of a seasoned mortgage shall be treated as a mortgage purchase for purposes of the housing goals, except where the Enterprise has already counted the mortgage under any current or previous housing goal within the five years immediately preceding the current performance year.

(7) *Purchase of refinancing mortgages.* The purchase of a refinancing mortgage by an Enterprise shall be treated as a mortgage purchase for purposes of the housing goals only if the refinancing is an arms-length transaction that is borrower-driven.

(8) *Mortgage revenue bonds.* The purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a State or local housing finance agency shall be treated as a purchase of the underlying mortgages for purposes of the housing goals only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities qualify for inclusion in the numerator for one or more housing goal.

(9) [Reserved]

(10) *Loan modifications.* An Enterprise's permanent modification, in accordance with the Making Home Affordable program announced on March 4, 2009, of a loan that is held in the Enterprise's portfolio or that is in a pool backing a security guaranteed by the Enterprise, shall be treated as a mortgage purchase for purposes of the housing goals. Each such permanent loan modification shall be counted in the same manner as a purchase of a refinancing mortgage.

(11)–(13) [Reserved]

(14) *Seller dissolution option.* (i) Mortgages acquired through transactions involving seller dissolution options shall be treated as mortgage purchases for purposes of the housing goals, only when:

(A) The terms of the transaction provide for a lockout period that prohibits the exercise of the dissolution option for at least one year from the date on which the transaction was entered into by the Enterprise and the seller of the mortgages; and

(B) The transaction is not dissolved during the one-year minimum lockout period.

(ii) The Director may grant an exception to the one-year minimum lockout period described in paragraphs (c)(14)(i)(A) and (B) of this section, in response to a written request from an Enterprise, if the Director determines that the transaction furthers the purposes of the Safety and Soundness Act and the Enterprise's Charter Act.

(iii) For purposes of this paragraph (c)(14), ''seller dissolution option'' means an option for a seller of mortgages to the Enterprises to dissolve or otherwise cancel a mortgage purchase agreement or loan sale.

(d) *HOEPA mortgages.* HOEPA mortgages shall be treated as mortgage purchases for purposes of the housing goals and shall be included in the denominator for each applicable single-family housing goal, but such mortgages shall not be counted in the numerator for any housing goal.

(e) *FHFA review of transactions.* FHFA may determine whether and how any transaction or class of transactions shall be counted for purposes of the housing goals, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any transaction or class of transactions under the housing goals. FHFA will make any such determinations available to the public on FHFA's Web site, *www.fhfa.gov*.

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53432, Sept. 3, 2015]

EFFECTIVE DATE NOTE: At 86 FR 73658, Dec. 28, 2021, §1282.16 was amended by removing and reserving paragraph (c)(10), effective Feb. 28, 2022.

§ 1282.17 Affordability—Income level definitions—family size and income known (owner-occupied units, actual tenants, and prospective tenants).

In determining whether a dwelling unit is affordable where income information (and family size, for rental units) is known to the Enterprise, the affordability of the unit shall be determined as follows:

(a) *Moderate-income* means:

(1) In the case of owner-occupied units, income not in excess of 100 percent of area median income; and

(2) In the case of rental units, where the income of actual or prospective tenants is available, income not in excess of the following percentages of area median income corresponding to the following family sizes:

Number of persons in family	Percentage of area median income
1	70
2	80
3	90
4	100
5 or more	*

*100% plus (8% multiplied by the number of persons in excess of 4).

(b) *Low-income (80%)* means:

(1) In the case of owner-occupied units, income not in excess of 80 percent of area median income; and

(2) In the case of rental units, where the income of actual or prospective tenants is available, income not in excess of the following percentages of area median income corresponding to the following family sizes:

Number of persons in family	Percentage of area median income
1	56
2	64
3	72
4	80
5 or more	*

*80% plus (6.4% multiplied by the number of persons in excess of 4).

(c) *Low-income (60%)* means:

(1) In the case of owner-occupied units, income not in excess of 60 percent of area median income; and

(2) In the case of rental units, where the income of actual or prospective tenants is available, income not in excess of the following percentages of area median income corresponding to the following family sizes:

Number of persons in family	Percentage of area median income
1	42
2	48
3	54
4	60
5 or more	*

*60% plus (4.8% multiplied by the number of persons in excess of 4).

(d) *Very low-income* means:

(1) In the case of owner-occupied units, income not in excess of 50 percent of area median income; and

(2) In the case of rental units, where the income of actual or prospective tenants is available, income not in excess of the following percentages of area median income corresponding to the following family sizes:

Number of persons in family	Percentage of area median income
1	35
2	40
3	45
4	50
5 or more	*

*50% plus (4.0% multiplied by the number of persons in excess of 4).

(e) *Extremely low-income* means:

(1) In the case of owner-occupied units, income not in excess of 30 percent of area median income; and

(2) In the case of rental units, where the income of actual or prospective tenants is available, income not in excess of the following percentages of area median income corresponding to the following family sizes:

Number of persons in family	Percentage of area median income
1	21
2	24
3	27
4	30

Number of persons in family	Percentage of area median income
5 or more	*

*30% plus (2.4% multiplied by the number of persons in excess of 4).

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53432, Sept. 3, 2015]

§ 1282.18 Affordability—Income level definitions—family size not known (actual or prospective tenants).

In determining whether a rental unit is affordable where family size is not known to the Enterprise, income will be adjusted using unit size, and affordability determined as follows:

(a) *For moderate-income*, the income of prospective tenants shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	70
1 bedroom	75
2 bedrooms	90
3 bedrooms or more	*

*104% plus (12% multiplied by the number of bedrooms in excess of 3).

(b) *For low-income (80%)*, income of prospective tenants shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	56
1 bedroom	60
2 bedrooms	72
3 bedrooms or more	*

*83.2% plus (9.6% multiplied by the number of bedrooms in excess of 3).

(c) *For low-income (60%)*, income of prospective tenants shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	42
1 bedroom	45
2 bedrooms	54
3 bedrooms or more	*

*62.4% plus (7.2% multiplied by the number of bedrooms in excess of 3).

(d) *For very low-income*, income of prospective tenants shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	35
1 bedroom	37.5
2 bedrooms	45
3 bedrooms or more	*

*52% plus (6.0% multiplied by the number of bedrooms in excess of 3).

(e) *For extremely low-income*, income of prospective tenants shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	21
1 bedroom	22.5
2 bedrooms	27
3 bedrooms or more	*

*31.2% plus (3.6% multiplied by the number of bedrooms in excess of 3).

§ 1282.19 Affordability—Rent level definitions—tenant income is not known.

For purposes of determining whether a rental unit is affordable where the income of the family in the dwelling unit is not known to the Enterprise, the affordability of the unit is determined based on unit size as follows:

(a) *For moderate-income*, maximum affordable rents to count as housing for moderate-income families shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	21
1 bedroom	22.5
2 bedrooms	27
3 bedrooms or more	*

*31.2% plus (3.6% multiplied by the number of bedrooms in excess of 3).

(b) *For low-income (80%)*, maximum affordable rents to count as housing for low-income (80%) families shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	16.8
1 bedroom	18
2 bedrooms	21.6
3 bedrooms or more	*

*24.96% plus (2.88% multiplied by the number of bedrooms in excess of 3).

(c) *For low-income (60%)*, maximum affordable rents to count as housing for low-income (60%) families shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	12.6
1 bedroom	13.5
2 bedrooms	16.2
3 bedrooms or more	*

*18.72% plus (2.16% multiplied by the number of bedrooms in excess of 3).

(d) *For very low-income*, maximum affordable rents to count as housing for very low-income families shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	10.5
1 bedroom	11.25
2 bedrooms	13.5
3 bedrooms or more	*

*15.6% plus (1.8% multiplied by the number of bedrooms in excess of 3).

(e) *For extremely low-income*, maximum affordable rents to count as housing for extremely low-income families shall not exceed the following percentages of area median income with adjustments, depending on unit size:

Unit size	Percentage of area median income
Efficiency	6.3
1 bedroom	6.75
2 bedrooms	8.1
3 bedrooms or more	*

*9.36% plus (1.08% multiplied by the number of bedrooms in excess of 3).

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53432, Sept. 3, 2015]

§ 1282.20 Determination of compliance with housing goals; notice of determination.

(a) *Single-family housing goals.* The Director shall evaluate each Enterprise's performance under the low-income families housing goal, the very low-income families housing goal, the low-income areas housing goal, the low-income areas housing subgoal, and the refinancing mortgages housing goal on an annual basis. If the Director determines that an Enterprise has failed, or there is a substantial probability that an Enterprise will fail, to meet a single-family housing goal established by this subpart, the Director shall notify the Enterprise in writing of such preliminary determination.

(b) *Multifamily housing goal and subgoals.* The Director shall evaluate each Enterprise's performance under the multifamily low-income housing goal, the multifamily very low-income housing subgoal, and the small multifamily low-income housing subgoal, on an annual basis. If the Director determines that an Enterprise has failed, or there is a substantial probability that an Enterprise will fail, to meet a multifamily housing goal or subgoal established by this subpart, the Director shall notify the Enterprise in writing of such preliminary determination.

(c) Any notification to an Enterprise of a preliminary determination under this section shall provide the Enterprise with an opportunity to respond in writing in accordance with the procedures at 12 U.S.C. 4566(b).

[75 FR 55930, Sept. 14, 2010, as amended at 80 FR 53433, Sept. 3, 2015]

§ 1282.21 Housing plans.

(a) *General.* If the Director determines that an Enterprise has failed, or there is a substantial probability that an Enterprise will fail, to meet any housing goal and that the achievement

of the housing goal was or is feasible, the Director may require the Enterprise to submit a housing plan for approval by the Director.

(b) *Nature of plan.* If the Director requires a housing plan, the housing plan shall:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Enterprise will take in a time period determined by the Director to improve the Enterprise's performance under the housing goal; and

(4) Address any additional matters relevant to the plan as required, in writing, by the Director.

(c) *Deadline for submission.* The Enterprise shall submit the housing plan to the Director within 45 days after issuance of a notice requiring the Enterprise to submit a housing plan. The Director may extend the deadline for submission of a plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) *Review of housing plans.* The Director shall review and approve or disapprove housing plans in accordance with 12 U.S.C. 4566(c)(4) and (c)(5).

(e) *Resubmission.* If the Director disapproves an initial housing plan submitted by an Enterprise, the Enterprise shall submit an amended plan acceptable to the Director not later than 15 days after the Director's disapproval of the initial plan; the Director may extend the deadline if the Director determines an extension is in the public interest. If the amended plan is not acceptable to the Director, the Director may afford the Enterprise 15 days to submit a new plan.

[75 FR 55930, Sept. 14, 2010, as amended at 83 FR 5899, Feb. 12, 2018]

Subpart C—Duty to Serve Underserved Markets

SOURCE: 81 FR 96294, Dec. 29, 2016, unless otherwise noted.

§ 1282.31 General.

(a) This subpart sets forth the Enterprise duty to serve three underserved markets as required by section 1335 of the Safety and Soundness Act (12 U.S.C. 4565). This subpart also establishes standards and procedures for annually evaluating and rating Enterprise compliance with the duty to serve underserved markets.

(b) Nothing in this subpart permits or requires an Enterprise to engage in any activity that would otherwise be inconsistent with its Charter Act or the Safety and Soundness Act.

§ 1282.32 Underserved Markets Plan.

(a) *General.* Each Enterprise must submit to FHFA an Underserved Markets Plan describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets. Plan activities and objectives may cover a single year or multiple years.

(b) *Term of Plan.* Each Enterprise's Plan must cover a period of three years.

(c) *Effective date of Plans.* Where an underserved market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(d) *Plan content.*—(1) *Consideration of minimum number of activities.* The Enterprises must consider and address in their Plans a minimum number of Statutory Activities or Regulatory Activities for each underserved market. The minimum number will be determined by FHFA and stated in the Evaluation Guidance as provided for in §1282.36(d). An Enterprise will select the specific Statutory Activities or Regulatory Activities to address in its Plan under this requirement. For the activities selected by the Enterprise, the Enterprise must address in its Plan either how it will undertake the activities and related objectives, or the reasons why it will not undertake the activities. The statutory programs in §1282.34(c)(5) and (c)(6) are excluded for this purpose.

(2) *Additional Activities.* An Enterprise may also include in its Plan Additional Activities eligible to serve an underserved market. For the Additional Activities included by the Enterprise, the Enterprise must address in its Plan how it will undertake the activities and related objectives.

(3) *Residential economic diversity activities.* If an Enterprises chooses to undertake a residential economic diversity activity for extra credit under § 1282.36(c)(3), the Enterprise must describe the activity and related objectives in its Plan.

(e) *Objectives.* Each Statutory Activity, Regulatory Activity, and Additional Activity in an Enterprise's Plan must comprise one or more objectives, which are the specific action items that the Enterprises will identify for each activity. Each objective must meet all of the following requirements:

(1) *Strategic.* Directly or indirectly maintain or increase liquidity to an underserved market;

(2) *Measurable.* Provide measurable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;

(3) *Realistic.* Be calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;

(4) *Time-bound.* Be subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and

(5) *Tied to analysis of market opportunities.* Be based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

(f) *Evaluation areas.* Each Plan objective must meet at least one of the evaluation areas set forth in § 1282.36(b). An Enterprise must designate in its Plan the one evaluation area under which each Plan objective will be evaluated.

(g) *Plan procedures.*—(1) *Submission of proposed Plans.*—(i) *First proposed Plan.* An Enterprise's first proposed Plan must be submitted to FHFA within 90 days after FHFA posts the proposed Evaluation Guidance on FHFA's Web site pursuant to § 1282.36(d)(3).

(ii) *Subsequent proposed Plans.* For subsequent proposed Plans after the first Plan, FHFA will provide timelines 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary, for proposed Plan submission, public input periods, and Non-Objection to an underserved market in a Plan. Unless otherwise directed by FHFA, each Enterprise must submit a proposed Plan to FHFA at least 210 days before the termination date of the Enterprise's Plan in effect.

(2) *Posting of proposed Plans.* As soon as practical after an Enterprise submits its proposed Plan to FHFA for review, FHFA will post the proposed Plan on FHFA's Web site, with any confidential and proprietary data and information omitted.

(3) *Public input.*—(i) For the first proposed Plans, the public will have 60 days from the date the proposed Plans are posted on FHFA's Web site to provide input on the proposed Plans.

(ii) The Enterprises' subsequent proposed Plans will be available for public input pursuant to the timeframe and procedures established by FHFA.

(4) *Enterprise review.* Each Enterprise may, in its discretion, make revisions to its proposed Plan based on the public input.

(5) *FHFA review.*—(i) *FHFA review of first proposed Plans.* FHFA will review each Enterprise's first proposed Plan and inform the Enterprise of any FHFA comments on the proposed Plan within 60 days from the end of the public input period on the proposed Plan, or such additional time as may be necessary. The Enterprise must address FHFA's comments, as appropriate, through revisions to its proposed Plan pursuant to the timeframe and procedures established by FHFA.

(ii) *FHFA review of subsequent proposed Plans.* For subsequent proposed Plans after the first proposed Plans, FHFA will establish a timeframe and procedures for FHFA review, comments, and any required Enterprise revisions.

(iii) *Designation of Statutory Activity or Regulatory Activity.* FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory Activity

or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in a proposed Plan.

(iv) *FHFA Non-Objections to underserved markets in a proposed Plan.* After FHFA is satisfied that all of its comments on an underserved market in a proposed Plan have been addressed, FHFA will issue a Non-Objection for that underserved market in the Plan.

(6) *Effective date of an underserved market in a Plan.* Where an underserved market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(7) *Posting of an underserved market section in a Plan.* As soon as practicable after FHFA issues a Non-Objection to an underserved market in a Plan, that section of the Plan will be posted on the Enterprise's and FHFA's respective Web sites, with any confidential and proprietary data and information omitted.

(h) *Modification of a Plan.* At any time after implementation of a Plan, an Enterprise may request to modify its Plan during the three-year term, subject to FHFA Non-Objection of the proposed modifications. FHFA may also require an Enterprise to modify its Plan during the three-year term. FHFA and the Enterprise may seek public input on proposed modifications to a Plan if FHFA determines that public input would assist its consideration of the proposed modifications. If a Plan is modified, the modified Plan, with any confidential and proprietary information and data omitted, will be posted on the Enterprise's and FHFA's respective Web sites.

§ 1282.33 Manufactured housing market.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on manufactured homes for very low-, low-, and moderate-income families. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of manufactured homes titled as real property or personal property; and manufactured housing communities.

(c) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the manufactured housing market:

(1) *Manufactured homes titled as real property.* Mortgages on manufactured homes titled as real property;

(2) *Chattel.* Loans on manufactured homes titled as personal property, including both pilot and ongoing initiatives;

(3) *Manufactured housing communities owned by a governmental entity, nonprofit organization, or residents.* Mortgages on manufactured housing communities that are owned by a governmental unit or instrumentality, a nonprofit organization, or residents; and

(4) *Manufactured housing communities with certain pad lease protections.* Manufactured housing communities with pad leases that have the following pad lease protections at a minimum, or manufactured housing communities that are subject to state or local laws requiring pad lease protections that equal or exceed the following pad lease protections:

(i) One-year renewable lease term unless there is good cause for nonrenewal;

(ii) Thirty-day written notice of rent increases;

(iii) Five-day grace period for rent payments and right to cure defaults on rent payments;

(iv) Tenant has the right to sell the manufactured home without having to first relocate it out of the community;

(v) Tenant has the right to sublease or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint;

(vi) Tenant has the right to post ''For Sale'' signs;

(vii) Tenant has the right to sell the manufactured home in place within a reasonable time period after eviction by the manufactured housing community owner; and

(viii) Tenant has the right to receive at least 60 days advance notice of a planned sale or closure of the manufactured housing community.

(d) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the manufactured housing market consistent with paragraph (b) of this section, subject to FHFA determination of whether the Additional Activity is eligible to receive duty to serve credit.

§ 1282.34 Affordable housing preservation market.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families under eligible housing programs or activities. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the affordable housing preservation market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

(c) *Statutory Activities.* Enterprise activities related to housing projects under the following programs in the Safety and Soundness Act (12 U.S.C. 4565(a)(1)(B)) are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) *Section 8.* The project-based and tenant-based rental assistance housing programs under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. 1437f;

(2) *Section 236.* The rental and cooperative housing program for lower income families under section 236 of the National Housing Act, 12 U.S.C. 1715z–1;

(3) *Section 221(d)(4).* The housing program for moderate-income and displaced families under section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715l;

(4) *Section 202.* The supportive housing program for the elderly under section 202 of the Housing Act of 1959, 12 U.S.C. 1701q;

(5) *Section 811.* The supportive housing program for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 8013;

(6) *McKinney-Vento Homeless Assistance.* Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11361, *et seq.;*

(7) *Section 515.* The rural rental housing program under section 515 of the Housing Act of 1949, 42 U.S.C. 1485;

(8) *Low-income housing tax credits.* Low-income housing tax credits under section 42 of the Internal Revenue Code of 1986, 26 U.S.C. 42; and

(9) *Other comparable state or local affordable housing programs.* Other comparable affordable housing programs administered by a state or local government that preserve housing affordable to very low-, low-, and moderate-income families. An Enterprise may include in its Plan statutory programs pursuant to this paragraph (c)(9), subject to FHFA determination that the program is comparable to one of the statutory programs in this paragraph (c) in the way it provides subsidy and preserves affordable housing for the income-eligible households.

(d) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) *Financing of small multifamily rental properties.* Financing of small multifamily rental properties by a community development financial institution,

insured depository institution, or federally insured credit union, where the entity's total assets are $10 billion or less;

(2) *Energy or water efficiency improvements on multifamily rental properties.* Energy or water efficiency improvements on multifamily rental properties provided there are projections made based on credible and generally accepted standards that the improvements financed by the loan will reduce energy or water consumption by the tenant or the property by at least 15 percent, and the energy or water savings generated over an improvement's expected life will exceed the cost of installation;

(3) *Energy or water efficiency improvements on single-family, first lien properties.* Energy or water efficiency improvements on single-family, first-lien properties, provided there are projections made based on credible and generally accepted standards that the improvements financed by the loan will reduce energy or water consumption by the homeowner, the tenant, or the property by at least 15 percent, and the utility savings generated over an improvement's expected life will exceed the cost of installation;

(4) *Shared equity programs for affordable homeownership preservation.*—(i) Affordable homeownership preservation through one of the following shared equity homeownership programs:

(A) Resale restriction programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities; or

(B) Shared appreciation loan programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities that may or may not partner with a for-profit institution to invest in, originate, sell, or service shared appreciation loans.

(ii) A program in paragraph (d)(4)(i) must:

(A) Provide homeownership opportunities to very low-, low-, or moderate-income households;

(B) Utilize a ground lease, deed restriction, subordinate loan, or similar legal mechanism that includes provisions stating that the program will keep the home affordable for subsequent very low-, low-, or moderate-income families, the affordability term is at least 30 years after recordation, a resale formula applies that limits the homeowner's proceeds upon resale, and the program administrator or its assignee has a preemptive option to purchase the homeownership unit from the homeowner at resale; and

(C) Support homebuyers and homeowners to promote sustainable homeownership, including reviewing and pre-approving refinances and home equity lines of credit.

(5) *HUD Choice Neighborhoods Initiative.* The HUD Choice Neighborhoods Initiative, as authorized by 42 U.S.C. 1437v;

(6) *HUD Rental Assistance Demonstration program.* The HUD Rental Assistance Demonstration program, as authorized by 42 U.S.C.1437f note; and

(7) *Purchase or rehabilitation of certain distressed properties.* Lending programs for the purchase or rehabilitation by very low-, low-, or moderate-income families, or by nonprofit organizations or local or tribal governments serving such families, of homes eligible for short sale, homes eligible for foreclosure sale, or properties that a lender acquires as a result of foreclosure.

(e) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the affordable housing preservation market consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.35 Rural markets.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on housing for very low-, low-, and moderate-income families in rural areas. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the rural market are activities that facilitate a secondary market for mortgages on residential properties for very low-

,low-, or moderate-income families in rural areas.

(c) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the rural market:

(1) *High-needs rural regions.* Housing in high-needs rural regions;

(2) *High-needs rural populations.* Housing for high-needs rural populations;

(3) *Financing by small financial institutions of rural housing.* Financing by a small financial institution of housing in a rural area; and

(4) *Small multifamily rental properties in rural areas.* Small multifamily rental properties that are located in a rural area.

(d) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in rural areas consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.36 Evaluations, ratings, and Evaluation Guidance.

(a) *Evaluation of compliance.* In determining whether an Enterprise has complied with the duty to serve each underserved market, FHFA will annually evaluate and rate the Enterprise's duty to serve performance based on the Enterprise's implementation of its Underserved Markets Plan during the relevant evaluation year. FHFA's evaluation will be in accordance with separate, FHFA-prepared Evaluation Guidance as provided for in paragraph (d) of this section.

(b) *Evaluation areas.* As provided in § 1282.32(f), an Enterprise must specify in its Plan the evaluation area under which each Plan objective will be evaluated. FHFA will evaluate an Enterprise's performance of each of its Plan objectives under one of the following four evaluation areas, as designated by the Enterprise in its Plan:

(1) *Outreach.* The extent of the Enterprise's outreach to qualified loan sellers and other market participants in each underserved market;

(2) *Loan product.* The Enterprise's development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing in each underserved market;

(3) *Loan purchase.* The volume of loan purchases by the Enterprise in each underserved market relative to the market opportunities available to the Enterprise; and

(4) *Investments and grants.* The amount of the Enterprise's investments and grants in projects that assist in meeting the needs of each underserved market.

(c) *Evaluation process.* At the end of each evaluation year, FHFA will evaluate each Enterprise's performance under its Plan based on quantitative and qualitative assessments of the Enterprise's accomplishment of the objectives for the activities under each underserved market in its Plan. Following the quantitative and qualitative assessments, FHFA may provide extra credit for extra credit-eligible residential economic diversity activities in an underserved market in a Plan, and for other extra credit-eligible activities in an underserved market in a Plan as may be designated by FHFA in the Evaluation Guidance.

(1) *Quantitative assessment.* FHFA will conduct a quantitative assessment which will evaluate the level of an Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the level of accomplishment needed for the objectives in order to receive a passing rating for compliance with the Duty to Serve an underserved market in a Plan, as established by FHFA in the Evaluation Guidance. At the conclusion of the quantitative assessment for an underserved market in a Plan, FHFA will determine whether an Enterprise has passed or failed the required level of accomplishment.

(2) *Qualitative assessment.* FHFA will conduct a qualitative assessment which will evaluate the Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(3) *Extra credit-eligible activities.* FHFA may provide extra credit for extra credit-eligible residential economic diversity activities included in an underserved market in a Plan, and for other extra credit-eligible activities included in an underserved market in a Plan, where such other activities are designated by FHFA in the Evaluation Guidance. FHFA will conduct its assessment of an Enterprise's accomplishment of activities that are eligible for extra credit based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(4) *Ratings.*—(i) *Assignment of ratings.* Based on the quantitative, qualitative and extra credit assessments, FHFA will assign a rating of Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails to the Enterprise's performance for each underserved market in its Plan. A rating of Exceeds, High Satisfactory, Low Satisfactory, or Minimally Passing will constitute compliance by the Enterprise with the duty to serve that underserved market. A rating of Fails will constitute noncompliance by the Enterprise with the duty to serve that underserved market.

(ii) *Ongoing Assessment of Evaluation and Rating Process.* FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the evaluation and rating process.

(d) *Evaluation Guidance.*—(1) *Three-year term.* FHFA will prepare Evaluation Guidance for use by both Enterprises for a three-year term.

(2) *Contents.* The Evaluation Guidance will include the information required under this subpart, as well as additional guidance on Enterprise Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit, how final ratings will be determined, and other matters as may be appropriate.

(3) *Timelines for Evaluation Guidance.*—(i) *For the first Plan.*—(A) FHFA will provide to the Enterprises the proposed Evaluation Guidance for the first Plan within 30 days after the posting of this subpart on FHFA's Web site. FHFA will post the proposed Evaluation Guidance on FHFA's Web site as soon as practicable after providing it to the Enterprises.

(B) The proposed Evaluation Guidance will be available for public input for a period of 120 days following its posting on FHFA's Web site.

(C) FHFA will provide the Evaluation Guidance to the Enterprises no later than the time FHFA provides comments to the Enterprises on their proposed Plans.

(ii) *For subsequent Plans.* FHFA will provide timelines for the Evaluation Guidance for subsequent Plans after the first Plan, including public input periods, 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary.

(4) *Posting of Evaluation Guidance.* The final Evaluation Guidance will be posted on the Enterprises' and FHFA's respective Web sites as soon as practicable after the Evaluation Guidance is finalized.

(5) *Modification of Evaluation Guidance.* From time to time, FHFA may modify the Evaluation Guidance prior to or during the Evaluation Guidance's three-year term. FHFA may seek public input on proposed modifications to the Evaluation Guidance if FHFA determines that public input would assist its consideration of the proposed modifications. Modified Evaluation Guidance will be effective on January 1 of the year after the modified Evaluation Guidance is posted. FHFA will post the modified Evaluation Guidance on FHFA's Web site as soon as practicable after modified.

§ 1282.37 General requirements for credit.

(a) *General.* FHFA will determine whether an activity included in an Enterprise's Underserved Markets Plan will receive duty to serve credit or extra credit under an underserved market in the Plan. In this determination, FHFA will consider whether the activity facilitates a secondary market for financing mortgages: On manufactured

homes for very low-, low-, and moderate-income families; to preserve housing affordable to very low-, low-, and moderate-income families; and on housing for very low-, low-, and moderate-income families in rural areas. If FHFA determines that an activity will receive duty to serve credit or extra credit under an underserved market in the Plan, the activity will receive such credit under the relevant evaluation area for each underserved market it serves.

(b) *No credit under any evaluation area.* Enterprise activities related to the following are not eligible to receive duty to serve credit under any evaluation area under an underserved market, even if the activity otherwise would receive credit under any other section of this subpart, except as provided in this section:

(1) Contributions to the Housing Trust Fund (12 U.S.C. 4568) and the Capital Magnet Fund (12 U.S.C. 4569), and mortgage purchases funded with such grant amounts;

(2) HOEPA mortgages;

(3) Subordinate liens on multifamily properties, except for subordinate liens originated for energy or water efficiency improvements on multifamily rental properties that meet the requirements in § 1282.34(d)(2);

(4) Subordinate liens on single-family properties, except for shared appreciation loans that satisfy all of the requirements in § 1282.34(d)(4) of this part;

(5) Low-Income Housing Tax Credit equity investments in a property, except where the property is located in a rural area;

(6) Permanent construction take-out loans and Additional Activities under the affordable housing preservation market, except as provided in paragraph (c) of this section; and

(7) Any combination of factors in paragraphs (b)(1) through (b)(6) of this section.

(c) *Credit for certain permanent construction take-out loans and Additional Activities under the affordable housing preservation market.* Enterprise activities related to permanent construction take-out loans and Additional Activities under the affordable housing preservation market are eligible for duty to serve credit, provided the following requirements are met, as applicable:

(1) *Permanent construction take-out loans.*—(i) The permanent construction take-out loans preserve existing subsidies on affordable housing with regulatory periods of required affordability that are at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved; or

(ii) The permanent construction take-out loans are for housing developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements under § 1282.34(d)(4), and where there is a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program.

(2) *Additional Activities.* Additional Activities that either:

(i) Involve preserving existing subsidy where the term of affordability required for the subsidy is followed, or where there is a deed restriction for affordability for the life of the loan; or

(ii) Involve preserving the affordability of properties in conjunction with state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program.

(d) *No credit under loan purchase evaluation area.* The following activities are not eligible to receive duty to serve credit under the loan purchase evaluation area, even if the activity otherwise would receive duty to serve credit under § 1282.38:

(1) Purchases of mortgages to the extent they finance any dwelling units that are secondary residences;

(2) Single-family refinancing mortgages that result from conversion of

balloon notes to fully amortizing notes, if the Enterprise already owns or has an interest in the balloon note at the time conversion occurs;

(3) Purchases of mortgages or interests in mortgages that previously received credit under any underserved market within the five years immediately preceding the current performance year;

(4) Purchases of mortgages where the property or any units within the property have not been approved for occupancy;

(5) Any interests in mortgages that FHFA determines will not be treated as interests in mortgages;

(6) Purchases of state and local government housing bonds except as provided in §1282.39(h); and

(7) Any combination of factors in paragraphs (d)(1) through (d)(6) of this section.

(e) *FHFA review of activities or objectives.* FHFA may determine whether and how any activity or objective will receive duty to serve credit under an underserved market in a Plan, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity or objective. FHFA will make any such determinations available to the public on FHFA's Web site.

(f) *The year in which an activity or objective will receive credit.* An activity or objective that FHFA determines will receive duty to serve credit under an underserved market in a Plan will receive such credit in the year in which the activity or objective is completed. FHFA may determine that credit is appropriate for an activity or objective in which an Enterprise engages, but does not complete, in a particular year, except that activities or objectives under the loan purchase evaluation area will receive credit in the year in which the Enterprise purchased the mortgage.

(g) *Credit under one evaluation area.* An activity or objective will receive duty to serve credit under only one evaluation area in a particular underserved market.

(h) *Credit under multiple underserved markets.* An activity or objective, including financing of dwelling units by an Enterprise's mortgage purchase, will receive duty to serve credit under each underserved market for which the activity or objective qualifies in that year.

§1282.38 General requirements for loan purchases.

(a) *General.* This section applies to Enterprise mortgage purchases that may receive duty to serve credit under the loan purchase evaluation area for a particular underserved market in a Plan. Only dwelling units securing a mortgage purchased by the Enterprise in that year and not specifically excluded under §1282.37(b) and (d) may receive credit.

(b) *Counting dwelling units.* Performance under the loan purchase evaluation area will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

(c) *Credit for owner-occupied units.*—(1) Mortgage purchases financing owner-occupied single-family properties will be evaluated based on the income of the mortgagor(s) and the area median income at the time the mortgage was originated. To determine whether mortgages may receive duty to serve credit under a particular family income level, *i.e.*, very low-, low-, or moderate-income, the income of the mortgagor(s) is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under §1282.17.

(2) Mortgage purchases financing owner-occupied single-family properties for which the income of the mortgagor(s) is not available will not receive duty to serve credit under the loan purchase evaluation area.

(d) *Credit for rental units.*—(1) *Use of rent.* For Enterprise mortgage purchases financing single-family rental units and multifamily rental units, affordability is determined based on rent and whether the rent is affordable to the income groups targeted by the duty to serve. A rent is affordable if the rent does not exceed the maximum levels as provided in §1282.19.

(2) *Affordability of rents based on housing program requirements.* Where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum

permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units. If using income, the maximum income level must be no greater than the maximum income level for each income group targeted by the duty to serve, adjusted for family or unit size as provided in § 1282.17 or § 1282.18, as appropriate. If using rent, the maximum rent level must be no greater than the maximum rent level for each income group targeted by the duty to serve, adjusted for unit size as provided in § 1282.19.

(3) *Unoccupied units.* Anticipated rent for unoccupied units may be the market rent for similar units in the neighborhood as determined by the lender or appraiser for underwriting purposes. A unit in a multifamily property that is unoccupied because it is being used as a model unit or rental office may receive duty to serve credit only if the Enterprise determines that the number of such units is reasonable and minimal considering the size of the multifamily property.

(4) *Timeliness of information.* In evaluating affordability for single-family rental properties, an Enterprise must use tenant income and area median income available at the time the mortgage was originated. For multifamily rental properties, the Enterprise must use tenant income and area median income available at the time the mortgage was acquired.

(e) *Missing data or information for rental units.*—(1) When calculating unit affordability, rental units for which bedroom data are missing will be considered efficiencies.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a single-family or multifamily property securing a mortgage purchased by the Enterprise receives duty to serve credit under the loan purchase evaluation area because rental data are not available, the Enterprise's performance with respect to such unit may be evaluated using estimated affordability information, except that an Enterprise may not estimate affordability of rental units for purposes of receiving extra credit for residential economic diversity activities. The estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA.

(f) *Affordability of manufactured housing communities.* For an Enterprise purchase of a blanket loan on a manufactured housing community, unless otherwise determined by FHFA, the affordability of the homes in the community shall be determined using one of the methodologies in paragraphs (f)(1) or (f)(2) of this section, as applicable, except that for purposes of determining extra credit for residential economic diversity activities or objectives, the methodology in paragraph (f)(2) of this section may not be used.

(1) *Methodology for government-, nonprofit- or resident-owned manufactured housing communities.* For a manufactured housing community owned by a government unit or instrumentality, a nonprofit organization, or the residents, if laws or regulations governing the affordability of the community, or the community's or ownership entity's founding, chartering, governing, or financing documents, require that a certain number or percentage of the community's homes be affordable consistent with paragraph (d)(1) of this section, then any homes subject to such affordability restriction are treated as affordable.

(2) *Census tract methodology for any type of manufactured housing community.* For any type of manufactured housing community, except for purposes of determining extra credit for residential economic diversity activities or objectives, the affordability of the homes in the community is determined as follows:

(i) If the median income of the census tract in which the manufactured housing community is located is less than or equal to the area median income,

then all homes in the community are treated as affordable;

(ii) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, then the number of homes that are treated as affordable is determined by dividing the area median income by the median income of the census tract in which the community is located and multiplying the resulting ratio by the total number of homes in the community.

(g) *Application of median income.*—(1) To determine an area's median income under §§ 1282.17 through 1282.19 and the definitions in § 1282.1, the area is:

(i) The metropolitan area, if the property which is the subject of the mortgage is in a metropolitan area; and

(ii) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(2) When an Enterprise cannot precisely determine whether a mortgage is on dwelling unit(s) located in one area, the Enterprise must determine the median income for the split area in the manner prescribed by the Federal Financial Institutions Examination Council for reporting under the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*), if the Enterprise can determine that the mortgage is on dwelling unit(s) located in:

(i) A census tract; or

(ii) A census place code.

(h) *Newly available data.* When an Enterprise uses data to determine whether a dwelling unit may receive duty to serve credit under the loan purchase evaluation area and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

§ 1282.39 Special requirements for loan purchases.

(a) *General.* Subject to FHFA's determination of whether an activity or objective will receive duty to serve credit under a particular underserved market, the activities or objectives identified in this section will be treated as mortgage purchases as described and receive credit under the loan purchase evaluation area. An activity or objective that is covered by more than one paragraph below must satisfy the requirements of each such paragraph.

(b) *Credit enhancements.*—(1) Dwelling units financed under a credit enhancement entered into by an Enterprise will be treated as mortgage purchases only when:

(i) The Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under a mortgage or mortgages financed by the issuance of housing bonds (such bonds may be issued by any entity, including a State or local housing finance agency); and

(ii) The Enterprise assumes a credit risk in the transaction substantially equivalent to the risk that would have been assumed by the Enterprise if it had securitized the mortgages financed by such bonds.

(2) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek approval from the Director for such transactions to receive credit under the loan purchase evaluation area for a particular underserved market.

(c) *Risk-sharing.* Mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount of the risk will be treated as mortgage purchases.

(d) *Participations.* Participations purchased by an Enterprise will be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent or more.

(e) *Cooperative housing and condominiums.*—(1) The purchase of a mortgage on a cooperative housing unit (''a share loan'') or a mortgage on a condominium unit will be treated as a mortgage purchase. Such a purchase will receive duty to serve credit in the same manner as a mortgage purchase of single-family owner-occupied units, *i.e.*, affordability is based on the income of the mortgagor(s).

(2) The purchase of a blanket mortgage on a cooperative building or a mortgage on a condominium project will be treated as a mortgage purchase. The purchase of a blanket mortgage on a cooperative building will receive duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property, except that affordability must be determined based solely on the comparable market rents used in underwriting the blanket loan. If the underwriting rents are not available, the loan will not be treated as a mortgage purchase. The purchase of a mortgage on a condominium project will receive duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property.

(3) Where an Enterprise purchases both a blanket mortgage on a cooperative building and share loans for units in the same building, both the mortgage on the cooperative building and the share loans will be treated as mortgage purchases. Where an Enterprise purchases both a mortgage on a condominium project and mortgages on individual dwelling units in the same project, both the mortgage on the condominium project and the mortgages on individual dwelling units will be treated as mortgage purchases.

(f) *Seasoned mortgages.* An Enterprise's purchase of a seasoned mortgage will be treated as a mortgage purchase.

(g) *Purchase of refinancing mortgages.* The purchase of a refinancing mortgage by an Enterprise will be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

(h) *Mortgage revenue bonds.* The purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a state or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

(i) *Seller dissolution option.*—(1) Mortgages acquired through transactions involving seller dissolution options will be treated as mortgage purchases only when:

(i) The terms of the transaction provide for a lockout period that prohibits the exercise of the dissolution option for at least one year from the date on which the transaction was entered into by the Enterprise and the seller of the mortgages; and

(ii) The transaction is not dissolved during the one-year minimum lockout period.

(2) FHFA may grant an exception to the one-year minimum lockout period described in paragraphs (i)(1)(i) and (i)(1)(ii) of this section, in response to a written request from an Enterprise, if FHFA determines that the transaction furthers the purposes of the Enterprise's Charter Act and the Safety and Soundness Act.

(3) For purposes of paragraph (i) of this section, ''seller dissolution option'' means an option for a seller of mortgages to the Enterprises to dissolve or otherwise cancel a mortgage purchase agreement or loan sale.

§ 1282.40 Failure to comply.

If the Director determines that an Enterprise has not complied with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year and the Director determines that such compliance is or was feasible, the Director will follow the procedures in 12 U.S.C. 4566(b).

§ 1282.41 Housing plans.

(a) *General.* If the Director determines that an Enterprise did not comply with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year, the Director may require the Enterprise to submit a housing plan for approval by the Director.

(b) *Nature of housing plan.* If the Director requires a housing plan, the housing plan must:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Enterprise will take:

(i) To comply with the duty to serve a particular underserved market for the next calendar year; or

(ii) To make such improvements and changes in its operations as are reasonable in the remainder of the year, if the Director determines that there is a substantial probability that the Enterprise will fail to comply with the duty to serve a particular underserved market in such year; and

(4) Address any additional matters relevant to the housing plan as required, in writing, by the Director.

(c) *Deadline for submission.* The Enterprise must submit the housing plan to the Director within 45 days after issuance of a notice requiring the Enterprise to submit a housing plan. The Director may extend the deadline for submission of a housing plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) *Review of housing plans.* The Director will review and approve or disapprove housing plans in accordance with 12 U.S.C. 4566(c)(4) and (c)(5).

(e) *Resubmission.* If the Director disapproves an initial housing plan submitted by an Enterprise, the Enterprise must submit an amended housing plan acceptable to the Director not later than 15 days after the Director's disapproval of the initial housing plan. The Director may extend the deadline if the Director determines that an extension is in the public interest. If the amended housing plan is not acceptable to the Director, the Director may afford the Enterprise 15 days to submit a new housing plan.

Subpart D—Reporting Requirements

§ 1282.61 General.

This subpart establishes data submission and reporting requirements to carry out the requirements of the Enterprises' Charter Acts and the Safety and Soundness Act.

§ 1282.62 Mortgage reports.

(a) *Loan-level data elements.* To implement the data collection and submission requirements for mortgage data, and to assist the Director in monitoring the Enterprises' housing goal activities, each Enterprise shall collect and compile computerized loan-level data on each mortgage purchased in accordance with 12 U.S.C. 1456(e) and 1723a(m). The Director may, from time to time, issue a list entitled ''Required Loan-level Data Elements'' specifying the loan-level data elements to be collected and maintained by the Enterprises and provided to the Director. The Director may revise the list by written notice to the Enterprises.

(b) *Quarterly Mortgage Reports.* Each Enterprise shall submit to the Director a quarterly Mortgage Report. The fourth quarter Mortgage Report shall serve as the Annual Mortgage Report and shall be designated as such. Each Mortgage Report shall include:

(1) Aggregations of the loan-level mortgage data compiled by the Enterprise under paragraph (a) of this section for year-to-date mortgage purchases, in the format specified in writing by the Director;

(2) Year-to-date dollar volume, number of units, and number of mortgages on owner-occupied and rental properties purchased by the Enterprise that do, and do not, qualify under each housing goal as set forth in this part; and

(3) Year-to-date computerized loan-level data consisting of the data elements required under paragraph (a) of this section.

(c) *Timing of Reports.* The Enterprises shall submit the Mortgage Report for each of the first 3 quarters of each year within 60 days of the end of the quarter. Each Enterprise shall submit its Annual Mortgage Report within 75 days after the end of the calendar year.

(d) *Revisions to Reports.* At any time before submission of its Annual Mortgage Report, an Enterprise may revise any of its quarterly reports for that year.

(e) *Format.* The Enterprises shall submit to the Director computerized loan-level data with the Mortgage Report, in the format specified in writing by the Director.

§ 1282.63 Annual Housing Activities Report.

To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and assist the Director in preparing the Director's Annual Report to Congress, each Enterprise shall submit

to the Director an AHAR including the information listed in those sections of the Charter Acts. Each Enterprise shall submit such report within 75 days after the end of each calendar year, to the Director, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate. Each Enterprise shall make its AHAR available to the public online and at its principal and regional offices. Before making any such report available to the public, the Enterprise may exclude from the report any information that the Director has deemed proprietary.

§ 1282.64 Periodic reports.

Each Enterprise shall provide to the Director such reports, information and data as the Director may request from time to time.

§ 1282.65 Enterprise data integrity.

(a) *Certification.* (1) The senior officer of each Enterprise who is responsible for submitting the fourth quarter Annual Mortgage Report and the AHAR under sections 309(m) and (n) of the Fannie Mae Charter Act or sections 307(e) and (f) of the Freddie Mac Act, as applicable, or for submitting any other report(s), data or information for which certification is requested in writing by the Director, shall certify such report(s), data or information.

(2) The certification shall state as follows: ''To the best of my knowledge and belief, the information provided herein is true, correct and complete.''

(b) *Adjustment to correct errors, omissions or discrepancies in AHAR data.* FHFA shall determine the official housing goal performance figure for each Enterprise under the housing goals on an annual basis. FHFA may resolve any error, omission or discrepancy by adjusting the Enterprise's official housing goal performance figure. If the Director determines that the year-end data reported by an Enterprise for a year preceding the latest year for which data on housing goals performance was reported to FHFA contained a material error, omission or discrepancy, the Director may increase the corresponding housing goal for the current year by the number of mortgages (or dwelling units) that the Director determines were overstated in the prior year's goal performance.

§ 1282.66 Enterprise reports on duty to serve.

(a) *First and third quarter reports.* Each Enterprise must submit to FHFA a first and third quarter report on its activities and objectives under each underserved market in its Underserved Markets Plan for the loan purchase evaluation area. The report must include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives in its Plan. The Enterprise must submit the first and third quarter reports to FHFA within 60 days of the end of the respective quarter.

(b) *Second quarter report.* Each Enterprise must submit to FHFA a second quarter report on all of the activities and objectives under each underserved market in its Underserved Markets Plan. The report must include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives under each underserved market in its Plan, and contain narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level detail. The Enterprise must submit the second quarter report to FHFA within 60 days of the end of the second quarter.

(c) *Annual report.* To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and for purposes of FHFA's Annual Housing Report to Congress, each Enterprise must submit to FHFA an annual report on all of the activities and objectives under each underserved market in its Underserved Markets Plan no later than 75 days after the end of each calendar year. For each underserved market, the Enterprise's annual report must include, at a minimum: A description of the Enterprise's market opportunities for loan purchases during the evaluation year to the extent data is available; the volume of qualifying loans purchased by the Enterprise during the evaluation year; a comparison of the Enterprise's loan purchases with its loan purchases in prior years; a comparison of market

opportunities with the size of the relevant markets in the past, to the extent data is available; and narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level data.

(d) *Public disclosure of information from reports.* FHFA will make public certain information from the first, second, and third quarter reports at a reasonable time after the end of the calendar year for which they apply, with any confidential and proprietary information and data omitted. FHFA will make public certain information from the annual reports at a reasonable time after receiving them from the Enterprises, with any confidential and proprietary information and data omitted. In the third year of the Underserved Markets Plans, FHFA will make public certain narrative information from the year's second quarter report, excluding data under the loan purchase evaluation area and any confidential and proprietary information and data, at a reasonable time after receiving it within the calendar year.

[81 FR 96300, Dec. 29, 2016]

PART 1290—COMMUNITY SUPPORT REQUIREMENTS

Sec.

AUTHORITY: 12 U.S.C. 1430(g).

SOURCE: 80 FR 30342, May 28, 2015, unless otherwise noted.

§ 1290.1 Definitions.

For purposes of this part:

Advisory Council means the Advisory Council each Bank is required to establish pursuant to section 10(j)(11) of the Bank Act (12 U.S.C. 1430(j)(11)) and part 1291 of this chapter.

CDFI Fund means the Community Development Financial Institutions Fund established under section 104(a) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(a)).

Community development financial institution or CDFI means an institution that is certified as a community development financial institution by the CDFI Fund under the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*).

CRA means the Community Reinvestment Act of 1977, as amended (12 U.S.C. 2901, *et seq.*).

CRA evaluation means the public disclosure portion of the CRA performance evaluation provided by a member's appropriate Federal banking agency.

Displaced homemaker means an adult who has not worked full-time, full-year in the labor force for a number of years, and during that period, worked primarily without remuneration to care for a home and family, and currently is unemployed or underemployed and is experiencing difficulty in obtaining or upgrading employment.

First-time homebuyer means:

(1) An individual and his or her spouse, if any, who has had no present ownership interest in a principal residence during the three-year period prior to purchase of a principal residence.

(2) A displaced homemaker who, except for owning a residence with his or her spouse or residing in a residence owned by his or her spouse, meets the requirements of paragraph (1) of this definition.

(3) A single parent who, except for owning a residence with his or her spouse or residing in a residence owned by his or her spouse, meets the requirements of paragraph (1) of this definition.

Long-term advance means an advance with a term to maturity greater than one year.

Restriction on access to long-term advances means a member may not borrow long-term advances or renew any maturing advance for a term to maturity greater than one year.

Single parent means an individual who is unmarried or legally separated from a spouse and has custody or joint

custody of one or more minor children or is pregnant.

Targeted community lending means providing financing for economic development projects for targeted beneficiaries.

[80 FR 30342, May 28, 2015, as amended at 81 FR 76300, Nov. 2, 2016]

§ 1290.2 Community support requirements.

(a) *Bank notice to members.* By a date designated by FHFA notice pursuant to paragraph (f) of this section, each Bank must provide written notice to each of its members subject to community support review that each such member must submit to FHFA a completed Community Support Statement in accordance with the requirements of paragraph (b) of this section. Unless instructed otherwise by FHFA, the Bank must provide to each member a blank Community Support Statement Form upon request by the member. FHFA will provide a copy of this blank form to the Bank. Upon a member's request, the Bank must provide assistance to the member in completing the Community Support Statement.

(b) *Community Support Statement submission requirements.* Except as provided in paragraphs (d) and (e) of this section, in each odd-numbered year, each member must submit to FHFA a completed Community Support Statement (and any other related information FHFA may require) in accordance with the submission dates designated by FHFA notice pursuant to paragraph (f) of this section. The member's completed Community Support Statement must be executed by an appropriate senior officer of the member and must be submitted to FHFA pursuant to FHFA's submission instructions.

(c) *Notice to public.*—(1) *By the Banks.* By a date designated by FHFA notice pursuant to paragraph (f) of this section, each Bank must provide written notice to its Advisory Council, and to interested nonprofit housing developers, community groups, and other interested parties in its district, and include a notice on its public website, of the opportunity to submit comments on the community support programs and activities of Bank members, with the name and address of each member subject to community support review, and the deadline and FHFA contact information for submission of any comments to FHFA.

(2) *By FHFA.* FHFA may publish a notice in the *Federal Register* notifying the public of the opportunity to submit comments on the community support programs and activities of Bank members, with the deadline and FHFA contact information for submission of any comments to FHFA.

(3) *Consideration of comments.* In reviewing a member for compliance with the community support requirements, FHFA will take into consideration any public comments it has received concerning the member.

(d) *Non-Depository Community Development Financial Institutions.* A member that has been certified as a community development financial institution by the CDFI Fund, other than a member that also is an insured depository institution or a CDFI credit union (as defined in 12 CFR 1263.1), is deemed to be in compliance with the community support requirements of section 10(g) of the Federal Home Loan Bank Act (12 U.S.C. 1430(g)) and this part, by virtue of that certification. Such non-depository CDFIs, therefore, are not required to submit Community Support Statements to FHFA under paragraph (b) of this section and are not subject to community support review under this part.

(e) *New Bank members.* A member of a Bank is not required to submit a Community Support Statement under paragraph (b) of this section if the institution has been a member of a Bank for a total of less than one year as of March 31 of the year in which submissions are due under paragraph (b) of this section.

(f) *Designation of submission and notice dates.* FHFA will designate applicable dates for each biennial review cycle via written notice to the Banks. The notice will designate the date by which FHFA will begin accepting Community Support Statements and the date by which Community Support Statements must be submitted, as well as the dates by which the Banks must notify members under paragraph (a) of this section and the public under paragraph (c)(1) of this section. FHFA's written notice to

the Banks will be issued at least 90 days prior to the date by which the Banks must notify members under paragraph (a).

[83 FR 52117, Oct. 16, 2018]

§ 1290.3 Community support standards.

(a) *In general.* A member subject to community support review meets the community support requirements of this part if it submits a completed Community Support Statement that demonstrates to FHFA's satisfaction that the member complies with both the CRA standard, if the member is subject to the requirements of the CRA, and the first-time homebuyer standard.

(b) *CRA standard.* A member meets the CRA standard if it is subject to the requirements of the CRA and the rating in the member's most recent CRA evaluation is ''Outstanding'' or ''Satisfactory.''

(c) *First-time homebuyer standard.* A member meets the first-time homebuyer standard if at least one of the following is satisfied:

(1) The member is subject to the requirements of the CRA and the rating in the member's most recent CRA evaluation is ''Outstanding'';

(2) The member has an established record of lending to first-time homebuyers;

(3) The member has a program whereby it actively seeks to lend or support lending to first-time homebuyers, including, but not limited to, the following—

(i) Providing special credit products with flexible underwriting standards for first-time homebuyers;

(ii) Participating in Federal, State, or local government, or nationwide homeownership lending programs that benefit, serve, or are targeted to, first-time homebuyers; or

(iii) Participating in loan consortia for first-time homebuyer loans or loans that serve predominantly low- or moderate-income borrowers;

(4) The member has a program whereby it actively seeks to assist or support organizations that assist potential first-time homebuyers to qualify for mortgage loans, including, but not limited to, the following—

(i) Providing, participating in, or supporting special counseling programs or other homeownership education activities that benefit, serve, or are targeted to, first-time homebuyers;

(ii) Providing or participating in marketing plans and related outreach programs targeted to first-time homebuyers;

(iii) Providing technical assistance or financial support to organizations that assist first-time homebuyers;

(iv) Participating with or financially supporting community or nonprofit groups that assist first-time homebuyers;

(v) Holding investments or making loans that support first-time homebuyer programs;

(vi) Holding mortgage-backed securities that may include a pool of loans to low- and moderate-income homebuyers;

(vii) Participating or investing in service organizations that assist credit unions in providing mortgages to first-time homebuyers or low- or moderate-income households; or

(viii) Participating in a Bank Affordable Housing Program or other Bank targeted community investment or development program;

(5) The member engages in other activities, not covered by paragraphs (c)(1) through (c)(4) of this section, that demonstrate to FHFA's satisfaction the member's support for first-time homebuyers financing; or

(6) FHFA determines that mitigating factors affect the member's ability to engage in activities to assist first-time or potential first-time homebuyers as described in paragraphs (c)(1) through (c)(5) of this section.

§ 1290.4 FHFA review and decision on Community Support Statements.

(a) *Review by FHFA.* FHFA will review each member approximately once every two years for compliance with the community support requirements of this part.

(b) *Complete Community Support Statements.* A Community Support Statement is complete when a member has provided to FHFA all of the information required by this part.

(c) *Decision on Community Support Statements.* FHFA will provide written

notice to the member's Bank of FHFA's determination regarding the Community Support Statement submitted by the member. A notice placing a member on probation or restricting the member's access to long-term Bank advances will identify the reasons for FHFA's determination. The Bank must promptly notify the member of FHFA's determination regarding the member's Community Support Statement.

§ 1290.5 Probation or restriction on member access to long-term Bank advances.

(a) *Probation.* FHFA will place a member on probation if the member is subject to the CRA, its most recent CRA rating was ''Needs to Improve,'' and either the member has not received any other CRA rating or its second-most recent CRA rating was ''Outstanding'' or ''Satisfactory.''

(b) *Restriction.* FHFA will restrict a member's access to long-term advances if:

(1) The member failed to sign its Community Support Statement submitted to FHFA pursuant to §1290.2(b), failed to include its CRA rating in its Community Support Statement submitted to FHFA if subject to the CRA, or failed to submit a Community Support Statement at all to FHFA;

(2) The member is subject to the CRA and its most recent CRA rating was ''Substantial Noncompliance'';

(3) The member is subject to the CRA, its most recent CRA rating was ''Needs to Improve,'' and its second-most recent CRA rating was ''Needs to Improve'';

(4) The member is subject to the CRA, its most recent CRA rating was ''Needs to Improve,'' its second-most recent CRA rating was ''Substantial Noncompliance,'' and its third-most recent CRA rating was ''Needs to Improve'' or ''Substantial Noncompliance''; or

(5) The member has not demonstrated compliance with the first-time homebuyer standard.

(c) *Effective dates.*—(1) *Probation.* A probationary period under §1290.5(a) will extend until the member's appropriate Federal banking agency completes its next CRA evaluation and issues a rating for the member. Probation will take effect on the date the notice required under §1290.4(c) is sent by FHFA to the Bank. The member will be eligible to receive long-term advances during the probationary period.

(2) *Restriction.* A restriction on access to long-term advances will take effect 30 days after the date the notice required under §1290.4(c) is sent by FHFA to the Bank, unless the member demonstrates compliance with the requirements of this part before the end of the 30-day period.

(d) *Removing a restriction.*—(1) FHFA may remove a restriction on a member's access to long-term advances imposed under this section if FHFA determines that application of the restriction may adversely affect the safety and soundness of the member. A member may submit a written request to FHFA to remove a restriction on access to long-term advances under this paragraph (d)(1). The written request must include a clear and concise statement of the basis for the request and a statement that application of the restriction may adversely affect the safety and soundness of the member from the member's appropriate Federal banking agency or the member's appropriate State regulator for a member that is not subject to regulation or supervision by a Federal regulator. FHFA will consider each written request within 30 calendar days of receipt.

(2) FHFA may remove a restriction on a member's access to long-term advances imposed under this section if FHFA determines that the member subsequently has complied with the requirements of this part. A member may submit a written request to FHFA to remove a restriction on access to long-term advances under this paragraph (d)(2). The written request must state with specificity how the member has complied with the requirements of this part. FHFA will consider each written request within 30 calendar days of receipt.

(3) FHFA may remove a restriction on a member's access to long-term advances imposed under this section and place the member on probation if the member is subject to the CRA, its most recent CRA rating was ''Needs to Improve,'' its second-most recent CRA

rating was ''Substantial Noncompliance,'' and either the member has not received any other CRA rating or its third-most recent CRA rating was ''Outstanding'' or ''Satisfactory.''

(4) FHFA will provide written notice to the member's Bank of any determination to remove a restriction under this paragraph (d). The Bank shall promptly notify the member of FHFA's determination to remove a restriction. FHFA's determination shall take effect on the date the notice is sent by FHFA to the Bank.

(e) *Bank Affordable Housing Programs and other Bank Community Investment Cash Advance Programs.* A member that is subject to a restriction on access to long-term advances under this part is not eligible to participate in the Bank's Affordable Housing Program (AHP) under part 1291 of this chapter or in other Bank Community Investment Cash Advance (CICA) programs offered under part 1292 of this chapter. The restriction in this paragraph (e) does not apply to AHP or other CICA applications or funding approved before the date the restriction is imposed.

[80 FR 30342, May 28, 2015, as amended at 83 FR 52118, Oct. 16, 2018]

§ 1290.6 Bank community support programs.

(a) *Requirement.* Consistent with the safe and sound operation of the Bank, each Bank shall establish and maintain a community support program. A Bank's community support program shall:

(1) Provide technical assistance to members;

(2) Promote and expand affordable housing finance;

(3) Identify opportunities for members to expand financial and credit services in underserved neighborhoods and communities;

(4) Encourage members to increase their targeted community lending and affordable housing finance activities by providing incentives such as awards or technical assistance to nonprofit housing developers or community groups with outstanding records of participation in targeted community lending or affordable housing finance partnerships with members; and

(5) Include an annual Targeted Community Lending Plan approved by the Bank's board of directors and subject to modification. The Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to adopt or amend the Targeted Community Lending Plan. The Targeted Community Lending Plan shall:

(i) Reflect market research conducted in the Bank's district;

(ii) Describe how the Bank will address identified credit needs and market opportunities in the Bank's district for targeted community lending;

(iii) Be developed in consultation with (and may only be amended after consultation with) its Advisory Council and with members, housing associates, and public and private economic development organizations in the Bank's district;

(iv) Establish quantitative targeted community lending performance goals;

(v) Identify and assess significant affordable housing needs in its district that will be addressed through its Affordable Housing Program under 12 CFR part 1291, reflecting market research conducted or obtained by the Bank; and

(vi) For any Targeted Funds established by the Bank under its Affordable Housing Program, specify, from among the identified affordable housing needs, the particular affordable housing needs the Bank plans to address through such Targeted Funds.

(b) *Notice.* A Bank shall provide annually to each of its members a written notice:

(1) Identifying CICA programs and other Bank activities that may provide opportunities for a member to meet the community support requirements and to engage in targeted community lending; and

(2) Summarizing targeted community lending and affordable housing activities undertaken by members, housing associates, nonprofit housing developers, community groups, or other entities in the Bank's district that may provide opportunities for a member to meet the community support requirements and to engage in targeted community lending.

(c) *Public access.* A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its Affordable Housing Program, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual Affordable Housing Program Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

[80 FR 30342, May 28, 2015, as amended at 83 FR 61231, Nov. 28, 2018]

§ 1290.7 Bank Advisory Council Annual Reports.

Each Annual Report submitted by a Bank's Advisory Council to FHFA pursuant to section 10(j)(11) of the Bank Act (12 U.S.C. 1430(j)(11)) must include an analysis of the Bank's targeted community lending and affordable housing activities.

§ 1290.8 Compliance dates.

From December 28, 2018 to December 31, 2020, a Bank shall comply with either prior part 1290 (in 12 CFR part 1290 (January 1, 2018 edition)) or this part 1290. On and after January 1, 2021, a Bank shall comply with this part 1290.

[83 FR 61231, Nov. 28, 2018]

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

Subpart A—General

Subpart B—Program Administration and Governance

Subpart C—General Fund and Targeted Funds

Subpart D—Homeownership Set-Aside Programs

Subpart E—Monitoring

Subpart F—Remedial Actions for Noncompliance

Subpart G—Affordable Housing Reserve Fund

AUTHORITY: 12 U.S.C. 1430(j).

SOURCE: 83 FR 61231, Nov. 28, 2018, unless otherwise noted.

Subpart A—General

§ 1291.1 Definitions.

As used in this part:

Affordable means that:

(1) The rent charged to a household for a unit that is to be reserved for occupancy by a household with an income at or below 80 percent of the median income for the area, does not exceed 30 percent of the income of a household of the maximum income and size expected, under the commitment made in the AHP application, to occupy the unit (assuming occupancy of 1.5 persons per bedroom or 1.0 persons per unit without a separate bedroom); or

(2) The rent charged to a household, for rental units subsidized with Section 8 assistance under 42 U.S.C. 1437f or subsidized under another assistance program where the rents are charged in the same way as under the Section 8 program, if the rent complied with this definition at the time of the household's initial occupancy and the household continues to be assisted through the Section 8 or another assistance program, respectively.

AHP means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part.

AHP project means a single-family or multifamily housing project for owner-occupied or rental housing that has been awarded or has received AHP subsidy under a Bank's General Fund and any Targeted Funds.

Cost of funds means, for purposes of a subsidized advance, the estimated cost of issuing Bank System consolidated obligations with maturities comparable to that of the subsidized advance.

Direct subsidy means an AHP subsidy in the form of a direct cash payment.

Eligible household means a household that meets the income limits and other requirements specified by a Bank for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, provided that:

(1) In the case of owner-occupied housing, the household's income may not exceed 80 percent of the median income for the area; and

(2) In the case of rental housing, the household's income in at least 20 percent of the units may not exceed 50 percent of the median income for the area.

Eligible project means a project eligible to receive AHP subsidy pursuant to the requirements of this part.

Extremely low-income household means a household that has an income at or below 30 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Family member means any individual related to a person by blood, marriage, or adoption.

Funding round means a time period, as determined by a Bank, during which the Bank accepts AHP applications for subsidy under its General Fund and any Targeted Funds.

General Fund means a program that each Bank is required to establish and under which the Bank approves *(i.e.*, awards) applications for AHP subsidy through a competitive application scoring process and disburses the subsidy, pursuant to the requirements of this part.

Homeownership Set-Aside Program means a program established by a Bank, in its discretion, under which the Bank approves (*i.e.*, awards) applications for AHP direct subsidy through a noncompetitive process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Household's investment means the following, to the extent paid by the household and documented (in the Closing Disclosure or other settlement statement, if applicable, or elsewhere) to the Bank or its designee:

(1) Reasonable and customary costs paid by the household in connection with the purchase of the unit (including real estate broker's commission, attorney's fees, and title search fees);

(2) Any down payment paid in connection with the household's purchase of the unit;

(3) The cost of any capital improvements made after the household's purchase of the unit until the time of the subsequent sale, transfer, assignment of title or deed, or refinancing; and

(4) The amount of principal on any mortgage senior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation repaid by the household.

LIHTC means Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code (26 U.S.C. 42).

Loan pool means a group of mortgage or other loans meeting the requirements of this part that are purchased, pooled, and held in trust.

Low- or moderate-income household means a household that has an income of 80 percent or less of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Median income for the area means one or more of the following median income standards as determined by a Bank, after consultation with its Advisory Council, in its AHP Implementation Plan:

(1) The median income for the area, as published annually by HUD;

(2) The median income for the area obtained from the Federal Financial Institutions Examination Council;

(3) The applicable median family income, as determined under 26 U.S.C. 143(f) (Mortgage Revenue Bonds) and published by a state agency or instrumentality;

(4) The median income for the area, as published by the United States Department of Agriculture; or

(5) The median income for an applicable definable geographic area, as published by a federal, state, or local government entity, and approved by FHFA, at the request of a Bank, for use under the AHP.

Multifamily building means a structure with five or more dwelling units.

Net earnings of a Bank means the net earnings of a Bank for a calendar year before declaring or paying any dividend under section 16 of the Bank Act (12 U.S.C. 1436). For purposes of this part, ''dividend'' includes any dividends on capital stock subject to a redemption request even if under GAAP those dividends are treated as an ''interest expense.''

Net proceeds means:

(1) In the case of a sale, transfer, or assignment of title or deed of an AHP-assisted unit by a household during the AHP five-year retention period, the sales price minus reasonable and customary costs paid by the household in connection with the transaction (including real estate broker's commission, attorney's fees, and title search fees) and outstanding debt superior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation;

(2) In the case of a refinancing of an AHP-assisted unit by a household during the AHP five-year retention period, the principal amount of the new mortgage minus reasonable and customary costs paid by the household in connection with the transaction (including attorney's fees and title search fees) and the principal amount of the refinanced mortgage.

Owner-occupied project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more owner-occupied units in a single-family or multifamily building, including condominiums, cooperative housing, and manufactured housing.

Owner-occupied unit means a dwelling unit occupied by the owner of the unit. Housing with two to four dwelling units consisting of one owner-occupied unit and one or more rental units is considered a single owner-occupied unit.

Program means the Affordable Housing Program established pursuant to this part.

Rental project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more dwelling units for occupancy by households that are not owner-occupants, including overnight and emergency shelters, transitional housing for homeless households, mutual housing, single-room occupancy housing, and manufactured housing communities.

Retention period means:

(1) Five years from closing for an AHP-assisted owner-occupied unit where the AHP subsidy is used for purchase of the unit or for purchase in conjunction with rehabilitation of the unit; and

(2) Fifteen years from the date of completion for a rental project.

Revolving loan fund means a capital fund established to make mortgage or other loans whereby loan principal is repaid into the fund and re-lent to other borrowers.

Single-family building means a structure with one to four dwelling units.

Sponsor means a not-for-profit or for-profit organization or public entity that:

(1) Has an ownership interest (including any partnership interest), as defined by the Bank in its AHP Implementation Plan, in a rental project;

(2) Is integrally involved, as defined by the Bank in its AHP Implementation Plan, in an owner-occupied project, such as by exercising control over the planning, development, or management of the project, or by qualifying borrowers and providing or arranging financing for the owners of the units;

(3) Operates a loan pool; or

(4) Is a revolving loan fund.

Subsidized advance means an advance to a member at an interest rate reduced below the Bank's cost of funds by use of a subsidy.

Subsidy means:

(1) A direct subsidy, provided that if a direct subsidy is used to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the subsidy must equal the net present value of the interest foregone from making the loan below the lender's market interest rate; or

(2) The net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds.

Targeted Fund means a program established by a Bank, in its discretion, to address specific affordable housing needs within its district that are unmet, have proven difficult to address through its General Fund, or align with objectives identified in its strategic plan, under which the Bank approves (*i.e.*, awards) applications for AHP subsidy through a competitive application scoring process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Very low-income household means a household that has an income at or below 50 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of ''median income for the area,'' unless such median income standard has no household size adjustment methodology.

Visitable means, in either owner-occupied or rental housing, at least one entrance is at-grade (no steps) and approached by an accessible route such as a sidewalk, and the entrance door and all interior passage doors are at least 34 inches wide, offering 32 inches of clear passage space.

§ 1291.2 Compliance dates.

(a) *General January 1, 2021 compliance date.* Except as provided in paragraph (b) of this section, from December 28, 2018 to December 31, 2020, a Bank shall comply with either prior part 1291 (in 12 CFR part 1291 (January 1, 2018 edition)) or this part 1291, and on and after January 1, 2021, a Bank shall comply with this part 1291.

(b) *January 1, 2020 compliance date for owner-occupied retention agreements; exception for adoption of proxies.* From December 28, 2018 to December 31, 2019, a Bank shall comply with either prior §1291.9(a)(7) (in 12 CFR part 1291 (January 1, 2018 edition)) or §1291.15(a)(7), and on and after January 1, 2020, a Bank shall comply with §1291.15(a)(7), except that a Bank shall comply with §1291.15(a)(7)(ii)(B) on the date set forth in the FHFA guidance on proxies referenced therein.

Subpart B—Program Administration and Governance

§ 1291.10 Required annual AHP contribution.

Each Bank shall contribute annually to its Program the greater of:

(a) 10 percent of the Bank's net earnings for the previous year; or

(b) That Bank's pro rata share of an aggregate of $100 million to be contributed in total by the Banks, such proration being made on the basis of the net earnings of the Banks for the previous year, except that the required annual AHP contribution for a Bank shall not exceed its net earnings in the previous year.

§ 1291.11 Temporary suspension of AHP contributions.

(a) *Request to FHFA.* If a Bank finds that the contributions required pursuant to § 1291.10 are contributing to the financial instability of the Bank, the Bank may apply in writing to FHFA for a temporary suspension of such contributions.

(b) *Director review*—(1) *Financial instability.* In determining the financial instability of a Bank, the Director shall consider such factors as:

(i) Severely depressed Bank earnings;

(ii) A substantial decline in Bank membership capital; and

(iii) A substantial reduction in Bank advances outstanding.

(2) *Limitations on grounds for suspension.* The Director shall not suspend a Bank's annual AHP contributions if it determines that the Bank's reduction in earnings is due to:

(i) A change in the terms of advances to members that is not justified by market conditions;

(ii) Inordinate operating and administrative expenses; or

(iii) Mismanagement.

§ 1291.12 Allocation of required annual AHP contribution.

Each Bank, after consultation with its Advisory Council and pursuant to written policies adopted by the Bank's board of directors, shall meet the following requirements for allocation of its required annual AHP contribution.

(a) *General Fund.* Each Bank shall allocate annually at least 50 percent of its required annual AHP contribution to provide funds to members through a General Fund established and administered by the Bank pursuant to the requirements of this part.

(b) *Homeownership Set-Aside Programs.* A Bank may, in its discretion, allocate annually, in the aggregate, up to the greater of $4.5 million or 35 percent of its required annual AHP contribution to provide funds to members participating in Homeownership Set-Aside Programs established and administered by the Bank pursuant to the requirements of this part, provided that at least one-third of the Bank's aggregate annual set-aside allocation to such programs is allocated to assist first-time homebuyers or households for owner-occupied rehabilitation, or a combination of both.

(c) *Targeted Funds—phase-in requirements for funding allocations.* Unless otherwise directed by FHFA and subject to the phase-in requirements for the number of Targeted Funds in § 1291.20(b), a Bank may, in its discretion, allocate annually, up to:

(1) 20 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds;

(2) 30 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 20 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year; or

(3) 40 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 30 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year.

(d) *Acceleration of funding.* A Bank may, in its discretion, accelerate to its current year's Program from future required annual AHP contributions an amount up to the greater of $5 million or 20 percent of its required annual AHP contribution for the current year. The Bank may credit the amount of the accelerated contribution against required AHP contributions under this part 1291 over one or more of the subsequent five years.

(e) *No delegation.* A Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the Bank's policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs.

§ 1291.13 Targeted Community Lending Plan; AHP Implementation Plan.

(a) *Targeted Community Lending Plan*—(1) *Identification of housing needs.* Pursuant to the requirements of 12 CFR 1290.6(a)(5)(v) and (vi), a Bank's annual Targeted Community Lending Plan adopted under its community support program shall, among other things, identify the significant affordable housing needs in its district that will be addressed through its AHP, as well as any specific affordable housing needs it plans to address through any Targeted Funds as set forth in its AHP Implementation Plan.

(2) *Public access.* A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its AHP, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual AHP Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

(3) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments to its Targeted Community Lending Plan within 30 days after the date of their adoption by the Bank's board of directors.

(b) *AHP Implementation Plan.* Each Bank's board of directors, after consultation with its Advisory Council, shall adopt a written AHP Implementation Plan, and shall not amend the AHP Implementation Plan without first consulting its Advisory Council. The Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility for such prior consultations with the Advisory Council, and shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting or amending the AHP Implementation Plan. The AHP Implementation Plan shall set forth, at a minimum:

(1) The applicable median income standard or standards adopted by the Bank consistent with the definition of ''median income for the area'' in §1291.1.

(2) For the General Fund established by the Bank pursuant to §1291.20(a), the Bank's requirements for the General Fund, including the Bank's scoring methodology, including its scoring tie-breaker policy adopted pursuant to §§1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§1291.25(c)(6) and 1291.28(b).

(3) For each Targeted Fund established by the Bank, if any, pursuant to §1291.20(b), the Bank's requirements for the Targeted Fund, including the Bank's scoring methodology for each Fund, including its scoring tie-breaker policy adopted pursuant to §§1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§1291.25(c)(6) and 1291.28(b), and the parameters adopted pursuant to §1291.20(b)(2).

(4) The Bank's policy on how it will determine under which Fund to approve an application for the same project that is submitted to more than one Fund at a Bank in a calendar year and scores high enough to be approved under each Fund, pursuant to §1291.28(d).

(5) For each Homeownership Set-Aside Program established by the Bank, if any, pursuant to §1291.40, the Bank's requirements for the program, including the Bank's application and subsidy disbursement methodology.

(6) The Bank's retention agreement requirements for projects and households under its General Fund, any Targeted Funds, and any Homeownership Set-Aside Programs, pursuant to §1291.15(a)(7) and (8), including the proxy or proxies selected by the Bank for determining a subsequent purchaser's income pursuant to FHFA guidance under §1291.15(a)(7)(ii)(B).

(7) The Bank's standards for approving a relocation plan for current occupants of rental projects pursuant to §1291.23(a)(2)(ii)(B).

(8) Any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

(9) The Bank's requirements for funding revolving loan funds, if adopted by the Bank pursuant to § 1291.31;

(10) The Bank's requirements for funding loan pools, if adopted by the Bank pursuant to § 1291.32;

(11) The Bank's requirements for monitoring under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs pursuant to §§ 1291.50 and 1291.51.

(12) The Bank's requirements, including time limits, for re-use of repaid AHP direct subsidy in the same project, if adopted by the Bank pursuant to § 1291.64(b).

(c) *Advisory Council review.* Prior to the amendment of a Bank's AHP Implementation Plan, the Bank shall provide its Advisory Council an opportunity to review the document, and the Advisory Council shall provide its recommendations to the Bank's board of directors for its consideration.

(d) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments made to its AHP Implementation Plan within 30 days after the date of their adoption by the Bank's board of directors.

(e) *Public access.* A Bank shall publish its current AHP Implementation Plan on its publicly available website, and shall publish any amendments to the AHP Implementation Plan on the website within 30 days after the date of their adoption by the Bank's board of directors.

§ 1291.14 Advisory Councils.

(a) *Appointment.* (1) Each Bank's board of directors shall appoint an Advisory Council of 7 to 15 persons who reside in the Bank's district and are drawn from community and not-for-profit organizations that are actively involved in providing or promoting low- and moderate-income housing, and community and not-for-profit organizations that are actively involved in providing or promoting community lending, in the district. Community organizations include for-profit organizations.

(2) Each Bank shall solicit nominations for membership on the Advisory Council from community and not-for-profit organizations pursuant to a nomination process that is as broad and as participatory as possible, allowing sufficient time for responses.

(3) The Bank's board of directors shall appoint Advisory Council members from a diverse range of organizations so that representatives of no one group constitute an undue proportion of the membership of the Advisory Council, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

(b) *Terms of Advisory Council members.* Pursuant to policies adopted by the Bank's board of directors, Advisory Council members shall be appointed by the Bank's board of directors to serve for terms of three years, which shall be staggered to provide continuity in experience and service to the Advisory Council, except that Advisory Council members may be appointed to serve for terms of one or two years solely for purposes of reconfiguring the staggering of the three-year terms. No Advisory Council member may be appointed to serve for more than three full consecutive terms. An Advisory Council member appointed to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

(c) *Election of officers.* Each Advisory Council shall elect from among its members a chairperson, a vice chairperson, and any other officers the Advisory Council deems appropriate.

(d) *Duties*—(1) *Meetings with the Banks.* (i) The Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, including, but not limited to, advice on the low- and moderate-income housing and community lending programs and needs in the Bank's district, and on the use of AHP subsidies, Bank advances, and other Bank credit products for these purposes.

(ii) The Advisory Council's advice shall include recommendations on:

(A) The Bank's Targeted Community Lending Plan, and any amendments thereto, pursuant to 12 CFR 1290.6(a)(5)(iii);

(B) The amount of AHP funds to be allocated to the Bank's General Fund and any Targeted Funds and Homeownership Set-Aside Programs, including how the set-aside funds should be apportioned under the one-third funding allocation requirement in §1291.12(b);

(C) The AHP Implementation Plan and any subsequent amendments thereto;

(D) The Bank's scoring methodologies, related definitions, and any additional optional district eligibility requirements for the General Fund and any Targeted Funds; and

(E) The eligibility requirements and any priority criteria for any Homeownership Set-Aside Programs.

(2) *Summary of AHP applications.* The Bank shall comply with requests from the Advisory Council for summary information regarding AHP applications from prior funding rounds.

(3) *Annual analysis; public access.* (i) Each Advisory Council annually shall submit to FHFA by May 1 its analysis of the low- and moderate-income housing and community lending activity of the Bank by which it is appointed.

(ii) Within 30 days after the date the Advisory Council's annual analysis is submitted to FHFA, the Bank shall publish the analysis on its publicly available website.

(e) *Expenses.* The Bank shall pay Advisory Council members' travel expenses, including transportation and subsistence, for each day devoted to attending meetings with representatives of the board of directors of the Bank and meetings requested by FHFA.

(f) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to appoint persons as members of the Advisory Council or to meet with the Advisory Council at the quarterly meetings required by the Bank Act (12 U.S.C. 1430(j)(11)).

§1291.15 Agreements.

(a) *Agreements between Banks and members.* A Bank shall have in place with each member receiving an AHP subsidized advance or AHP direct subsidy an agreement or agreements containing, at a minimum, the following provisions, where applicable:

(1) *Notification of member.* The member has been notified of the requirements of this part as they may be amended from time to time, and all Bank policies relevant to the member's approved application for AHP subsidy.

(2) *AHP subsidy pass-through.* The member shall pass on the full amount of the AHP subsidy to the project or household, as applicable, for which the subsidy was approved.

(3) *Use of AHP subsidy*—(i) *Use of AHP subsidy by the member.* The member shall use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(ii) *Use of AHP subsidy by the project sponsor or owner.* The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(4) *Repayment of AHP subsidies in case of noncompliance*—(i) *Noncompliance by the member.* The member shall repay AHP subsidies to the Bank in accordance with the requirements of §1291.61.

(ii) *Noncompliance by a project sponsor or owner*—(A) *Agreement.* The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to repay AHP subsidies to the member or the Bank in accordance with the requirements of §1291.60.

(B) *Recovery of AHP subsidies.* The member shall recover from the project sponsor or owner and repay to the Bank AHP subsidies in accordance with the requirements of §1291.60 (if applicable).

(5) *Project monitoring*—(i) *Monitoring by the member.* The member shall comply with the monitoring requirements applicable to it, as established by the Bank in its monitoring policies pursuant to §§1291.50 and 1291.51.

(ii) *Agreement; LIHTC noncompliance notice.* The member shall have in place an agreement with each project sponsor and owner, in which the project sponsor and owner agree to comply

with the monitoring requirements applicable to such parties, as established by the Bank in its monitoring policies pursuant to §1291.50. The member's agreement shall also include an agreement by the project owner to provide prompt written notice to the Bank if the project also received LIHTC and the project is in material and unresolved noncompliance with the LIHTC income targeting or rent requirements at any time during the AHP 15-year retention period.

(6) *Transfer of AHP obligations*—(i) *To another member*. The member shall make best efforts to transfer its obligations under the approved application for AHP subsidy to another member in the event of its loss of membership in the Bank prior to the Bank's final disbursement of AHP subsidies.

(ii) *To a nonmember*. If, after final disbursement of AHP subsidies to the member, the member undergoes an acquisition or a consolidation resulting in a successor organization that is not a member of the Bank, the nonmember successor organization assumes the member's obligations under its approved application for AHP subsidy, and where the member received an AHP subsidized advance, the nonmember assumes such obligations until prepayment or orderly liquidation by the nonmember of the subsidized advance.

(7) *Owner-occupied units—required provisions for retention agreements*. The member shall ensure that where a household receives AHP subsidy for purchase, or purchase in conjunction with rehabilitation, of an owner-occupied unit, the unit is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) *Notice*. The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the unit by the household occurring during the AHP five-year retention period;

(ii) *Repayment of subsidy; exceptions*. In the case of a sale, transfer, assignment of title or deed, or refinancing of the unit by the household during the retention period, the amount of AHP subsidy calculated in accordance with paragraph (a)(7)(v) of this section shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance;

(B) The subsequent purchaser, transferee, or assignee is a low- or moderate-income household, as determined by the Bank. For any sale, transfer, or assignment that occurs after the date established by FHFA in guidance on the use of proxies, the Bank or its designee shall determine the household's income using one or more proxies that are reliable indicators of the subsequent purchaser's income, which may be selected by the Bank pursuant to the FHFA guidance and shall be included in the Bank's AHP Implementation Plan, unless documentation demonstrating that household's actual income is available. The Bank or its designee is not required to request or obtain such documentation, but must use it in lieu of a proxy if available;

(C) The amount of the AHP subsidy that would be required to be repaid in accordance with the calculation in paragraph (a)(7)(v) of this section is $2,500 or less; or

(D) Following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism described in this paragraph (a)(7);

(iii) *Subsidy repayments to Bank, member, or project sponsor*. In the case of a direct subsidy, such repayment of AHP subsidy shall be made:

(A) To the Bank. If the Bank has not authorized re-use of the repaid AHP subsidy or has authorized re-use of the repaid subsidy but not retention of such repaid subsidy by the member or project sponsor pursuant to §1291.64(b) of this part, or has authorized retention and re-use of such repaid subsidy by the member or project sponsor pursuant to such section and the repaid subsidy is not re-used in accordance with the requirements of the Bank and such section; or

(B) To the member or project sponsor. To the member or project sponsor for re-use by such member or project sponsor, if the Bank has authorized retention and re-use of such subsidy by

the member or project sponsor pursuant to §1291.64(b);

(iv) *Termination of subsidy repayment obligation*. The obligation to repay AHP subsidy to the Bank shall terminate after any event of foreclosure, transfer by deed-in-lieu of foreclosure, an assignment of a Federal Housing Administration first mortgage to HUD, or death of the AHP-assisted homeowner; and

(v) *Calculation of AHP subsidy repayment based on net proceeds and household's investment*. The Bank shall be repaid the lesser of:

(A) The AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the AHP five-year retention period; or

(B) Any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, as applicable, minus the AHP-assisted household's investment.

(8) *Rental projects—required provisions for retention agreements*. The member shall ensure that an AHP-assisted rental project is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) *Income and rent commitments*. The project's rental units, or applicable portion thereof, must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the approved AHP application for the duration of the AHP 15-year retention period;

(ii) *Notice*. The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the project by the project owner occurring during the retention period;

(iii) *Repayment of subsidy; exceptions*. In the case of a sale, transfer, assignment of title or deed, or refinancing of the project by the project owner during the retention period, the full amount of the AHP subsidy received by the project owner shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The project continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the duration of the AHP 15-year retention period; or

(B) If authorized by the Bank, in its discretion, the households are relocated, due to the exercise of eminent domain, or for expansion of housing or services, to another property that is made subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the remainder of the AHP 15-year retention period; and

(iv) *Termination of income and rent restrictions*. The income-eligibility and affordability restrictions applicable to the project shall terminate after any foreclosure.

(9) *Lending of AHP direct subsidies*. If a member or a project sponsor lends AHP direct subsidy to a project, any repayments of principal and payments of interest received by the member or the project sponsor must be paid forthwith to the Bank, unless the direct subsidy is being both lent and re-lent by a revolving loan fund pursuant to §1291.31(d).

(10) *Special provisions where members obtain AHP subsidized advances*—(i) *Repayment schedule*. The term of an AHP subsidized advance shall be no longer than the term of the member's loan to the project funded by the advance, and at least once in every 12-month period, the member shall be scheduled to make a principal repayment to the Bank equal to the amount scheduled to be repaid to the member on its loan to the project in that period.

(ii) *Prepayment fees*. Upon a prepayment of an AHP subsidized advance, the Bank shall charge a prepayment fee only to the extent the Bank suffers an economic loss from the prepayment.

(iii) *Treatment of loan prepayment by project*. If all or a portion of the loan or loans financed by an AHP subsidized advance are prepaid by the project to the member, the member may, at its option, either:

(A) Repay to the Bank that portion of the advance used to make the loan

or loans to the project, and be subject to a fee imposed by the Bank sufficient to compensate the Bank for any economic loss the Bank experiences in reinvesting the repaid amount at a rate of return below the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance; or

(B) Continue to maintain the advance outstanding, subject to the Bank resetting the interest rate on that portion of the advance used to make the loan or loans to the project to a rate equal to the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance.

(b) *Agreements between Banks and project sponsors or owners*—(1) *Repayment of subsidies.* A Bank may have in place an agreement with each project sponsor or owner, in which the project sponsor or owner agrees to repay AHP subsidies directly to the Bank in accordance with the requirements of § 1291.60.

(2) *Project sponsor qualifications.* A Bank's AHP subsidy application form and AHP subsidy disbursement form for each subsidy disbursement (or other related documents) must include a requirement for the project sponsor to provide a certification that it meets the project sponsor qualifications criteria established by the Bank and that it has not engaged in, and is not engaging in, covered misconduct as defined in FHFA's Suspended Counterparty Program regulation (12 CFR part 1227), or as defined by the Bank, provided the Bank's definition incorporates the definition in 12 CFR part 1227 at a minimum.

(c) *Application to existing AHP agreements.* The requirements of section 10(j) of the Bank Act (12 U.S.C. 1430(j)) and the provisions of this part, as amended, are incorporated into all AHP agreements between a Bank and any member, project sponsor, or project owner receiving AHP subsidies under the General Fund and any Targeted Funds, and between a Bank and any member or unit owner under any Homeownership Set-Aside Programs. To the extent the requirements of this part are amended from time to time, such agreements are deemed to incorporate the amendments to conform to any new requirements of this part. No amendment to this part shall affect the legality of actions taken prior to the effective date of such amendment.

§ 1291.16 Conflicts of interest.

(a) *Bank directors and employees.* (1) Each Bank's board of directors shall adopt a written policy providing that if a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Bank director or employee shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(2) If a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (a)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(b) *Advisory Council members.* (1) Each Bank's board of directors shall adopt a written policy providing that if an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Advisory Council member shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(2) If an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (b)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(c) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt the conflict of interest policies required by this section.

Subpart C—General Fund and Targeted Funds

§ 1291.20 Establishment of programs.

(a) *General Fund*—(1) *Establishment.* A Bank shall establish a General Fund pursuant to the requirements of this part.

(2) *Eligibility requirements.* A Bank may not adopt eligibility requirements for its General Fund except as specifically authorized in this part.

(b) *Targeted Funds*—(1) *Establishment; number of Targeted Funds and funding allocation amounts.* A Bank may establish, in its discretion, up to three Targeted Funds to address specified affordable housing needs in its district pursuant to the phase-in funding allocation requirements in §1291.12(c)(1), the following phase-in requirements for the number of Targeted Funds unless otherwise directed by FHFA, and any other applicable requirements of this part:

(i) One Targeted Fund;

(ii) Two Targeted Funds to be administered in the same calendar year, provided that the Bank administered at least one Targeted Fund in any preceding year; or

(iii) Three Targeted Funds to be administered in the same calendar year, provided that the Bank administered at least two Targeted Funds in any preceding year.

(2) *Eligibility requirements.* (i) A Bank shall adopt and implement parameters, which shall be included in its AHP Implementation Plan, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a robust competitive scoring process.

(ii) A Bank may not adopt eligibility requirements for its Targeted Funds except as specifically authorized in this part.

§ 1291.21 Eligible applicants.

(a) *Member applicants.* A Bank shall accept applications for AHP subsidy under its General Fund and any Targeted Funds only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(b) *Project sponsor qualifications*—(1) *In general.* A project sponsor must be qualified and able to perform its responsibilities as committed to in the application for AHP subsidy funding the project.

(2) *Revolving loan fund.* Pursuant to written policies adopted by a Bank's board of directors, a revolving loan fund sponsor that intends to use AHP direct subsidy in accordance with §1291.31 shall:

(i) Provide audited financial statements that its operations are consistent with sound business practices; and

(ii) Demonstrate the ability to relend AHP subsidy repayments on a timely basis and track the use of the AHP subsidy.

(3) *Loan pool.* Pursuant to written policies adopted by a Bank's board of directors, a loan pool sponsor that intends to use AHP subsidy in accordance with §1291.32 shall:

(i) Provide evidence of sound asset/liability management practices;

(ii) Provide audited financial statements that its operations are consistent with sound business practices; and

(iii) Demonstrate the ability to track the use of the AHP subsidy.

§ 1291.22 Funding rounds; application process.

(a) *Funding rounds.* A Bank may accept applications from proposed projects for AHP subsidy under its General Fund and any Targeted Funds during a specified number of funding rounds each year, as determined by the Bank.

(b) *Submission of applications.* Except as provided in §1291.29(a), a Bank shall require applications for AHP subsidy to contain information sufficient for the Bank to:

(1) Determine that the proposed AHP project meets the eligibility requirements of this part; and

(2) Evaluate the application pursuant to the scoring methodology adopted by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) *Review of applications submitted.* Except as provided in § 1291.29(b), a Bank shall review the applications for AHP subsidy to determine that the proposed AHP project meets the eligibility requirements of this part, and shall evaluate the applications pursuant to the Bank's scoring methodology adopted pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

§ 1291.23 Eligible projects.

Projects receiving AHP subsidies pursuant to a Bank's General Fund and any Targeted Funds must meet the following eligibility requirements:

(a) *Owner-occupied or rental housing.* The AHP subsidy shall be used exclusively for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of an owner-occupied project for very low-income or low- or moderate-income households, where the housing is to be used as the household's primary residence. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project;

(2) *Rental housing.* The purchase, construction, or rehabilitation of a rental project, where at least 20 percent of the units in the project are occupied by and affordable for very low-income households.

(i) *Projects that are not occupied.* For a rental project that is not occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental unit.

(ii) *Projects that are occupied.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, for a rental project involving purchase or rehabilitation that is occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application at the time of such submission.

(B) If the project has a relocation plan for current occupants that is approved by one of its federal, state, or local government funders, or a reasonable relocation plan for current occupants that is otherwise approved by the Bank according to standards included in the Bank's AHP Implementation Plan, a household may have an income meeting the income targeting commitments upon initial occupancy of the rental unit after completion of the purchase or rehabilitation.

(b) *Project feasibility*—(1) *Developmental feasibility.* The project must be likely to be completed and occupied, based on relevant factors contained in the Bank's project feasibility guidelines, including, but not limited to, the development budget, market analysis, and project sponsor's experience in providing the requested assistance to households.

(2) *Operational feasibility of rental projects.* A rental project must be able to operate in a financially sound manner, in accordance with the Bank's project feasibility guidelines, as projected in the project's operating pro forma.

(c) *Timing of AHP subsidy use.* Some or all of the AHP subsidy must be likely to be drawn down by the project or used by the project to procure other financing commitments within 12 months of the date of approval of the application for AHP subsidy funding the project.

(d) *Retention agreements*—(1) *Owner-occupied projects.* Each AHP-assisted unit in an owner-occupied project for which the AHP subsidy was used for purchase, or for purchase in conjunction with rehabilitation, of the unit by the AHP-assisted household, is, or is committed to be, subject to a five-year retention agreement described in § 1291.15(a)(7).

(2) *Rental projects.* AHP-assisted rental projects are, or are committed to be, subject to a 15-year retention agreement as described in § 1291.15(a)(8).

(e) *Fair housing.* The project, as proposed, must comply with applicable federal and state laws on fair housing and housing accessibility, including, but not limited to, the Fair Housing

Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Architectural Barriers Act of 1969, and must demonstrate how the project will be affirmatively marketed.

§ 1291.24 Eligible uses.

(a) *Eligible uses of AHP subsidy.* AHP subsidies shall be used only for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of owner-occupied housing.

(2) *Rental housing.* The purchase, construction, or rehabilitation of rental housing.

(3) *Need for AHP subsidy*—(i) *Review of project development budget.* The project's estimated sources of funds shall equal its estimated uses of funds, as reflected in the project's development budget. The difference between the project's sources of funds (excluding AHP subsidy) and uses of funds is the project's need for AHP subsidy, which is the maximum amount of AHP subsidy the project may receive. A Bank, in its discretion, may permit a project's sources of funds to include or exclude the estimated market value of in-kind donations and voluntary professional labor or services (excluding the value of sweat equity), provided that the project's uses of funds also include or exclude, respectively, the value of such estimates.

(ii) *Cash sources of funds.* A project's cash sources of funds shall include any cash contributions by the sponsor, any cash from sources other than the sponsor, and estimates of funds the project sponsor intends to obtain from other sources but which have not yet been committed to the project. In the case of homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution shall include the present value of any payments the sponsor is to receive from the buyer, which shall include any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

(iii) *Cash uses.* A project's cash uses are the actual outlay of cash needed to pay for materials, labor, and acquisition or other costs of completing the project. Cash costs do not include in-kind donations, voluntary professional labor or services, or sweat equity.

(4) *Project costs*—(i) *In general.* (A) Taking into consideration the geographic location of the project, development conditions, and other non-financial household or project characteristics, a Bank shall determine that a project's costs, as reflected in the project's development budget, are reasonable, in accordance with the Bank's project cost guidelines.

(B) For purposes of determining the reasonableness of a developer's fee for a project as a percentage of total development costs, a Bank may, in its discretion, include estimates of the market value of in-kind donations and volunteer professional labor or services (excluding the value of sweat equity) committed to the project as part of the total development costs.

(ii) *Cost of property and services provided by a member.* The purchase price of property or services, as reflected in the project's development budget, sold to the project by a member providing AHP subsidy to the project, or, in the case of property, upon which such member holds a mortgage or lien, may not exceed the market value of such property or services as of the date the purchase price was agreed upon. In the case of real estate owned property sold to a project by a member providing AHP subsidy to the project, or property sold to the project upon which the member holds a mortgage or lien, the market value of such property is deemed to be the ''as-is'' or ''as-rehabilitated'' value of the property, whichever is appropriate. That value shall be reflected in an independent appraisal of the property performed by a state certified or licensed appraiser, as defined in 12 CFR 564.2(j) and (k), within 6 months prior to the date the Bank disburses AHP subsidy to the project.

(5) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans that are made for the

project in conjunction with the AHP subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(6) *Counseling costs.* Counseling costs, provided:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(7) *Refinancing.* Refinancing of an existing single-family or multifamily mortgage loan, provided that the refinancing produces equity proceeds and such equity proceeds up to the amount of the AHP subsidy in the project shall be used only for the purchase, construction, or rehabilitation of housing units meeting the eligibility requirements of this part.

(8) *Calculation of AHP subsidy.* (i) Where an AHP direct subsidy is provided to a project to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the net present value of the interest foregone from making the loan below the lender's market interest rate shall be calculated as of the date the application for AHP subsidy is submitted to the Bank, and subject to adjustment under § 1291.30(d).

(ii) Where an AHP subsidized advance is provided to a project, the net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds shall be determined as of the earlier of the date of disbursement of the subsidized advance or the date prior to disbursement on which the Bank first manages the funding to support the subsidized advance through its asset/liability management system, or otherwise.

(b) *Prohibited uses of AHP subsidy.* AHP subsidy may not be used to pay for:

(1) *Certain prepayment fees.* Prepayment fees imposed by a Bank on a member for a subsidized advance that is prepaid, unless:

(i) The project is in financial distress that cannot be remedied through a project modification pursuant to § 1291.29;

(ii) The prepayment of the subsidized advance is necessary to retain the project's affordability and income targeting commitments;

(iii) Subsequent to such prepayment, the project will continue to comply with the terms of the approved AHP application and the requirements of this part for the duration of the original retention period;

(iv) Any unused AHP subsidy is returned to the Bank and made available for other AHP projects or households; and

(v) The amount of AHP subsidy used for the prepayment fee may not exceed the amount of the member's prepayment fee to the Bank;

(2) *Cancellation fees.* Cancellation fees and penalties imposed by a Bank on a member for a subsidized advance commitment that is canceled;

(3) *Processing fees.* Processing fees charged by members for providing AHP direct subsidies to a project; or

(4) *Reserves and certain expenses.* Capitalized reserves, periodic deposits to reserve accounts, operating expenses, or supportive services expenses.

(c) *Optional Bank district eligibility requirements.* A Bank may require a project receiving AHP subsidies to meet one or more of the following additional eligibility requirements adopted by the Bank's board of directors and included in its AHP Implementation Plan after consultation with its Advisory Council:

(1) *AHP subsidy limits.* A requirement that the amount of AHP subsidy requested for the project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member, per project sponsor, per project, or per project unit in a single AHP funding round. A Bank may establish only one maximum subsidy limit per member, per sponsor, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund, but the maximum subsidy limit per project or per project unit may differ among the Funds; or

(2) *Homebuyer or homeowner counseling.* A requirement that a household

must complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization recognized as experienced in homebuyer or homeowner counseling, respectively.

(d) *Applications to multiple Funds—subsidy amount.* If an application for a project is submitted to more than one Fund at the same time, the application for each Fund must be for the same amount of AHP subsidy.

§ 1291.25 Scoring methodologies.

(a)(1) *Written scoring methodologies.* A Bank shall establish a written scoring methodology for its General Fund and for any Targeted Fund setting forth the Bank's scoring point allocations as required in paragraph (a)(2) of this section, scoring criteria adopted pursuant to the requirements of §§ 1291.26 and 1291.27, as applicable, and related definitions. The scoring methodology for each Fund may be different. A Bank shall not adopt scoring points allocations or scoring criteria for its General Fund and any Targeted Funds except as specifically authorized under this paragraph (a)(1) and §§ 1291.26 and 1291.27, respectively.

(2) *Scoring points allocations*—(i) *General Fund.* A Bank shall allocate 100 points among all of the scoring criteria adopted by the Bank for its General Fund pursuant to § 1291.26. The scoring criterion for targeting in § 1291.26(d) shall be allocated at least 20 points. The remaining scoring criteria shall be allocated at least 5 points each, except that if a Bank adopts the scoring criterion for home purchase by low- or moderate-income households in § 1291.26(c) as an optional scoring criterion, the Bank may allocate fewer than the full 5 points to it, with the remainder of such points allocated to one or a combination of the other scoring criteria in § 1291.26 other than to the scoring criterion for Bank district priorities in § 1291.26(h). If a Bank adopts a scoring criterion under its Bank district priorities for housing located in the Bank's district, the Bank may not allocate points to the scoring criterion in a way that excludes all out-of-district projects from its General Fund.

(ii) *Targeted Funds.* A Bank shall allocate 100 points among all of the scoring criteria adopted by the Bank for each Targeted Fund pursuant to § 1291.27. A Bank may not allocate more than 50 points to any one scoring criterion for a Targeted Fund.

(3) *Fixed-point and variable-point scoring criteria.* A Bank shall designate each scoring criterion as either a fixed-point or a variable-point criterion, defined as follows:

(i) Fixed-point scoring criteria are those that cannot be satisfied in varying degrees and are either satisfied or not, with the total number of points allocated to the criterion awarded by the Bank to an application meeting the criterion; and

(ii) Variable-point criteria are those where there are varying degrees to which an application can satisfy the criteria, with the number of points that may be awarded to an application for meeting the criterion varying, depending on the extent to which the application satisfies the criterion, based on a fixed scale or on a scale relative to the other applications being scored. A Bank shall designate the targeting scoring criterion in § 1291.26(d) as a variable-point criterion.

(b) *Satisfaction of scoring criteria.* A Bank shall award scoring points to applications to a particular Fund based on satisfaction of the scoring criteria in the Bank's scoring methodology for that Fund.

(c) *Scoring tied applications.* A Bank shall establish and implement, as necessary, a scoring tie-breaker policy to address the case of two or more applications to its General Fund or any Targeted Fund receiving identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them. A Bank shall meet the following requirements in establishing its scoring tie-breaker policy:

(1) The Bank shall consult with its Advisory Council prior to adoption of its policy;

(2) The Bank shall adopt the policy in advance of an AHP funding round and include it in its AHP Implementation Plan;

(3) The policy shall include the methodology used to break a scoring tie, which may differ for each Fund, and

which shall be drawn from the particular Fund's scoring criteria adopted in the Bank's AHP Implementation Plan;

(4) The scoring tie-breaker methodology shall be reasonable, transparent, verifiable, and impartial;

(5) The scoring tie-breaker methodology shall be used solely to break a scoring tie and may not affect the eligibility of the applications, including financial feasibility, or their scores and resultant rankings;

(6) The Bank shall approve a tied application as an alternate pursuant to §1291.28(b) if the application does not prevail under the scoring tie-breaker methodology, or if the application is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded, if the Bank has a written policy to approve alternates for funding under the applicable Fund; and

(7) The Bank shall document in writing its analysis and results for each use of the scoring tie-breaker methodology.

§ 1291.26 Scoring criteria for the General Fund.

A Bank shall adopt in its scoring methodology for its General Fund all of the following categories of scoring criteria, including at least one housing need under each of paragraphs (e), (f), and (g) of this section, except that a Bank is not required to adopt the scoring criterion for homeownership by low- or moderate-income households in paragraph (c) of this section if the Bank allocates at least 10 percent of its required annual AHP contribution to any Homeownership Set-Aside Programs, and a Bank is not required to adopt the scoring criterion for Bank district priorities in paragraph (h) of this section:

(a) *Use of donated or conveyed government-owned or other properties.* The financing of housing using a significant proportion, as defined by the Bank in its AHP Implementation Plan, of:

(1) Land or units donated or conveyed by the federal government or any agency or instrumentality thereof; or

(2) Land or units donated or conveyed by any other party for an amount significantly below the fair market value of the property, as defined by the Bank in its AHP Implementation Plan.

(b) *Sponsorship by a not-for-profit organization or government entity.* Project sponsorship by a not-for-profit organization, a state or political subdivision of a state, a state housing agency, a local housing authority, a Native American Tribe, an Alaskan Native Village, or the government entity for Native Hawaiian Home Lands.

(c) *Home purchase by low- or moderate-income households.* The financing of home purchases by low- or moderate-income households.

(d) *Income targeting.* The extent to which a project provides housing for very low- and low- or moderate-income households, as follows:

(1) *Rental projects.* An application for a rental project shall be awarded the maximum number of points available under this scoring criterion if 60 percent or more of the units in the project are reserved for occupancy by households with incomes at or below 50 percent of the median income for the area. Applications for projects with less than 60 percent of the units reserved for occupancy by households with incomes at or below 50 percent of the median income for the area shall be awarded points on a declining scale based on the percentage of units in a project that are reserved for households with incomes at or below 50 percent of the median income for the area, and on the percentage of the remaining units reserved for households with incomes at or below 80 percent of the median income for the area.

(2) *Owner-occupied projects.* Applications for owner-occupied projects shall be awarded points based on a declining scale to be determined by the Bank in its AHP Implementation Plan, taking into consideration percentages of units and targeted income levels.

(3) *Separate scoring.* For purposes of this scoring criterion, applications for owner-occupied projects and rental projects may be scored separately.

(e) *Underserved communities and populations.* The financing of housing for underserved communities or populations, by addressing one or more of the following specific housing needs:

(1) *Housing for homeless households.* The financing of rental housing, excluding overnight shelters, reserving at least 20 percent of the units for homeless households, the creation of transitional housing for homeless households permitting a minimum of 6 months occupancy, or the creation of permanent owner-occupied housing reserving at least 20 percent of the units for homeless households, with the term ''homeless households'' defined by the Bank in its AHP Implementation Plan.

(2) *Housing for special needs populations.* The financing of housing in which at least 20 percent of the units are reserved for households with specific special needs, such as: The elderly; persons with disabilities; formerly incarcerated persons; persons recovering from physical abuse or alcohol or drug abuse; victims of domestic violence, dating violence, sexual assault or stalking; persons with HIV/AIDS; or unaccompanied youth; or the financing of housing that is visitable by persons with physical disabilities who are not occupants of such housing. A Bank may, in its discretion, adopt a requirement that projects provide supportive services, or access to supportive services, for specific special needs populations identified by the Bank in order for the project to receive scoring points under this paragraph (e)(2).

(3) *Housing for other targeted populations.* The financing of housing in which at least 20 percent of the units are reserved for households specifically in need of housing, such as agricultural workers, military veterans, Native Americans, households requiring large units, or kinship care households in which children are in the care of cohabitating relatives, such as grandparents, aunts or uncles, or cohabitating close family friends.

(4) *Housing in rural areas.* The financing of housing located in a rural area, as defined by the Bank in its AHP Implementation Plan.

(5) *Rental housing for extremely low-income households.* The financing of rental housing in which a minimum percentage of the units, as defined by the Bank in its AHP Implementation Plan, are reserved for extremely low-income households. Points awarded under this criterion shall be awarded in addition to any points awarded for income targeting under paragraph (d)(1) of this section, such that the points awarded to a project under this criterion and the income targeting criterion, combined, may exceed the maximum number of possible points awarded under the income targeting criterion.

(6) *Other.* The financing of other housing addressing specific housing needs of underserved communities or populations as FHFA may provide by guidance.

(f) *Creating economic opportunity.* The financing of housing that facilitates economic opportunity for the residents by addressing one or more of the following specific housing needs:

(1) *Promotion of empowerment.* The provision of housing in combination with a program offering services that assist residents in attaining life skills or moving toward better economic opportunities, such as: Employment; education; training; homebuyer, homeownership or tenant counseling; child care; adult daycare services; afterschool care; tutoring; health services, including mental health and behavioral health services; resident involvement in decision making affecting the creation or operation of the project; or workforce preparation and integration.

(2) *Residential economic diversity.* The financing of either affordable housing in a high opportunity area, or mixed-income housing in an area designated by the Bank, with those terms defined and area designated by the Bank in its AHP Implementation Plan.

(3) *Other.* The financing of other housing that facilitates economic opportunity as FHFA may provide by guidance.

(g) *Community stability, including affordable housing preservation.* The promotion of community stability, such as by preserving affordable housing, rehabilitating vacant or abandoned properties, or being an integral part of a community revitalization or economic development strategy approved by a unit of state or local government or instrumentality thereof, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement.

(h) *Bank district priorities.* The satisfaction of one or more housing needs in the Bank's district, as defined by the Bank in its AHP Implementation Plan, that the Bank has not otherwise adopted under this section.

§ 1291.27 Scoring criteria for Targeted Funds.

A Bank shall adopt in its scoring methodology for each Targeted Fund established by the Bank at least three different scoring criteria, as determined by the Bank in its discretion, that allow the Bank to select applications that meet the specific affordable housing need or needs being addressed by the Targeted Fund.

§ 1291.28 Approval of AHP applications under the General Fund and Targeted Funds.

(a) *Approval of AHP applications.* Subject to the requirements in paragraphs (c) and (d) of this section, a Bank shall approve applications for AHP subsidy under its General Fund and any Targeted Funds that meet all of the applicable AHP eligibility requirements in this part in descending order, starting with the highest scoring application until the total funding amount for the particular AHP funding round, except for any amount insufficient to fund the next highest scoring application, has been approved.

(b) *AHP application alternates.* For the General Fund and any Targeted Funds, the Bank also may, in its discretion, approve a specified number, as determined by the Bank, of the next highest scoring applications as alternates eligible for funding, and may approve any tied applications as alternates eligible for funding pursuant to paragraph (c)(2) of this section, if any previously committed AHP subsidies become available, pursuant to a written policy on approving alternates for funding established by the Bank and included in the Bank's AHP Implementation Plan. If a Bank has established such a policy for approving alternates for funding and sufficient previously committed AHP subsidies become available within one year of application approval, the Bank shall approve the designated alternates for funding within that one-year period.

(c) *Tied applications.* (1) Where two or more applications to a General Fund or Targeted Fund have identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them, a Bank shall approve the tied application that prevails under the Bank's scoring tie-breaker methodology in its policy adopted pursuant to § 1291.25(c).

(2) A tied application that does not prevail under the Bank's scoring tie-breaker methodology, or is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded under the Fund, shall be approved as an alternate for funding if the Bank has a written policy to approve alternates for funding under the Fund.

(d) *Applications to multiple Funds—approval under one Fund.* If an application for the same project is submitted to more than one Fund at a Bank in a calendar year and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan.

(e) *No delegation.* A Bank's board of directors may not delegate to Bank officers or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications, as well as any alternates under the Bank's General Fund and any Targeted Fund if the Bank has a written policy to approve alternates for funding under such Fund.

§ 1291.29 Modifications of approved AHP applications.

(a) *Modification procedure.* If, prior to or after final disbursement of funds to a project from all funding sources, in order to remedy noncompliance or receive additional subsidy, there is or will be a change in the project that would change the score that the project application received in the AHP funding round in which it was originally scored and approved, had the changed facts been operative at that time, a Bank shall approve in writing a request for a modification to the terms

of the approved application, provided that:

(1) The Bank first requests that the project sponsor or owner make a reasonable effort to cure any noncompliance within a reasonable period of time, and the noncompliance could not be cured within a reasonable period of time;

(2) The project, incorporating any such changes, would meet the eligibility requirements of this part;

(3) The application, as reflective of such changes, continues to score high enough to have been approved in the AHP funding round in which the application was originally scored and approved by the Bank, which is as high as the lowest ranking alternate approved for funding by the Bank if the Bank has a written policy to approve alternates for funding; and

(4) There is good cause for the modification, which may not be solely remediation of noncompliance, and the analysis and justification for the modification, including why a cure of noncompliance was not successful or attempted, are documented by the Bank in writing.

(b) *AHP subsidy increases; no delegation*—(1) *AHP subsidy increases.* A Bank's board of directors may, in its discretion, approve or disapprove requests for modifications involving an increase in AHP subsidy in accordance with the requirements of paragraph (a) of this section.

(2) *No delegation.* The authority to approve or disapprove requests for modifications involving an increase in AHP subsidy shall not be delegated by the Bank's board of directors to Bank officers or other Bank employees.

§ 1291.30 Procedures for funding.

(a) *Disbursement of AHP subsidies to members.* (1) A Bank may disburse AHP subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP subsidy loses its membership in a Bank, the Bank may disburse AHP subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Progress towards use of AHP subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of AHP subsidies by approved projects, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(c) *Compliance upon disbursement of AHP subsidies.* A Bank shall establish and implement policies for determining, prior to its initial disbursement of AHP subsidy for an approved project, and prior to each subsequent disbursement, that the project meets the eligibility requirements of this part and all obligations committed to in the approved AHP application. If a Bank cancels any AHP application approvals due to noncompliance with eligibility requirements of this part, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(d) *Changes in approved AHP subsidy amount where a direct subsidy is used to write down prior to closing the principal amount or interest rate on a loan.* If a member is approved to receive AHP direct subsidy to write down prior to closing the principal amount or the interest rate on a loan to a project, and the amount of AHP subsidy required to maintain the debt service cost for the loan decreases from the amount of AHP subsidy initially approved by the Bank due to a decrease in market interest rates between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank shall reduce the AHP subsidy amount accordingly. If market interest rates rise between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank, in its discretion, may increase the AHP subsidy amount accordingly.

(e) *AHP outlay adjustment.* If a Bank reduces the amount of AHP subsidy approved for a project, the amount of such reduction shall be returned to the Bank's AHP fund. If a Bank increases the amount of AHP subsidy approved for a project, the amount of such increase shall be drawn first from any currently uncommitted or repaid AHP subsidies and then from the Bank's required AHP contribution for the next year.

(f) *Project sponsor notification of re-use of repaid AHP direct subsidy.* Prior to disbursement by a project sponsor of AHP direct subsidy repaid to and retained by such project sponsor pursuant to a subsidy re-use program authorized by the Bank under § 1291.64(b), the project sponsor shall provide written notice to the member and the Bank of its intent to disburse the repaid AHP subsidy to a household satisfying the requirements of this part and the commitments made in the approved AHP application.

§ 1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP direct subsidy under its General Fund or any Targeted Funds for eligible projects and households involving both the lending of the subsidy and subsequent lending of subsidy principal and interest repayments by a revolving loan fund, provided the following requirements are met:

(a) *Submission of application.* (1) An application for AHP subsidy under this section shall include the revolving loan fund's criteria for the initial lending of the subsidy, identification of and information on a specific proposed AHP project if required in the Bank's discretion, the revolving loan fund's criteria for subsequent lending of subsidy principal and interest repayments, and any other information required by the Bank.

(2) The information in the application shall be sufficient for the Bank to:

(*i*) Determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23; and

(ii) Evaluate the criteria for the initial lending of the subsidy, and the specific proposed project if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(b) *Review of application.* A Bank shall review the application for AHP subsidy to determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23, and shall evaluate the criteria for the initial lending of the subsidy and the specific proposed project, if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) *Initial lending of subsidy.* (1) The revolving loan fund's initial lending of the AHP subsidy shall meet the eligibility requirements of paragraph (a) of this section, shall be to projects or households meeting the commitments in the approved application for AHP subsidy, and shall be subject to the requirements in §§ 1291.15 and 1291.50, respectively.

(2) If an owner-occupied unit or project funded under this paragraph (c) is in noncompliance with the commitments in the approved AHP application, or is sold or refinanced prior to the end of the applicable AHP retention period, the required amount of AHP subsidy shall be repaid to the revolving loan fund in accordance with §§ 1291.15(a)(7), 1291.15(a)(8), and 1291.60, and the revolving loan fund shall relend such repaid subsidy, excluding the amounts of AHP subsidy principal already repaid to the revolving loan fund, to another owner-occupied unit or project meeting the initial lending requirements of this paragraph (c) for the remainder of the retention period.

(d) *Subsequent lending of AHP subsidy principal and interest repayments.* (1) AHP subsidy principal and interest repayments received by the revolving loan fund from the initial lending of

the AHP direct subsidy shall be re-lent by the revolving loan fund in accordance with the requirements of this paragraph (d), except that the revolving loan fund, in its discretion, may provide part or all of such repayments as nonrepayable grants to eligible projects in accordance with the requirements of this paragraph (d).

(2) The revolving loan fund's subsequent lending of AHP subsidy principal and interest repayments shall be for the purchase, construction, or rehabilitation of owner-occupied projects for households with incomes at or below 80 percent of the median income for the area, or of rental projects where at least 20 percent of the units are occupied by and affordable for households with incomes at or below 50 percent of the median income for the area, and shall meet all other eligibility requirements of this paragraph (d).

(3) A Bank may, in its discretion, require the revolving loan fund's subsequent lending of subsidy principal and interest repayments to be subject to retention period, monitoring, and recapture requirements, as defined by the Bank in its AHP Implementation Plan.

(e) *Return of unused AHP subsidy*. The revolving loan fund shall return to the Bank any AHP subsidy that will not be used according to the requirements in this section.

§ 1291.32 Use of AHP subsidy in loan pools.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP subsidy under its General Fund or any Targeted Funds for the origination of first mortgage or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans, provided the following requirements are met:

(a) *Eligibility requirements*. The loan pool sponsor's use of the AHP subsidies shall meet the requirements under this section, and shall not be used for the purpose of providing liquidity to the originator or holder of the loans, or paying the loan pool's operating or secondary market transaction costs.

(b) *Forward commitment*. (1) The loan pool sponsor shall purchase the loans pursuant to a forward commitment that identifies the loans to be originated with interest-rate reductions as specified in the approved application for AHP subsidy to households with incomes at or below 80 percent of the median income for the area. Both initial purchases of loans for the AHP loan pool and subsequent purchases of loans to substitute for repaid loans in the pool shall be made pursuant to the terms of such forward commitment and subject to time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application.

(2) As an alternative to using a forward commitment, the loan pool sponsor may purchase an initial round of loans that were not originated pursuant to an AHP-specific forward commitment, provided that the entities from which the loans were purchased are required to use the proceeds from the initial loan purchases within time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application. The proceeds shall be used by such entities to assist households that are income-eligible under the approved AHP application during subsequent rounds of lending, and such assistance shall be provided in the form of a below-market AHP-subsidized interest rate as specified in the approved AHP application.

(c) Each AHP-assisted owner-occupied unit and rental project receiving AHP direct subsidy or a subsidized advance shall be subject to the requirements of §§ 1291.15, 1291.50, and 1291.60, respectively.

(d) Where AHP direct subsidy is being used to buy down the interest rate of a loan or loans from a member or other party, the loan pool sponsor shall use the full amount of the AHP direct subsidy to buy down the interest rate on a permanent basis at the time of closing on such loan or loans.

Subpart D—Homeownership Set-Aside Programs

§ 1291.40 Establishment of programs.

A Bank may establish, in its discretion, one or more Homeownership Set-Aside Programs pursuant to the requirements of this part.

§ 1291.41 Eligible applicants.

A Bank shall accept applications for AHP direct subsidy under its Homeownership Set-Aside Programs only from institutions that are members of the Bank at the time the application is submitted to the Bank.

§ 1291.42 Eligibility requirements.

A Bank's Homeownership Set-Aside Programs shall meet the eligibility requirements set forth in this section. A Bank may not adopt additional eligibility requirements for its Homeownership Set-Aside Programs except for eligible households pursuant to paragraph (b) of this section.

(a) *Member allocation criteria.* AHP direct subsidies shall be provided to members pursuant to allocation criteria established by the Bank in its AHP Implementation Plan.

(b) *Eligible households.* Members shall provide AHP direct subsidies only to households that:

(1) Have incomes at or below 80 percent of the median income for the area at the time the household is accepted for enrollment by the member in the Bank's Homeownership Set-Aside Programs, with such time of enrollment by the member defined by the Bank in its AHP Implementation Plan;

(2) Complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization experienced in homebuyer or homeowner counseling, in the case of households that are first-time homebuyers; and

(3) Are first-time homebuyers or households receiving AHP subsidy for owner-occupied rehabilitation, in the case of households receiving subsidy pursuant to the one-third set-aside funding allocation requirement in § 1291.12(b), and meet such other eligibility criteria that may be established by the Bank in its AHP Implementation Plan, such as a matching funds requirement, homebuyer or homeowner counseling requirement for households that are not first-time homebuyers, or criteria that give priority for the purchase or rehabilitation of housing in particular areas or as part of a disaster relief effort.

(c) *Maximum grant limit.* Members shall provide AHP direct subsidies to households as a grant, in an amount up to a maximum established by the Bank, not to exceed $22,000 per household, which limit shall adjust upward on an annual basis in accordance with increases in FHFA's House Price Index (HPI). In the event of a decrease in the HPI, the subsidy limit shall remain at its then-current amount until the HPI increases above the subsidy limit, at which point the subsidy limit shall adjust to that higher amount. FHFA will notify the Banks annually of the maximum subsidy limit, based on the HPI. A Bank may establish a different maximum grant limit, up to the maximum grant limit, for each Homeownership Set-Aside Program it establishes. A Bank's maximum grant limit for each such program shall be included in its AHP Implementation Plan, which limit shall apply to all households in the specific program for which it is established.

(d) *Eligible uses of AHP direct subsidy.* Households shall use the AHP direct subsidies to pay for down payment, closing cost, counseling, or rehabilitation assistance in connection with the household's purchase or rehabilitation of an owner-occupied unit, including a condominium or cooperative housing unit or manufactured housing, to be used as the household's primary residence.

(e) *Retention agreement.* An owner-occupied unit purchased, or purchased in conjunction with rehabilitation, using AHP direct subsidy, shall be subject to a five-year retention agreement described in § 1291.15(a)(7).

(f) *Financial or other concessions.* The Bank may, in its discretion, require members and other lenders to provide financial or other concessions, as defined by the Bank in its AHP Implementation Plan, to households in connection with providing the AHP direct subsidy or financing to the household.

(g) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans made in conjunction with the AHP direct subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(h) *Counseling costs.* The AHP direct subsidies may be used to pay for counseling costs only where:

(1) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(2) The cost of the counseling has not been covered by another funding source, including the member.

(i) *Cash back to household.* A member may provide cash back to a household at closing on the mortgage loan in an amount not exceeding $250, as determined by the Bank in its AHP Implementation Plan, and a member shall use any AHP direct subsidy exceeding such amount that is beyond what is needed at closing for closing costs and the approved mortgage amount as a credit to reduce the principal of the mortgage loan or as a credit toward the household's monthly payments on the mortgage loan.

§ 1291.43 Approval of AHP applications.

A Bank shall approve applications for AHP direct subsidy under its Homeownership Set-Aside Programs in accordance with the Bank's criteria governing the allocation of funds.

§ 1291.44 Procedures for funding.

(a) *Disbursement of AHP direct subsidies to members.* (1) A Bank may disburse AHP direct subsidies under its Homeownership Set-Aside Programs only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP direct subsidy loses its membership in a Bank, the Bank may disburse AHP direct subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP direct subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Reservation of Homeownership Set-Aside Program subsidies.* A Bank shall establish and implement policies for reservation of set-aside subsidies for households enrolled in the Bank's Homeownership Set-Aside Programs. The policies shall provide that set-aside subsidies be reserved no more than two years in advance of the Bank's time limit in its AHP Implementation Plan for draw-down and use of the subsidies by the household and the reservation of subsidies be made from the allocation for the Homeownership Set-Aside Programs for the year in which the Bank makes the reservation.

(c) *Progress towards use of AHP direct subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of the AHP direct subsidies by eligible households, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, it shall make the AHP direct subsidies available for other applicants for AHP direct subsidies under the Homeownership Set-Aside Programs or for other AHP-eligible projects.

Subpart E—Monitoring

§ 1291.50 Monitoring under the General Fund and Targeted Funds.

(a) *Initial monitoring policies for owner-occupied and rental projects.* A Bank shall adopt written policies pursuant to which the Bank shall monitor each AHP owner-occupied project and rental project approved under its General Fund and any Targeted Funds prior to, and within a reasonable period of time after, project completion to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Satisfactory progress.* The Bank shall determine that:

(i) The project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank

policies, and the requirements of this part; and

(ii) Following completion of the project, satisfactory progress is being made towards occupancy of the project by eligible households.

(2) *Project sponsor or owner certification, rent roll and other documentation; backup and other project documentation.* Within a reasonable period of time after project completion, the Bank shall review a certification from the project sponsor or owner, the project rent roll (which includes household incomes and rents), and any other documentation to verify that the project meets the following requirements, at a minimum:

(*i*) The AHP subsidies were used for eligible purposes according to the commitments made in the approved AHP application;

(ii) The household incomes and rents comply with the income targeting and rent commitments made in the approved AHP application;

(iii) The project's costs were reasonable in accordance with the Bank's project cost guidelines, and the AHP subsidies were necessary for the completion of the project as currently structured, as determined pursuant to §1291.24(a)(4);

(iv) Each AHP-assisted unit of an owner-occupied project and rental project is subject to an AHP retention agreement that meets the requirements of §1291.15(a)(7) and (8), respectively; and

(v) The services and activities committed in the approved AHP application have been provided.

(3) *Back-up and other project documentation.* The Bank's written monitoring policies shall include requirements for:

(i) Bank review within a reasonable period of time after project completion of back-up project documentation regarding household incomes and rents (not including the rent roll) maintained by the project sponsor or owner, except for projects that received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have also been allocated LIHTC; and

(ii) Maintenance and Bank review of other project documentation in the Bank's discretion.

(4) *Sampling plan.* The Bank shall not use a sampling plan to select the projects to be monitored under this paragraph (a), but may use a reasonable risk-based sampling plan to review the back-up project documentation.

(b) *Long-term monitoring—reliance on other governmental monitoring for certain rental projects.* For completed AHP rental projects that also received funds from federal, state, or local government entities other than LIHTC, a Bank may, in its discretion, for purposes of long-term AHP monitoring under its General Fund and any Targeted Funds, rely on the monitoring by such entities of the income targeting and rent requirements applicable under their programs, provided that the Bank can show that:

(1) The compliance profiles regarding income targeting, rent, and retention period requirements of the AHP and the other programs are substantively equivalent;

(2) The entity has demonstrated and continues to demonstrate its ability to monitor the project;

(3) The entity agrees to provide reports to the Bank on the project's incomes and rents for the full 15-year AHP retention period; and

(4) The Bank reviews the reports from the monitoring entity to confirm that they comply with the Bank's monitoring policies.

(c) *Long-term monitoring policies for rental projects.* In cases where a Bank does not rely on monitoring by a federal, state, or local government entity pursuant to paragraph (b) of this section, pursuant to written policies established by the Bank, the Bank shall monitor completed AHP rental projects approved under its General Fund and any Targeted Funds, commencing in the second year after project completion through the AHP 15-year retention period, to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Annual project sponsor or owner certifications; backup and other project documentation.* A Bank's written monitoring policies shall include requirements for:

(i) Bank review of annual certifications by project sponsors or owners to the Bank that household incomes and rents are in compliance with the commitments made in the approved AHP application during the AHP 15-year retention period, along with information on the ongoing financial viability of the project, including whether the project is current on its property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources;

(ii) Bank review of back-up project documentation regarding household incomes and rents, including the rent rolls, maintained by the project sponsor or owner, except for projects that also received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have been allocated LIHTC, provided that the Bank shall review any LIHTC noncompliance notices received from project owners pursuant to §1291.15(a)(5)(ii) during the AHP 15-year retention period; and

(iii) Maintenance and Bank review of other project documentation in the Banks' discretion.

(2) *Risk factors and other monitoring*—(i) *Risk factors; other monitoring.* A Bank's written monitoring policies shall take into account risk factors such as the amount of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience and performance, and any monitoring of the project provided by a federal, state, or local government entity.

(ii) *Risk-based sampling plan.* A Bank may use a reasonable, risk-based sampling plan to select the rental projects to be monitored under this paragraph (c), and to review the back-up and any other project documentation. The risk-based sampling plan and its basis shall be in writing.

(d) *Annual adjustment of targeting commitments.* For purposes of determining compliance with the targeting commitments in an approved AHP application for both initial and long-term AHP monitoring purposes under a Bank's General Fund and any Targeted Funds, such commitments shall be considered to adjust annually according to the current applicable median income data. A rental unit may continue to count toward meeting the targeting commitment of an approved AHP application as long as the rent charged to a household remains affordable, as defined in §1291.1, for the household occupying the unit.

§1291.51 Monitoring under Homeownership Set-Aside Programs.

(a) *Adoption and implementation.* Pursuant to written policies adopted by a Bank, the Bank shall monitor compliance with the requirements of its Homeownership Set-Aside Programs, including monitoring to determine, at a minimum, whether:

(1) The AHP subsidy was provided to households meeting all applicable eligibility requirements in §1291.42(b) and the Bank's Homeownership Set-Aside Program policies; and

(2) All other applicable eligibility requirements in §1291.42 and the Bank's Homeownership Set-Aside Program policies are met, including that the AHP-assisted units are subject to retention agreements, as required under §1291.15(a)(7), where the AHP subsidy was used for purchase of the unit, or for purchase of the unit in conjunction with rehabilitation.

(b) *Member certifications; back-up and other documentation.* The Bank's written monitoring policies shall include requirements for:

(1) Bank review of certifications by members to the Bank, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in §1291.42;

(2) Bank review of back-up documentation regarding household incomes maintained by the member; and

(3) Maintenance and Bank review of other documentation in the Bank's discretion.

(c) *Sampling plan.* The Bank may use a reasonable sampling plan to select the households to be monitored, and to

review the back-up and any other documentation received by the Bank, but not the member certifications required in paragraph (b) of this section. The sampling plan and its basis shall be in writing.

Subpart F—Remedial Actions for Noncompliance

§ 1291.60 Remedial actions for project noncompliance.

(a) *Scope.* This section sets forth the requirements applicable to the Banks in the event of noncompliance by an AHP-assisted project with the commitments made in its application for AHP subsidies and the requirements of this part, including any use of AHP subsidy by the project sponsor or owner for purposes other than those committed to in the AHP application. This section does not apply to individual AHP-assisted households or to the sale or refinancing by such households of their homes.

(b) *Elimination of project noncompliance*—(1) *Cure.* In the event of project noncompliance, the Bank shall request that the project sponsor or owner make a reasonable effort to cure the noncompliance within a reasonable period of time. If the noncompliance cannot be cured within a reasonable period of time, the requirements for project modification in paragraph (b)(2) of this section shall apply. If the noncompliance is cured within a reasonable period of time, the Bank shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(2) *Project modification.* If the project sponsor or owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the AHP application pursuant to §1291.29. When the circumstances of the noncompliance can be eliminated through a modification, the Bank shall approve the modification and shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(c) *Reasonable collection efforts*—(1) *Demand for repayment.* If the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the requirements of this part (plus interest, if appropriate). If the noncompliance is occupancy by households with incomes exceeding the income-targeting commitments in the AHP application, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

(2) *Settlement.* (i) If the demand for repayment of the full amount due is unsuccessful, the Bank, or the member if delegated the responsibility and in consultation with the Bank, shall make reasonable efforts to collect the subsidy from the project sponsor or owner, which may include settlement for less than the full amount due, taking into account factors such as the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, other assets of the project sponsor or owner, the degree of culpability of the project sponsor or owner, and the extent of the Bank's or member's collection efforts.

(ii) The settlement with the project sponsor or owner must be supported by sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance, including any factors in paragraph (c)(2)(i) of this section that were considered in reaching the settlement.

§ 1291.61 Recovery of subsidy for member noncompliance.

A Bank shall recover from a member the amount of any AHP subsidy (plus interest, if appropriate) not used in compliance with the commitments in the member's AHP application or the requirements of this part as a result of the actions or omissions of the member.

§ 1291.62 Bank reimbursement of AHP fund.

(a) *By the Bank.* A Bank shall reimburse its AHP fund in the amount of any AHP subsidies (plus interest, if appropriate) not used in compliance with the commitments in an AHP application or the requirements of this part as a result of the actions or omissions of the Bank.

(b) *By FHFA order.* FHFA may order a Bank to reimburse its AHP fund in an appropriate amount upon determining that:

(1) The Bank has failed to reimburse its AHP fund as required under paragraph (a) of this section; or

(2) The Bank has failed to recover the full amount of AHP subsidy due from a project sponsor, project owner, or member pursuant to the requirements of §§ 1291.60 and 1291.61, and has not shown that such failure is reasonably justified, considering factors such as those in § 1291.60(c)(2)(i).

§ 1291.63 Suspension and debarment.

(a) *At a Bank's initiative.* A Bank may suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(b) *At FHFA's initiative.* FHFA may order a Bank to suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

§ 1291.64 Use of repaid AHP subsidies.

(a) *Use of repaid AHP subsidies for other AHP-eligible projects or households.* Except as provided in paragraph (b) of this section, amounts of AHP subsidy, including any interest, repaid to a Bank pursuant to this part shall be made available by the Bank for other AHP-eligible projects or households.

(b) *Re-use of repaid AHP direct subsidies in same project*—(1) *Requirements.* AHP direct subsidy, including any interest, repaid to a member or project sponsor, as applicable, under a Bank's General Fund and any Targeted Funds may be repaid by such parties to the Bank for subsequent disbursement to and re-use by such parties, or retained by such parties for subsequent re-use, as authorized by the Bank, in its discretion, after consultation with its Advisory Council, in its AHP Implementation Plan, provided all of the following requirements are satisfied:

(i) The member or the project sponsor originally provided the AHP direct subsidy as down payment, closing cost, rehabilitation, or interest rate buy down assistance to an eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit pursuant to an approved AHP application;

(ii) The AHP direct subsidy, including any interest, was repaid to the member or project sponsor as a result of a sale, transfer, or assignment of title or deed of the unit prior to the end of the retention period to a subsequent purchaser that is not a low- or moderate-income household; and

(iii) The repaid AHP direct subsidy is made available by the member or project sponsor, within the period of time specified by the Bank in its AHP Implementation Plan, to another AHP-eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit in the same project in accordance with the terms of the approved AHP application.

(2) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt any Bank policies on re-use of repaid AHP direct subsidies in the same project pursuant to paragraph (b) of this section.

§ 1291.65 Transfer of Program administration.

Without limitation on other remedies, FHFA, upon determining that a Bank has engaged in mismanagement of its Program, may designate another Bank to administer all or a portion of the first Bank's annual AHP contribution, for the benefit of the first Bank's members, under such terms and conditions as FHFA may prescribe.

Subpart G—Affordable Housing Reserve Fund

§ 1291.70 Affordable Housing Reserve Fund.

(a) *Deposits.* If a Bank fails to use or commit the full amount it is required to contribute to the Program in any year pursuant to §1291.10(a), 90 percent of the unused or uncommitted amount shall be deposited by the Bank in an Affordable Housing Reserve Fund established and administered by FHFA. The remaining 10 percent of the unused and uncommitted amount retained by the Bank should be fully used or committed by the Bank during the following year, and any remaining portion shall be deposited in the Affordable Housing Reserve Fund.

(b) *Use or commitment of AHP funds.* Approval of applications for AHP funds from members sufficient to exhaust the amount a Bank is required to contribute pursuant to §1291.10(a) shall constitute use or commitment of funds. Amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects, they are insufficient to fund:

(1) AHP application alternates in the Bank's final funding round of the year for its General Fund or any Targeted Funds, if the Bank has a policy to approve alternates for funding under such Funds;

(2) Pending applications for funds under the Bank's Homeownership Set-Aside Programs, if any; and

(3) Project modifications for AHP subsidy increases approved by the Bank pursuant to the requirements of this part.

(c) *Carryover of insufficient amounts.* Such insufficient amounts as described in paragraph (b) of this section shall be carried over by the Bank for use or commitment in the following year in its General Fund, any Targeted Funds, or any Homeownership Set-Aside Programs.

PART 1292—COMMUNITY INVESTMENT CASH ADVANCE PROGRAMS

Sec.

AUTHORITY: 12 U.S.C. 1430, 4511(b)(2).

SOURCE: 78 FR 2328, Jan. 11, 2013, unless otherwise noted.

§ 1292.1 Definitions.

As used in this part:

Champion Community means a community which developed a strategic plan and applied for designation by either the Secretary of HUD or the Secretary of the USDA as an Empowerment Zone or Enterprise Community, but was designated a Champion Community.

CICA program or Community Investment Cash Advance program means:

(1) A Bank's AHP;

(2) A Bank's CIP;

(3) A Bank's RDF program or UDF program using any combination of the targeted beneficiaries and targeted income levels specified in §1292.1 of this part; and

(4) Any other advance or grant program offered by a Bank using targeted beneficiaries and targeted income levels other than those specified in §1292.1 of this part, established by the Bank with the prior approval of FHFA.

Economic development projects means:

(1) Commercial, industrial, manufacturing, social service, and public facility projects and activities; and

(2) Public or private infrastructure projects, such as roads, utilities, and sewers.

Family means one or more persons living in the same dwelling unit.

Housing projects means projects or activities that involve the purchase, construction, rehabilitation or refinancing (subject to §1292.5(c) of this part) of, or predevelopment financing for:

(1) Individual owner-occupied housing units, each of which is purchased or

owned by a family with an income at or below the targeted income level;

(2) Projects involving multiple units of owner-occupied housing in which at least 51% of the units are owned or are intended to be purchased by families with incomes at or below the targeted income level;

(3) Rental housing where at least 51% of the units in the project are occupied by, or the rents are affordable to, families with incomes at or below the targeted income level; or

(4) Manufactured housing parks where:

(i) At least 51% of the units in the project are occupied by, or the rents are affordable to, families with incomes at or below the targeted income level; or

(ii) The project is located in a neighborhood with a median income at or below the targeted income level.

Median income for the area— (1) *Owner-occupied housing projects and economic development projects.* For purposes of owner-occupied housing projects and economic development projects, median income for the area means one or more of the following, as determined by the Bank:

(i) The median income for the area, as published annually by HUD;

(ii) The median income for the area obtained from the Federal Financial Institutions Examination Council;

(iii) The applicable median family income, as determined under 26 U.S.C. 143(f) (Mortgage Revenue Bonds) and published by a State agency or instrumentality;

(iv) The median income for the area, as published by the USDA; or

(v) The median income for the area obtained from another public entity or a private source and approved by the Director, at the request of a Bank, for use under the Bank's CICA programs.

(2) *Rental housing projects.* For purposes of rental housing projects, median income for the area means one or more of the following, as determined by the Bank:

(i) The median income for the area, as published annually by HUD; or

(ii) The median income for the area obtained from the Federal Financial Institutions Examination Council;

(iii) The median income for the area obtained from another public entity or a private source and approved by the Director, at the request of a Bank, for use under the Bank's CICA programs.

MSA means a Metropolitan Statistical Area as designated by the Office of Management and Budget.

Neighborhood means:

(1) A census tract or block numbering area;

(2) A unit of local government with a population of 25,000 or less;

(3) A rural county; or

(4) A geographic location designated in comprehensive plans, ordinances, or other local documents as a neighborhood, village, or similar geographic designation that is within the boundary of but does not encompass the entire area of a unit of general local government.

Provide financing means:

(1) Originating loans;

(2) Purchasing a participation interest, or providing financing to participate, in a loan consortium for CICA-eligible housing or economic development projects;

(3) Making loans to entities that, in turn, make loans for CICA-eligible housing or economic development projects;

(4) Purchasing mortgage revenue bonds or mortgage-backed securities, where all of the loans financed by such bonds and all of the loans backing such securities, respectively, meet the eligibility requirements of the CICA program under which the member or housing associate borrower receives funding;

(5) Creating or maintaining a secondary market for loans, where all such loans are mortgage loans meeting the eligibility requirements of the CICA program under which the member or housing associate borrower receives funding;

(6) Originating CICA-eligible loans within 3 months prior to receiving the CICA funding; and

(7) Purchasing low-income housing tax credits.

RDF or Rural Development Funding program means an advance or grant program offered by a Bank for targeted community lending in rural areas.

Rural area means:

(1) A unit of general local government with a population of 25,000 or less;

(2) An unincorporated area outside an MSA; or

(3) An unincorporated area within an MSA that qualifies for housing or economic development assistance from the USDA.

Small business means a ''small business concern,'' as that term is defined by section 3(a) of the Small Business Act (15 U.S.C. 632(a)) and implemented by the Small Business Administration under 13 CFR part 121, or any successor provisions.

Targeted beneficiaries means beneficiaries determined by the geographical area in which a project is located (Geographically Defined Beneficiaries), by the individuals who benefit from a project as employees or service recipients (Individual Beneficiaries), or by the nature of the project itself (Activity Beneficiaries), as follows:

(1) Geographically Defined Beneficiaries:

(i) The project is located in a neighborhood with a median income at or below the targeted income level;

(ii) The project is located in a rural Champion Community, or a rural Empowerment Zone or rural Enterprise Community, as designated by the Secretary of the USDA;

(iii) The project is located in an urban Champion Community, or an urban Empowerment Zone or urban Enterprise Community, as designated by the Secretary of HUD;

(iv) The project is located in an Indian area, as defined by the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*), Alaskan Native Village, or Native Hawaiian Home Land;

(v) The project is located in an area and involves a property eligible for a Brownfield Tax Credit;

(vi) The project is located in an area affected by a military base closing and is a ''community in the vicinity of the installation'' as defined by the Department of Defense at 32 CFR part 176;

(vii) The project is located in a designated community under the Community Adjustment and Investment Program as defined under 22 U.S.C. 290m–2;

(viii) The project is located in a Federally declared disaster area; or

(ix) The project is located in a state declared disaster area, or other area that qualifies for assistance under another Federal or State targeted economic development program, approved by FHFA.

(2) Individual Beneficiaries:

(i) The annual salaries for at least 51% of the permanent full- and part-time jobs, computed on a full-time equivalent basis, created or retained by the project, other than construction jobs, are at or below the targeted income level; or

(ii) At least 51% of the families who otherwise benefit from (other than through employment), or are provided services by, the project have incomes at or below the targeted income level.

(3) Activity Beneficiaries: Projects that qualify as small businesses.

(4) Other Targeted Beneficiaries. A Bank may designate, with the prior approval of FHFA, other targeted beneficiaries for its targeted community lending.

(5) Only targeted beneficiaries identified in paragraphs (1)(i) through (1)(iv), and (2)(i) and (2)(ii) of this definition are eligible for CIP advances.

Targeted community lending means providing financing for economic development projects for targeted beneficiaries.

Targeted income level means:

(1) For rural areas, incomes at or below 115 percent of the median income for the area, as adjusted for family size in accordance with the methodology of the applicable area median income standard or, at the option of the Bank, for a family of four;

(2) For urban areas, incomes at or below 100 percent of the median income for the area, as adjusted for family size in accordance with the methodology of the applicable area median income standard or, at the option of the Bank, for a family of four;

(3) For advances provided under CIP:

(i) For economic development projects, incomes at or below 80 percent of the median income for the area; or

(ii) For housing projects, incomes at or below 115 percent of the median income for the area, both as adjusted for

family size in accordance with the methodology of the applicable area median income standard or, at the option of the Bank, for a family of four; or

(4) For advances or grants provided under any other CICA program offered by a Bank, a targeted income level established by the Bank with the prior approval of FHFA.

UDF program or Urban Development Funding program means an advance or grant program offered by a Bank for targeted community lending in urban areas.

Urban area means:

(1) A unit of general local government with a population of more than 25,000; or

(2) An unincorporated area within an MSA that does not qualify for housing or economic development assistance from the USDA.

USDA means the United States Department of Agriculture.

§ 1292.2 Scope.

Section 10(j)(10) of the Bank Act (12 U.S.C. 1430(j)(10)) authorizes the Banks to offer Community Investment Cash Advance (CICA) programs. This part establishes requirements for all CICA programs offered by a Bank, except for a Bank's Affordable Housing Program (AHP), which is governed specifically by part 1291 of this chapter.

§ 1292.3 Purpose.

The purpose of this part is to identify targeted community lending projects that the Banks may support through the establishment of CICA programs under section 10(j)(10) of the Bank Act (12 U.S.C. 1430(j)(10)). Pursuant to this part, a Bank may offer RDF or UDF programs, or both, for targeted community lending using the targeted beneficiaries or targeted income levels specified in §1292.1, without prior FHFA approval. A Bank also may offer other CICA programs for targeted community lending using targeted beneficiaries and targeted income levels other than those specified in §1292.1, established by the Bank with the prior approval of FHFA. In addition, a Bank shall offer CICA programs under section 10(i) of the Bank Act (12 U.S.C. 1430(i)) (Community Investment Program (CIP)) and section 10(j) of the Bank Act (12 U.S.C. 1430(j)) (AHP). A Bank may provide advances or grants under its CICA programs except for CIP programs, under which a Bank may only provide advances.

§ 1292.4 Targeted Community Lending Plan.

Each Bank shall develop and adopt an annual Targeted Community Lending Plan pursuant to §1290.6 of this chapter.

§ 1292.5 Community Investment Cash Advance Programs.

(a) *In general.* (1) Each Bank shall offer an AHP in accordance with part 1291 of this chapter.

(2) Each Bank shall offer a CIP to provide financing for housing projects and for eligible targeted community lending at the appropriate targeted income levels.

(3) Each Bank may offer RDF programs or UDF programs, or both, for targeted community lending using the targeted beneficiaries or targeted income levels specified in §1292.1 of this part, without prior FHFA approval.

(4) Each Bank may offer CICA programs for targeted community lending using targeted beneficiaries and targeted income levels other than those specified in §1292.1 of this part, established by the Bank with the prior approval of FHFA.

(b) *Mixed-use projects.* (1) For projects funded under CICA programs other than CIP, involving a combination of housing projects and economic development projects, only the economic development components of the project must meet the appropriate targeted income level for the respective CICA program.

(2) For projects funded under CIP, both the housing and economic development components of the project must meet the appropriate targeted income levels.

(c) *Refinancing.* CICA funding other than AHP may be used to refinance economic development projects and housing projects, provided that any equity proceeds of the refinancing of rental housing and manufactured housing parks are used to rehabilitate the projects or to preserve affordability for current residents.

(d) *Pricing and Availability of advances*—(1) *Advances to members.* For CICA programs other than AHP and CIP, a Bank shall price advances to members as provided in §1266.5 of this chapter, and may price such advances at rates below the price of advances of similar amounts, maturities and terms made pursuant to section 10(a) of the Bank Act. (12 U.S.C. 1430(a)).

(2) *Pricing of CIP advances.* The price of advances made under CIP shall not exceed the Bank's cost of issuing consolidated obligations of comparable maturity, taking into account reasonable administrative costs.

(3) *Pricing of AHP advances.* A Bank shall price advances made under AHP in accordance with parts 1266 and 1291 of this chapter.

(4) *Advances to housing associate borrowers.* (i) A Bank may offer advances under CICA programs to housing associate borrowers at the Bank's option, except for AHP and CIP, which are available only to members.

(ii) A Bank shall price advances to housing associate borrowers as provided in §1266.17 of this chapter, and may price such advances at rates below the price of advances of similar amounts, maturities and terms made pursuant to section 10b of the Bank Act. (12 U.S.C. 1430b).

(5) *Pricing pass-through.* A Bank may require that borrowers receiving advances made under CICA programs pass through the benefit of any price reduction from regular advance pricing to their borrowers.

(6) *Discount Fund.* (i) A Bank may establish a Discount Fund which the Bank may use to reduce the price of CIP or other advances made under CICA programs below the advance prices provided for by this part.

(ii) Price reductions made through the Discount Fund shall be made in accordance with a fair distribution scheme.

§1292.6 Reporting.

(a) Each Bank annually shall provide to FHFA, on or before January 31, a Targeted Community Lending Plan.

(b) Each Bank shall provide such other reports concerning its CICA programs as FHHA may request from time to time.

§1292.7 Documentation.

(a) A Bank shall require the borrower to certify to the Bank that each project funded under a CICA program (other than AHP) meets the respective targeting requirements of the CICA program. Such certification shall include a description of how the project meets the requirements, and where appropriate, a statistical summary or list of incomes of the borrowers, rents for the project, or salaries of jobs created or retained.

(b) For those CICA-funded projects that also receive funds from another targeted Federal economic development program that has income targeting requirements that are the same as, or more restrictive than, the targeting requirements of the applicable CICA program, the Bank shall permit the borrower to certify that compliance with the criteria of such Federal economic development program will meet the requirements of the respective CICA program.

(c) Such certifications shall satisfy the Bank's obligations to document compliance with the CICA funding provisions of this part.

PARTS 1293–1299 [RESERVED]

CHAPTER XIII—FINANCIAL STABILITY OVERSIGHT COUNCIL

PART 1300 [RESERVED]

PART 1301—FREEDOM OF INFORMATION

Sec.

AUTHORITY: 12 U.S.C. 5322; 5 U.S.C. 552.

SOURCE: 82 FR 55744, Nov. 24, 2017, unless otherwise noted.

§ 1301.1 General.

This subpart contains the regulations of the Financial Stability Oversight Council (the ''Council'') implementing the Freedom of Information Act (''FOIA''), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to records maintained by the Council. These regulations should be read together with the FOIA, which provides additional information about this topic.

§ 1301.2 Information made available.

(a) *General.* The FOIA provides for access to records developed or maintained by a Federal agency. The provisions of the FOIA are intended to assure the right of the public to information. Generally, this section divides agency records into three major categories and provides methods by which each category of records is to be made available to the public. The three major categories of records are as follows:

(1) Information required to be published in the FEDERAL REGISTER (see § 1301.3);

(2) Information required to be made available for public inspection in an electronic format or, in the alternative, to be published and offered for sale (see § 1301.4); and

(3) Information required to be made available to any member of the public upon specific request (see §§ 1301.5 through 1301.12).

(b) *Right of access.* Subject to the exemptions and exclusions set forth in the FOIA (5 U.S.C. 552(b) and (c)), and the regulations set forth in this subpart, any person shall be afforded access to records.

(c) *Exemptions.* (1) The disclosure requirements of 5 U.S.C. 552(a) do not apply to certain records which are exempt under 5 U.S.C. 552(b); nor do the disclosure requirements apply to certain records which are excluded under 5 U.S.C. 552(c).

(2) The Council shall withhold records or information under the FOIA only when it reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or when disclosure is prohibited by law. Whenever the Council determines that full disclosure of a requested record is not possible, the Council shall consider whether partial disclosure is possible and shall take reasonable steps to segregate and release nonexempt information. Nothing in this paragraph requires disclosure of information that is otherwise exempted from disclosure under 12 U.S.C. 552(b)(3).

§ 1301.3 Publication in the Federal Register.

Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)) and subject to the limitations provided in 5 U.S.C. 552(a)(1), the Council shall state, publish and maintain current in the FEDERAL REGISTER for the guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Council; and

(e) Each amendment, revision, or repeal of matters referred to in paragraphs (a) through (d) of this section.

§ 1301.4 Public inspection.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall, in conformance with 5 U.S.C. 552(a)(2), make available for public inspection in an electronic format, or, in the alternative, promptly publish and offer for sale:

(1) Final opinions, including concurring and dissenting opinions, and orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the Council but which are not published in the FEDERAL REGISTER;

(3) Its administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, that have been released previously to any person under 5 U.S.C. 552(a)(3) and §§ 1301.5 through 1301.12, and that the Council determines have become or are likely to become the subject of subsequent requests for substantially the same records. When the Council receives three (3) or more requests for substantially the same records, then the Council shall place those requests in front of any existing processing backlog and make the released records available in the Council's public reading room and in the electronic reading room on the Council's Web site.

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) *Information made available online.* For records required to be made available for public inspection in an electronic format pursuant to 5 U.S.C. 552(a)(2) and paragraphs (a)(1) through (4) of this section, the Council shall make such records available on its Web site as soon as practicable but in any case no later than one year after such records are created.

(c) *Redaction.* Based upon applicable exemptions in 5 U.S.C. 552(b), the Council may redact certain information contained in any matter described in paragraphs (a)(1) through (4) of this section before making such information available for inspection or publishing it. The justification for the redaction shall be explained in writing, and the extent of such redaction shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the redaction is made. If technically feasible, the extent of the redaction shall be indicated at the place in the record where the redaction was made.

(d) *Public reading room.* The Council shall make available for public inspection in an electronic format, in a reading room or otherwise, the material described in paragraphs (a)(1) through (5) of this section. Fees for duplication shall be charged in accordance with § 1301.12. The location of the Council's reading room is the Department of the Treasury's Library. The Library is located in the Freedman's Bank Building (formerly the Treasury Annex), Room 1020, 1500 Pennsylvania Avenue NW., Washington, DC 20220. For building security purposes, visitors are required to make an appointment by calling (202) 622–0990.

(e) *Indices.* (1) The Council shall maintain and make available for public inspection in an electronic format current indices identifying any material described in paragraphs (a)(1) through (3) of this section. In addition, the Council shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplement unless the Council determines by order published in the FEDERAL REGISTER that the publication would be unnecessary and impractical, in which case the Council shall nonetheless provide copies of the index on request at a cost not to exceed the direct cost of duplication.

(2) The Council shall make the indices referred to in paragraphs (a)(5) and (e)(1) of this section available on its Web site.

§ 1301.5 Requests for Council records.

(a) *In general.* Except for records made available under 5 U.S.C. 552(a)(1) and (a)(2) and subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall promptly make its records available to any person pursuant to a request that conforms to the rules and procedures of this section.

(b) *Form and content of request.* A request for records of the Council shall be made as follows:

(1) The request for records shall be made in writing and submitted by mail or via the Internet and should state, both in the request itself and on any envelope that encloses it, that it comprises a FOIA request. A request that does not explicitly state that it is a FOIA request, but clearly indicates or implies that it is a request for records, may also be processed under the FOIA.

(2) If a request is sent by mail, it shall be addressed and submitted as follows: FOIA Request—Financial Stability Oversight Council, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington DC 20220. If a request is made via the Internet, it shall be submitted as set forth on the Council's Web site.

(3) In order to ensure the Council's ability to respond in a timely manner, a FOIA request must describe the records that the requester seeks in sufficient detail to enable Council personnel to locate them with a reasonable amount of effort. Whenever possible, the request must include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, the requester must include any file designations or descriptions for the records requested. In general, a requester is encouraged to provide more specific information about the records or types of records sought to increase the likelihood that responsive records can be located.

(4) The request shall include the name of and contact information for the requester, including a mailing address, telephone number, and, if available, an email address at which the Council may contact the requester regarding the request.

(5) For the purpose of determining any fees that may apply to processing a request, a requester shall indicate in the request whether the requester is a commercial user, an educational institution, non-commercial scientific institution, representative of the news media, or ''other'' requester, as those terms are defined in § 1301.12(c), or in the alternative, state how the records released will be used. The Council shall use this information solely for the purpose of determining the appropriate fee category that applies to the requester and shall not use this information to determine whether to disclose a record in response to the request.

(6) If a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect, pursuant to § 1301.12(f). Any request that does not seek a waiver or reduction of fees shall constitute an agreement of the requester to pay any and all fees (of up to $25) that may apply to the request, unless or until a request for waiver is sought and granted. The requester also may specify in the request an upper limit (of not less than $25) that the requester is willing to pay to process the request.

(i) Any request for waiver or reduction of fees should be filed together with or as part of the FOIA request, or at a later time prior to the Council incurring costs to process the request.

(ii) A waiver request submitted after the Council incurs costs will be considered in accordance with § 1301.12(f); however, the requester must agree in writing to pay the fees already incurred if the waiver is denied.

(7) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by § 1301.7(c).

(c) *Request receipt; effect of request deficiencies.* The Council shall deem itself to have received a request on the date that it receives a complete request containing the information required by paragraph (b) of this section. The Council need not accept a request, process a request, or be bound by any

deadlines in this subpart for processing a request that fails materially to conform to the requirements of paragraph (b) of this section. If the Council determines that it cannot process a request because the request is deficient, then the Council shall return it to the requester and advise the requester in what respect the request is deficient. The requester may then resubmit the request, which the Council shall treat as a new request. A determination by the Council that a request is deficient in any respect is not a denial of a request for records, and such determinations are not subject to appeal.

(d) *Processing of request containing technical deficiency*. Notwithstanding paragraph (c) of this section, the Council shall not reject a request solely due to one or more technical deficiencies contained in the request. For the purposes of this paragraph, the term ''technical deficiency'' means an error or omission with respect to an item of information required by paragraph (b) of this section which, by itself, does not prevent that part of the request from conforming to the applicable requirement, and includes without limitation a non-material error relating to the contact information for the requester, or similar error or omission regarding the date, title or name, author, recipient, or subject matter of the record requested.

§ 1301.6 Responsibility for responding to requests for Council records.

(a) *In general*. In determining which records are responsive to a request, the Council ordinarily will include only information contained in records that the Council maintains, or are in its possession and control, as of the date the Council begins its search for responsive records. If any other date is used, the Council shall inform the requester of that date.

(b) *Authority to grant or deny requests*. The records officer shall be authorized to make an initial determination to grant or deny, in whole or in part, a request for a record.

(c) *Referrals*. When the Council receives a request for a record or any portion of a record in its possession that originated with another agency, including but not limited to a constituent agency of the Council, it shall:

(1) In the case of a record originated by a federal agency subject to the FOIA, refer the responsibility for responding to the request regarding that record to the originating agency to determine whether to disclose it; and

(2) In the case of a record originated by a state agency, respond to the request after giving notice to the originating state agency and a reasonable opportunity to provide input or to assert any applicable privileges.

(d) *Notice of referral*. Whenever the Council refers all or any part of the responsibility for responding to a request to another agency, the Council shall notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred and of the part of the request that has been referred.

§ 1301.7 Timing of responses to requests for Council records.

(a) *In general*. Except as set forth in paragraphs (b) through (d) of this section, the Council shall respond to requests according to their order of receipt.

(b) *Multitrack processing*. (1) The Council may establish tracks to process separately simple and complex requests. The Council may assign a request to the simple or complex track based on the amount of work and/or time needed to process the request. The Council shall process requests in each track according to the order of their receipt.

(2) The Council may provide a requester in its complex track with an opportunity to limit the scope of the request to qualify for faster processing within the specified limits of the simple track(s).

(c) *Requests for expedited processing*. (1) The Council shall respond to a request out of order and on an expedited basis whenever a requester demonstrates a compelling need for expedited processing in accordance with the requirements of this paragraph (c).

(2) *Form and content of a request for expedited processing*. A request for expedited processing shall be made as follows:

(i) A request for expedited processing shall be made in writing or via the Internet and submitted as part of the initial request for records. When a request for records includes a request for expedited processing, both the envelope and the request itself must be clearly marked ''Expedited Processing Requested.'' A request for expedited processing that is not clearly so marked, but satisfies the requirements in paragraphs (c)(2)(ii) and (iii) of this section, may nevertheless be granted.

(ii) A request for expedited processing shall contain a statement that demonstrates a compelling need for the requester to obtain expedited processing of the requested records. A ''compelling need'' may be established under the standard in either paragraph (c)(2)(ii)(A) or (B) of this section by demonstrating that:

(A) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester shall fully explain the circumstances warranting such an expected threat so that the Council may make a reasoned determination that a delay in obtaining the requested records would pose such a threat; or

(B) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. A person ''primarily engaged in disseminating information'' does not include individuals who are engaged only incidentally in the dissemination of information. The standard of ''urgency to inform'' requires that the records requested pertain to a matter of current exigency to the American general public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

(iii) The requester shall certify the written statement that purports to demonstrate a compelling need for expedited processing to be true and correct to the best of the requester's knowledge and belief. The certification must be in the form prescribed by 28 U.S.C. 1746: ''I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date].''

(3) *Determinations of requests for expedited processing.* Within ten (10) calendar days of its receipt of a request for expedited processing, the Council shall decide whether to grant the request and shall notify the requester of the determination in writing.

(4) *Effect of granting expedited processing.* If the Council grants a request for expedited processing, then the Council shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable. The Council may assign expedited requests to their own simple and complex processing tracks based upon the amount of work and/or time needed to process them. Within each such track, an expedited request shall be processed in the order of its receipt.

(5) *Appeals of denials of requests for expedited processing.* If the Council denies a request for expedited processing, then the requester shall have the right to submit an appeal of the denial determination in accordance with §1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying expedited processing. The requester shall clearly mark its appeal request and any envelope that encloses it with the words ''Appeal for Expedited Processing.''

(d) *Time period for responding to requests for records.* Ordinarily, the Council shall have twenty (20) days (excepting Saturdays, Sundays, and legal public holidays) from when a request that satisfies the requirements of §1301.5(b) is received by the Council to determine whether to grant or deny a request for records. The twenty-day time period set forth in this paragraph shall not be tolled by the Council except that the Council may:

(1) Make one reasonable demand to the requester for clarifying information about the request and toll the twenty-day time period while it awaits the clarifying information; or

(2) Toll the twenty-day time period while awaiting receipt of the requester's response to the Council's request for clarification regarding the assessment of fees.

(e) *Unusual circumstances*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, if the Council determines that, due to unusual circumstances, it cannot respond either to a request within the time period set forth in paragraph (d) of this section or to an appeal within the time period set forth in §1301.11, the Council may extend the applicable time periods by informing the requester in writing of the unusual circumstances and of the date by which the Council expects to complete its processing of the request or appeal. Any extension or extensions of time shall not cumulatively total more than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays).

(2) *Additional time.* If the Council determines that it needs additional time beyond a ten-day extension to process the request or appeal, then the Council shall notify the requester and provide the requester with an opportunity to limit the scope of the request or appeal or to arrange for an alternative time frame for processing the request or appeal or a modified request or appeal. The requester shall retain the right to define the desired scope of the request or appeal, as long as it meets the requirements contained in this part. To aid the requester, the Council shall make available its FOIA Public Liaison, who shall assist in defining the desired scope of the request, and shall notify the requester of the right to seek dispute resolution services from the Office of Government Information Services.

(3) As used in this paragraph (e), ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components or component offices having substantial subject matter interest therein.

(4) Where the Council reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated. The Council may disaggregate and treat as separate requests a single request that has multiple unrelated components. The Council shall notify the requester if a request is disaggregated.

§1301.8 Responses to requests for Council records.

(a) *Acknowledgement of requests.* Upon receipt of a request that meets the requirements of §1301.5(b), the Council ordinarily shall assign to the request a unique tracking number and shall send an acknowledgement letter or email to the requester that contains the following information:

(1) A brief description of the request;

(2) The applicable request tracking number;

(3) The date of receipt of the request, as determined in accordance with §1301.5(c); and

(4) A confirmation, with respect to any fees that may apply to the request pursuant to §1301.12, that the requester has sought a waiver or reduction in such fees, has agreed to pay any and all applicable fees, or has specified an upper limit (of not less than $25) that the requester is willing to pay in fees to process the request.

(b) *Initial determination to grant or deny a request*—(1) *In general.* The Council records officer (as designated in §1301.6(b)) shall make initial determinations to grant or to deny in whole or in part requests for records.

(2) *Granting of request.* If the request is granted in full or in part, the Council shall provide the requester with a copy of the releasable records, and shall do so in the format specified by the requester to the extent that the records are readily producible by the Council in the requested format. The Council also shall send the requester a statement of the applicable fees, broken down by search, review and duplication fees, either at the time of the determination or shortly thereafter. The Council shall also advise the requester of the right to seek assistance from the FOIA Public Liaison.

(3) *Denial of requests.* If the Council determines that the request for records should be denied in whole or in part, the Council shall notify the requester in writing. The notification shall:

(i) State the exemptions relied on in not granting the request;

(ii) If technically feasible, indicate the volume of information redacted (including the number of pages withheld in part and in full) and the exemptions under which the redaction is made at the place in the record where such redaction is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(iii) Set forth the name and title or position of the responsible official;

(iv) Advise the requester of the right to administrative appeal in accordance with §1301.11 and specify the official or office to which such appeal shall be submitted; and

(v) Advise the requester of the right to seek assistance from the FOIA Public Liaison or seek dispute resolution services offered by the Office of Government Information Services.

(4) *No records found.* If it is determined, after an adequate search for records by the responsible official or his/her delegate, that no records could be located, the Council shall so notify the requester in writing. The notification letter shall advise the requester of the right to seek assistance from the FOIA Public Liaison, seek dispute resolution services offered by the Office of Government Information Services, and administratively appeal the Council's determination that no records could be located (*i.e.*, to challenge the adequacy of the Council's search for responsive records) in accordance with §1301.11. The response shall specify the official to whom the appeal shall be submitted for review.

§1301.9 Classified information.

(a) *Referrals of requests for classified information.* Whenever a request is made for a record containing information that has been classified, or may be appropriate for classification, by another agency under Executive Order 13526 or any other executive order concerning the classification of records, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by the Council because it contains information classified by another agency, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the underlying information or shall consult with that agency prior to processing the record for disclosure or withholding.

(b) *Determination of continuing need for classification of information.* Requests for information classified pursuant to Executive Order 13526 require the Council to review the information to determine whether it continues to warrant classification. Information which no longer warrants classification under the Executive Order's criteria shall be declassified and made available to the requester, unless the information is otherwise exempt from disclosure.

§1301.10 Requests for business information provided to the Council.

(a) *In general.* Business information provided to the Council by a submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means information from a submitter that is trade

secrets or other commercial or financial information that may be protected from disclosure under Exemption 4.

(2) *Submitter* means any person or entity from whom the Council obtains business information, directly or indirectly. The term includes corporations, state, local, and tribal governments, and foreign governments.

(3) *Exemption 4* means Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(c) *Designation of business information.* A submitter of business information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten (10) years after the date of the submission unless the submitter on his or her own initiative requests otherwise, and provides justification for, a longer designation period.

(d) *Notice to submitters.* The Council shall provide a submitter with prompt written notice of receipt of a request or appeal encompassing the business information of the submitter whenever required in accordance with paragraph (e) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information. When a voluminous number of submitters must be notified, the Council may post or publish such notice in a place reasonably likely to accomplish such notification.

(e) *When notice is required.* The Council shall provide a submitter with notice of receipt of a request or appeal whenever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) The Council has reason to believe that the information may be protected from disclosure under Exemption 4 because disclosure could reasonably be expected to cause substantial competitive harm to the submitter.

(f) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (d) of this section, the Council shall notify the submitter in writing that the submitter shall have ten (10) days from the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays) to provide the Council with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under Exemption 4, including a statement of why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. In the event that the submitter fails to respond to the notice within the time specified, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a submitter pursuant to this paragraph (f) may itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the Council shall advise the requester that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the Council shall invite the requester to agree to an extension of time so that the Council may review the submitter's objection to disclosure.

(g) *Notice of intent to disclose.* The Council shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information responsive to the request. If the Council decides to disclose business information over the objection of a submitter, the Council shall provide the submitter with a written notice which shall include:

(1) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date which is not less than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of the final decision to release the requested information has been provided to the submitter. Except as otherwise prohibited

by law, notice of the final decision to release the requested information shall be forwarded to the requester at the same time.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered in paragraph (c) of this section, the Council shall promptly notify the submitter.

(i) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

(1) The Council determines that the information shall not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public; or

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1987 Comp., p. 235).

§ 1301.11 Administrative appeals and dispute resolution.

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the Council, including but not limited to a determination:

(1) To deny access to records in whole or in part (as provided in § 1301.8(b)(3));

(2) To assign a particular fee category to the requester (as provided in § 1301.12(c));

(3) To deny a request for a reduction or waiver of fees (as provided in § 1301.12(f)(7));

(4) That no records could be located that are responsive to the request (as provided in § 1301.8(b)(4)); or

(5) To deny a request for expedited processing (as provided in § 1301.7(c)(5)).

(b) *Time limits for filing administrative appeals.* An appeal must be submitted within ninety (90) days of the date of the initial determination or the date of the letter transmitting the last records released, whichever is later, or, in the case of an appeal of a denial of expedited processing, within ninety (90) days of the date of the initial determination to deny expedited processing (see § 1301.7).

(c) *Form and content of administrative appeals.* The appeal shall—

(1) Be made in writing or, as set forth on the Council's Web site, via the Internet;

(2) Be clearly marked on the appeal request and any envelope that encloses it with the words ''Freedom of Information Act Appeal'' and addressed to Financial Stability Oversight Council, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220;

(3) Set forth the name of and contact information for the requester, including a mailing address, telephone number, and, if available, an email address at which the Council may contact the requester regarding the appeal;

(4) Specify the date of the initial request and date of the letter of initial determination, and, where possible, enclose a copy of the initial request and the initial determination being appealed; and

(5) Set forth specific grounds for the appeal.

(d) *Processing of administrative appeals.* Appeals shall be stamped with the date of their receipt by the office to which addressed, and shall be processed in the approximate order of their receipt. The receipt of the appeal shall be acknowledged by the Council and the requester advised of the date the appeal was received and the expected date of response.

(e) *Determinations to grant or deny administrative appeals.* The Chairperson of the Council or his/her designee is authorized to and shall decide whether to affirm or reverse the initial determination (in whole or in part), and shall notify the requester of this decision in writing within twenty (20) days (exclusive of Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal, unless extended pursuant to § 1301.7(e).

(1) If it is decided that the appeal is to be denied (in whole or in part) the requester shall be—

(i) Notified in writing of the denial;

(ii) Notified of the reasons for the denial, including the FOIA exemptions relied upon;

(iii) Notified of the name and title or position of the official responsible for the determination on appeal;

(iv) Provided with a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia in accordance with 5 U.S.C. 552(a)(4)(B); and

(v) Provided with notification that mediation services may be available to the requester as a non-exclusive alternative to litigation through the Office of Government Information Services in accordance with 5 U.S.C. 552(h)(3).

(2) If the Council grants the appeal in its entirety, the Council shall so notify the requester and promptly process the request in accordance with the decision on appeal.

(f) *Dispute resolution*. Requesters may seek dispute resolution by contacting the FOIA Public Liaison or the Office of Government Information Services as set forth on the Council's Web site.

§ 1301.12 Fees for processing requests for Council records.

(a) *In general*. The Council shall charge the requester for processing a request under the FOIA in the amounts and for the services set forth in paragraphs (b) through (d) of this section, except if a waiver or reduction of fees is granted under paragraph (f) of this section, or if, pursuant to paragraph (e)(2) of this section, the failure of the Council to comply with certain time limits precludes it from assessing certain fees. No fees shall be charged if the amount of fees incurred in processing the request is below $25.

(b) *Fees chargeable for specific services*. The fees for services performed by the Council shall be imposed and collected as set forth in this paragraph (b).

(1) *Duplicating records*. The Council shall charge a requester fees for the cost of copying records as follows:

(i) $0.08 per page, up to 8½ x 14″, made by photocopy or similar process.

(ii) Photographs, films, and other materials—actual cost of duplication.

(iii) Other types of duplication services not mentioned above—actual cost.

(iv) Material provided to a private contractor for copying shall be charged to the requester at the actual cost charged by the private contractor.

(2) *Search services*. The Council shall charge a requester for all time spent by its employees searching for records that are responsive to a request, including page-by-page or line-by-line identification of responsive information within records, even if no responsive records are found. The Council shall charge the requester fees for search time as follows:

(i) *Searches for other than electronic records*. The Council shall charge for search time at the salary rate(s) (basic pay plus sixteen (16) percent) of the employee(s) who conduct the search. This charge shall also include transportation of employees and records at actual cost. Fees may be charged for search time even if the search does not yield any responsive records, or if records are exempt from disclosure.

(ii) *Searches for electronic records*. The Council shall charge the requester for the actual direct cost of the search, including computer search time, runs, and the operator's salary. The fee for computer output shall be the actual direct cost. For a requester in the ''other'' category, when the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search (*i.e.*, the operator), the charge for the computer search will begin.

(3) *Review of records*. The Council shall charge a requester for time spent by its employees examining responsive records to determine whether any portions of such record are withholdable from disclosure, pursuant to the FOIA exemptions of 5 U.S.C. 552(b). The Council shall also charge a requester for time spent by its employees redacting any such withholdable information from a record and preparing a record for release to the requester. The Council shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.*, basic pay plus sixteen (16) percent) of the employees who conduct the review. Fees may be charged for review time even if records ultimately are not disclosed.

(4) *Inspection of records in the reading room*. Fees for all services provided

shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records.

(5) *Other services.* Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at the actual cost to the Council. Charges permitted under this paragraph may include:

(i) Certifying that records are true copies; and

(ii) Sending records by special methods (such as by express mail, etc.).

(c) *Fees applicable to various categories of requesters*—(1) *Generally.* The Council shall assess the fees set forth in paragraph (b) of this section in accordance with the requester fee categories set forth below.

(2) *Requester selection of fee category.* A requester shall identify, in the initial FOIA request, the purpose of the request in one of the following categories:

(i) *Commercial.* A commercial use request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The Council may determine from the use specified in the request that the requester is a commercial user.

(ii) *Educational institution.* This refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. This includes a request from a teacher or student at any such institution making the request in connection with his or her role at the educational institution.

(iii) *Non-commercial scientific institution.* This refers to an institution that is not operated on a ''commercial'' basis, as that term is defined in paragraph (c)(2)(i) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(iv) *Representative of the news media.* This refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph (c)(2)(iv), the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by subscription or by free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Council may also consider the past publication record of the requester in making such a determination.

(v) *Other requester.* This refers to a requester who does not fall within any of the categories described in paragraphs (c)(2)(i)–(iv) of this section.

(d) *Fees applicable to each category of requester.* The Council shall apply the fees set forth in this paragraph, for each category described in paragraph (c) of this section, to requests processed by the Council under the FOIA.

(1) *Commercial use.* A requester seeking records for commercial use shall be charged the full direct costs of searching for, reviewing, and duplicating the records they request as set forth in paragraph (b) of this section. Moreover,

when a request is received for disclosure that is primarily in the commercial interest of the requester, the Council is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest. The Council may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records or no records are located.

(2) *Educational and non-commercial scientific uses.* A requester seeking records for educational or non-commercial scientific use shall be charged only for the cost of duplicating the records they request, except that the Council shall provide the first one hundred (100) pages of duplication free of charge. To be eligible, the requester must show that the request is made in connection with the requester's role at an educational institution or is made under the auspices of a non-commercial scientific institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) *News media uses.* A requester seeking records under the news media use category shall be charged only for the cost of duplicating the records they request, except that the Council shall provide the requester with the first one hundred (100) pages of duplication free of charge.

(4) *Other requests.* A requester seeking records for any other use shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, as set forth in paragraph (b) of this section, except that the Council shall provide the first one hundred (100) pages of duplication and the first two hours of search time free of charge. The Council may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located.

(e) *Other circumstances when fees are not charged.* (1) Notwithstanding paragraphs (b), (c), and (d) of this section, the Council may not charge a requester a fee for processing a FOIA request if—:

(i) Services were performed without charge;

(ii) The cost of collecting a fee would be equal to or greater than the fee itself; or

(iii) The fees were waived or reduced in accordance with paragraph (f) of this section.

(2) Notwithstanding paragraphs (b), (c), and (d) of this section, the Council may not charge a requester search fees or, in the case of a requester described in paragraphs (c)(2)(ii) through (iv) of this section, duplication fees if the Council fails to comply with any time limit under §1301.7 or §1301.11; provided that:

(i) If unusual circumstances (as that term is defined in §1301.7(e)) apply to the processing of the request and the Council has provided a timely notice to the requester in accordance with §1301.7(e)(1), then a failure to comply with such time limit shall be excused for an additional ten days;

(ii) If unusual circumstances (as that term is defined in §1301.7(e)) apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, the Council has provided a timely written notice to the requester in accordance with §1301.7(e)(2), and the Council has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with §1301.7(e)(2), then the Council may charge a requester such fees; and

(iii) If a court has determined that exceptional circumstances exist, then a failure to comply with such time limit shall be excused for the length of time provided by the court order.

(f) *Waiver or reduction of fees.* (1) A requester shall be entitled to receive from the Council a waiver or reduction in the fees otherwise applicable to a FOIA request whenever the requester:

(i) Requests such waiver or reduction of fees in writing and submits the written request to the Council together with or as part of the FOIA request, or at a later time consistent with §1301.5(b)(7) to process the request; and

(ii) Demonstrates that the fee reduction or waiver request is in the public interest because:

(A) Furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Furnishing the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the requirements of paragraph (f)(1)(ii)(A) of this section, the Council shall consider:

(i) The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated;

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding;

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(3) To determine whether the requester satisfies the requirement of paragraph (f)(1)(ii)(B) of this section, the Council shall consider:

(i) Any commercial interest of the requester (with reference to the definition of ''commercial use'' in paragraph (c)(2)(i) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. In the administrative process, a requester may provide explanatory information regarding this consideration; and

(ii) Whether the public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Council ordinarily shall presume that, if a news media requester satisfies the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver or reduction of fees, a waiver or reduction shall be granted for those records.

(5) *Determination of request to reduce or waive fees.* The Council shall notify the requester in writing regarding its determinations to reduce or waive fees.

(6) *Effect of denying request to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the Council shall advise the requester, in the denial notification letter, that the requester may incur fees as a result of processing the request. In the denial notification letter, the Council shall advise the requester that the Council will not proceed to process the request further unless the requester, in writing, directs the Council to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than $25) that the requester is willing to pay to process the request. If the Council does not receive this written direction and agreement/specification within thirty (30) days of the date of the denial notification letter, then the Council shall deem the FOIA request to be withdrawn.

(7) *Appeals of denials of requests to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this

appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester shall clearly mark its appeal request and any envelope that encloses it with the words ''Appeal for Fee Reduction/Waiver.''

(g) *Notice of estimated fees; advance payments.* (1) When the Council estimates the fees for processing a request will exceed the limit set by the requester, and that amount is less than $250, the Council shall notify the requester of the estimated costs, broken down by search, review and duplication fees. The requester must provide an agreement to pay the estimated costs, except that the requester may reformulate the request in an attempt to reduce the estimated fees.

(2) If the requester fails to state a limit and the costs are estimated to exceed $250, the requester shall be notified of the estimated costs, broken down by search, review and duplication fees, and must pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. Alternatively, the requester may reformulate the request in such a way as to constitute a request for responsive records at a reduced fee.

(3) The Council reserves the right to request advance payment after a request is processed and before records are released.

(4) If a requester previously has failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or the pending request.

(h) *Form of payment.* Payment may be made by check or money order paid to the Treasurer of the United States.

(i) *Charging interest.* The Council may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Council. The Council will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) *Aggregating requests.* If the Council reasonably determines that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Council may aggregate those requests and charge accordingly. The Council may presume that multiple requests involving related matters submitted within a thirty (30) calendar day period have been made in order to avoid fees. The Council shall not aggregate multiple requests involving unrelated matters.

PART 1310—AUTHORITY TO REQUIRE SUPERVISION AND REGULATION OF CERTAIN NONBANK FINANCIAL COMPANIES

Subpart A—General

Subpart B—Determinations

Subpart C—Information Collection; Proposed and Final Determinations; Evidentiary Hearings

AUTHORITY: 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5323.

SOURCE: 77 FR 21651, Apr. 11, 2012, unless otherwise noted.

Subpart A—General

§ 1310.1 Authority and purpose.

(a) *Authority*. This part is issued by the Council under sections 111, 112 and 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') (12 U.S.C. 5321, 5322, and 5323).

(b) *Purpose*. The principal purposes of this part are to set forth the standards and procedures governing Council determinations under section 113 of the Dodd-Frank Act (12 U.S.C. 5323), including whether material financial distress at a nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States, and whether a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards in accordance with title I of the Dodd-Frank Act.

§ 1310.2 Definitions.

The terms used in this part have the following meanings—

Board of Governors. The term ''Board of Governors'' means the Board of Governors of the Federal Reserve System.

Commission. The term ''Commission'' means the Securities and Exchange Commission, except in the context of the Commodity Futures Trading Commission.

Council. The term ''Council'' means the Financial Stability Oversight Council.

Federal Insurance Office. The term ''Federal Insurance Office'' means the office established within the Department of the Treasury by section 502(a) of the Dodd-Frank Act (31 U.S.C. 301 (note)).

Foreign nonbank financial company. The term ''foreign nonbank financial company'' means a company (other than a company that is, or is treated in the United States as, a bank holding company) that is—

(1) Incorporated or organized in a country other than the United States; and

(2) ''Predominantly engaged in financial activities,'' as that term is defined in section 102(a)(6) of the Dodd-Frank Act (12 U.S.C. 5311(a)(6)) and pursuant to any requirements for determining if a company is predominantly engaged in financial activities as established by regulation of the Board of Governors pursuant to section 102(b) of the Dodd-Frank Act (12 U.S.C. 5311(b)), including through a branch in the United States.

Hearing date. The term ''hearing date'' means the latest of—

(1) The date on which the Council has received all of the written materials timely submitted by a nonbank financial company for a hearing that is conducted without oral testimony pursuant to §1310.21 or §1310.22, as applicable;

(2) The final date on which the Council or its representatives convene to hear oral testimony presented by a nonbank financial company pursuant to §1310.21 or §1310.22, as applicable; and

(3) The date on which the Council has received all of the written materials timely submitted by a nonbank financial company to supplement any oral testimony and materials presented by the nonbank financial company pursuant to §1310.21 or §1310.22, as applicable.

Member agency. The term ''member agency'' means an agency represented by a voting member of the Council under section 111(b)(1) of the Dodd-Frank Act (12 U.S.C. 5321).

Nonbank financial company. The term ''nonbank financial company'' means a U.S. nonbank financial company or a foreign nonbank financial company.

Office of Financial Research. The term ''Office of Financial Research'' means the office established within the Department of the Treasury by section 152 of the Dodd-Frank Act (12 U.S.C. 5342).

Primary financial regulatory agency. The term ''primary financial regulatory agency'' means—

(1) The appropriate Federal banking agency, with respect to institutions described in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), except to the extent that an institution is or the activities of an institution are otherwise described in paragraph (2), (3), (4), or (5) of this definition;

(2) The Commission, with respect to—

(i) Any broker or dealer that is registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the broker or dealer that require the broker or dealer to be registered under that Act;

(ii) Any investment company that is registered with the Commission under the Investment Company Act of 1940, with respect to the activities of the investment company that require the investment company to be registered under that Act;

(iii) Any investment adviser that is registered with the Commission under the Investment Advisers Act of 1940, with respect to the investment advisory activities of such company and activities that are incidental to such advisory activities;

(iv) Any clearing agency registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the clearing agency that require the agency to be registered under such Act;

(v) Any nationally recognized statistical rating organization registered with the Commission under the Securities Exchange Act of 1934;

(vi) Any transfer agent registered with the Commission under the Securities Exchange Act of 1934;

(vii) Any exchange registered as a national securities exchange with the Commission under the Securities Exchange Act of 1934;

(viii) Any national securities association registered with the Commission under the Securities Exchange Act of 1934;

(ix) Any securities information processor registered with the Commission under the Securities Exchange Act of 1934;

(x) The Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934;

(xi) The Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*);

(xii) The Securities Investor Protection Corporation established under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*); and

(xiii) Any security-based swap execution facility, security-based swap data repository, security-based swap dealer or major security-based swap participant registered with the Commission under the Securities Exchange Act of 1934, with respect to the security-based swap activities of the person that require such person to be registered under such Act;

(3) The Commodity Futures Trading Commission, with respect to—

(i) Any futures commission merchant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), with respect to the activities of the futures commission merchant that require the futures commission merchant to be registered under that Act;

(ii) Any commodity pool operator registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), with respect to the activities of the commodity pool operator that require the commodity pool operator to be registered under that Act, or a commodity pool, as defined in that Act;

(iii) Any commodity trading advisor or introducing broker registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), with respect to the activities of the commodity trading advisor or introducing broker that require the commodity trading advisor or introducing broker to be registered under that Act;

(iv) Any derivatives clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), with respect to the activities of the derivatives clearing organization that require the derivatives clearing organization to be registered under that Act;

(v) Any board of trade designated as a contract market by the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(vi) Any futures association registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(vii) Any retail foreign exchange dealer registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), with respect to the activities of the retail foreign exchange dealer that require the retail foreign exchange dealer to be registered under that Act;

(viii) Any swap execution facility, swap data repository, swap dealer, or major swap participant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) with respect to the swap activities of the person that require such person to be registered under that Act; and

(ix) Any registered entity as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), with respect to the activities of the registered entity that require the registered entity to be registered under that Act;

(4) The State insurance authority of the State in which an insurance company is domiciled, with respect to the insurance activities and activities that are incidental to such insurance activities of an insurance company that is subject to supervision by the State insurance authority under State insurance law; and

(5) The Federal Housing Finance Agency, with respect to Federal Home Loan Banks or the Federal Home Loan Bank System, and with respect to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

Prudential standards. The term ''prudential standards'' means enhanced supervision and regulatory standards established by the Board of Governors under section 165 of the Dodd-Frank Act (12 U.S.C. 5365).

Significant companies. The terms ''significant nonbank financial company'' and ''significant bank holding company'' have the meanings ascribed to such terms by regulation of the Board of Governors issued under section 102(a)(7) of the Dodd-Frank Act (12 U.S.C. 5311(a)(7)).

U.S. nonbank financial company. The term ''U.S. nonbank financial company'' means a company (other than a bank holding company; a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or security-based swap data repository registered with the Commission; a board of trade designated as a contract market by the Commodity Futures Trading Commission (or parent thereof); or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility, or swap data repository registered with the Commodity Futures Trading Commission), that is—

(1) Incorporated or organized under the laws of the United States or any State; and

(2) ''Predominantly engaged in financial activities,'' as that term is defined in section 102(a)(6) of the Dodd-Frank Act (12 U.S.C. 5311(a)(6)), and pursuant to any requirements for determining if a company is predominantly engaged in financial activities as established by regulation of the Board of Governors pursuant to section 102(b) of the Dodd-Frank Act (12 U.S.C. 5311(b)).

§ 1310.3 Amendments.

The Council shall not amend or rescind appendix A to this part without providing the public with notice and an opportunity to comment in accordance with the procedures applicable to legislative rules under 5 U.S.C. 553.

[84 FR 8959, Mar. 13, 2019]

Subpart B—Determinations

§ 1310.10 Council determinations regarding nonbank financial companies.

(a) *Determinations.* The Council may determine that a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards, in accordance with title I of the Dodd-Frank Act, if the Council determines that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

(b) *Vote required.* Any proposed or final determination under paragraph (a) of this section shall—

(1) Be made by the Council and shall not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) *Back-up examination by the Board of Governors.* (1) If the Council is unable to determine whether the financial activities of a U.S. nonbank financial company, including a U.S. nonbank financial company that is owned by a foreign nonbank financial company, pose a threat to the financial stability of the United States, based on information or reports obtained by the Council under §1310.20, including discussions with management, and publicly available information, the Council may request the Board of Governors, and the Board of Governors is authorized, to conduct an examination of the U.S. nonbank financial company and its subsidiaries for the sole purpose of determining whether the nonbank financial company should be supervised by the Board of Governors for purposes of title I of the Dodd-Frank Act (12 U.S.C. 5311–5374).

(2) The Council shall review the results of the examination of a nonbank financial company, including its subsidiaries, conducted by the Board of Governors under this paragraph (c) in connection with any proposed or final determination under paragraph (a) of this section with respect to the nonbank financial company.

§ 1310.11 Considerations in making proposed and final determinations.

(a) *Considerations for U.S. nonbank financial companies.* In making a proposed or final determination under §1310.10(a) with respect to a U.S. nonbank financial company, the Council shall consider—

(1) The extent of the leverage of the U.S. nonbank financial company and its subsidiaries;

(2) The extent and nature of the off-balance-sheet exposures of the U.S. nonbank financial company and its subsidiaries;

(3) The extent and nature of the transactions and relationships of the U.S. nonbank financial company and its subsidiaries with other significant nonbank financial companies and significant bank holding companies;

(4) The importance of the U.S. nonbank financial company and its subsidiaries as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;

(5) The importance of the U.S. nonbank financial company and its subsidiaries as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such U.S. nonbank financial company would have on the availability of credit in such communities;

(6) The extent to which assets are managed rather than owned by the U.S. nonbank financial company and its subsidiaries, and the extent to which ownership of assets under management is diffuse;

(7) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the U.S. nonbank financial company and its subsidiaries;

(8) The degree to which the U.S. nonbank financial company and its subsidiaries are already regulated by 1 or more primary financial regulatory agencies;

(9) The amount and nature of the financial assets of the U.S. nonbank financial company and its subsidiaries;

(10) The amount and types of the liabilities of the U.S. nonbank financial company and its subsidiaries, including the degree of reliance on short-term funding; and

(11) Any other risk-related factor that the Council deems appropriate, either by regulation or on a case-by-case basis.

(b) *Considerations for foreign nonbank financial companies.* In making a proposed or final determination under §1310.10(a) with respect to a foreign nonbank financial company, the Council shall consider—

(1) The extent of the leverage of the foreign nonbank financial company and its subsidiaries;

(2) The extent and nature of the United States related off-balance-sheet exposures of the foreign nonbank financial company and its subsidiaries;

(3) The extent and nature of the transactions and relationships of the foreign nonbank financial company and its subsidiaries with other significant nonbank financial companies and significant bank holding companies;

(4) The importance of the foreign nonbank financial company and its subsidiaries as a source of credit for United States households, businesses, and State and local governments and as a source of liquidity for the United States financial system;

(5) The importance of the foreign nonbank financial company and its subsidiaries as a source of credit for low-income, minority, or underserved communities in the United States, and the impact that the failure of such foreign nonbank financial company would have on the availability of credit in such communities;

(6) The extent to which assets are managed rather than owned by the foreign nonbank financial company and its subsidiaries and the extent to which ownership of assets under management is diffuse;

(7) The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the foreign nonbank financial company and its subsidiaries;

(8) The extent to which the foreign nonbank financial company and its subsidiaries are subject to prudential standards on a consolidated basis in the foreign nonbank financial company's home country that are administered and enforced by a comparable foreign supervisory authority;

(9) The amount and nature of the United States financial assets of the foreign nonbank financial company and its subsidiaries;

(10) The amount and nature of the liabilities of the foreign nonbank financial company and its subsidiaries used to fund activities and operations in the United States, including the degree of reliance on short-term funding; and

(11) Any other risk-related factor that the Council deems appropriate, either by regulation or on a case-by-case basis.

§ 1310.12 Anti-evasion provision.

(a) *Determinations.* In order to avoid evasion of title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part, the Council, on its own initiative or at the request of the Board of Governors, may require that the financial activities of a company shall be supervised by the Board of Governors and subject to prudential standards if the Council determines that—

(1) Material financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the financial activities conducted directly or indirectly by a company incorporated or organized under the laws of the United States or any State or the financial activities in the United States of a company incorporated or organized in a country other than the United States would pose a threat to the financial stability of the United States, based on consideration of the factors in—

(i) § 1310.11(a) if the company is incorporated or organized under the laws of the United States or any State; or

(ii) § 1310.11(b) if the company is incorporated or organized in a country other than the United States; and

(2) The company is organized or operates in such a manner as to evade the application of title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part.

(b) *Vote required.* Any proposed or final determination under paragraph (a) of this section shall—

(1) Be made by the Council and shall not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(c) *Definition of covered financial activities.* For purposes of this section, the term ''financial activities''—

(1) Means activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956);

(2) Includes the ownership or control of one or more insured depository institutions; and

(3) Does not include internal financial activities conducted for the company or any affiliate thereof, including

internal treasury, investment, and employee benefit functions.

(d) *Application of other provisions.* Sections 1310.20(a), 1310.20(b), 1310.20(c), 1310.20(e), 1310.21, 1310.22, and 1310.23, and the definitions referred to therein, shall apply to proposed and final determinations of the Council with respect to the financial activities of a company pursuant to this section in the same manner as such sections apply to proposed and final determinations of the Council with respect to nonbank financial companies.

Subpart C—Information Collection; Proposed and Final Determinations; Evidentiary Hearings

§ 1310.20 Council information collection; consultation; coordination; confidentiality.

(a) *Information collection from the Office of Financial Research, member agencies, the Federal Insurance Office, and other Federal and State financial regulatory agencies.* The Council may receive, and may request the submission of, such data or information from the Office of Financial Research, member agencies, the Federal Insurance Office, and (acting through the Office of Financial Research, to the extent the Council determines necessary) other Federal and State financial regulatory agencies as the Council deems necessary to carry out the provisions of title I of the Dodd-Frank Act (12 U.S.C. 5311–5374) or this part.

(b) *Information collection from nonbank financial companies.* (1) The Council may, to the extent the Council determines appropriate, direct the Office of Financial Research to require the submission of periodic and other reports from any nonbank financial company, including a nonbank financial company that is being considered for a proposed or final determination under §1310.10(a), for the purpose of assessing the extent to which a nonbank financial company poses a threat to the financial stability of the United States.

(2) Before requiring the submission of reports under this paragraph (b) from any nonbank financial company that is regulated by a member agency or any primary financial regulatory agency, the Council, acting through the Office of Financial Research, shall coordinate with such agency or agencies and shall, whenever possible, rely on information available from the Office of Financial Research or such agency or agencies.

(3) Before requiring the submission of reports under this paragraph (b) from a company that is a foreign nonbank financial company, the Council shall, acting through the Office of Financial Research, to the extent appropriate, consult with the appropriate foreign regulator of such foreign nonbank financial company and, whenever possible, rely on information already being collected by such foreign regulator, with English translation.

(4) The Council may, to the extent the Council determines appropriate, accept the submission of any data, information, and reports voluntarily submitted by any nonbank financial company that is being considered for a proposed or final determination under §1310.10(a), for the purpose of assessing the extent to which a nonbank financial company poses a threat to the financial stability of the United States.

(c) *Consultation.* The Council shall consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for supervision by the Board of Governors under §1310.10(a) in a timely manner before the Council makes any final determination under §1310.10(a) with respect to such nonbank financial company.

(d) *International coordination.* In exercising its duties under this part with respect to foreign nonbank financial companies and cross-border activities and markets, the Council, acting through its Chairperson or other authorized designee, shall consult with appropriate foreign regulatory authorities, to the extent appropriate.

(e) *Confidentiality*—(1) *In general.* The Council shall maintain the confidentiality of any data, information, and reports submitted under this part.

(2) *Retention of privilege.* The submission of any non-publicly available data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of

any Federal or State court) to which the data or information is otherwise subject.

(3) *Freedom of Information Act.* Section 552 of title 5, United States Code, including the exceptions thereunder, and any regulations thereunder adopted by the Council, shall apply to any data, information, and reports submitted under this part.

§ 1310.21 Proposed and final determinations; notice and opportunity for an evidentiary hearing.

(a) *Written notice of consideration of determination; submission of materials.* Before providing a nonbank financial company written notice of a proposed determination pursuant to paragraph (b) of this section, the Council shall provide the nonbank financial company—

(1) Written notice that the Council is considering whether to make a proposed determination with respect to the nonbank financial company under § 1310.10(a);

(2) An opportunity to submit written materials, within such time as the Council determines to be appropriate (which shall be not less than 30 days after the date of receipt by the nonbank financial company of the notice described in paragraph (a)(1)), to the Council to contest the Council's consideration of the nonbank financial company for a proposed determination, including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States; and

(3) Notice when the Council deems its evidentiary record regarding such nonbank financial company to be complete.

(b) *Notice of proposed determination.* If the Council determines under § 1310.10(a) that a nonbank financial company should be supervised by the Board of Governors and be subject to prudential standards, the Council shall provide to the nonbank financial company written notice of the proposed determination, including an explanation of the basis of the proposed determination and the date by which an evidentiary hearing may be requested by the nonbank financial company under paragraph (c) of this section.

(c) *Evidentiary hearing.* (1) Not later than 30 days after the date of receipt by a nonbank financial company of the notice of proposed determination under paragraph (b) of this section, the nonbank financial company may request, in writing, an opportunity for a nonpublic, written or oral evidentiary hearing before the Council or its representatives to contest the proposed determination under § 1310.10(a).

(2) Upon receipt by the Council of a timely request under paragraph (c)(1), the Council shall fix a time (not later than 30 days after the date of receipt by the Council of the request) and place at which such nonbank financial company may appear, personally or through counsel, for a nonpublic evidentiary hearing at which the nonbank financial company may submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) to contest the proposed determination under § 1310.10(a), including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

(d) *Final determination after evidentiary hearing.* If the nonbank financial company makes a timely request for an evidentiary hearing under paragraph (c) of this section, the Council shall, not later than 60 days after the hearing date—

(1) Determine whether to make a final determination under § 1310.10(a);

(2) Notify the nonbank financial company, in writing, of any final determination of the Council under § 1310.10(a), which notice shall contain a statement of the basis for the decision of the Council; and

(3) If the Council makes a final determination under § 1310.10(a), publicly announce the final determination of the Council.

(e) *No evidentiary hearing requested.* If a nonbank financial company does not make a timely request for an evidentiary hearing under paragraph (c) of this section or notifies the Council in writing that it is not requesting an evidentiary hearing under paragraph (c) of this section, the Council shall, not later than 10 days after the date by which the nonbank financial company could have requested a hearing under paragraph (c) of this section or 10 days after the date on which the Council receives notice from the nonbank financial company that it is not requesting an evidentiary hearing, as applicable—

(1) Determine whether to make a final determination under §1310.10(a);

(2) Notify the nonbank financial company, in writing, of any final determination of the Council under §1310.10(a), which notice shall contain a statement of the basis for the decision of the Council; and

(3) If the Council makes a final determination under §1310.10(a), publicly announce the final determination of the Council.

(f) *Time period for consideration.* (1) If the Council does not make a proposed determination under §1310.10(a) with respect to a nonbank financial company within 180 days after the date on which the nonbank financial company receives the notice of completion of the Council's evidentiary record described in paragraph (a)(3) of this section, the nonbank financial company shall not be eligible for a proposed determination under §1310.10(a) unless the Council issues a subsequent written notice of consideration of determination under paragraph (a) of this section to such nonbank financial company.

(2) This paragraph (f) shall not limit the Council's ability to issue a subsequent written notice of consideration of determination under §1310.21(a) to any nonbank financial company that, within 180 days after the date on which such nonbank financial company received a notice described in paragraph (a)(3) of this section, does not become subject to a proposed determination under §1310.10(a).

§1310.22 Emergency exception to §1310.21.

(a) *Exception to §1310.21.* Notwithstanding anything to the contrary in §1310.21, the Council may waive or modify any or all of the notice and other procedural requirements of §1310.21 with respect to a nonbank financial company if—

(1) The Council determines that such waiver or modification is necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company to the financial stability of the United States; and

(2) The Council provides written notice of the waiver or modification under this section to the nonbank financial company as soon as practicable, but not later than 24 hours after the waiver or modification is granted. Any such notice shall set forth the manner and form for transmitting a request for an evidentiary hearing under paragraph (c) of this section.

(b) *Consultation.* (1) In making a determination under paragraph (a) of this section with respect to a nonbank financial company, the Council shall consult with the primary financial regulatory agency, if any, for such nonbank financial company, in such time and manner as the Council may deem appropriate.

(2) In making a determination under paragraph (a) of this section with respect to a foreign nonbank financial company, the Council shall consult with the appropriate home country supervisor, if any, of such foreign nonbank financial company, in such time and manner as the Council may deem appropriate.

(c) *Opportunity for evidentiary hearing.* (1) If the Council, pursuant to paragraph (a) of this section, waives or modifies any of the notice or other procedural requirements of §1310.21 with respect to a nonbank financial company, the nonbank financial company may request, in writing, an opportunity for a nonpublic, written or oral evidentiary hearing before the Council or its representatives to contest such waiver or modification, not later than 10 days after the date of receipt by the

nonbank financial company of the notice described in paragraph (a)(2) of this section.

(2) Upon receipt of a timely request for an evidentiary hearing under paragraph (c)(1), the Council shall fix a time (not later than 15 days after the date of receipt by the Council of the request) and place at which the nonbank financial company may appear, personally or through counsel, for a nonpublic evidentiary hearing at which the nonbank financial company may submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) regarding the waiver or modification under this section.

(d) *Notice of final determination.* If the nonbank financial company makes a timely request for an evidentiary hearing under paragraph (c) of this section, the Council shall, not later than 30 days after the hearing date—

(1) Make a final determination regarding the waiver or modification under this §1310.22;

(2) Notify the nonbank financial company, in writing, of the final determination of the Council regarding the waiver or modification under this §1310.22, which notice shall contain a statement of the basis for the final decision of the Council; and

(3) If the Council makes a final determination under §1310.10(a), publicly announce the final determination of the Council.

(e) *Vote required.* Any determination of the Council under paragraph (a)(1) of this section to waive or modify any of the notice or other procedural requirements of §1310.21 shall—

(1) Be made by the Council and shall not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

§1310.23 Council reevaluation and rescission of determinations.

(a) *Reevaluation and rescission.* The Council shall, not less frequently than annually—

(1) Reevaluate each currently effective determination made under §1310.10(a); and

(2) Rescind any such determination, if the Council determines that the nonbank financial company no longer meets the standard under §1310.10(a), taking into account the considerations in §1310.11(a) or §1310.11(b), as applicable.

(b) *Notice of reevaluation; submission of materials.* The Council shall provide written notice to each nonbank financial company subject to a currently effective determination prior to the Council's reevaluation of such determination under paragraph (a) of this section and shall provide such nonbank financial company an opportunity to submit written materials, within such time as the Council determines to be appropriate (which shall be not less than 30 days after the date of receipt by the nonbank financial company of such notice), to the Council to contest the determination, including materials concerning whether, in the nonbank financial company's view, material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

(c) *Vote required.* Any determination of the Council under paragraph (a)(2) of this section to rescind a determination made with respect to a nonbank financial company shall—

(1) Be made by the Council and shall not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(d) *Notice of rescission.* If the Council rescinds a determination with respect to any nonbank financial company under paragraph (a) of this section, the Council shall notify the nonbank financial company, in writing, of such rescission and publicly announce such rescission.

APPENDIX A TO PART 1310—FINANCIAL STABILITY OVERSIGHT COUNCIL GUIDANCE FOR NONBANK FINANCIAL COMPANY DETERMINATIONS

I. INTRODUCTION

Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'')[1] authorizes the Financial Stability Oversight Council (the ''Council'') to determine that a nonbank financial company will be supervised by the Board of Governors of the Federal Reserve System (the ''Federal Reserve'') and be subject to prudential standards in accordance with Title I of the Dodd-Frank Act if either of two standards is met. Under the first standard, the Council may subject a nonbank financial company to supervision by the Federal Reserve and prudential standards if the Council determines that material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States. Under the second standard, the Council may determine that a nonbank financial company will be supervised by the Federal Reserve and subject to prudential standards if the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability. Section 113 of the Dodd-Frank Act also lists considerations that the Council must take into account in making a determination.

Section II of this document describes the approach the Council intends to take in prioritizing its work to identify and address potential risks to U.S. financial stability using an activities-based approach. This approach reflects the Council's priorities of identifying potential risks on a system-wide basis, reducing the potential for competitive distortions that could arise from entity-specific determinations, and allowing relevant financial regulatory agencies[2] to address identified potential risks. First, the Council will monitor markets to identify potential risks to U.S. financial stability and to assess those risks on a system-wide basis. Second, the Council will then work with relevant financial regulatory agencies to seek the implementation of actions intended to address identified potential risks to financial stability.

Section III of this appendix describes the manner in which the Council intends to apply the statutory standards and considerations in making determinations under section 113 of the Dodd-Frank Act, if the Council determines that potential risks to U.S. financial stability are not adequately addressed through the activities-based approach. Section III defines key terms used in the statute, including ''threat to the financial stability of the United States.'' Section III also includes a detailed description of the analysis that the Council intends to conduct during its reviews, including a discussion of channels through which risks from a company may be transmitted to other companies or markets, and the Council's assessment of the likelihood of the company's material financial distress and the benefits and costs of a determination.

Section IV of this appendix outlines a two-stage process that the Council will follow in non-emergency situations when determining whether to subject a nonbank financial company to Federal Reserve supervision and prudential standards. In the first stage of the process, the Council will notify the company and its primary financial regulatory agency and conduct a preliminary analysis to determine whether the company should be subject to further evaluation by the Council. During the second stage of the evaluation process, the Council will conduct an in-depth evaluation if it determines in the first stage that the nonbank financial company merits additional review.

The Council's practices set forth in this guidance to address potential risks to U.S. financial stability are intended to comply with its statutory purposes: (1) To identify risks to U.S. financial stability that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (2) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the government will shield them from losses in the event of failure; and (3) to respond to emerging threats to the stability of the U.S. financial system.[3] Council actions seek to foster transparency and to avoid competitive distortions in markets for financial services and products. Further, nonbank financial companies should not benefit from an implicit federal financial safety net. Therefore, the Council emphasizes the importance of market discipline as a mechanism for addressing potential risks to U.S. financial stability posed by financial companies.

[1] *See* Dodd-Frank Act section 113, 12 U.S.C. 5323.

[2] References in this appendix to ''relevant financial regulatory agencies'' may encompass a broader range of regulators than those included in the statutory definition of ''primary financial regulatory agency,'' which is defined in Dodd-Frank Act section 2(12), 12 U.S.C. 5301(12).

[3] Dodd-Frank Act section 112(a)(1), 12 U.S.C. 5322(a)(1).

This interpretive guidance is not a binding rule, except to the extent that it sets forth rules of agency organization, procedure, or practice. This guidance is intended to assist financial companies and other market participants in understanding how the Council expects to exercise certain of its authorities under Title I of the Dodd-Frank Act. The Council retains discretion, subject to applicable statutory requirements, to consider factors relevant to the assessment of a potential risk or threat to U.S. financial stability on a case-by-case basis. If the Council were to depart from the interpretative guidance, it would need to provide a reasoned explanation for its action, which would ordinarily require acknowledging the change in position.[4]

II. Activities-Based Approach

The Dodd-Frank Act gives the Council broad discretion in determining how to respond to potential threats to U.S. financial stability. A determination to subject a nonbank financial company to Federal Reserve supervision and prudential standards under section 113 of the Dodd-Frank Act is only one of several Council authorities for responding to potential risks to U.S. financial stability.[5] The Council will prioritize its efforts to identify, assess, and address potential risks and threats to U.S. financial stability through a process that begins with an activities-based approach, and will pursue entity-specific determinations under section 113 of the Dodd-Frank Act only if a potential risk or threat cannot be adequately addressed through an activities-based approach. The Council anticipates it would consider a nonbank financial company for a potential determination under section 113 only in rare instances, such as if the products, activities, or practices of a company that pose a potential threat to U.S. financial stability are outside the jurisdiction or authority of financial regulatory agencies. This approach reflects two priorities: (1) Identifying and addressing, in consultation with relevant financial regulatory agencies, potential risks and emerging threats on a system-wide basis and to reduce the potential for competitive distortions among financial companies and in markets that could arise from entity-specific determinations, and (2) allowing relevant financial regulatory agencies, which generally possess greater information and expertise with respect to company, product, and market risks, to address potential risks, rather than subjecting the companies to new regulatory authorities.

As part of its activities-based approach, the Council will examine a range of financial products, activities, or practices that could pose risks to U.S. financial stability. These types of activities are often identified in the Council's annual reports, such as activities related to (1) the extension of credit, (2) the use of leverage or short-term funding, (3) the provision of guarantees of financial performance, and (4) other key functions critical to support the functioning of financial markets. The Council considers a risk to financial stability to mean a risk of an event or development that could impair financial intermediation or financial market functioning to a degree that would be sufficient to inflict significant damage on the broader economy. The Council's activities-based approach is intended to identify and address risks to financial stability using a two-step approach, described below.

a. Step One of Activities-Based Approach: Identifying Potential Risks From Products, Activities, or Practices

Monitoring Markets

The Council has a statutory duty to monitor the financial services marketplace in order to identify potential threats to U.S. financial stability.[6] In the first step of the activities-based approach, to enable the Council to identify potential risks to U.S. financial stability, the Council, in consultation with relevant financial regulatory agencies, intends to monitor diverse financial markets and market developments to identify products, activities, or practices that could pose risks to U.S. financial stability. When monitoring potential risks to financial stability, the Council intends to consider the linkages across products, activities, and practices, and their interconnectedness across firms and markets.

For example, the Council's monitoring may include:

[4] *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[5] For example, the Council has authority to make recommendations to the Federal Reserve concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to nonbank financial companies supervised by the Federal Reserve; make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by certain financial companies if the Council determines that such activity or practice could create or increase certain risks; and designate financial market utilities and payment, clearing, and settlement activities that the Council determines are, or are likely to become, systemically important. Dodd-Frank Act sections 115, 120, 804, 12 U.S.C. 5325, 5330, 5463.

[6] Dodd-Frank Act section 112(a)(2), 12 U.S.C. 5322(a)(2).

• Corporate and sovereign debt and loan markets;
• equity markets;
• markets for other financial products, including structured products and derivatives;
• short-term funding markets;
• payment, clearing, and settlement functions;
• new or evolving financial products, activities, and practices; and
• developments affecting the resiliency of financial market participants.

To monitor markets and market developments, the Council will review information such as historical data, research regarding the behavior of financial market participants, and new developments that arise in evolving marketplaces. The Council will regularly rely on data, research, and analysis from Council member agencies, the Office of Financial Research, industry participants, and other public sources. Consistent with its statutory obligations, the Council will, whenever possible, rely on information available from primary financial regulatory agencies.[7]

Evaluating Potential Risks

If the Council's monitoring of markets and market developments identifies a product, activity, or practice that could pose a potential risk to U.S. financial stability, the Council, in consultation with relevant financial regulatory agencies, will evaluate the potential risk to determine whether it merits further review or action. The Council's work in this step may include efforts such as sharing data, research, and analysis among Council members and member agencies and their staffs; consultations with regulators and other experts regarding the scope of potential risks and factors that may mitigate those risks; and the collaborative development of analyses for consideration by the Council. As part of this work, the Council may also engage with industry participants and other members of the public as it assesses potential risks.

The Council will assess the extent to which characteristics such as the following could amplify potential risks to U.S. financial stability arising from products, activities, or practices:

• Asset valuation risk or credit risk;
• leverage, including leverage arising from debt, derivatives, off-balance sheet obligations, and other arrangements;
• liquidity risk or maturity mismatch, such as reliance on funding sources that could be susceptible to dislocations;
• counterparty risk and interconnectedness among financial market participants;
• the transparency of financial markets, such as growth in financial transactions occurring outside of regulated sectors;
• operational risks, such as cybersecurity and operational resilience; or
• the risk of destabilizing markets for particular types of financial instruments, such as trading practices that substantially increase volatility in key markets.

Various factors may exacerbate or mitigate each of these types of risks. For example, activities may pose greater risks if they are complex or opaque, are conducted without effective risk-management practices, are significantly correlated with other financial products, and are either highly concentrated or significant and widespread. In contrast, regulatory requirements or market practices may mitigate risks by, for example, limiting exposures or leverage, enhancing risk-management practices, or restricting excessive risk-taking.

While the contours of the Council's initial evaluation of any potential risk will depend on the type and scope of analysis relevant to the particular risk, the Council's analyses will generally focus on four framing questions:

1. How could the potential risk be triggered? For example, could it be triggered by sharp reductions in the valuation of particular classes of financial assets?

2. How could the adverse effects of the potential risk be transmitted to financial markets or market participants? For example, what are the direct or indirect exposures in financial markets to the potential risk?

3. What impact could the potential risk have on the financial system? For example, what could be the scale of its adverse effects on other companies and markets, and would its effects be concentrated or distributed broadly among market participants? This analysis should take into account factors such as existing regulatory requirements or market practices that mitigate potential risks.

4. Could the adverse effects of the potential risk impair the financial system in a manner that could harm the non-financial sector of the U.S. economy?

In this evaluation, the Council will consult with relevant financial regulatory agencies and will take into account existing laws and regulations that may mitigate a potential risk to U.S. financial stability. The Council will also take into account the risk profiles and business models of market participants engaging in the products, activities, or practices under evaluation, and consider available evidence regarding the potential risk. Empirical data may not be available regarding all potential risks, and the type and scope of the Council's analysis will be tailored to the potential risk under consideration.

[7] Dodd-Frank Act section 112(d)(3), 12 U.S.C. 5322(d)(3).

If a product, activity, or practice creating a potential risk to financial stability is identified, the Council will work with relevant financial regulatory agencies to address the identified risk, as described in section II.b of this appendix.

b. Step Two of Activities-Based Approach: Working With Regulators To Address Identified Risks

If the Council identifies a potential risk to U.S. financial stability in step one of the activities-based approach, the Council will work with the relevant financial regulatory agencies at the federal and state levels to seek the implementation of appropriate actions to address the identified potential risk. The Council will coordinate among its members and member agencies and will follow up on supervisory or regulatory actions to ensure the potential risk is adequately addressed. The goal of this step would be for existing regulators to take appropriate action, such as modifying their regulation or supervision of companies or markets under their jurisdiction in order to mitigate potential risks to U.S. financial stability identified by the Council.[8] If a potential risk identified by the Council relates to a product, activity, or practice arising at a limited number of individual financial companies, the Council nonetheless will prioritize a remedy that addresses the underlying risk across all companies that engage in the relevant activity. If the Council finds that a particular type of financial product could present risks to U.S. financial stability, there may be different approaches existing regulators could take, based on their authorities and the urgency of the risk, such as restricting or prohibiting the offering of that product, or requiring market participants to take additional risk-management steps that address the risks.

If, after engaging with relevant financial regulatory agencies, the Council believes those regulators' actions are inadequate to address the identified potential risk to U.S. financial stability, the Council has authority to make formal public recommendations to primary financial regulatory agencies under section 120 of the Dodd-Frank Act. Under section 120, the Council may provide for more stringent regulation of a financial activity by issuing nonbinding recommendations, following consultation with the primary financial regulatory agency and public notice inviting comments on proposed recommendations, to the primary financial regulatory agency to apply new or heightened standards or safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies under their jurisdiction.[9] In addition, in any case in which no primary financial regulatory agency exists for the markets or companies conducting financial activities or practices identified by the Council as posing risks, the Council can consider reporting to Congress on recommendations for legislation that would prevent such activities or practices from threatening U.S. financial stability. The Council intends to make recommendations under section 120 only to the extent that its recommendations are consistent with the statutory mandate of the primary financial regulatory agency to which the Council is making the recommendation.

The authority to issue recommendations to primary financial regulatory agencies under section 120 is one of the Council's most formal tools for responding to potential risks to U.S. financial stability. The Council will make these recommendations only if it determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of the activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, U.S. financial markets, or low-income, minority, or underserved communities.

In its recommendations under section 120, the Council may suggest broad approaches to address the risks it has identified. When appropriate, the Council may make a more specific recommendation. To promote analytical rigor and avoid duplication, before making any recommendation under section 120, the Council will ascertain whether the relevant primary financial regulatory agency would be expected to perform a cost-benefit analysis of the actions it would take in response to the Council's contemplated recommendation. In cases where the primary financial regulatory agency would not be expected to conduct such an analysis, the Council itself will—prior to making a final recommendation—conduct an analysis, using empirical data, to the extent available, of

[8] The Dodd-Frank Act provides that the Council's duties include to recommend to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies and to make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading among bank holding companies, nonbank financial companies, and United States financial markets. Dodd-Frank Act sections 112(a)(2)(F), (K), 12 U.S.C. 5322(a)(2)(F), (K).

[9] Dodd-Frank Act section 120(a), 12 U.S.C. 5330(a).

the benefits and costs of the actions that the primary financial regulatory agency would be expected to take in response to the contemplated recommendation. Where the Council conducts its own such analysis, the specificity of its assessment of benefits and costs would be commensurate with the specificity of the contemplated recommendation. Furthermore, where the Council conducts its own analysis, the Council will make a recommendation under section 120 only if it believes that the results of its assessment of benefits and costs support the recommendation.

Primary financial regulatory agencies have significant experience, knowledge, and expertise that can be useful in determining the most efficient way to address a particular risk within their regulatory jurisdiction. In every case, prior to issuing a recommendation under section 120, the Council will consult with the relevant primary financial regulatory agency and provide notice to the public and opportunity for comment as required by section 120.

III. Analytic Framework for Nonbank Financial Company Determinations

If the Council's collaboration and engagement with the relevant financial regulatory agencies during the activities-based approach does not adequately address a potential threat identified by the Council—or if a potential threat to U.S. financial stability is outside the jurisdiction or authority of financial regulatory agencies—and if the potential threat identified by the Council is one that could be effectively addressed by a Council determination regarding one or more nonbank financial companies, the Council may evaluate one or more nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act, applying the analytic framework described below. This section describes the analysis the Council will conduct in general regarding individual nonbank financial companies that are considered for a potential determination, and section IV of this appendix describes the Council's process for those reviews.

a. Statutory Standards and Considerations

The Council may determine, by a vote of not fewer than two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, that a nonbank financial company will be supervised by the Federal Reserve and be subject to prudential standards if the Council determines that (1) material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States (the ''First Determination Standard'') or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to the financial stability of the United States (the ''Second Determination Standard,'' and, together with the First Determination Standard, the ''Determination Standards'').[10] The analytic framework described below focuses primarily on the First Determination Standard because threats to financial stability (such as asset fire sales or financial market disruptions) are most commonly propagated through a nonbank financial company when it is in distress.

Several relevant terms used in the Dodd-Frank Act are not defined in the statute. The Council intends to interpret the term ''company'' to include any corporation, limited liability company, partnership, business trust, association, or similar organization.[11] In addition, the Council intends to interpret ''nonbank financial company supervised by the Board of Governors'' as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council.[12] The Council intends to interpret the term ''material financial distress'' as a nonbank financial company being in imminent danger of insolvency or defaulting on its financial obligations. The Council intends

[10] If the Council is unable to determine whether the financial activities of a U.S. nonbank financial company pose a threat to the financial stability of the United States based on certain information, the Council may request the Federal Reserve to conduct an examination of the U.S. nonbank financial company for the sole purpose of determining whether the company should be supervised by the Federal Reserve for purposes of Title I of the Dodd-Frank Act. Dodd-Frank Act section 112(d)(4), 12 U.S.C. 5322(d)(4).

[11] The statutory definition of ''nonbank financial company'' excludes bank holding companies and certain other types of companies. Dodd-Frank Act section 102(a)(4), 12 U.S.C. 5311(a)(4).

[12] As a result, if a nonbank financial company subject to a final determination of the Council sells or otherwise transfers a majority of its assets or liabilities, the acquirer will succeed to, and become subject to, the Council's determination. As discussed in section V below, a nonbank financial company that is subject to a final determination of the Council may request a reevaluation of the determination before the next required annual reevaluation, in appropriate cases. Such an acquirer can use this reevaluation process to seek a rescission of the determination upon consummation of its transaction.

to interpret the term ''threat to the financial stability of the United States'' as meaning the threat of an impairment of financial intermediation or of financial market functioning that would be sufficient to inflict severe damage on the broader economy. For purposes of considering whether a nonbank financial company could pose a threat to U.S. financial stability under either Determination Standard, the Council intends to assess the company in the context of a period of overall stress in the financial services industry and in a weak macroeconomic environment, with market developments such as increased counterparty defaults, decreased funding availability, and decreased asset prices. The Council believes this is appropriate because in such a context, the risks posed by a nonbank financial company may have a greater effect on U.S. financial stability.

The Dodd-Frank Act requires the Council to consider 10 specific considerations when determining whether a nonbank financial company satisfies either of the Determination Standards. These statutory considerations help the Council to evaluate whether one of the Determination Standards has been met:[13]

- The extent of the leverage of the company;
- the extent and nature of the off-balance-sheet exposures of the company;
- the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;
- the importance of the company as a source of credit for households, businesses, and state and local governments and as a source of liquidity for the U.S. financial system;
- the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;
- the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;
- the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;
- the degree to which the company is already regulated by one or more primary financial regulatory agencies;
- the amount and nature of the financial assets of the company; and
- the amount and types of the liabilities of the company, including the degree of reliance on short-term funding.

The statute also requires the Council to take into account any other risk-related factors that the Council deems appropriate. Any determination by the Council will be made based on a company-specific evaluation and an application of the standards and considerations set forth in section 113 of the Dodd-Frank Act, and taking into account qualitative and quantitative information the Council deems relevant to a particular nonbank financial company. The Council anticipates that the information relevant to an in-depth analysis of a nonbank financial company may vary based on the nonbank financial company's characteristics.

The discussion below describes how the Council will apply the Determination Standards in its evaluation of a nonbank financial company, including how the Council will take into account the statutory considerations, and other risk-related factors that the Council will take into account. Due to the unique threat that each nonbank financial company could pose to U.S. financial stability and the nature of the inquiry required by the statutory considerations, the Council expects that its evaluations of nonbank financial companies will be firm-specific and may include quantitative and qualitative information that the Council deems relevant to a particular nonbank financial company. The transmission channels, sample metrics, and other factors set forth below are not exhaustive and may not apply to all nonbank financial companies under evaluation.

b. Transmission Channels

The Council's evaluation of any nonbank financial company under section 113 of the Dodd-Frank Act will seek to determine whether a nonbank financial company meets one of the Determination Standards described above. In its analysis of a nonbank financial company, the Council will assess how the negative effects of the company's material financial distress, or of the nature, scope, size, scale, concentration, interconnectedness, or mix of the company's activities, could be transmitted to or affect other firms or markets, thereby causing a broader impairment of financial intermediation or of financial market functioning. Such a transmission of risk can occur through various mechanisms, or channels. The Council has identified three transmission channels as most likely to facilitate the transmission of the negative effects of a

[13] Dodd-Frank Act section 113(a)(2), 12 U.S.C. 5323(a)(2). This list of considerations is applicable to U.S. nonbank financial companies. With respect to foreign nonbank financial companies, the Council is required to take into account a similar list of considerations, in some cases limited to the companies' U.S. business or activities. *See* Dodd-Frank Act section 113(b)(2), 12 U.S.C. 5323(b)(2).

nonbank financial company's material financial distress, or of the nature, scope, size, scale, concentration, interconnectedness, or mix of the company's activities, to other financial firms and markets: Exposure; asset liquidation; and critical function or service. These three transmission channels are described below. The Council may also consider other relevant channels through which risks could be transmitted from a particular nonbank financial company and thereby pose a threat to U.S. financial stability. The Council will take into account the 10 statutory considerations and any other risk-related factors the Council deems appropriate as part of its evaluation of a nonbank financial company under the three transmission channels and the other factors described below. Further, in its analyses under the transmission channels, the Council will consider applicable factors that may limit the transmission of risk, such as existing regulatory requirements, collateralization, bankruptcy-remote structures, or guarantee funds that reduce counterparties' exposures to the nonbank financial company or mitigate incentives for customers or counterparties to withdraw funding or assets.

Exposure Transmission Channel

Under this transmission channel, the Council will evaluate whether a nonbank financial company's creditors, counterparties, investors, or other market participants have direct or indirect exposure to the nonbank financial company that is significant enough to materially and adversely affect those or other creditors, counterparties, investors, or other market participants and thereby pose a threat to U.S. financial stability.

The Council expects that its analyses under the exposure transmission channel will generally include the factors described below. The potential threat to U.S. financial stability will generally be greater if the amounts of the exposures are larger; if the terms of the transactions provide less protection for the counterparty; and if the largest counterparties include large financial institutions.

The Council also will consider a company's leverage and size. A company's leverage can amplify the risks posed by exposures, including off-balance sheet exposures, by reducing the company's ability to satisfy its obligations to creditors in the event of its material financial distress. Size is relevant to this analysis, as material financial distress at a larger nonbank financial company would generally transmit risk on a larger scale than distress at a smaller company. Size may be measured by the assets, liabilities, and capital of the firm.

As required by statute, the Council will consider the extent to which assets are managed rather than owned by the company and the extent to which ownership of assets under management is diffuse. The Council's analysis will recognize the distinct nature of exposure risks when the company is acting as an agent rather than as principal.[14] In particular, in the case of a nonbank financial company that manages assets on behalf of customers or other third parties, the third parties' direct financial exposures are often to the issuers of the managed assets, rather than to the nonbank financial company managing those assets.

The Council will consider the exposures that counterparties and other market participants have to a nonbank financial company arising from the company's capital markets activities. This assessment includes an evaluation of the company's relationships with other significant nonbank financial companies and significant bank holding companies. In most cases, the Council will consider factors such as the amount and nature of, and counterparties to, the company's:

- Outstanding debt (regardless of term) and other liabilities (such as guaranteed investment contracts issued by an insurance company or Federal Home Loan Bank loans).
- Derivatives transactions (which may be measured on the basis of gross notional amount, net fair value, or potential future exposures).
- Securities financing transactions (*i.e.*, repurchase agreements and securities lending transactions).
- Lines of credit.
- Credit-default swaps outstanding for which the company or an affiliate is the reference entity (generally focusing on single-name credit-default swaps).

Relevant metrics may include the number, size, and financial strength of a nonbank financial company's counterparties, including the proportion of its counterparties' exposure to the nonbank financial company relative to the counterparties' capital. The potential risk arising under this transmission channel depends not only on the number of counterparties that a nonbank financial company has, but also on the importance of that nonbank financial company to its counterparties and the extent to which the counterparties are interconnected with other financial firms, the financial system, and the broader economy. Therefore, the Council will focus on exposures of large financial institutions to the nonbank financial company under review. This analysis will take into account both individual counterparty exposures as well as aggregate exposures of other financial institutions to the company under review. The amount and types of other exposures that counterparties and other market participants have to a nonbank financial company is highly dependent on the nature

[14] Dodd-Frank Act section 113(a)(2)(F), 12 U.S.C. 5323(a)(2)(F).

of the company's business. The Council's analysis will take these other fact-specific considerations into account.

The Council also will consider applicable factors, including existing regulatory requirements, that may mitigate potential risks under the exposure transmission channel. For example, collateralization by high-quality, highly liquid securities, such as U.S. Treasury securities, the use of insurance funds to limit counterparty exposures, or other transactions that reallocate risk to well-capitalized entities, may reduce the potential for certain exposures to serve as a channel for the transmission of risk.

Contagion. The negative effects of the material financial distress of a large, interconnected nonbank financial company are not necessarily limited to the amount of direct losses suffered by the firm's creditors, counterparties, investors, or other market participants. In general, the wider and more interconnected a company's network of financial counterparties, the greater the potential negative effect of the material financial distress of the company. Aggregate exposures to a nonbank financial company can create a potential threat to U.S. financial stability if they lead to contagion among financial institutions and financial markets more broadly. Contagion has the potential to spread distress quickly and seemingly unexpectedly. Such transmission is associated with opaque balance sheets, closely correlated markets, and coordination failures among investors. In such circumstances, fire sales by a highly leveraged and interconnected nonbank financial company may result in a loss of confidence in other financial companies that are perceived to have similar characteristics. The Council will seek evidence regarding the potential for contagion, including relevant industry-specific historical examples and the scope of the company's interconnectedness with large financial institutions, among other factors. Various market-based or regulatory factors can strongly mitigate the risk of contagion. Contagion should be viewed in conjunction with other factors described above when evaluating risk under the exposure transmission channel.

Asset Liquidation Transmission Channel

Under this transmission channel, the Council will consider whether a nonbank financial company holds assets that, if liquidated quickly, could pose a threat to U.S. financial stability by, for example, causing a fall in asset prices that significantly disrupts trading or funding in key markets or causes significant losses or funding problems for other firms with similar holdings. This channel would likely be most relevant for a nonbank financial company that could be forced to liquidate assets quickly due to its funding and liquid asset profile. For example, this could be the case if a nonbank financial company relies heavily on short-term funding. The Council may also consider whether a deterioration in asset pricing or market functioning could pressure other financial firms to sell their holdings of affected assets in order to maintain adequate capital and liquidity, which, in turn, could produce a cycle of asset sales that could lead to further market disruptions. This analysis includes an assessment of any maturity mismatch at the company—the difference between the maturities of the company's assets and liabilities. A company's reliance on short-term funding to finance longer-term positions can subject the company to rollover or refinancing risk that may force it to sell assets rapidly at low market prices. The Council will also consider applicable factors that may mitigate potential risks under the asset liquidation transmission channel. As part of its analysis, the Council will consider the extent to which assets are managed rather than owned by the company.

The Council's analyses of the asset liquidation transmission channel will focus on three central factors, described below.

Liquidity of the company's liabilities. The first factor in the Council's assessment under this transmission channel is the amount and nature of the company's liabilities that are, or could become, short-term in nature. This analysis involves an assessment of the company's liquidity risk. Liquidity risk generally refers to the risk that a company may not have sufficient funding to satisfy its short-term needs. For example, relevant factors may include:

- The company's short-term financial obligations (including outstanding commercial paper).
- Financial arrangements that can be terminated by counterparties and therefore become short-term (including callable debt, derivatives, securities lending, repurchase agreements, and off-balance-sheet exposures).
- Long-term liabilities that may come due in a short-term period.
- Financial transactions that may require the company to provide additional margin or collateral to the counterparty.
- Products that allow customers rapidly to withdraw funds from the company.
- Liabilities related to other collateralized borrowings and deposits.

The Council will quantitatively identify the scale of potential liquidity needs that could plausibly arise at the company. As part of this analysis, the Council will apply counterparty and customer withdrawal rates based on historical examples and other relevant models to assess the scope of plausible withdrawals. In addition, any ability of the company or its financial regulators to impose stays on counterparty terminations or

withdrawals is relevant, because it may reduce the company's liquidity needs in an event of material financial distress. The Council also will consider the company's internal estimates of potential liquidity needs in a context of material financial distress.

The company's leverage and short-term debt ratios are relevant to this analysis, as high leverage and reliance on short-term funding can increase the potential for a company to be subject to sudden liquidity strains that force it rapidly to sell assets. Leverage can be measured by the ratio of assets to capital or as a measure of economic risk relative to capital. The latter measurement can better capture the effect of derivatives and other products with embedded leverage on the risk undertaken by a nonbank financial company. Comparisons of leverage to peer financial institutions can help indicate the level of risk at the company. Metrics that may be used to assess leverage include:

• Total assets and total debt measured relative to total equity, which measures financial leverage.

• Derivatives liabilities and off-balance sheet obligations relative to total equity, which may show how much off-balance sheet leverage a nonbank financial company may have.

• Securities financing transactions and funding agreements that provide alternative sources of liquidity or operating income, which indicate the use of operating leverage.

• Changes in leverage ratios, which may indicate that a nonbank financial company is increasing or decreasing its risk profile.

Liquidity of the company's assets. The second factor under the asset liquidation transmission channel is an analysis of the company's assets that the company could rapidly liquidate, if necessary, to satisfy its obligations. In particular, the Council expects that this assessment will focus on the size and liquidity characteristics of the company's investment portfolio. The Council will assess the company's assets, grouped into categories such as highly liquid (for example, cash, U.S. Treasury securities, and U.S. agency mortgage-backed securities) and less-liquid (for example, corporate bonds, non-agency mortgage-backed securities, and mortgages and other loans) to determine if it holds cash instruments or readily marketable securities that could reasonably be expected to have a liquid market in times of broader market stress. To the extent that the company's assets are encumbered, those assets would generally not be considered to be available to satisfy short-term obligations.

Potential fire sale impacts. The third factor in the asset liquidation transmission channel analysis is the potential effects of the company's asset liquidation on markets and market participants. As described above, the Council will assess the scale of potential liquidity needs that could plausibly arise at the company and the amount and nature of financial assets the company could sell to satisfy its obligations. In this step of the asset liquidation transmission channel analysis, the Council will apply quantitative models to assess how the company could satisfy the identified range of potential liquidity needs by rapidly selling its identified liquid assets. To assess this factor, the Council will compare the volume of the company's potential liquidation of particular categories of financial instruments with the average daily trading volume in the United States of those types of instruments. In general, a rapid liquidation of a significant amount of relatively illiquid financial instruments, or instruments that are widely held by other market participants, will have a greater effect on the market than a liquidation of the same amount of highly liquid instruments or instruments that are not widely held. The Council may also conduct an analysis to assess the relative impact of negative shocks to the equity or assets of certain financial institutions on other financial institutions. The Council expects that its analysis will generally focus on potential asset liquidation periods of 30 to 90 days.

The order in which a nonbank financial company may liquidate assets is a factor in the extent of any fire sale risk, but is subject to considerable uncertainties. A company could liquidate a significant portion of its highly liquid assets first, in order to reduce the likelihood that the company would be forced to liquidate illiquid assets in the event of its material financial distress. However, in the event of the company's material financial distress, a company may also be expected to seek to maintain compliance with any applicable risk-based capital ratios and other requirements. Doing so might require a company to sell a mix of assets across a number of asset classes, rather than proceed with the sale of assets in order from most liquid to least liquid. Further, in the event of a significant market disruption, there could be a meaningful first-mover advantage to selling less-liquid assets first. For example, markets for less-liquid assets, such as private and public corporate bonds and asset-backed securities, could be prone to disruption in the event that a seller liquidated a large portion of its portfolio of those assets. Given these potential discounts, in some circumstances a company may be incentivized to sell a portion of its less-liquid assets first and to hold U.S. government securities and agency mortgage-backed securities, which tend to increase in value during a period of market turmoil. To the extent that a company's highly liquid assets are encumbered (for example, under securities financing transactions or as collateral for loans), the company would also need to sell less-liquid

assets to satisfy its liquidity needs. Further, a company's holdings of liquid assets could be reduced before the company enters material financial distress. As a result, the Council may take into account company-specific factors in assessing the order in which the company might liquidate assets. One approach the Council may take is to assess the potential effects if the company sells pro rata portions of the more-liquid segments of its investment portfolio (such as cash and highly liquid instruments, U.S. agency securities, investment-grade public corporate debt securities, publicly traded equity securities, and asset backed-securities).

Critical Function or Service Transmission Channel

Under this transmission channel, the Council will consider the potential for a nonbank financial company to become unable or unwilling to provide a critical function or service that is relied upon by market participants and for which there are no ready substitutes and thereby pose a threat to U.S. financial stability. This factor is commonly referred to as ''substitutability.'' Substitutability captures the extent to which other firms could provide similar financial services in a timely manner at a similar price and quantity if a nonbank financial company withdraws from a particular market. Substitutability also captures situations in which a nonbank financial company is the primary or dominant provider of services in a market that the Council determines to be essential to U.S. financial stability. A risk under this transmission channel may be identified if a company provides a critical function or service that may not easily be substitutable. The Council's analysis will also consider applicable factors that may mitigate potential risks under the critical function or service transmission channel.

Concern about a potential lack of substitutability could be greater if a nonbank financial company and its competitors are likely to experience stress at the same time because they are exposed to the same risks. The Council may also analyze the nonbank financial company's activities and critical functions and the importance of those activities and functions to the U.S. financial system and assess how those activities and functions would be performed by the nonbank financial company or other market participants in the event of the nonbank financial company's material financial distress. The Council also will consider the substitutability of critical market functions that the company provides in the United States in the event of material financial distress of a foreign parent company.

The analysis of this channel incorporates a review of the competitive landscape for markets in which a nonbank financial company participates and for the services it provides (including the provision of liquidity to the U.S. financial system, the provision of credit to low-income, minority, or underserved communities, or the provision of credit to households, businesses and state and local governments), the ability of other firms to replace those services, and the nonbank financial company's market share. This analysis may focus on the company's market share in specific product lines and the ability of substitutes to replace a service or function provided by the company. The Council's evaluation of a nonbank financial company's market share regarding a particular product or service may include assessments of the ability of the nonbank financial company's competitors to expand to meet market needs during a period of overall stress in the financial services industry or in a weak macroeconomic environment; the costs that market participants would incur if forced to switch providers; the timeframe within which a disruption in the provision of the product or service would materially affect market participants or market functioning; and the economic implications of such a disruption.

c. Complexity and Resolvability

The potential threat a nonbank financial company could pose to U.S. financial stability may be mitigated or aggravated by the company's complexity, opacity, or resolvability. In particular, a risk may be aggravated if a nonbank financial company's resolution under ordinary insolvency regimes could disrupt key markets or have a material adverse impact on other financial firms or markets. An evaluation of a nonbank financial company's complexity and resolvability entails an assessment of (1) the complexity of the nonbank financial company's legal, funding, and operational structure, and (2) any obstacles to the rapid and orderly resolution of the nonbank financial company:

• Legal structure factors may include the number of jurisdictions the company operates in, the number of subsidiaries, and the organizational structure.

• Funding structure factors may include the degree of interaffiliate dependency for liquidity and funding (such as intercompany loans or other affiliate support arrangements), payment operation (such as treasury operations), and risk-management.

• Operational structure factors may include the number of employees, the number of U.S. and non-U.S. locations, and the degree of inter-company dependency in regard to financial guarantees and support arrangements, the ability to separate functions and spin off services or business lines, the complexity and resiliency of intercompany and

outsourced services and arrangements in resolution, and the likelihood of preserving franchise value in a recovery or resolution scenario.

• Cross-border operational factors may include size and complexity of the company's cross-border operations and impact of potential ring-fencing on an orderly resolution.

Factors that would tend to increase the risk associated with a company's complexity and resolvability include large size or scope of activities; a complex legal or operational structure; multi-jurisdictional operations and regulatory regimes; complex funding structures; the potential impact of a loss of key personnel; and shared services among affiliates. The opacity of a firm's structure—if the firm's structure and operations cannot readily or easily be determined—may present an obstacle to resolution.

d. Existing Regulatory Scrutiny

As noted above, one of the considerations the Council is statutorily required to take into account in making a determination under section 113 of the Dodd-Frank Act is the degree to which the nonbank financial company is already regulated by one or more primary financial regulatory agencies.[15] In its analysis of this statutory consideration, the Council will focus on the extent to which existing regulation of the company has mitigated the potential risks to financial stability identified by the Council. For example, factors that may be used to assess existing regulatory scrutiny include:

• The extent to which the company's primary financial regulator has imposed risk-management standards such as capital, liquidity, and reporting requirements, as relevant to the type of company, and has authority to supervise, examine, and bring enforcement actions, with respect to the company and its affiliates.

• Regulators' processes for inter-regulator coordination.

• For non-U.S. entities, the extent to which the company is supervised and subject to prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority.

e. Benefits and Costs of Determination; Likelihood of Material Financial Distress

Determining whether the expected benefits of a potential Council determination justify the expected costs is necessary to ensure that the Council's actions are expected to provide a net benefit to U.S. financial stability and are consistent with thoughtful decisionmaking.[16] Financial stability benefits may be difficult to quantify, and some of the costs may be difficult to forecast with precision. When possible, the Council will quantify reasonably estimable benefits and costs, using ranges, as appropriate, and based on empirical data when available. If such benefits or costs cannot be quantified in this manner, the Council will explain why such benefits or costs could not be quantified. The Council also expects to consider benefits and costs qualitatively.[17] To the extent feasible, the Council will attempt to assess the relative importance of any such qualitative elements. The Council will make a determination under section 113 only if the expected benefits to financial stability from Federal Reserve supervision and prudential standards justify the expected costs that the determination would impose. As part of this analysis, the Council will assess the likelihood of a firm's material financial distress, in order to assess the extent to which a determination may promote U.S. financial stability.

The key elements of regulatory analysis include (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs (quantitative and qualitative) of the proposed action and the main alternatives.[18] The Council will conduct this analysis only in cases where the Council is concluding that the company meets one of the standards for a determination by the Council under section 113 of the Dodd-Frank Act, because in other cases doing so would not affect the outcome of the Council's analysis.

Benefits. With respect to the benefits of a Council determination, the Council will consider the benefits of the determination itself, both to (1) the U.S. financial system and long-term economic growth and (2) the nonbank financial company due to additional regulatory requirements resulting from the determination, particularly the prudential standards adopted by the Federal Reserve under section 165 of the Dodd-Frank Act.

[15] Dodd-Frank Act section 113(a)(2)(H), 12 U.S.C. 5323(a)(2)(H).

[16] *See MetLife, Inc.* v. *Financial Stability Oversight Council*, 177 F. Supp.3d 219, 242 (D.D.C. 2016) (quoting 12 U.S.C. 5323(a)(2)(K) and *Michigan* v. *Environmental Protection Agency*, 135 S. Ct. 2699, 2707 (2015)).

[17] The Council will also consider non-quantified benefits and costs. *See* Office of Management and Budget Circular A–4 (Sept. 17, 2003), section (E) (Developing Benefit and Cost Estimates) (7).

[18] *See* Office of Management and Budget Circular A–4 (Sept. 17, 2003).

One of the Council's statutory purposes is to respond to emerging threats to the stability of the U.S. financial system.[19] The primary intended benefit of a determination under section 113 of the Dodd-Frank Act is a reduction in the likelihood or severity of a financial crisis. Therefore, the Council will consider potential benefits to the U.S. financial system and the U.S. economy arising from a Council determination. To the extent that a Council determination reduces the likelihood or severity of a potential financial crisis, the determination could enhance financial stability and mitigate the severity of economic downturns. The Council may use various measures of systemic risk to assess any improvement in financial stability. Such measures include S-Risk (which attempts to quantify the amount of capital a financial firm would need to raise in order to function normally in the event of a severe financial crisis), conditional value at risk, and certain estimates of fire sale risk, among others. To assess the benefit to the U.S. financial system and the U.S. economy from a determination, the Council may also consider historical analogues to the nonbank under review. In addition, the Council may compare the risks to financial stability posed by a particular nonbank to the risks posed by large bank holding companies, in order to produce an assessment of the relative risks the company may pose. Further, the loss of any implicit ''too big to fail'' or similar subsidy would be considered a benefit to the economy, even if it increases the nonbank financial company's cost of capital.

Analysis of the benefits of a determination for the relevant nonbank financial company may include those arising directly from the Council's determination as well as any benefits arising from anticipated new or increased requirements resulting from the determination, such as additional supervision and enhanced capital, liquidity, or risk-management requirements. For example, a nonbank financial company subject to a Council determination may benefit from a lower cost of capital or higher credit ratings upon meeting its post-determination regulatory requirements.

Costs. With respect to the costs of a Council determination, the Council will consider the costs of the determination itself, both to (1) the nonbank financial company due to additional regulatory requirements resulting from the determination, including the costs of the prudential standards adopted by the Federal Reserve under section 165 of the Dodd Frank Act; and (2) the U.S. economy.

The Council will consider costs to the company arising from anticipated new or increased regulatory requirements resulting from the determination related to:

- Risk-management requirements, such as the costs of capital planning and stress testing.
- Supervision and examination, such as compliance costs to the firm of additional examination and supervision.
- Increased capital requirements, after accounting for offsetting benefits to taxpayers and to the holders of the firm's other liabilities.
- Liquidity requirements, such as the opportunity cost from any requirement to hold additional high-quality liquid assets, relative to the company's current investment portfolio.

Because the Federal Reserve is required to tailor prudential standards to a nonbank financial company subject to a Council determination after the Council has made a determination regarding the company, the new regulatory requirements that result from the Council's determination will not be known to the Council during its analysis of the company. In cases where the nonbank financial company under review primarily engages in bank-like activities, the Council may consider, as a proxy, the costs that would be imposed on the nonbank if the Federal Reserve imposed prudential standards similar to those imposed on bank holding companies with at least $250 billion in total consolidated assets under section 165 of the Dodd-Frank Act.[20]

The Council also will consider the cost of a determination under section 113 of the Dodd-Frank Act to the U.S. economy by assessing the impact of the determination on the availability and cost of credit or financial products in relevant U.S. markets. To the extent that the markets in which the relevant nonbank participates have low concentration, the impact that the determination regarding one firm would have on credit conditions would generally be immaterial. However, if the relevant markets are concentrated, a Council determination regarding a significant market participant could have a material impact on credit conditions in that market. As part of this analysis, the Council may also consider the extent to which any reduction in financial services provided by the nonbank financial company under review would be offset by other market participants.

Likelihood of Material Financial Distress. As part of the assessment of the overall impact of a Council determination for any company under review under the First Determination Standard, the Council will assess the likelihood of the company's material financial distress based on its vulnerability to a range

[19] Dodd-Frank Act section 112(a)(1)(C), 12 U.S.C. 5322(a)(1)(C).

[20] Dodd-Frank Act section 165, 12 U.S.C. 5365.

of factors. For example, these factors may include leverage (both on- and off-balance sheet), potential risks associated with asset reevaluations (whether such reevaluations arise from market disruptions or severe macroeconomic conditions), reliance on short-term funding or other fragile funding markets, maturity transformation, and risks from exposures to counterparties or other market participants. This assessment may rely upon historical examples regarding the characteristics of financial companies that have experienced financial distress, but may also consider other risks that do not have historical precedent. The Council's analysis of the vulnerability of a nonbank financial company to material financial distress will be conducted taking into account a period of overall stress in the financial services industry and a weak macroeconomic environment. The Council may also consider the results of any stress tests that have previously been conducted by the company or by its primary financial regulatory agency.

IV. The Determination Process

As described in section II above, the Council will prioritize an activities-based approach for identifying, assessing, and addressing potential risks to financial stability. However, if a potential risk or threat to U.S. financial stability cannot be adequately addressed through an activities-based approach, the Council may consider a nonbank financial company for a potential determination under section 113 of the Dodd-Frank Act. The Council anticipates it would consider a nonbank financial company for a potential determination under section 113 only in rare instances, such as if the products, activities, or practices of a company that pose a potential threat to U.S. financial stability are outside the jurisdiction or authority of financial regulatory agencies. The Council expects generally to follow a two-stage process of evaluation and analysis, as described below.

In the first stage of the process (''Stage 1''), nonbank financial companies identified as potentially posing risks to U.S. financial stability will be notified and subject to a preliminary analysis, based on quantitative and qualitative information available to the Council primarily through public and regulatory sources. During Stage 1, the Council will permit, but not require, the company to submit relevant information. The Council will also consult with the primary financial regulatory agency or home country supervisor, as appropriate. This approach will enable the Council to fulfill its statutory obligation to rely whenever possible on information available through the Office of Financial Research (the ''OFR''), Council member agencies, or the nonbank financial company's primary financial regulatory agencies before requiring the submission of reports from any nonbank financial company.[21]

Following Stage 1, nonbank financial companies that are selected for additional review will receive notice that they are being considered for a proposed determination that the company could pose a threat to U.S. financial stability (a ''Proposed Determination'') and will be subject to in-depth evaluation during the second stage of review (''Stage 2''). Stage 2 will involve the evaluation of additional information collected directly from the nonbank financial company. At the end of Stage 2, the Council may consider whether to make a Proposed Determination with respect to the nonbank financial company. If a Proposed Determination is made by the Council, the nonbank financial company may request a hearing in accordance with section 113(e) of the Dodd-Frank Act and §1310.21(c) of the Council's rule.[22] After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a final determination.

a. Stage 1: Preliminary Evaluation of Nonbank Financial Companies

Stage 1 involves a preliminary analysis of nonbank financial companies to assess the risks they could pose to U.S. financial stability.

Identification of Company for Review in Stage 1

If, as described in section II, the Council's consultation with and any recommendations to a nonbank financial company's primary financial regulatory agency do not adequately address a potential risk identified by the Council, the Council may evaluate one or more individual nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act. The Council will vote to commence review of a nonbank financial company in Stage 1. When evaluating the potential risks associated with a nonbank financial company, the Council may consider the company and its subsidiaries together. This approach enables the Council to consider potential risks arising across the consolidated organization, while retaining the ability to make a determination regarding either the parent or any individual nonbank financial company subsidiary (or neither), depending on which entity the Council determines could pose a threat to financial stability.

[21] *See* Dodd-Frank Act section 112(d)(3), 12 U.S.C. 5322(d)(3).

[22] *See* 12 CFR 1310.21(c).

Engagement With Company and Regulators in Stage 1

The Council will provide a notice to any nonbank financial company under review in Stage 1. In Stage 1, the Council will consider available public and regulatory information; in addition, a company under review in Stage 1 may submit to the Council any information it deems relevant to the Council's evaluation and may, upon request, meet with staff of Council members and member agencies who are leading the Council's analysis. In order to reduce the burdens of review on the company, the Council will not require the company to submit information during Stage 1. In addition, staff representing Council members will, upon request, provide the company with a list of the primary public sources of information being considered during the Stage 1 analysis, so that the company has an opportunity to understand the information the Council may rely upon during Stage 1. Through this engagement, the Council will seek to enable the company under review to understand the focus of the Council's analysis, which may enable the company to act to mitigate any risks to financial stability and thereby potentially avoid becoming subject to a Council determination.

During the discussions in Stage 1 with the company, the Council intends for staff of Council members and member agencies to explain to the company the key risks that have been identified in the analysis. Because the review of the company is preliminary and continues to change until the Council makes a final determination, these identified risks may shift over time.

The Council will also consider in Stage 1 information available from relevant existing regulators of the company. Under the Dodd-Frank Act, the Council is required to consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for a determination before the Council makes any final determination with respect to such company.[23] For any company under review in Stage 1 that is regulated by a primary financial regulatory agency or home country supervisor, the Council will notify the regulator or supervisor that the company is under review no later than such time as the company is notified. As part of that consultation process, the Council will consult with the primary financial regulatory agency, if any, of each significant subsidiary of the nonbank financial company, to the extent the Council deems appropriate in Stage 1. The Council will actively solicit the regulator's views regarding risks at the company and potential mitigants. In order to enable the regulator to provide relevant information, the Council will share its preliminary views regarding potential risks at the company, and request that the regulator provide information regarding those specific risks, including whether the risks are adequately mitigated by factors such as existing regulation or the company's business practices. During the determination process, the Council will continue to encourage the regulator to address any risks to U.S. financial stability using the regulator's existing authorities; if the Council believes the regulator's actions adequately address the potential risks to U.S. financial stability the Council has identified, the Council may discontinue its consideration of the firm for a potential determination under section 113 of the Dodd-Frank Act.

Based on the preliminary evaluation in Stage 1, the Council may vote to commence a more detailed analysis of the company by advancing the company to Stage 2, or it may decide not to evaluate the company further. If the Council determines not to advance a company that has been reviewed in Stage 1 to Stage 2, the Council will notify the company in writing of the Council's decision. The notice will clarify that a decision not to advance the company from Stage 1 to Stage 2 at that time does not preclude the Council from reinitiating review of the company in Stage 1. For example, the Council may reinitiate review of the company if material changes affecting the firm merit further evaluation.

b. Stage 2: In-Depth Evaluation

Stage 2 involves an in-depth evaluation of any company that the Council has determined merits additional review.

In Stage 2, the Council will review the relevant company using information collected directly from the nonbank financial company, through the OFR, as well as public and regulatory information. The review will focus on whether the nonbank financial company could pose a threat to U.S. financial stability because of the company's material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company. The Council expects that the transmission channels and the other factors described above will be used to evaluate a nonbank financial company's potential to pose a threat to U.S. financial stability.

Engagement With Company and Regulators in Stage 2

Each nonbank financial company to be evaluated in Stage 2 will receive a notice (a ''Notice of Consideration'') that the nonbank financial company is under consideration for a Proposed Determination. The Council also

[23] Dodd-Frank Act section 113(g), 12 U.S.C. 5323(g).

will submit to the company a request that the company provide information that the Council deems relevant to the Council's evaluation, and the nonbank financial company will be provided an opportunity to submit written materials to the Council.[24] This information will generally be collected by the OFR. Before requiring the submission of reports from any nonbank financial company that is regulated by a Council member agency or any primary financial regulatory agency, the Council, acting through the OFR, will coordinate with such agencies and will, whenever possible, rely on information available from the OFR or such agencies. Council members and their agencies and staffs will maintain the confidentiality of such information in accordance with applicable law. During Stage 2, the company may also submit any other information that it deems relevant to the Council's evaluation. Information considered by the Council includes details regarding the company's financial activities, legal structure, liabilities, counterparty exposures, resolvability, and existing regulatory oversight.

Information requests likely will involve both qualitative and quantitative data. Information relevant to the Council's analysis may include confidential business information such as detailed information regarding financial assets, terms of funding arrangements, counterparty exposure or position data, strategic plans, and interaffiliate transactions.

The Council will make staff representing Council members available to meet with the representatives of any company that enters Stage 2, to explain the evaluation process and the framework for the Council's analysis. If the analysis in Stage 1 has identified specific aspects of the company's operations or activities as the primary focus for the evaluation, staff will notify the company of those issues, although the issues will be subject to change based on the ongoing analysis. In addition, the Council expects that its Deputies Committee[25] will grant a request to meet with a company in Stage 2 to allow the company to present any information or arguments it deems relevant to the Council's evaluation.

During Stage 2 the Council will also seek to continue its consultation with the company's primary financial regulatory agency or home country supervisor in a timely manner before the Council makes any proposed or final determination with respect to such nonbank financial company. The Council will continue to encourage the regulator during the determination process to address any risks to U.S. financial stability using the regulator's existing authorities; as noted above, if the Council believes the regulator's actions adequately address the potential risks to U.S. financial stability the Council has identified, the Council may discontinue its consideration of the firm for a potential determination under section 113 of the Dodd-Frank Act.

Before making a Proposed Determination regarding a nonbank financial company, the Council will notify the company when the Council believes that the evidentiary record regarding such nonbank financial company is complete. The Council will notify any nonbank financial company in Stage 2 if the nonbank financial company ceases to be considered for a determination. Any nonbank financial company that ceases to be considered at any time in the Council's determination process may be considered for a Proposed Determination in the future at the Council's discretion, consistent with the processes described above.

c. Proposed and Final Determination

Proposed Determination

Based on the analysis performed in Stage 2, a nonbank financial company may be considered for a Proposed Determination. A proposed determination requires a vote of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council.[26] Following a Proposed Determination, the Council will issue a written notice of the Proposed Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.[27] Promptly after the Council votes to make a proposed determination regarding a company, the Council will provide the company's primary financial regulatory agency or home country supervisor (subject to appropriate protections for confidential information) with the nonpublic written explanation of the basis of the Council's proposed or final determination. The Council also will publish the explanation of the basis of the Proposed Determination, subject to redactions to protect confidential information from the company or its regulators.

Hearing

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act. If the

[24] *See* 12 CFR 1310.21(a).

[25] The Council's Deputies Committee is composed of senior officials from each Council member and member agency. It coordinates and oversees the work of the Council's other interagency staff committees.

[26] 12 CFR 1310.10(b).

[27] Dodd-Frank Act section 113(e)(1), 12 U.S.C. 5323(e)(1).

nonbank financial company requests a hearing in accordance with the procedures set forth in §1310.21(c) of the Council's rule,[28] the Council will set a time and place for such hearing. The Council has published hearing procedures on its website.[29] In light of the short statutory timeframe for conducting a hearing, and the fact that the purpose of the hearing is to benefit the company, if a company requests that the Council waive the statutory deadline for conducting the hearing, the Council may do so in appropriate circumstances.

Final Determination

After making a Proposed Determination and holding any requested written or oral hearing, the Council may, by a vote of not fewer than two-thirds of the voting members of the Council then serving (including an affirmative vote by the Chairperson of the Council), make a final determination that the company will be subject to supervision by the Federal Reserve and prudential standards. If the Council makes a final determination, it will provide the company with a written notice of the Council's final determination, including an explanation of the basis for the Council's decision.[30] The Council will also provide the company's primary financial regulatory agency or home country supervisor (subject to appropriate protections for confidential information) with the nonpublic written explanation of the basis of the Council's final determination. The Council expects that its explanation of the final basis for any determination will highlight the key risks that led to the determination and include clear guidance regarding the factors that were most important in the Council's determination. When practicable and consistent with the purposes of the determination process, the Council will provide a nonbank financial company with a notice of a final determination at least one business day before publicly announcing the determination pursuant to §1310.21(d)(3), §1310.21(e)(3), or §1310.22(d)(3) of the Council's rule.[31] In accordance with section 113(h) of the Dodd-Frank Act, a nonbank financial company that is subject to a final determination may bring an action in U.S. district court for an order requiring that the determination be rescinded.

The Council does not intend to publicly announce the name of any nonbank financial company that is under evaluation prior to a final determination with respect to such company. However, if a company that is under review in Stage 1 or Stage 2 publicly announces the status of its review by the Council, the Council intends, upon the request of a third party, to confirm the status of the company's review. In addition, the Council will publicly release the explanation of the Council's basis for any nonbank financial company determination or rescission of a determination. The Council is subject to statutory and regulatory requirements to maintain the confidentiality of certain information submitted to it by a nonbank financial company or its regulators.[32] In light of these confidentiality obligations, such confidential information will be redacted from the materials that the Council makes publicly available.

V. Annual Reevaluations of Nonbank Financial Company Determinations

After the Council makes a final determination regarding a company, the Council intends to encourage the company or its regulators to take steps to mitigate the potential risks identified in the Council's written explanation of the basis for its final determination. Except in cases where new material risks arise over time, if a company adequately addresses the potential risks identified in writing by the Council at the time of the final determination and in subsequent reevaluations, the Council should generally be expected to rescind its determination regarding the company.

For any nonbank financial company that is subject to a final determination, the Council is required to reevaluate the determination at least annually, and to rescind the determination if the Council determines that the company no longer meets the statutory standards for a determination. The Council may also consider a request from a company for a reevaluation before the next required annual reevaluation, in the case of an extraordinary change that materially decreases the threat the nonbank financial company could pose to U.S. financial stability.[33]

The Council applies the same standards of review in its annual reevaluations as the standard for an initial determination regarding a nonbank financial company: Either the company's material financial distress, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the company's

[28] *See* 12 CFR 1310.21(c).

[29] Financial Stability Oversight Council Hearing Procedures for Proceedings Under Title I or Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at *https://www.treasury.gov/initiatives/fsoc/designations/Pages/Hearing-Procedures.aspx*.

[30] Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); *see also* 12 CFR 1310.21(d)(2) and (e)(2).

[31] *See* 12 CFR 1310.21(d)(3) and (e)(3) and 1310.22(d)(3).

[32] *See* Dodd-Frank Act section 112(d)(5), 12 U.S.C. 5322(d)(5); *see also* 12 CFR 1310.20(e).

[33] *See* note 12 above.

activities, could pose a threat to U.S. financial stability. If the Council determines that the company no longer meets those standards, the Council will rescind its determination.

The Council's annual reevaluations generally assess whether any material changes since the previous reevaluation and since the determination justify a rescission of the determination, based on the same transmission channels and other factors that are considered during a determination decision. The Council expects that its reevaluation process will focus on whether any material changes—including changes at the company, changes in its markets or its regulation, changes in the Council's own analysis, or otherwise—result in the company no longer meeting the standard for a determination. In light of the frequent reevaluations, the Council's analyses will generally focus on changes since the Council's previous review, but the ultimate question the Council will seek to assess is whether changes in the aggregate since the Council's determination regarding the company have caused the company to cease meeting the Determination Standards. The Council expects that its analysis in its annual reevaluations will generally be organized around the three transmission channels described above as well as existing regulatory scrutiny and the company's complexity and resolvability.

Before the Council's annual reevaluation of a determination regarding a nonbank financial company, the Council will provide the company with an opportunity to meet with staff of Council members and member agencies to discuss the scope and process for the review and to present information regarding any change that may be relevant to the threat the company could pose to financial stability. Staff of Council members and member agencies will also be available to meet with the company during the annual reevaluation, at the company's request. In addition, during an annual reevaluation, a company may submit any written information to the Council the company considers relevant to the Council's analysis. During annual reevaluations, companies are encouraged to submit information regarding any changes related to the company's risk profile that mitigate the potential risks previously identified by the Council. Such changes could include updates regarding company restructurings, regulatory developments, market changes, or other factors. If the company has taken steps to address the potential risks previously identified by the Council, the Council will assess whether those risks have been adequately mitigated to merit a rescission of the determination regarding the company. If the company explains in detail potential changes it could make to its business to address the potential risks previously identified by the Council, staff of Council members and member agencies will endeavor to provide their feedback on the extent to which those changes may address the potential risks.

If a company contests the Council's determination during the Council's annual reevaluation, the Council will vote on whether to rescind the determination and provide the company, its primary financial regulatory agency, and the primary financial regulatory agency of its significant subsidiaries with a notice explaining the primary basis for any decision not to rescind the determination. If the Council does not rescind the determination, the written notice provided to the company will address each of the material factors raised by the company in its submissions to the Council contesting the determination during the annual reevaluation. The written notice from the Council will also explain in detail why the Council did not find that the company no longer met the standard for a determination under section 113 of the Dodd-Frank Act. In general, due to the sensitive nature of its analyses in annual reevaluations, the Council may not in all cases publicly release the written findings that it provides to the company.

Finally, the Council will provide each nonbank financial company subject to a Council determination with an opportunity for an oral hearing before the Council once every five years at which the company can contest the determination.

[84 FR 71760, Dec. 30, 2019]

PART 1320—DESIGNATION OF FINANCIAL MARKET UTILITIES

Subpart A—General

Subpart B—Consultations, Determinations and Hearings

Subpart C—Information Collection

AUTHORITY: 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5463; 12 U.S.C. 5468; 12 U.S.C. 5469

SOURCE: 76 FR 44773, July 27, 2011, unless otherwise noted.

Subpart A—General

§ 1320.1 Authority and purpose.

(a) *Authority*. This part is issued by the Financial Stability Oversight Council under sections 111, 112, 804, 809, and 810 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') (12 U.S.C. 5321, 5322, 5463, 5468, and 5469).

(b) *Purpose*. The purpose of this part is to set forth the standards and procedures governing the Council's designation of a financial market utility that the Council determines is, or is likely to become, systemically important.

§ 1320.2 Definitions.

The terms used in this part have the following meanings:

Appropriate Federal banking agency. The term ''*appropriate Federal banking agency*'' has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), as amended.

Board of Governors. The term ''*Board of Governors*'' means the Board of Governors of the Federal Reserve System.

Council. The term ''*Council*'' means the Financial Stability Oversight Council.

Designated clearing entity. The term ''*designated clearing entity*'' means a designated financial market utility that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1).

Designated financial market utility. The term ''*designated financial market utility*'' means a financial market utility that the Council has designated as systemically important under § 1320.13.

Financial institution. The term ''*financial institution*''—

(1) Means—

(i) A depository institution as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ii) A branch or agency of a foreign bank, as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101);

(iii) An organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601–604a and 611 through 631);

(iv) A credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(v) A broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(vi) An investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3);

(vii) An insurance company, as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a–2);

(viii) An investment adviser, as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2);

(ix) A futures commission merchant, commodity trading advisor, or commodity pool operator, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); and

(x) Any company engaged in activities that are financial in nature or incidental to a financial activity, as described in section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) Does not include designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, securities information processors solely with respect to the activities of the entity as a securities information processor, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or designated clearing entities, provided that the exclusions in this paragraph apply only with respect to the activities that require the entity to be so registered.

Financial market utility. The term ''financial market utility''—

(1) Means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or

settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person; and

(2) Does not include—

(i) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap data execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; and

(ii) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.

Hearing date. The term ''hearing date'' means the later of—

(1) The date on which the Council receives all of the written materials timely submitted by the financial market utility for a hearing that is conducted without oral testimony; or

(2) The final date on which the Council convenes for the financial market utility to present oral testimony.

Payment, clearing, or settlement activity.

(1) The term ''payment, clearing, or settlement activity'' means an activity carried out by 1 or more financial institutions to facilitate the completion of financial transactions, but shall not include any offer or sale of a security under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), or any quotation, order entry, negotiation, or other pre-trade activity or execution activity.

(2) For purposes of paragraph (1) of this definition, the term ''financial transaction'' includes—

(i) Funds transfers;

(ii) Securities contracts;

(iii) Contracts of sale of a commodity for future delivery;

(iv) Forward contracts;

(v) Repurchase agreements;

(vi) Swaps;

(vii) Security-based swaps;

(viii) Swap agreements;

(ix) Security-based swap agreements;

(x) Foreign exchange contracts;

(xi) Financial derivatives contracts; and

(xii) Any similar transaction that the Council determines to be a financial transaction for purposes of this part.

(3) When conducted with respect to a financial transaction, payment, clearing, and settlement activities may include—

(i) The calculation and communication of unsettled financial transactions between counterparties;

(ii) The netting of transactions;

(iii) Provision and maintenance of trade, contract, or instrument information;

(iv) The management of risks and activities associated with continuing financial transactions;

(v) Transmittal and storage of payment instructions;

(vi) The movement of funds;

(vii) The final settlement of financial transactions; and

(viii) Other similar functions that the Council may determine.

(4) Payment, clearing, and settlement activities shall not include public reporting of swap transactions under section 727 or 763(i) of the Dodd-Frank Act.

Supervisory Agency. (1) The term ''Supervisory Agency'' means the Federal agency that—

(i) Has primary jurisdiction over a designated financial market utility under Federal banking, securities, or commodity futures laws as follows—

(A) The Securities and Exchange Commission, with respect to a designated financial market utility that is a clearing agency registered with the Securities and Exchange Commission;

(B) The Commodity Futures Trading Commission, with respect to a designated financial market utility that is a derivatives clearing organization registered with the Commodity Futures Trading Commission;

(C) The appropriate Federal banking agency, with respect to a designated financial market utility that is an institution described in section 3(q) of the Federal Deposit Insurance Act;

(D) The Board of Governors, with respect to a designated financial market utility that is otherwise not subject to the jurisdiction of any agency listed in paragraphs (1)(i), (ii), and (iii) of this definition; or

(ii) Would have primary jurisdiction over a financial market utility if the financial market utility were a designated financial market utility under paragraph (1) of this definition.

(2) If a financial market utility is subject to the jurisdictional supervision of more than one agency listed in paragraph (1) of this definition, then such agencies should agree on one agency to act as the Supervisory Agency, and if such agencies cannot agree on which agency has primary jurisdiction, the Council shall decide which is the Supervisory Agency for purposes of this part.

Systemically important and systemic importance. The terms ''systemically important'' and ''systemic importance'' mean a situation where the failure of or a disruption to the functioning of a financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

Subpart B—Consultations, Determinations and Hearings

§ 1320.10 Factors for consideration in designations.

In making any proposed or final determination with respect to whether a financial market utility is, or is likely to become, systemically important under this part, the Council shall take into consideration:

(a) The aggregate monetary value of transactions processed by the financial market utility, including without limitation—

(1) The number of transactions processed, cleared or settled;

(2) The value of transactions processed, cleared or settled; and

(3) The value of other financial flows.

(b) The aggregate exposure of the financial market utility to its counterparties, including without limitation—

(1) Credit exposures, which includes but is not limited to potential future exposures; and

(2) Liquidity exposures.

(c) The relationship, interdependencies, or other interactions of the financial market utility with other financial market utilities or payment, clearing, or settlement activities, including without limitation interactions with different types of participants in those utilities or activities.

(d) The effect that the failure of or a disruption to the financial market utility would have on critical markets, financial institutions, or the broader financial system, including without limitation—

(1) Role of the financial market utility in the market served;

(2) Availability of substitutes;

(3) Concentration of participants;

(4) Concentration by product type;

(5) Degree of tiering; and

(6) Potential impact or spillover in the event of a failure or disruption.

(e) Any other factors that the Council deems appropriate.

§ 1320.11 Consultation with financial market utility.

Before providing a financial market utility notice of a proposed determination under § 1320.12, the Council shall provide the financial market utility with—

(a) Written notice that the Council is considering whether to make a proposed determination with respect to the financial market utility under §1320.13; and

(b) An opportunity to submit written materials to the Council, within such time as the Council determines to be appropriate, concerning—

(1) Whether the financial market utility is systemically important taking into consideration the factors set out in §1320.10; and

(2) Proposed changes by the financial market utility that could—

(i) Reduce or increase the inherent systemic risk the financial market utility poses and the need for designation under §1320.13; or

(ii) Reduce or increase the appropriateness of rescission under §1320.13.

(3) The Council shall consider any written materials timely submitted by the financial market utility under this section before making a proposed determination under section 1320.13.

§1320.12 Advance notice of proposed determination.

(a) *Notice of proposed determination and opportunity for hearing.* Before making any final determination on designation or rescission under §1320.13, the Council shall propose a determination and provide the financial market utility with advance notice of the proposed determination, and proposed findings of fact supporting that determination. A proposed determination shall be made by a vote of the Council in the manner described in §1320.13(c).

(b) *Request for hearing.* Within 30 calendar days from the date of any provision of notice of the proposed determination of the Council, the financial market utility may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the proposed designation or rescission of designation is not supported by substantial evidence.

(c) *Written submissions.* Upon receipt of a timely request, the Council shall fix a time, not more than 30 calendar days after receipt of the request, unless extended by the Council at the request of the financial market utility, and place at which the financial market utility may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Council, oral testimony and oral argument.

§1320.13 Council determination regarding systemic importance.

(a) *Designation determination.* The Council shall designate a financial market utility if the Council determines that the financial market utility is, or is likely to become, systemically important.

(b) *Rescission determination.* The Council shall rescind a designation of systemic importance for a designated financial market utility if the Council determines that the financial market utility no longer meets the standards for systemic importance.

(c) *Vote required.* Any determination under paragraph (a) or (b) of this section and any proposed determination under §1320.12 shall—

(1) Be made by the Council and must not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(d) *Consultations.* Before making any determination under paragraph (a) or (b) of this section or any proposed determination under §1320.12, the Council shall consult with the relevant Supervisory Agency and the Board of Governors.

§1320.14 Emergency exception.

(a) *Emergency exception.* Notwithstanding §§1320.11 and 1320.12, the Council may waive or modify any or all of the notice, hearing, and other requirements of §§1320.11 and 1320.12 with respect to a financial market utility if—

(1) The Council determines that the waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the financial market utility; and

(2) The Council provides notice of the waiver or modification, and an explanation of the basis for the waiver or modification, to the financial market utility concerned, as soon as practicable, but not later than 24 hours after the waiver or modification.

(b) *Vote required.* Any determination by the Council under paragraph (a) to waive or modify any of the requirements of §§ 1320.11 and 1320.12 shall—

(1) Be made by the Council; and

(2) Require the affirmative vote of not fewer than two-thirds of members then serving, including the affirmative vote of the Chairperson of Council.

(c) *Request for hearing.* Within 10 calendar days from the date of any provision of notice of waiver or modification of the Council, the financial market utility may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the basis for the waiver or modification is not supported by substantial evidence.

(d) *Written submissions.* Upon receipt of a timely request, the Council shall fix a time, not more than 30 calendar days after receipt of the request, and place at which the financial market utility may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Counsel, oral testimony and oral argument.

(e) *Notification of hearing determination.* If a financial market utility makes a timely request for a hearing under paragraph (c) of this section, the Council shall, not later than 30 calendar days after the hearing date, notify the financial market utility of the determination of the Council, which shall include a statement of the basis for the determination of the Council.

§ 1320.15 Notification of final determination regarding systemic importance.

(a) *Notification of final determination after a hearing.* Within 60 calendar days of the hearing date, the Council shall provide to the financial market utility written notification of the final determination of the Council under § 1320.13, which shall include findings of fact upon which the determination of the Council is based.

(b) *Notification of final determination if no hearing.* If the Council does not receive a timely request for a hearing under § 1320.12, the Council shall provide the financial market utility written notification of the final determination of the Council under § 1320.13 not later than 30 calendar days after the expiration of the date by which a financial market utility could have requested a hearing.

§ 1320.16 Extension of time periods.

The Council may extend any time period established in § 1320.12, § 1320.14, or § 1320.15 as the Council determines to be necessary or appropriate.

Subpart C—Information Collection

§ 1320.20 Council information collection and coordination.

(a) *Information collection to assess systemic importance.* The Council may require any financial market utility to submit such information to the Council as the Council may require for the sole purpose of assessing whether the financial market utility is systemically important.

(b) *Prerequisites to information collection.* Before requiring any financial market utility to submit information to the Council under paragraph (a) of this section, the Council shall—

(1) Determine that it has reasonable cause to believe that the financial market utility is, or is likely to become, systemically important, considering the standards set out in § 1320.10; or

(2) Determine that it has reasonable cause to believe that the designated financial market utility is no longer, or is no longer likely to become, systemically important, considering the standards set out in § 1320.10; and

(3) Coordinate with the Supervisory Agency for the financial market utility to determine if the information is available from, or may be obtained by, the Supervisory Agency in the form, format, or detail required by the Council.

(c) *Timing of response from the appropriate Supervisory Agency.* If the information, reports, records, or data requested by the Council under paragraph (b)(3) of this section are not provided in full by the Supervisory Agency in less than 15 calendar days after the date on which the material is requested, the Council may request the information directly from the financial market utility with notice to the Supervisory Agency.

(d) *Notice to financial market utility of information collection requirement.* In requiring a financial market utility to submit information to the Council, the Council shall provide to the financial market utility the following—

(1) Written notice that the Council is considering whether to make a proposed determination under §1320.12; and

(2) A description of the basis for the Council's belief under paragraphs (b)(1) or (b)(2) of this section.

PARTS 1321–1399 [RESERVED]

CHAPTER XIV—FARM CREDIT SYSTEM INSURANCE CORPORATION

PART 1400—ORGANIZATION AND FUNCTIONS

Subpart A—Organization and Functions

Sec.

Subpart B [Reserved]

AUTHORITY: 12 U.S.C. 2277a–5; 12 U.S.C. 2277a–7.

SOURCE: 55 FR 36610, Sept. 6, 1990, unless otherwise noted.

Subpart A—Organization and Functions

§ 1400.1 Farm Credit System Insurance Corporation.

The Farm Credit System Insurance Corporation (Corporation) was created by sections 5.52 and 5.58 of the Farm Credit Act of 1971 (Act) to carry out the responsibilities set out in part E of title V of the Act, including insuring the timely payment of principal and interest on notes, bonds, debentures, and other obligations issued under subsection (c) or (d) of section 4.2 of the Farm Credit Act on behalf of one or more Farm Credit System banks.

§ 1400.2 Board of Directors of the Farm Credit System Insurance Corporation.

The Board of Directors of the Farm Credit System Insurance Corporation is entrusted with the responsibility to manage the Corporation. The Board of Directors consists of the members of the Farm Credit Administration Board. The Chairman of the Corporation is elected by the members of the Board.

§ 1400.3 Organization of the Farm Credit System Insurance Corporation.

Officers of the Corporation shall be appointed by the Board of Directors of the Corporation. Current information on the organization of the Corporation may be obtained from the Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102–0826.

Subpart B [Reserved]

PART 1401—EMPLOYEE RESPONSIBILITIES AND CONDUCT

AUTHORITY: 5 U.S.C. 7301; 12 U.S.C. 2277a–7.

§ 1401.1 Cross-references to employee ethical conduct standards and financial disclosure regulations.

Board members, officers, and other employees of the Farm Credit System Insurance Corporation are subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, the Farm Credit System Insurance Corporation regulation at 5 CFR part 4001, which supplements the Executive Branch-wide Standards, and the executive branch-wide financial disclosure regulations at 5 CFR part 2634.

[60 FR 30778, June 12, 1995]

PART 1402—RELEASING INFORMATION

Subpart A [Reserved]

Subpart B—Availability of Records of the Farm Credit System Insurance Corporation

Sec.

Subpart C—Fees for Provision of Information

AUTHORITY: Secs. 5.58, 5.59 of Pub. L. 92–181, 85 Stat. 583 (12 U.S.C. 2277a–7, 2277a–8); 5 U.S.C. 552; 52 FR 10012; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

SOURCE: 59 FR 24638, May 12, 1994, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Availability of Records of the Farm Credit System Insurance Corporation

§ 1402.10 Official records of the Farm Credit System Insurance Corporation.

(a) The Farm Credit System Insurance Corporation shall, upon any request for records which reasonably describes them and is made in accordance with the provisions of this subpart, make the records available as promptly as practicable to any person, except exempt records, which include the following:

(1) Records specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order;

(2) Records related solely to the internal personnel rules and practices of the Farm Credit System Insurance Corporation, including matters which are for the guidance of agency personnel;

(3) Records which are specifically exempted from disclosure by statute;

(4) Trade secret, commercial, proprietary, or financial information obtained from any person or organization and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the Farm Credit System Insurance Corporation or in litigation in which the United States, as a real party in interest on behalf of the Farm Credit System Insurance Corporation, is a party;

(6) Personnel and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual; and

(8) Records of or related to examination, operation, reports of condition and performance, or reports of or related to Farm Credit System institutions and that are prepared by, on behalf of, or for the use of the Farm Credit System Insurance Corporation.

(b) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

§ 1402.11 Current index.

The Farm Credit System Insurance Corporation will make available for public inspection and copying a current index to provide identifying information as to any matter required by 5 U.S.C. 552(a)(2)(C) to be made available or published in the FEDERAL REGISTER. Because of the anticipated infrequency of requests for material required to be indexed, it is determined that the publication of the index in the FEDERAL

REGISTER is unnecessary and impracticable. However, the Farm Credit System Insurance Corporation will provide a copy of such index to a member of the public upon request therefor at a cost not in excess of the direct cost of duplication.

§ 1402.12 Identification of records requested.

A member of the public who requests records from the Farm Credit System Insurance Corporation shall provide a reasonable description of the records sought including, where possible, specific information as to dates, titles, and subject matter, so that such records may be located without undue search or inquiry. If a record is not identified by a reasonable description, the request therefor may be denied.

§ 1402.13 Request for records.

Requests for records shall be in writing and addressed to the attention of the Freedom of Information Officer, Farm Credit System Insurance Corporation, McLean, Virginia 22102. A request improperly addressed will be deemed not to have been received for purposes of the 20-day time period set forth in § 1402.14(a) of this part until it is received, or would have been received, by the Freedom of Information Officer, with the exercise of due diligence by Corporation personnel. Records requested in conformance with this subpart and which are not exempt records may be received in person or by mail as specified in the request. Records to be received in person will be available for inspection or copying during business hours on a regular business day in the office of the Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia, 22102.

[62 FR 49593, Sept. 23, 1997]

§ 1402.14 Response to requests for records.

(a) Within 20 days (excluding Saturdays, Sundays, and legal public holidays), or any extensions thereof as provided in paragraph (d) of this section, of the receipt of a request by the Freedom of Information Officer, the Freedom of Information Officer shall determine whether to comply with or deny such a request and transmit a written notice thereof to the requester.

(b) Within 90 days of the receipt of a notice denying, in whole or in part, a request for records, the requester may appeal the denial. The appeal shall be in writing addressed to the Chief Financial Officer, Farm Credit System Insurance Corporation, McLean, Virginia 22102, and both the letter and envelope shall clearly be marked ''FOIA Appeal.'' An appeal improperly addressed shall be deemed not to have been received for purposes of the 20-day time period set forth in paragraph (c) of this section until it is received, or would have been received with the exercise of due diligence by Farm Credit System Insurance Corporation personnel. You also have the right to seek dispute resolution services from the Corporation's FOIA Public Liaison, McLean, Virginia 22102, and the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road—OGIS, College Park, Maryland 20740–6001.

(c) Within 20 days (excluding Saturdays, Sundays, and legal public holidays), or any extension thereof as provided in paragraph (d) of this section, of the receipt of an appeal, the Farm Credit System Insurance Corporation shall act upon the appeal and place a notice of the determination thereof in writing in the mail addressed to the requester. If the determination on the appeal upholds in whole or in part the denial of the request for records, or, if a determination on the appeal has not been mailed at the end of the 20-day period or the last extension thereof, the requester is deemed to have exhausted that person's administrative remedies, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When a determination cannot be mailed within the applicable time limit, the appeal will nevertheless be processed. In such case, upon the expiration of the time limit, the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be mailed, and of that person's right to seek judicial review. The requester may be asked to forego judicial review until determination of the appeal.

(d) In ''unusual circumstances,'' the 20-day time limit prescribed in paragraphs (a) and (c) of this section, or both, may be extended by the Freedom of Information Officer or, in the case of an appeal, by the General Counsel, provided that the total of all extensions does not exceed 10 days (excluding Saturdays, Sundays, and legal public holidays). Extensions shall be made by written notice to the requester setting forth the reason for the extension and the date on which a determination is expected to be dispatched. As used in this paragraph, ''*unusual circumstances*'' means, but only to the extent reasonably necessary to the proper processing of the request:

(1) The need to search for and collect the requested records from facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having a substantial subject matter interest therein.

(e) A requester may obtain, upon request, expedited processing of a request for records when the requester demonstrates a ''compelling need'' for the information. The Freedom of Information Officer will notify the requester within 10 calendar days after receipt of such a request whether the Corporation granted expedited processing. If expedited processing was granted, the request will be processed as soon as practicable.

(1) For the purposes of this paragraph, ''*compelling need*'' means:

(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(2) A requester shall demonstrate a compelling need by a statement certified by the requester to be true and correct to the best of such person's knowledge and belief.

(3) The procedures of this paragraph (e) for expedited processing apply to both requests for information and to administrative appeals.

[59 FR 24638, May 12, 1994, as amended at 62 FR 49593, Sept. 23, 1997; 81 FR 59438, Aug. 30, 2016]

§ 1402.15 Business information.

(a) Business information provided to the Farm Credit System Insurance Corporation by a business submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. The requirements of this section shall not apply if:

(1) The Farm Credit System Insurance Corporation determines that the information should not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public; or

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(b) For the purpose of this section, the following definitions shall apply.

(1) *Business information* means trade secrets or other commercial or financial information.

(2) *Business submitter* means any person or entity which provides business information to the government.

(3) *Requester* means the person or entity making the Freedom of Information Act request.

(c)(1) The Freedom of Information Officer shall, to the extent permitted by law, provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (d) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(2) Whenever the Freedom of Information Officer provides a business submitter with the notice set forth in paragraph (c)(1) of this section, the Freedom of Information Officer shall notify the requester that the request

includes information that may arguably be exempt from disclosure under 5 U.S.C. 552(b)(4) and that the person or entity who submitted the information to the Farm Credit System Insurance Corporation has been given the opportunity to comment on the proposed disclosure of information.

(d)(1) The Farm Credit System Insurance Corporation shall provide a business submitter with notice of a request whenever:

(i) The business submitter has in good faith designated the information as commercially or financially sensitive information; or

(ii) The Farm Credit System Insurance Corporation has reason to believe that the disclosure of the information may result in commercial or financial injury to the business submitter.

(2) Notice of a request for business information falling within paragraph (d)(1)(i) of this section shall be required for a period of not more than 10 years after the date of submission unless the business submitter requests and provides acceptable justification for a specific notice period of greater duration.

(3) Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter that the information in question is in fact a trade secret or commercial or financial information that is privileged or confidential.

(e) Through the notice described in paragraph (c) of this section, the Farm Credit System Insurance Corporation shall, to the extent permitted by law, afford a business submitter a reasonable period within which it can provide the Farm Credit System Insurance Corporation with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act and, in the case of the exemption provided by 5 U.S.C. 552(b)(4), shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(f)(1) The Farm Credit System Insurance Corporation shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Farm Credit System Insurance Corporation decides to disclose business information over the objection of a business submitter, the Freedom of Information Officer shall forward to the business submitter a written notice which shall include:

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(ii) A description of the business information to be disclosed; and

(iii) A specified disclosure date.

(2) The notice of intent to disclose required by this paragraph shall be sent, to the extent permitted by law, within a reasonable number of days prior to the specified date upon which disclosure is intended.

(3) The Freedom of Information Officer shall send a copy of such disclosure notice to the requester at the same time the notice is sent to the business submitter.

(g) Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (d) of this section, the Farm Credit System Insurance Corporation shall promptly notify the business submitter of such action.

Subpart C—Fees for Provision of Information

§ 1402.20 Definitions.

For the purpose of this subpart, the following definitions shall apply:

(a) *Commercial use request* means a request for information that is from or on behalf of an individual or entity seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or on whose behalf the request is being made. To determine whether a request is properly classified as a commercial use request, the Farm Credit System Insurance Corporation shall determine the purpose for which the documents requested will be used. If the

Farm Credit System Insurance Corporation has reasonable cause to doubt the purpose specified in the request, for which a requester will use the records sought, or where the purpose is not clear from the request itself, the Farm Credit System Insurance Corporation shall seek additional clarification before assigning the request to a specified category.

(b) *Direct costs* means those expenditures the Farm Credit System Insurance Corporation actually incurs in searching for and reproducing documents to respond to a request for information. In the case of a commercial use request, the term also means those expenditures the Farm Credit System Insurance Corporation actually incurs in reviewing documents to respond to the request. The direct cost shall include the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating reproduction equipment. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(c) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education that operates a program or programs of scholarly research.

(d) *Noncommercial scientific institution* refers to an institution that is not operated on a commercial, trade, or profit basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(e) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunication services), such alternative media would be included in this category. ''Freelance'' journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by the organization. A publication contract would be the clearest proof that a journalist is working for a news organization, but the Farm Credit System Insurance Corporation may look to a requester's past publication record to determine whether a journalist is working for a news organization.

(f) *Reproduce* and *reproduction* mean the process of making a copy of a document necessary to respond to a request for information. Such copies take the form of paper copy, microfilm, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided shall be in a form that is reasonably usable by requesters.

(g) *Review* means the process of examining documents located in response to a request for information to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure (e.g., doing all that is necessary to prepare the documents for release). The term review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. The Farm Credit System Insurance Corporation shall only charge fees for reviewing documents in response to a commercial use request.

(h) *Search* includes all time spent looking for material that is responsive to a request for information, including page-by-page or line-by-line identification of material within documents. Searching for material shall be done in the most efficient and least expensive manner so as to minimize the costs of

the Farm Credit System Insurance Corporation and the requester. For example, a line-by-line search for responsive material should not be performed when merely reproducing an entire document would be the less expensive and the faster method of complying with a request for information. Searches may be done manually or by computer using existing programming. A ''search'' for material that is responsive to a request should be distinguished from a ''review'' of material to determine whether the material is exempt from disclosure.

§ 1402.21 Categories of requesters—fees.

There are four categories of requesters: Commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters.

(a) The Farm Credit System Insurance Corporation shall charge fees for records requested by or on behalf of educational institutions and noncommercial scientific institutions in an amount which equals the cost of reproducing the documents responsive to the request, excluding the costs of reproducing the first 100 pages. For a request to be included in this category, requesters must show that the request being made is authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a noncommercial scientific institution).

(b) The Farm Credit System Insurance Corporation shall charge fees for records requested by representatives of the news media in an amount which equals the cost of reproducing the documents responsive to the request, excluding the costs of reproducing the first 100 pages. For a request to be included in this category, the requester must qualify as a representative of the news media and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

(c) The Farm Credit System Insurance Corporation shall charge fees for records requested by persons or entities making a commercial use request in an amount that equals the full direct costs for searching for, reviewing for release, and reproducing the records sought. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of documents. In accordance with §1402.26, commercial use requesters may be charged the costs of searching for and reviewing records even if there is ultimately no disclosure of records.

(d) The Farm Credit System Insurance Corporation shall charge fees for records requested by persons or entities that are not classified in any of the categories listed in paragraphs (a), (b), or (c) of this section in an amount that equals the full reasonable direct cost of searching for and reproducing records that are responsive to the request, excluding the first 2 hours of search time and the cost of reproducing the first 100 pages of records. In accordance with §1402.26, requesters in this category may be charged the cost of searching for records even if there is ultimately no disclosure of records, excluding the first 2 hours of search time.

(e) For purposes of the exceptions contained in this section on assessment of fees, the word *pages* refers to paper copies of ''8½ × 11'' or ''11 × 14.'' Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or a computer disk containing the equivalent of 100 pages of computer printout meets the terms of the exception.

(f) For purposes of paragraph (d) of this section, the term *search time* has as its basis, manual search. To apply this term to searches made by computer, the Farm Credit System Insurance Corporation will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent of that rate. When the cost of search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of 2 hours of the salary of the person performing the search, i.e., the operator, the Farm Credit System Insurance Corporation

will begin assessing charges for computer search.

§ 1402.22 Fees to be charged.

(a) Generally, the fees charged for requests for records shall cover the full allowable direct costs of searching for, reproducing, and reviewing documents that are responsive to a request for information.

(b) Manual searches for records will be charged at the salary rate(s) (i.e., basic pay plus 16 percent of that rate) of the employee(s) making the search.

(c) Computer searches for records will be charged at the actual direct cost of providing the service. This will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records and the operator/programmer salary apportionable to the search. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the prevailing levels of costs to the Farm Credit System Insurance Corporation for the type and amount of such supplies of materials that are used. Nothing in this paragraph shall be construed to entitle any person or entity, as a right, to any services in connection with computerized records, other than services to which such person or entity may be entitled under the provisions of this subpart.

(d) Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., the review undertaken the first time the Farm Credit System Insurance Corporation analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

(e) Records will be reproduced at a rate of $.15 per page. For copies prepared by computer, such as tapes or printouts, the requester shall be charged the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction, the actual direct costs of producing the document(s) shall be charged.

(f) The Farm Credit System Insurance Corporation will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies; or

(2) Sending records by special methods such as express mail.

(g) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Farm Credit System Insurance Corporation.

(h) We will not assess fees if we fail to comply with any time limit under the FOIA or these regulations, and have not timely notified the requester, in writing, that an unusual circumstance exists. If an unusual circumstance exists, and timely, written notice is given to the requester, we may be excused an additional 10 working days before fees are automatically waived under this paragraph (h).

(i) If we determine that unusual circumstances apply and more than 5,000 pages are necessary to respond to a request, we may charge fees if we provided a timely, written notice to the requester and discussed with the requester via mail, Email, or telephone (or made at least three good faith attempts to do so) how the requester could effectively limit the scope of the request.

(j) If a court has determined that exceptional circumstances exist, a failure to comply with time limits imposed by these regulations or FOIA shall be excused for the length of time provided by court order.

(k) A receipt for fees paid will be given upon request.

[59 FR 24638, May 12, 1994, as amended at 81 FR 59438, Aug. 30, 2016]

§ 1402.23 Waiver or reduction of fees.

(a) The Farm Credit System Insurance Corporation may grant a waiver or reduction of fees if the Farm Credit System Insurance Corporation determines that the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and the disclosure of the information is not primarily in the commercial interest of the requester.

(b) The Farm Credit System Insurance Corporation will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs of receiving and recording a requester's remittance and processing the fee.

§ 1402.24 Advance payments—notice.

(a) Where it is anticipated that the fees chargeable will amount to more than $25 and the requester has not indicated in advance a willingness to pay fees as high as are anticipated, the requester shall be promptly notified of the amount of the anticipated fee or such portion thereof that can be readily estimated.

(b) If the anticipated fees exceed $250 and if the requester has a history of promptly paying fees charged in connection with information requests, the Farm Credit System Insurance Corporation may obtain satisfactory assurances that the requester will fully pay the fees anticipated.

(c) If the anticipated fees exceed $250 and if the requester has no history of paying fees charged in connection with information requests, the Farm Credit System Insurance Corporation may require an advance payment of fees in an amount up to the full amount anticipated.

(d) If the requester has previously failed to pay a fee charged within 30 days of the date of a billing for fees charged in connection with information requests, the Farm Credit System Insurance Corporation may require the requester to pay the fees owed, plus interest, or demonstrate that the full amount owed has been paid, and require the requester to make an advance payment of the full amount of the fees anticipated before processing a new request or a pending request from that requester.

(e) The notice of the amount of an anticipated fee or a request for an advance deposit shall include an offer to the requester to confer with identified Farm Credit System Insurance Corporation personnel to attempt to reformulate the request in a manner which will meet the needs of the requester at a lower cost.

§ 1402.25 Interest.

The Farm Credit System Insurance Corporation may begin charging interest on unpaid fees, starting on the 31st day following the day on which the bill for such fees was sent. Interest will not accrue if payment of the fees has been received by the Farm Credit System Insurance Corporation, even if said payment has not been processed. Interest will accrue at the rate prescribed in section 3717 of title 31, United States Code, and will accrue from the day on which the bill for such fees was sent.

§ 1402.26 Charges for unsuccessful searches or reviews.

The Farm Credit System Insurance Corporation may assess charges for time spent searching for records on behalf of requesters in the categories provided for in § 1402.21 (c) and (d), even if there are no records that are responsive to the request or there is ultimately no disclosure of records. The Farm Credit System Insurance Corporation may assess charges for time spent reviewing records for requesters in the category provided for in § 1402.21(c) even if the records located are determined to be exempt from disclosure.

§ 1402.27 Aggregating requests.

A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Farm Credit System Insurance Corporation reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into

a series of requests for the purpose of evading the assessment of fees, the Farm Credit System Insurance Corporation may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

PART 1403—PRIVACY ACT REGULATIONS

Sec.

AUTHORITY: Secs. 5.58, 5.59 of the Farm Credit Act (12 U.S.C. 2277a–7, 2277a–8); 5 U.S.C. app. 3, 5 U.S.C. 552a.

SOURCE: 59 FR 53084, Oct. 21, 1994, unless otherwise noted.

§ 1403.1 Purpose and scope.

(a) This part is published by the Farm Credit System Insurance Corporation pursuant to the Privacy Act of 1974 (Pub. L. 93–579, 5 U.S.C. 552a) which requires each Federal agency to promulgate rules to establish procedures for notification and disclosure to an individual of agency records pertaining to that person, and for review of such records.

(b) The records covered by this part include:

(1) Personnel and employment records maintained by the Farm Credit System Insurance Corporation not covered by §§ 293.101 through 293.108 of the regulations of the Office of Personnel Management (5 CFR 293.101 through 293.108); and

(2) Other records contained in record systems maintained by the Farm Credit System Insurance Corporation.

(c) This part does not apply to any records maintained by the Farm Credit System Insurance Corporation in its capacity as a receiver or conservator.

§ 1403.2 Definitions.

For the purposes of this part:

(a) *Agency* means the Farm Credit System Insurance Corporation. It does not include the Farm Credit System Insurance Corporation when it is acting as a receiver or a conservator;

(b) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(c) *Maintain* includes maintain, collect, use, or disseminate;

(d) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, that person's education, financial transactions, medical history, and criminal or employment history, and that contains that person's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph;

(e) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose that is compatible with the purpose for which it was collected;

(f) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8;

(g) *System of records* means a group of any records under the control of any agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

§ 1403.3 Procedures for requests pertaining to individual records in a record system.

(a) Any present or former employee of the Farm Credit System Insurance Corporation seeking access to that person's official civil service records

maintained by the Farm Credit System Insurance Corporation shall submit a request in such manner as is prescribed by the Office of Personnel Management.

(b) Individuals shall submit their requests in writing to the Privacy Act Officer, Farm Credit System Insurance Corporation, McLean, Virginia 22102–0826, when seeking to obtain the following information from the Farm Credit System Insurance Corporation:

(1) Notification of whether the agency maintains a record pertaining to that person in a system of records;

(2) Notification of whether the agency has disclosed a record for which an accounting of disclosure is required to be maintained and made available to that person;

(3) A copy of a record pertaining to that person or the accounting of its disclosure; or

(4) The review of a record pertaining to that person or the accounting of its disclosure.

The request shall state the full name and address of the individual, and identify the system or systems of records believed to contain the information or record sought.

§ 1403.4 Times, places, and requirements for identification of individuals making requests.

The individual making written requests for information or records ordinarily will not be required to verify that person's identity. The signature upon such requests shall be deemed to be a certification by the requester that he or she is the individual to whom the record pertains, or the parent of a minor, or the duly appointed legal guardian of the individual to whom the record pertains. The Privacy Act Officer, however, may require such additional verification of identity in any instance in which the Privacy Act Officer deems it advisable.

§ 1403.5 Disclosure of requested information to individuals.

(a) The Privacy Act Officer shall, within a reasonable period of time after the date of receipt of a request for information of records:

(1) Determine whether or not such request shall be granted;

(2) Notify the requester of the determination, and, if the request is denied, of the reasons therefor; and

(3) Notify the requester that fees for reproducing copies of records may be charged as provided in § 1403.10.

(b) If access to a record is denied because the information therein has been compiled by the Farm Credit System Insurance Corporation in reasonable anticipation of a civil or criminal action proceeding, the Privacy Act Officer shall notify the requester of that person's right to judicial appeal under 5 U.S.C. 552a(g).

(c)(1) If access to a record is granted, the requester shall notify the Privacy Act Officer whether the requested record is to be copied and mailed to the requester or whether the record is to be made available for personal inspection.

(2) A requester who is an individual may be accompanied by an individual selected by the requester when the record is disclosed, in which case the requester may be required to furnish a written statement authorizing the discussion of the record in the presence of the accompanying person.

(d) If the record is to be made available for personal inspection, the requester shall arrange with the Privacy Act Officer a mutually agreeable time in the offices of the Farm Credit System Insurance Corporation for inspection of the record.

§ 1403.6 Special procedures for medical records.

Medical records in the custody of the Farm Credit System Insurance Corporation which are not subject to Office of Personnel Management regulations shall be disclosed either to the individual to whom they pertain or that person's authorized or legal representative or to a licensed physician named by the individual.

§ 1403.7 Request for amendment to record.

(a) If, after disclosure of the requested information, an individual believes that the record is not accurate, relevant, timely, or complete, that person may request in writing that the record be amended. Such a request shall be submitted to the Privacy Act Officer and shall identify the system of

records and the record or information therein, a brief description of the material requested to be changed, the requested change or changes, and the reason for such change or changes.

(b) The Privacy Act Officer shall acknowledge receipt of the request within 10 days (excluding Saturdays, Sundays, and legal holidays) and, if a determination has not been made, advise the individual when that person may expect to be advised of action taken on the request. The acknowledgment may contain a request for additional information needed to make a determination.

§ 1403.8 Agency review of request for amendment of record.

Upon receipt of a request for amendment of a record, the Privacy Act Officer shall:

(a) Correct any portion of a record which the individual making the request believes is not accurate, relevant, timely, or complete and thereafter inform the individual in writing of such correction, or

(b) Inform the individual in writing of the refusal to amend the record and of the reasons therefor, and advise that the individual may appeal such determination as provided in §1403.9.

§ 1403.9 Appeal of an initial adverse determination of a request to amend a record.

(a) Not more than 10 days (excluding Saturdays, Sundays, and legal holidays) after receipt by an individual of an adverse determination on the individual's request to amend a record or otherwise, the individual may appeal to the Chief Operating Officer, Farm Credit System Insurance Corporation, McLean, Virginia 22102–0826.

(b) The appeal shall be by letter, mailed or delivered to the Chief Operating Officer, Farm Credit System Insurance Corporation, McLean, Virginia 22102–0826. The letter shall identify the records involved in the same manner they were identified to the Privacy Act Officer, shall specify the dates of the request and adverse determination, and shall indicate the expressed basis for that determination. Also, the letter shall state briefly and succinctly the reasons why the adverse determination should be reversed.

(c) The review shall be completed and a final determination made by the Chief Operating Officer not later than 30 days (excluding Saturdays, Sundays, and legal holidays) from receipt of the request for such review, unless the Chief Operating Officer extends such 30-day period for good cause. If the 30-day period is extended, the individual shall be notified of the reasons therefor.

(d) If the Chief Operating Officer refuses to amend the record in accordance with the request, the individual shall be notified of the right to file a concise statement setting forth that person's disagreement with the final determination and that person's right under 5 U.S.C. 552a(g)(1)(A) to a judicial review of the final determination.

(e) If the refusal to amend a record as requested is confirmed, there shall be included in the disputed portion of the record a copy of the concise statement filed by the individual together with a concise statement of the reasons for not amending the record as requested. Such statements will be included when disclosure of the disputed record is made to persons and agencies as authorized under 5 U.S.C. 552a.

§ 1403.10 Fees for providing copies of records.

Fees for providing copies of records shall be charged in accordance with §§1402.22 and 1402.24 of this chapter.

§ 1403.11 Criminal penalties.

Section 552a(i)(3) of the Privacy Act (5 U.S.C. 552a(i)(3)) makes it a misdemeanor, subject to a maximum fine of $5,000, to knowingly and willfully request or obtain any record concerning any individual from an agency under false pretenses. Sections 552a(i) (1) and (2) of the Act (5 U.S.C. 552a(i) (1), (2)) provide penalties for violation by agency employees of the Act or regulations established thereunder.

§ 1403.12 Exemptions.

Specific. Pursuant to 5 U.S.C. 552a(k)(5), the investigatory material compiled for law enforcement purposes in the following system of records is exempt from subsections (c)(3), (d),

(e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a and from the provisions of this part:

Personnel Security Files—FCSIC.

PART 1408—COLLECTION OF CLAIMS OWED THE UNITED STATES

Subpart A—Administrative Collection of Claims

Subpart B—Administrative Offset

Subpart C—Offset Against Salary

AUTHORITY: Sec. 5.58 of the Farm Credit Act (12 U.S.C. 2277a-7); 31 U.S.C. 3701–3719; 5 U.S.C. 5514; 4 CFR parts 101–105; 5 CFR part 550.

SOURCE: 59 FR 24899, May 13, 1994, unless otherwise noted.

Subpart A—Administrative Collection of Claims

§ 1408.1 Authority.

The regulations of this part are issued under the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982, 31 U.S.C. 3701–3719 and 5 U.S.C. 5514, and in conformity with the joint regulations issued under that Act by the General Accounting Office and the Department of Justice (joint regulations) prescribing standards for administrative collection, compromise, suspension, and termination of agency collection actions, and referral to the General Accounting Office and to the Department of Justice for litigation of civil claims for money or property owed to the United States (4 CFR parts 101–105).

§ 1408.2 Applicability.

This part applies to all claims of indebtedness due and owing to the United States and collectible under procedures authorized by the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982. The joint regulations and this part do not apply to conduct in violation of antitrust laws, tax claims, claims between Federal agencies, or to any claim which appears to involve fraud, presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, unless the Justice Department authorizes the Farm Credit System Insurance Corporation, pursuant to 4 CFR 101.3, to handle the claim in accordance with the provisions of 4 CFR parts 101 through 105. Additionally, this part does not apply to Farm Credit System Insurance Corporation's premiums regulations under part 1410 of this chapter.

§ 1408.3 Definitions.

In this part (except where the term is defined elsewhere in this part), the following definitions shall apply:

(a) *Administrative offset* or *offset*, as defined in 31 U.S.C. 3701(a)(1), means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(b) *Agency* means a department, agency, or instrumentality in the executive or legislative branch of the Government.

(c) *Claim* or *debt* means money or property owed by a person or entity to an agency of the Federal Government. A ''claim'' or ''debt'' includes amounts due the Government from loans insured by or guaranteed by the United States and all other amounts due from fees, leases, rents, royalties, services, sales of real or personal property, overpayment, penalties, damages, interest, and fines.

(d) *Claim certification* means a creditor agency's written request to a paying agency to effect an administrative offset.

(e) *Corporation* means the Farm Credit System Insurance Corporation.

(f) *Creditor agency* means an agency to which a claim or debt is owed.

(g) *Debtor* means the person or entity owing money to the Federal Government.

(h) *Hearing official* means an individual who is responsible for reviewing a claim under §1408.10.

(i) *Paying agency* means an agency of the Federal Government owing money to a debtor against which an administrative or salary offset can be effected.

(j) *Salary offset* means an administrative offset to collect a debt under 5 U.S.C. 5514 by deductions at one or more officially established pay intervals from the current pay account of a debtor.

§1408.4 Delegation of authority.

The Corporation official(s) designated by the Chairman of the Farm Credit System Insurance Corporation are authorized to perform all duties which the Chairman is authorized to perform under these regulations, the Federal Claims Collection Act of 1966, as amended, and the joint regulations issued under that Act.

§1408.5 Responsibility for collection.

(a) The collection of claims shall be aggressively pursued in accordance with the provisions of the Federal Claims Collection Act of 1966, as amended, the joint regulations issued under that Act, and these regulations. Debts owed to the United States, together with charges for interest, penalties, and administrative costs, should be collected in one lump sum unless otherwise provided by law. If a debtor requests installment payments, the debtor, as requested by the Corporation, shall provide sufficient information to demonstrate that the debtor is unable to pay the debt in one lump sum. When appropriate, the Corporation shall arrange an installment payment schedule. Claims which cannot be collected directly or by administrative offset shall be either written off as administratively uncollectible or referred to the General Counsel for further consideration.

(b) The Chairman, or designee of the Chairman, may compromise claims for money or property arising out of the activities of the Corporation, where the claim (exclusive of charges for interest, penalties, and administrative costs) does not exceed $100,000. When the claim exceeds $100,000 (exclusive of charges for interest, penalties, and administrative costs), the authority to accept a compromise rests solely with the Department of Justice. The standards governing the compromise of claims are set forth in 4 CFR part 103.

(c) The Chairman, or designee of the Chairman, may suspend or terminate the collection of claims which do not exceed $100,000 (exclusive of charges for interest, penalties, and administrative costs) after deducting the amount of any partial payments or collections. If, after deducting the amount of any partial payments or collections, a claim exceeds $100,000 (exclusive of charges for interest, penalties, and administrative costs), the authority to suspend or terminate rests solely with the Department of Justice. The standards governing the suspension or termination of claim collections are set forth in 4 CFR part 104.

(d) The Corporation shall refer claims to the Department of Justice for litigation or to the General Accounting Office (GAO) for claims arising from audit exceptions taken by the GAO to payments made by the Corporation in accordance with 4 CFR part 105.

§ 1408.6 Demand for payment.

(a) A total of three progressively stronger written demands at not more than 30-day intervals should normally be made upon a debtor, unless a response or other information indicates that additional written demands would either be unnecessary or futile. When necessary to protect the Government's interest, written demands may be preceded by other appropriate actions under Federal law, including immediate referral for litigation and/or administrative offset.

(b) The initial demand for payment shall be in writing and shall inform the debtor of the following:

(1) The amount of the debt, the date it was incurred, and the facts upon which the determination of indebtedness was made;

(2) The payment due date, which shall be 30 calendar days from the date of mailing or hand delivery of the initial demand for payment;

(3) The right of the debtor to inspect and copy the records of the agency related to the claim or to receive copies if personal inspection is impractical. The debtor shall be informed that the debtor may be assessed for the cost of copying the documents in accordance with § 1408.7;

(4) The right of the debtor to obtain a review of the Corporation's determination of indebtedness;

(5) The right of the debtor to offer to enter into a written agreement with the agency to repay the amount of the claim. The debtor shall be informed that the acceptance of such an agreement is discretionary with the agency;

(6) That charges for interest, penalties, and administrative costs will be assessed against the debtor, in accordance with 31 U.S.C. 3717, if payment is not received by the payment due date;

(7) That if the debtor has not entered into an agreement with the Corporation to pay the debt, has not requested the Corporation to review the debt, or has not paid the debt by the payment due date, the Corporation intends to collect the debt by all legally available means, which may include initiating legal action against the debtor, referring the debt to a collection agency for collection, collecting the debt by offset, or asking other Federal agencies for assistance in collecting the debt by offset;

(8) The name and address of the Corporation official to whom the debtor shall send all correspondence relating to the debt; and

(9) Other information, as may be appropriate.

(c) If, prior to, during, or after completion of the demand cycle, the Corporation determines to collect the debt by either administrative or salary offset, the Corporation shall follow, as applicable, the requirements for a Notice of Intent to Collect by Administrative Offset or a Notice of Intent to Collect by Salary Offset set forth in § 1408.22.

(d) If no response to the initial demand for payment is received by the payment due date, the Corporation shall take further action under this part, under the Federal Claims Collection Act of 1966, as amended, under the joint regulations (4 CFR parts 101–105), or under any other applicable State or Federal law. These actions may include reports to credit bureaus, referrals to collection agencies, termination of contracts, debarment, and salary or administrative offset.

§ 1408.7 Right to inspect and copy records.

The debtor may inspect and copy the Corporation records related to the claim. The debtor shall give the Corporation reasonable advanced notice that he/she intends to inspect and copy the records involved. The debtor shall pay copying costs unless they are waived by the Corporation. Copying costs shall be assessed pursuant to § 1402.22 of this chapter.

§ 1408.8 Right to offer to repay claim.

(a) The debtor may offer to enter into a written agreement with the Corporation to repay the amount of the claim. The acceptance of such an offer and the decision to enter into such a written agreement is at the discretion of the Corporation.

(b) If the debtor requests a repayment arrangement because payment of the amount due would create a financial hardship, the Corporation shall analyze the debtor's financial condition. The Corporation may enter into a

written agreement with the debtor permitting the debtor to repay the debt in installments if the Corporation determines, in its sole discretion, that payment of the amount due would create an undue financial hardship for the debtor. The written agreement shall set forth the amount and frequency of installment payments and shall, in accordance with §1408.12, provide for the imposition of charges for interest, penalties, and administrative costs unless waived by the Corporation.

(c) The written agreement may require the debtor to execute a confess-judgment note when the total amount of the deferred installments will exceed $750. The Corporation shall provide the debtor with a written explanation of the consequences of signing a confess-judgment note. The debtor shall sign a statement acknowledging receipt of the written explanation. The statement shall recite that the written explanation was read and understood before execution of the note and that the debtor signed the note knowingly and voluntarily. Documentation of these procedures will be maintained in the Corporation's file on the debtor.

§1408.9 Right to agency review.

(a) If the debtor disputes the claim, the debtor may request a review of the Corporation's determination of the existence of the debt or of the amount of the debt. If only part of the claim is disputed, the undisputed portion should be paid by the payment due date.

(b) To obtain a review, the debtor shall submit a written request for review to the Corporation official named in the initial demand letter, within 15 calendar days after receipt of the letter. The debtor's request for review shall state the basis on which the claim is disputed.

(c) The Corporation shall promptly notify the debtor, in writing, that the Corporation has received the request for review. The Corporation shall conduct its review of the claim in accordance with §1408.10.

(d) Upon completion of its review of the claim, the Corporation shall notify the debtor whether the Corporation's determination of the existence or amount of the debt has been sustained, amended, or canceled. The notification shall include a copy of the written decision issued by the hearing official pursuant to §1408.10(e). If the Corporation's determination is sustained, this notification shall contain a provision which states that the Corporation intends to collect the debt by all legally available means, which may include initiating legal action against the debtor, referring the debt to a collection agency for collection, collecting the debt by offset, or asking other Federal agencies for assistance in collecting the debt by offset.

§1408.10 Review procedures.

(a) Unless an oral hearing is required by §1408.23(d), the Corporation's review shall be a review of the written record of the claim.

(b) If an oral hearing is required under §1408.23(d) the Corporation shall provide the debtor with a reasonable opportunity for such a hearing. The oral hearing, however, shall not be an adversarial adjudication and need not take the form of a formal evidentiary hearing. All significant matters discussed at the hearing, however, will be carefully documented.

(c) Any review required by this part, whether a review of the written record or an oral hearing, shall be conducted by a hearing official. In the case of a salary offset, the hearing official shall not be under the supervision or control of the Chairman of the Farm Credit System Insurance Corporation.

(d) The Corporation may be represented by legal counsel. The debtor may represent himself or herself or may be represented by an individual of the debtor's choice and at the debtor's expense.

(e) The hearing official shall issue a final written decision based on documentary evidence and, if applicable, information developed at an oral hearing. The written decision shall be issued as soon as practicable after the review but not later than 60 days after the date on which the request for review was received by the Corporation, unless the debtor requests a delay in the proceedings. A delay in the proceedings shall be granted if the hearing official determines, in his or her sole discretion, that there is good cause to grant

the delay. If a delay is granted, the 60-day decision period shall be extended by the number of days by which the review was postponed.

(f) Upon issuance of the written opinion, the Corporation shall promptly notify the debtor of the hearing official's decision. Said notification shall include a copy of the written decision issued by the hearing official pursuant to paragraph (e) of this section.

§ 1408.11 Special review.

(a) An employee subject to salary offset, under subpart C of this part, or a voluntary repayment agreement, may, at any time, request a special review by the Corporation of the amount of the salary offset or voluntary repayment, based on materially changed circumstances such as, but not limited to, catastrophic illness, divorce, death, or disability.

(b) To determine whether an offset would prevent the employee from meeting essential subsistence expenses (costs incurred for food, housing, clothing, transportation, and medical care), the employee shall submit a detailed statement and supporting documents for the employee, his or her spouse, and dependents indicating:

(1) Income from all sources;

(2) Assets;

(3) Liabilities;

(4) Number of dependents;

(5) Expenses for food, housing, clothing, and transportation;

(6) Medical expenses; and

(7) Exceptional expenses, if any.

(c) If the employee requests a special review under this section, the employee shall file an alternative proposed offset or payment schedule and a statement, with supporting documents, showing why the current salary offset or payments result in an extreme financial hardship to the employee.

(d) The Corporation shall evaluate the statement and supporting documents, and determine whether the original offset or repayment schedule imposes an undue financial hardship on the employee. The Corporation shall notify the employee in writing of such determination, including, if appropriate, a revised offset or payment schedule.

§ 1408.12 Charges for interest, administrative costs, and penalties.

(a) Except as provided in paragraph (d) of this section, the Corporation shall:

(1) Assess interest on unpaid claims;

(2) Assess administrative costs incurred in processing and handling overdue claims; and

(3) Assess penalty charges not to exceed 6 percent a year on any part of a debt more than 90 days past due.

The imposition of charges for interest, administrative costs, and penalties shall be made in accordance with 31 U.S.C. 3717.

(b)(1) Interest shall accrue from the date of mailing or hand delivery of the initial demand for payment or the Notice of Intent to Collect by either Administrative or Salary Offset if the amount of the claim is not paid within 30 days from the date of mailing or hand delivery of the initial demand or notice.

(2) The 30-day period may be extended on a case-by-case basis if the Corporation reasonably determines that such action is appropriate. Interest shall only accrue on the principal of the claim and the interest rate shall remain fixed for the duration of the indebtedness, except, as provided in paragraph (c) of this section, in cases where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, or if the Corporation reasonably determines that a higher rate is necessary to protect the interests of the United States.

(c) If a debtor defaults on a repayment agreement and seeks to enter into a new agreement, the Corporation may assess a new interest rate on the unpaid claim. In addition, charges for interest, administrative costs, and penalties which accrued but were not collected under the original repayment agreement shall be added to the principal of the claim to be paid under the new repayment agreement. Interest shall accrue on the entire principal balance of the claim, as adjusted to reflect any increase resulting from the addition of these charges.

(d) The Corporation may waive charges for interest, administrative costs, and/or penalties if it determines that:

(1) The debtor is unable to pay any significant sum toward the claim within a reasonable period of time;

(2) Collection of charges for interest, administrative costs, and/or penalties would jeopardize collection of the principal of the claim;

(3) Collection of charges for interest, administrative costs, or penalties would be against equity and good conscience; or

(4) It is otherwise in the best interest of the United States, including the situation where an installment payment agreement or offset is in effect.

§ 1408.13 Contracting for collection services.

The Chairman, or designee of the Chairman, may contract for collection services in accordance with 31 U.S.C. 3718 and 4 CFR 102.6 to recover debts.

§ 1408.14 Reporting of credit information.

The Chairman, or designee of the Chairman, may disclose to a consumer reporting agency information that an individual is responsible for a debt owed to the United States. Information will be disclosed to reporting agencies in accordance with the terms and conditions of agreements entered into between the Corporation and the reporting agencies. The terms and conditions of such agreements shall specify that all of the rights and protection afforded to the debtor under 31 U.S.C. 3711(f) have been fulfilled. The Corporation shall notify each consumer reporting agency, to which a claim was disclosed, when the debt has been satisfied.

§ 1408.15 Credit report.

In order to aid the Corporation in making appropriate determinations regarding the collection and compromise of claims; the collection of charges for interest, administrative costs, and penalties; the use of administrative offset; the use of other collection methods; and the likelihood of collecting the claim, the Corporation may institute, consistent with the provisions of the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*), a credit investigation of the debtor immediately following a determination that the claim exists.

Subpart B—Administrative Offset

§ 1408.20 Applicability.

(a) The provisions of this subpart shall apply to the collection of debts by administrative [or salary] offset under 31 U.S.C. 3716, 5 U.S.C. 5514, or other statutory or common law.

(b) Offset shall not be used to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility of discovering and collecting such debt.

(c) Offset shall not be used with respect to:

(1) Debts owed by other agencies of the United States or by any State or local government;

(2) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1986, as amended, or tariff laws of the United States; or

(3) Any case in which collection by offset of the type of debt involved is explicitly provided for or prohibited by another statute.

(d) Unless otherwise provided by contract or law, debts or payments which are not subject to offset under 31 U.S.C. 3716 or 5 U.S.C. 5514 may be collected by offset if such collection is authorized under common law or other applicable statutory authority.

§ 1408.21 Collection by offset.

(a) Collection of a debt by administrative [or salary] offset shall be accomplished in accordance with the provisions of these regulations, 4 CFR 102.3, and 5 CFR part 550, subpart K. It is not necessary for the debt to be reduced to judgment or to be undisputed for offset to be used.

(b) The Chairman, or designee of the Chairman, may determine that it is feasible to collect a debt to the United States by offset against funds payable to the debtor.

(c) The feasibility of collecting a debt by offset will be determined on a case-by-case basis. This determination shall be made by considering all relevant factors, including the following: (1) The

degree to which the offset can be accomplished in accordance with law. This determination should take into consideration relevant statutory, regulatory, and contractual requirements;

(2) The degree to which the Corporation is certain that its determination of the existence and amount of the debt is correct;

(3) The practicality of collecting the debt by offset. The cost, in time and money, of collecting the debt by offset and the amount of money which can reasonably be expected to be recovered through offset will be relevant to this determination; and

(4) Whether the use of offset will substantially interfere with or defeat the purpose of a program authorizing payments against which the offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, the imposition of offset against such a payment may be inappropriate.

(d) The collection of a debt by offset may not be feasible when there are circumstances which would indicate that the likelihood of collection by offset is less than probable.

(e) The offset will be effected 31 days after the debtor receives a Notice of Intent to Collect by Administrative Offset (or Notice of Intent to Collect by Salary Offset if the offset is a salary offset), or upon the expiration of a stay of offset, unless the Corporation determines under §1408.24 that immediate action is necessary.

(f) If the debtor owes more than one debt, amounts recovered through offset may be applied to them in any order. Applicable statutes of limitation would be considered before applying the amounts recovered to any debts owed.

§1408.22 Notice requirements before offset.

(a) Except as provided in §1408.24, the Corporation will provide the debtor with 30 calendar days' written notice that unpaid debt amounts shall be collected by administrative [or salary] offset (Notice of Intent to Collect by Administrative [or Salary] Offset) before the Corporation imposes offset against any money that is to be paid to the debtor.

(b) The Notice of Intent to Collect by Administrative [or Salary] Offset shall be delivered to the debtor by hand or by mail and shall provide the following information:

(1) The amount of the debt, the date it was incurred, and the facts upon which the determination of indebtedness was made;

(2) In the case of an administrative offset, the payment due date, which shall be 30 calendar days from the date of mailing or hand delivery of the Notice;

(3) In the case of a salary offset:

(i) The Corporation's intention to collect the debt by means of deduction from the employee's current disposable pay account until the debt and all accumulated interest is paid in full; and

(ii) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(4) The right of the debtor to inspect and copy the records of the Corporation related to the claim or to receive copies if personal inspection is impractical. The debtor shall be informed that he/she shall be assessed for the cost of copying the documents in accordance with §1408.7 of this part;

(5) The right of the debtor to obtain a review of, and to request a hearing, on the Corporation's determination of indebtedness, the propriety of collecting the debt by offset, and, in the case of salary offset, the propriety of the proposed repayment schedule (i.e., the percentage of disposable pay to be deducted each pay period). The debtor shall be informed that to obtain a review, the debtor shall deliver a written request for a review to the Corporation official named in the Notice, within 15 calendar days after the debtor's receipt of the Notice. In the case of a salary offset, the debtor shall also be informed that the review shall be conducted by an official arranged for by the Corporation who shall be a hearing official not under the control of the Chairman of the Farm Credit System Insurance Corporation, or an administrative law judge;

(6) That the filing of a petition for hearing within 15 calendar days after receipt of the Notice will stay the commencement of collection proceedings;

(7) That a final decision on the hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 days after the filing of the written request for review unless the employee requests, and the hearing official grants, a delay in the proceedings;

(8) The right of the debtor to offer to enter into a written agreement with the Corporation to repay the amount of the claim. The debtor shall be informed that the acceptance of such an agreement is discretionary with the Corporation;

(9) That charges for interest, penalties, and administrative costs shall be assessed against the debtor, in accordance with 31 U.S.C. 3717, if payment is not received by the payment due date. The debtor shall be informed that such assessments must be made unless excused in accordance with the Federal Claims Collection Standards (4 CFR parts 103 and 104);

(10) The amount of accrued interest and the amount of any other penalties or administrative costs which may have been added to the principal debt;

(11) That if the debtor has not entered into an agreement with the Corporation to pay the debt, has not requested the Corporation to review the debt, or has not paid the debt prior to the date on which the offset is to be imposed, the Corporation intends to collect the debt by administrative [or salary] offset or by requesting other Federal agencies for assistance in collecting the debt by offset. The debtor shall be informed that the offset shall be imposed against any funds that might become available to the debtor, until the principal debt and all accumulated interest and other charges are paid in full;

(12) The date on which the offset will be imposed, which shall be 31 calendar days from the date of mailing or hand delivery of the Notice. The debtor shall be informed that the Corporation reserves the right to impose an offset prior to this date if the Corporation determines that immediate action is necessary;

(13) That any knowingly false or frivolous statements, representations, or evidence may subject the debtor to:

(i) Penalties under the False Claims Act, 31 U.S.C. 3729 through 3731, or any other applicable statutory authority;

(ii) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or any other applicable statutory authority; and, with regard to employees,

(iii) Disciplinary procedures appropriate under 5 U.S.C. chapter 75; 5 CFR part 752, or any other applicable statute or regulation;

(14) The name and address of the Corporation official to whom the debtor shall send all correspondence relating to the debt or the offset;

(15) Any other rights and remedies available to the debtor under statutes or regulations governing the program for which the collection is being made;

(16) That unless there are applicable contractual or statutory provisions to the contrary, amounts paid on or deducted for the debt, which are later waived or found not owed to the United States, will be promptly refunded to the employee; and

(17) Other information, as may be appropriate.

(c) When the procedural requirements of this section have been provided to the debtor in connection with the same debt or under some other statutory or regulatory authority, the Corporation is not required to duplicate those requirements before effecting offset.

§ 1408.23 Right to review of claim.

(a) If the debtor disputes the claim, the debtor may request a review of the Corporation's determination of the existence of the debt, the amount of the debt, the propriety of collecting the debt by offset, and in the case of salary offset, the propriety of the proposed repayment schedule. If only part of the claim is disputed, the undisputed portion should be paid by the payment due date.

(b) To obtain a review, the debtor shall submit a written request for review to the Corporation official named in the Notice of Intent to Collect by Administrative [or Salary] Offset within 15 calendar days after receipt of the notice. The debtor's written request for review shall state the basis on which the claim is disputed and shall specify whether the debtor requests an oral hearing or a review of the written

record of the claim. If an oral hearing is requested, the debtor shall explain in the request why the matter cannot be resolved by a review of the documentary evidence alone.

(c) The Corporation shall promptly notify the debtor, in writing, that the Corporation has received the request for review. The Corporation shall conduct its review of the claim in accordance with §1408.10.

(d) The Corporation's review of the claim, under this section, shall include providing the debtor with a reasonable opportunity for an oral hearing if:

(1) An applicable statute authorizes or requires the Corporation to consider waiver of the indebtedness, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or

(2) The debtor requests reconsideration of the debt and the Corporation determines that the question of the indebtedness cannot be resolved by reviewing the documentary evidence; for example, when the validity of the debt turns on an issue of credibility or veracity.

(e) A debtor waives the right to a hearing and will have his or her debt offset in accordance with the proposed offset schedule if the debtor:

(1) Fails to file a written request for review within the timeframe set forth in paragraph (b) of this section, unless the Corporation determines that the delay was the result of circumstances beyond his or her control; or

(2) Fails to appear at an oral hearing of which he or she was notified unless the hearing official determines that the failure to appear was due to circumstances beyond the employee's control.

(f) Upon completion of its review of the claim, the Corporation shall notify the debtor whether the Corporation's determination of the existence or amount of the debt has been sustained, amended, or canceled. The notification shall include a copy of the written decision issued by the hearing official, pursuant to §1408.10(e). If the Corporation's determination is sustained, this notification shall contain a provision which states that the Corporation intends to collect the debt by offset or by requesting other Federal agencies for assistance in collecting the debt.

(g) When the procedural requirements of this section have been provided to the debtor in connection with the same debt or under some other statutory or regulatory authority, the Corporation is not required to duplicate those requirements before effecting offset.

§1408.24 Waiver of procedural requirements.

(a) The Corporation may impose offset against a payment to be made to a debtor prior to the completion of the procedures required by this part, if:

(1) Failure to impose the offset would substantially prejudice the Government's ability to collect the debt; and

(2) The timing of the payment against which the offset will be imposed does not reasonably permit the completion of those procedures.

(b) The procedures required by this part shall be complied with promptly after the offset is imposed. Amounts recovered by offset, which are later found not to be owed to the Government, shall be promptly refunded to the debtor.

§1408.25 Coordinating offset with other Federal agencies.

(a)(1) Any creditor agency which requests the Corporation to impose an offset against amounts owed to the debtor shall submit to the Corporation a claim certification which meets the requirements of this paragraph. The Corporation shall submit the same certification to any agency that the Corporation requests to effect an offset.

(2) The claim certification shall be in writing. It shall certify the debtor owes the debt and that all of the applicable requirements of 31 U.S.C. 3716 and 4 CFR part 102 have been met. If the intended offset is to be a salary offset, a claim certification shall instead certify that the debtor owes the debt and that the applicable requirements of 5 U.S.C. 5514 and 5 CFR part 550, subpart K, have been met.

(3) A certification that the debtor owes the debt shall state the amount of the debt, the factual basis supporting the determination of indebtedness, and the date on which payment of the debt

was due. A certification that the requirements of 31 U.S.C. 3716 and 4 CFR part 102 have been met shall include a statement that the debtor has been sent a Notice of Intent to Collect by Administrative Offset at least 31 calendar days prior to the date of the intended offset or a statement that pursuant to 4 CFR 102.3(b)(5) said Notice was not required to be sent. A certification that the requirements of 5 U.S.C. 5514 and 5 CFR part 550, subpart K, have been met shall include a statement that the debtor has been sent a Notice of Intent to Collect by Salary Offset at least 31 calendar days prior to the date of the intended offset or a statement that pursuant to 4 CFR 102.3(b)(5) said Notice was not required to be sent.

(b)(1) The Corporation shall not effect an offset requested by another Federal agency without first obtaining the claim certification required by paragraph (a) of this section. If the Corporation receives an incomplete claim certification, the Corporation shall return the claim certification with notice that a claim certification which complies with the requirements of paragraph (a) of this section must be submitted to the Corporation before the Corporation will consider effecting an offset.

(2) The Corporation may rely on the information contained in the claim certification provided by a requesting creditor agency. The Corporation is not authorized to review a creditor agency's determination of indebtedness.

(c) Only the creditor agency may agree to enter into an agreement with the debtor for the repayment of the claim. Only the creditor agency may agree to compromise, suspend, or terminate collection of the claim.

(d) The Corporation may decline, for good cause, a request by another agency to effect an offset. Good cause includes that the offset might disrupt, directly or indirectly, essential Corporation operations. The refusal and the reasons shall be sent in writing to the creditor agency.

§ 1408.26 Stay of offset.

(a)(1) When a creditor agency receives a debtor's request for inspection of agency records, the offset is stayed for 10 calendar days beyond the date set for the record inspection.

(2) When a creditor agency receives a debtor's offer to enter into a repayment agreement, the offset is stayed until the debtor is notified as to whether the proposed agreement is acceptable.

(3) When a review is conducted, the offset is stayed until the creditor agency issues a final written decision.

(b) When offset is stayed, the amount of the debt and the amount of any accrued interest or other charges will be withheld from payments to the debtor. The withheld amounts shall not be applied against the debt until the stay expires. If withheld funds are later determined not to be subject to offset, they will be promptly refunded to the debtor.

(c) If the Corporation is the creditor agency and the offset is stayed, the Corporation will immediately notify an offsetting agency to withhold the payment pending termination of the stay.

§ 1408.27 Offset against amounts payable from Civil Service Retirement and Disability Fund.

The Corporation may request that monies payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset to collect debts owed to the Corporation by the debtor. The Corporation must certify that the debtor owes the debt, the amount of the debt, and that the Corporation has complied with the requirements set forth in this part, 4 CFR 102.3, and the Office of Personnel Management regulations. The request shall be submitted to the official designated in the Office of Personnel Management regulations to receive the request.

Subpart C—Offset Against Salary

§ 1408.35 Purpose.

The purpose of this subpart is to implement section 5 of the Debt Collection Act of 1982 (Pub. L. 97–365 (5 U.S.C. 5514)), which authorizes the collection of debts owed by Federal employees to the Federal Government by means of salary offsets. These regulations provide procedures for the collection of a debt owed to the Government by the

imposition of a salary offset against amounts payable to a Federal employee as salary. These regulations are consistent with the regulations on salary offset published by the Office of Personnel Management, codified in 5 CFR part 550, subpart K. Since salary offset is a type of administrative offset, the requirements of subpart B also apply to salary offsets.

§ 1408.36 Applicability of regulations.

(a) These regulations apply to the following cases:

(1) Where the Corporation is owed a debt by an individual currently employed by another agency;

(2) Where the Corporation is owed a debt by an individual who is currently employed by the Corporation; or

(3) Where the Corporation currently employs an individual who owes a debt to another Federal agency. Upon receipt of proper certification from the creditor agency, the Corporation will offset the debtor-employee's salary in accordance with these regulations.

(b) These regulations do not apply to the following: (1) Debts or claims arising under the Internal Revenue Code of 1986, as amended (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 301 *et seq.*); the tariff laws of the United States; or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108).

(2) Any adjustment to pay arising from an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(3) A claim which has been outstanding for more than 10 years after the creditor agency's right to collect the debt first accrued, unless facts material to the Government's right to collect were not known and could not reasonably have been known by the official or officials charged with the responsibility for discovery and collection of such debts.

§ 1408.37 Definitions.

In this subpart, the following definitions shall apply:

(a) *Agency* means:

(1) An executive agency as defined by 5 U.S.C. 105, including the United States Postal Service and the United States Postal Rate Commission;

(2) A military department as defined in 5 U.S.C. 102;

(3) An agency or court of the judicial branch, including a court as defined in 28 U.S.C. 610, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multi-district Litigation;

(4) An agency of the legislative branch, including the United States Senate and the United States House of Representatives; or

(5) Other independent establishments that are entities of the Federal Government.

(b) *Disposable pay* means, for an officially established pay interval, that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. The Corporation shall allow the deductions described in 5 CFR 581.105 (b) through (f).

(c) *Employee* means a current employee of the Corporation or other agency, including a current member of the Armed Forces or Reserve of the Armed Forces of the United States.

(d) *Waiver* means the cancellation, remission, forgiveness, or nonrecovery of a debt allegedly owed by an employee to the Corporation or another agency as permitted or required by 5 U.S.C. 5584 or 8346(b), 10 U.S.C. 2774, 32 U.S.C. 716, or any other law.

§ 1408.38 Waiver requests and claims to the General Accounting Office.

(a) The regulations contained in this subpart do not preclude an employee from requesting a waiver of an overpayment under 5 U.S.C. 5584 or 8346(b), 10 U.S.C. 2774, 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting

Office in accordance with the procedures prescribed by the General Accounting Office.

(b) These regulations also do not preclude an employee from requesting a waiver pursuant to other statutory provisions pertaining to the particular debts being collected.

§ 1408.39 Procedures for salary offset.

(a) The Chairman, or designee of the Chairman, shall determine the amount of an employee's disposable pay and the amount to be deducted from the employee's disposable pay at regular pay intervals.

(b) Deductions shall begin within three official pay periods following the date of mailing or delivery of the Notice of Intent to Collect by Salary Offset.

(c)(1) If the amount of the debt is equal to or is less than 15 percent of the employee's disposable pay, such debt should be collected in one lump-sum deduction.

(2) If the amount of the debt is not collected in one lump-sum deduction, the debt shall be collected in installment deductions over a period of time not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted from any pay period will not exceed 15 percent of the employee's disposable pay for that period, unless the employee has agreed in writing to the deduction of a greater amount.

(3) A deduction exceeding the 15-percent disposable pay limitation may be made from any final salary payment pursuant to 31 U.S.C. 3716 in order to liquidate the debt, whether the employee is being separated voluntarily or involuntarily.

(4) Whenever an employee subject to salary offset is separated from the Corporation and the balance of the debt cannot be liquidated by offset of the final salary check pursuant to 31 U.S.C. 3716, the Corporation may offset any later payments of any kind against the balance of the debt.

(d) In instances where two or more creditor agencies are seeking salary offsets against current employees of the Corporation or where two or more debts are owed to a single creditor agency, the Corporation, at its discretion, may determine whether one or more debts should be offset simultaneously within the 15-percent limitation. Debts owed to the Corporation should generally take precedence over debts owed to other agencies.

§ 1408.40 Refunds.

(a) In instances where the Corporation is the creditor agency, it shall promptly refund any amounts deducted under the authority of 5 U.S.C. 5514 when:

(1) The debt is waived or otherwise found not to be owed to the United States (unless expressly prohibited by statute or regulations); or

(2) An administrative or judicial order directs the Corporation to make a refund.

(b) Unless required or permitted by law or contract, refunds under this section shall not bear interest.

§ 1408.41 Requesting current paying agency to offset salary.

(a) To request a paying agency to impose a salary offset against amounts owed to the debtor, the Corporation shall provide the paying agency with a claim certification which meets the requirements set forth in §1408.25(a) of this part. The Corporation shall also provide the paying agency with a repayment schedule determined under the provisions of §1408.39 or in accordance with a repayment agreement entered into with the debtor.

(b) If the employee separates from the paying agency before the debt is paid in full, the paying agency shall certify the total amount collected on the debt. A copy of this certification shall be sent to the employee and a copy shall be sent to the Corporation. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with. However, the Corporation must submit a properly

certified claim to the agency responsible for making such payments before the collection can be made.

(c) When an employee transfers to another paying agency, the Corporation is not required to repeat the due process procedures set forth in 5 U.S.C. 5514 and this part to resume the collection. The Corporation shall, however, review the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

(d) If a special review is conducted pursuant to §1408.11 and results in a revised offset or repayment schedule, the Corporation shall provide a new claim certification to the paying agency.

§1408.42 Responsibility of the Corporation as the paying agency.

(a) When the Corporation receives a claim certification from a creditor agency, deductions should be scheduled to begin at the next officially established pay interval. The Corporation shall send the debtor written notice which provides:

(1) That the Corporation has received a valid claim certification from the creditor agency;

(2) The date on which salary offset will begin;

(3) The amount of the debt; and

(4) The amount of such deductions.

(b) If, after the creditor agency has submitted the claim certification to the Corporation, the employee transfers to a different agency before the debt is collected in full, the Corporation must certify the total amount collected on the debt. The Corporation shall send a copy of this certification to the creditor agency and a copy to the employee. If the Corporation is aware that the employee is entitled to payments from the Civil Service Retirement Fund and Disability Fund, or other similar payments, it shall provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount).

§1408.43 Nonwaiver of rights by payments.

An employee's involuntary payment of all or any portion of a debt being collected under this subpart shall not be construed as a waiver of any rights the employee may have under 5 U.S.C. 5514 or any other provisions of a written contract or law unless there are statutory or contractual provisions to the contrary.

PART 1410—PREMIUMS

Sec.

AUTHORITY: Secs. 12 U.S.C. 2020, 2277a–4, 2277a–5, 2277a–7.

SOURCE: 56 FR 3201, Jan. 29, 1991, unless otherwise noted.

§1410.1 Purpose and scope.

This part sets forth the rules for:

(a) The calculation of premiums;

(b) The time for payment of the premium required by sections 5.55 and 5.56 of the Farm Credit Act of 1971, as amended;

(c) Interest charges on delinquent payments;

(d) The form and content of certified statements; and,

(e) Documentation supporting certified statements.

§1410.2 Definitions.

(a) *Act* means the Farm Credit Act of 1971, as amended.

(b) *Average principal outstanding* means the average annual principal outstanding on a daily basis using balances as of the close of each day. In computing the average annual principal outstanding in this manner, the closing balance of the most recent past business day shall be the closing balance for days when an institution is closed.

(c) *Direct lending association* means any production credit association or any other association making direct loans under authority provided under

section 7.6 of the Act, including, without limitation, agricultural credit associations and Federal land credit associations.

(d) *Government-guaranteed loans or investments* means loans or credits or investments, or portions of loans or credits or investments, that are guaranteed:

(1) By the full faith and credit of the United States Government or any State government; or,

(2) By an agency or other entity of the United States Government whose obligations are explicitly guaranteed by the United States Government; or,

(3) By an agency or other entity of a State government whose obligations are explicitly guaranteed by such State government.

(e) *Insured bank* means any Farm Credit bank whose participation in notes, bonds, debentures, and other obligations issued under subsection (c) or (d) of section 4.2 of the Act is insured under part E of title V of the Act, including, without limitation, banks that are in or are placed in receivership or conservatorship to the extent that those banks' participation in such obligations is insured.

(f) *Loan* means any extension of credit or lease resulting from direct negotiations between a lender and a borrowing entity that is recorded as an asset of an insured bank, a direct lending association, or an other financing institution. The term ''loan'' includes loans, contracts of sale, notes receivable, and other similar obligations and lease financings. The term ''loan'' includes loans originated through direct negotiations between the insured bank, direct lending association, or other financing institution and a borrowing entity and loans or interests in loans purchased from another lender. Loans purchased subject to recourse shall be considered loans of the seller to the extent of the recourse.

(g)(1) *Nonaccrual loan* means any loan where—

(i) Any amount of outstanding principal and all past and future interest accruals, considered over the full term of the asset, are determined to be uncollectible for any reason; or,

(ii) It has been classified ''loss'' as a result of a periodic credit evaluation and has not been charged off; or,

(iii) The loan is severely past due and is not adequately secured, in process of collection, and fully collectible with respect to all principal and interest.

(2) For the purposes of determining whether a loan is considered as accrual or nonaccrual under this part, all loans on which a borrowing entity, or a component of a borrowing entity, is primarily obligated to the institution shall be considered as one loan unless a review of all pertinent facts supports a reasonable determination that a particular loan constitutes an independent credit risk and such determination is adequately documented in the loan file.

(h) *Other financing institution* means any bank, company, institution, corporation, union, or association described in section 1.7(b)(1)(B) of the Act.

[56 FR 3201, Jan. 29, 1991; 56 FR 10302, Mar. 11, 1991; 74 FR 17373, Apr. 15, 2009]

§ 1410.3 Calculation and reporting of premiums due.

(a) *Reporting.* For purposes of computing premiums, each insured bank shall, without limitation, report all information concerning the insured bank; each direct lending association that is receiving (or has received) funds provided through the insured bank; and each other financing institution that is receiving (or has received) funds provided through the insured bank; that the Corporation determines is necessary in order to compute the premiums due under the Act.

(b) *Calculating the premium payment for periods from July 1, 2008 through December 31, 2008.* (1) The premium payment for the 3rd Quarter 2008 (defined for purposes of this section as the period from July 1, 2008 through September 30, 2008) and the premium payment for the 4th Quarter 2008 (defined for purposes of this section as the period October 1, 2008, through December 31, 2008) shall be equal to 25 percent of the amount computed by applying the premium calculation formulas contained in sections 5.55 and 5.56 of the Act (unless reduced by the Corporation acting under section 5.55(a)(3) of the

Act or under paragraph (d) of this section) to the insured bank during the 3rd Quarter 2008 or 4th Quarter 2008, respectively.

(2) In accord with paragraph (b)(1) of this section, the premium payment for the 3rd Quarter 2008 (having been reduced by the Corporation acting under section 5.55(a)(3) of the Act) shall be equal to 25 percent of the following amount:

(i) The average outstanding insured obligations issued by the bank for the period, after deducting from the obligations the percentages of the guaranteed portions of loans and investments described in section 5.55(a)(2) of the Act, multiplied by 0.0015; and

(ii) The product obtained by multiplying—

(A) The sum of—

(*1*) The average principal outstanding for the period on loans made by the bank (computed in accord with section 5.55 of the Act) that are in nonaccrual status; and

(*2*) The average amount outstanding for the period of other-than-temporarily impaired investments made by the bank (computed in accord with section 5.55 of the Act);

(B) By 0.0010.

(3) In accord with paragraph (b)(1) of this section, the premium payment for the 4th Quarter 2008 (having been reduced by the Corporation acting under section 5.55(a)(3) of the Act) shall be equal to 25 percent of the following amount:

(i) The average outstanding insured obligations issued by the bank for the period, after deducting from the obligations the percentages of the guaranteed portions of loans and investments described in section 5.55(a)(2) of the Act, multiplied by 0.0018; and

(ii) The product obtained by multiplying—

(A) The sum of—

(*1*) The average principal outstanding for the period on loans made by the bank (computed in accord with section 5.55 of the Act) that are in nonaccrual status; and

(*2*) The average amount outstanding for the period of other-than-temporarily impaired investments made by the bank (computed in accord with section 5.55 of the Act);

(B) By 0.0010.

(c) *Calculating the premium payment for periods in 2009 and subsequent years.* (1) The premium payment for periods in calendar year 2009 and subsequent years shall be equal to the amount computed by applying the premium calculation formulas contained in sections 5.55 and 5.56 of the Act (unless reduced by the Corporation acting under section 5.55(a)(3) of the Act or under paragraph (d) of this section) to the insured bank during the period.

(2) In accord with paragraph (c)(1) of this section, the premium payment for the period shall (unless reduced by the Corporation acting under section 5.55(a)(3) of the Act or under paragraph (d) of this section) be equal to:

(i) The average outstanding insured obligations issued by the bank for the period, after deducting from the obligations the percentages of the guaranteed portions of loans and investments described in section 5.55(a)(2), multiplied by 0.0020; and

(ii) The product obtained by multiplying—

(A) The sum of—

(*1*) The average principal outstanding for the period on loans made by the bank (computed in accord with section 5.55 of the Act) that are in nonaccrual status; and

(*2*) The average amount outstanding for the period of other than temporarily impaired investments made by the bank (computed in accord with section 5.55 of the Act);

(B) By 0.0010.

(d) *Secure base amount.* In addition to the Corporation's authority to reduce premiums under section 5.55(a)(3) of the Act, upon reaching the secure base amount determined by the Corporation in accordance with section 5.55 of the Act, the annual premium to be paid by each insured bank, computed in accordance with paragraphs (b) and (c) of this section, shall be reduced by a percentage determined by the Corporation so that the aggregate of the premiums payable by all of the Farm Credit banks for the following calendar year is sufficient to ensure that the Insurance Fund balance is maintained at not less than the secure base amount. The Corporation shall announce any such percentage no later than December 31

of the year prior to the January in which such premiums are to be paid.

[74 FR 17373, Apr. 15, 2009]

§ 1410.4 Payment of premiums.

(a) *Payments.* Each insured bank shall pay to the Corporation the amount of the premium due to the Corporation computed in accordance with sections 5.55 and 5.56 of the Act, and §1410.3 of this part, and shown on its certified statement, at the time the statement is filed. Certified statements shall be considered to have been filed and payments made in a timely manner if they are received on or before January 31 following the end of the calendar year on which the certified statement is based.

(b) *Premiums as obligations of insured banks.* Premiums required to be paid by §1410.3 are obligations of the insured banks, and are to be paid at the times required by this section, regardless of whether the insured bank has assessed and collected any assessments under section 1.12 of the Act.

[56 FR 3201, Jan. 29, 1991; 56 FR 10302, Mar. 11, 1991; 74 FR 17374, Apr. 15, 2009]

§ 1410.5 Delinquent premium payments and premium overpayments.

(a) *Delinquent payments.* Each insured bank shall pay to the Corporation interest on delinquent premium payments. All premiums will be considered delinquent if they are received after the time for payment specified in §1410.4 of this part, including late payments caused by bank errors in the certified statement. The interest rate will be the United States Treasury Department's current value of funds rate, which is issued under the Treasury Fiscal Requirements Manual (TFRM rate) and published quarterly in the FEDERAL REGISTER. The interest rate will be determined as follows:

(1) *Current year.* (i) For delinquent days occurring on or prior to March 31, the rate will be the TFRM rate that is published in the preceding December.

(ii) For delinquent days occurring from April 1 to June 30, the rate will be the TFRM rate that is published in March for the second quarter of the year.

(iii) For delinquent days occurring from July 1 to September 30, the rate will be the TFRM rate that is published in June for the third quarter.

(iv) For delinquent days occurring from October 1 to December 31, the rate will be the TFRM rate that is published in September for the fourth quarter.

(2) *Prior years.* The interest will be calculated quarterly and compounded annually at the rates applicable for each quarter as issued under the TFRM. For the initial year, the rate will be applied to the gross amount of the delinquent payment. For each additional year or portion thereof the rate will be applied to the net amount of the delinquent payment after it has been reduced by any premium credit under paragraph (c) of this section.

(b) *Other rights and remedies.* Payment of the interest specified in paragraph (a) of this section does not affect any other rights and remedies available to the Corporation.

(c) *Overpayments.* To the extent that any payment by a bank exceeds the required amount:

(1) The excess shall be credited against future premium payments by the bank which overpaid; or,

(2)(i) Upon written request to the Corporation by the bank which overpaid, the excess shall be refunded to the bank within 30 days of receipt of the written request; and

(ii) If the Corporation fails to make a refund within such 30-day period, and the Corporation determines that a refund is in order, the Corporation shall pay to the bank interest on the amount of the overpayment, from the end of such 30-day period through the date the refund is issued.

§ 1410.6 Certified statements.

(a) *Forms.* The certified statements required to be filed by insured banks under the provisions of section 5.56 of the Act shall be filed with the Corporation. The certified statement forms will be furnished to all insured banks by, or may be obtained from, the Corporation.

(b) *Amendments to certified statements.* In the event of an amendment or correction of a previously submitted certified statement, the amending insured

bank shall resubmit to the Corporation the appropriate certified statement along with a letter of explanation regarding the amendment or correction.

[56 FR 3201, Jan. 29, 1991, as amended at 56 FR 57233, Nov. 8, 1991; 74 FR 17374, Apr. 15, 2009]

§ 1410.7 Documentation.

Each insured bank shall:

(a) Prepare and maintain accurate and complete records as necessary to prepare certified statements, including, but not limited to, records relating to the loans of each direct lending association and other financing institution that are able to make such loans because they are receiving, or have received, funding from the insured bank.

(b) Prepare and maintain on its premises books and records in such a manner as to facilitate reconciliation with certified statements prepared from them.

(c) Maintain in its books and records documentation supporting its certified statement for a period no less than 5 years following the date of each certified statement, unless the bank shall have requested in writing, and the Corporation shall have granted to the bank, written permission to dispose of such documentation prior to the expiration of 5 years.

(d) Make all records and any supporting documentation available, without limitation, to Corporation officials upon request.

PART 1411—RULES OF PRACTICE AND PROCEDURE

AUTHORITY: 12 U.S.C. 2277a–7(10), 2277a–14(c) and (d); 28 U.S.C. 2461 *note*.

Subpart A—Rules and Procedures for Assessment and Collection of Civil Money Penalties

§ 1411.1 Inflation adjustment of civil money penalties for failure to file a certified statement, pay any premium required or obtain approval before employment of persons convicted of criminal offenses.

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, a civil money penalty imposed pursuant to section 5.65(c) or (d) of the Farm Credit Act of 1971, as amended, shall not exceed $217 per day for each day the violation continues.

[86 FR 8854, Feb. 10, 2021]

PART 1412—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.

AUTHORITY: 12 U.S.C. 2277a–10b.

SOURCE: 71 FR 7405, Feb. 13, 2006, unless otherwise noted.

§ 1412.1 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of Farm Credit System (System) institutions, their service corporations, subsidiaries and affiliates from making golden parachute and indemnification payments to institution-related parties (IRPs).

(b) This part applies to System institutions in a troubled condition that seek to make golden parachute payments to their IRPs.

(c) The limitations on indemnification payments apply to all System institutions, their service corporations, subsidiaries and affiliates regardless of their financial health.

§ 1412.2 Definitions.

(a) *Act* or *Farm Credit Act* means Farm Credit Act of 1971 (12 U.S.C. 2002(a)), as amended by the Farm Credit System Reform Act of 1996, amending 12 U.S.C. 2277a–10.

(b) *Farm Credit System institution* or *System institution* means any ''institution'' enumerated in section 1.2 of the Act including, but not limited to, associations, banks, service corporations,

the Federal Farm Credit Banks Funding Corporation, the Farm Credit Leasing Services Corporation and their subsidiaries and affiliates, as well as, the Federal Agricultural Mortgage Corporation and its subsidiaries and affiliates, as described in 12 U.S.C. 2279aa–1(a).

(c) *Benefit plan* means any plan, contract, agreement or other arrangement which is an ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or other benefits provided under a cafeteria plan sponsored by the System institution; provided however, that such term shall not include any plan intended to be subject to paragraph (f)(2)(iii), (vii) and (viii) of this section.

(d) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(1) An IRP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the System institution either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the System institution's creditors in the case of insolvency; or

(2) The System institution establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (d)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IRPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in §1412.5); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d)(1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least 1 year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than 1 year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such 1 year period that do not increase the benefits payable thereunder;

(iii) The IRP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than 1 year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The System institution has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to

satisfy claims of the System institution's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) *Corporation or FCSIC* mean the Farm Credit System Insurance Corporation, in its corporate capacity.

(f) *Golden parachute payment.* (1) The term ''golden parachute payment'' means any payment (or any agreement to make any payment) in the nature of compensation by any System institution for the benefit of any current or former IRP pursuant to an obligation of such System institution that:

(i) Is contingent on the termination of such party's primary employment or relationship with the System institution; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the System institution which is making the payment or bankruptcy or insolvency (or similar event) of the service corporation, subsidiary or affiliate which is making the payment; or

(B) The System institution is assigned a composite rating of 4 or 5 by the FCA; or

(C) The appointment of any conservator or receiver for such System institution; or

(D) A determination by the Corporation, that the System institution is in a troubled condition, as defined in paragraph (m) of this section; and

(iii) Is payable to an IRP whose employment by or relationship with a System institution is terminated at a time when the System institution by which the IRP is employed or related satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (D) of this section, or in contemplation of any of these conditions.

(2) *Exceptions.* The term ''golden parachute payment'' shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401); or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a ''bona fide'' deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of IRP; or

(v) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vi) Any other payment which the Corporation determines to be permissible in accordance with §1412.6, on permissible indemnification payments; or

(vii) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement that provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement. Furthermore, such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the System institution was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the FCA; or in lieu of a payment made pursuant to this paragraph;

(viii) Any payment made pursuant to a severance pay plan or arrangement that provides severance benefits upon involuntary termination other than for cause, voluntary resignation, or early retirement. No employee shall receive any payment under this subpart which exceeds the base compensation paid to such employee during the 12 months (or longer period or greater benefit as the Corporation shall consent to) immediately proceeding termination of employment. Furthermore, such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or the scope of the severance benefits at a time when the System institution was in a condition specified in paragraph (f)(1)(ii) of this

section or in contemplation of such a condition without the written approval of the FCA.

(g) The *FCA* means the Farm Credit Administration.

(h) *Institution-related party (IRP)* means:

(1) Any director, officer, employee, or controlling stockholder (other than another Farm Credit System institution) of, or agent for a System institution;

(2) Any stockholder (other than another Farm Credit System institution), consultant, joint venture partner, and any other person as determined by the FCA (by regulation or case-by-case) who participates in the conduct of the affairs of a System institution; and

(3) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the System institution.

(i) *Liability or legal expense* means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or actions; and

(3) The amount of, any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, processing, or action.

(j) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of a System institution who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis, with a modest disparity in severance benefits relating to any one criterion of 20 percent.

(k) *Payment* means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of benefits in the nature of compensation, including but not limited to stock options and stock appreciation rights; or

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) *Prohibited indemnification payment.* (1) The term ''prohibited indemnification payment'' means any payment (or any agreement or arrangement to make any payment) by any System institution for the benefit of any person who is or was an IRP of such System institution, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by the FCA, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by the FCA which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the institution; or

(iii) Is required to cease and desist from or take any affirmative action with respect to such institution.

(2) *Exceptions.* (i) The term ''prohibited indemnification'' payment shall not include any reasonable payment by a System institution which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IRP for

the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by the FCA, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the System institution or receiver.

(ii) The term ''prohibited indemnification payment'' shall not include any reasonable payment by a System institution that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IRP has not violated certain FCA laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty, unless the administrative action or civil proceedings has resulted in a final prohibition order against the IRP.

(m) *Troubled condition* means a System institution that:

(1) Is subject to a cease-and-desist order or written agreement issued by the FCA that requires action to improve the financial condition of the System institution or is subject to a proceeding initiated by the FCA which contemplates the issuance of an order that requires action to improve the financial condition of the institution, unless otherwise informed in writing by the FCA; or

(2) Is unable to make a timely payment of principal or interest on any insured obligation (as defined in section 5.51(3) of the Farm Credit Act; 12 U.S.C. 2277a(3)); or

(3) Is receiving assistance as described in section 5.61 of the Farm Credit Act, 12 U.S.C. 2277a–10; or

(4) Is unable to make timely payment of principal or interest on debt obligations issued under the authority of section 8.6(e)(2) of the Farm Credit Act; 12 U.S.C. 2279aa–6(e)(2) or is unable to fulfill the guarantee obligations provided under section 8.6 of the Farm Credit Act; 12 U.S.C. 2279aa–6; or

(5) Is informed in writing by the Corporation that it is in a ''troubled condition'' for purposes of the requirements of this subpart on the basis of the System institution's most recent report of condition or report of examination or other information available to the Corporation.

§ 1412.3 Golden parachute payments prohibited.

No System institution shall make or agree to make any golden parachute payment, except as provided in this part.

§ 1412.4 Prohibited indemnification payments.

No System institution shall make or agree to make any prohibited indemnification payment, except as provided in this part.

§ 1412.5 Permissible golden parachute payments.

(a) A System institution may agree to make or may make a golden parachute payment if and to the extent that:

(1) The FCA, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IRP either at a time when the System institution satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in §1412.2(f)(1)(ii), and the FCA and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the Corporation and the FCA shall not improve the IRP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the Corporation and/or the FCA shall not be obligated to pay the promised golden parachute and the IRP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed 18-months' salary, to an IRP in the event of a change in control of the System institution; *provided, however,*

that the System institution shall obtain the consent of the FCA prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of System institution which results from an assisted transaction as described in section 5.61 of the Farm Credit Act; 12 U.S.C. 2277a–10 or the System institution being placed into conservatorship or receivership; and

(4) A System institution or IRP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IRP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the System institution that has had or is likely to have a material adverse effect on the institution;

(ii) The IRP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations concerning the System institution;

(iii) The IRP has materially violated any applicable Federal or state law or regulation that has had or is likely to have a material effect on the System institution; and

(iv) The IRP has violated or conspired to violate section 215, 657, 1006, 1014, or 1344 of title 18 of the United States Code or section 1341 or 1343 of such title affecting a Farm Credit System institution.

(b) In making a determination under paragraphs (a)(1) through (3) of this section the FCA and the Corporation may consider:

(1) Whether, and to what degree, the IRP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IRP was affiliated with the System institution, and the degree to which the proposed payment represents reasonable compensation earned over the period of employment and reasonable payment for services rendered; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of the Act or this part.

§ 1412.6 Permissible indemnification payments.

(a) A System institution may make or agree to make reasonable indemnification payments to an IRP with respect to an administrative proceeding or civil action initiated by the FCA if:

(1) The System institution's board of directors, in good faith, determines in writing after due investigation and consideration that the IRP acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The System institution's board of directors, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in §1412.2(l); and

(4) The IRP agrees in writing to reimburse the System institution, to the extent not covered by payments from insurance or bonds purchased pursuant to §1412.2(l)(2), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined herein.

(b) An IRP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; *provided, however*, that such IRP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in

paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

§ 1412.7 Filing instructions.

Requests to make excess nondiscriminatory severance plan payments and permitted golden parachute payments shall be submitted in writing to the FCA and the Corporation. The request shall be in letter form and shall contain all relevant factual information as well as the reasons why such approval should be granted.

§ 1412.8 Application in the event of receivership.

The provisions of this part or any consent or approval granted under the provisions of this part by the Corporation (in its corporate capacity), shall not in any way bind any receiver of a failed System institution. Any consent or approval granted under the provisions of this part by the Corporation or the FCA shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the Corporation is appointed as receiver for any System institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IRP contrary to 12 U.S.C. 2277a–10b(d).

PARTS 1413–1499 [RESERVED]

CHAPTER XV—DEPARTMENT OF THE TREASURY

SUBCHAPTER A—GENERAL PROVISIONS

SUBCHAPTER B—RESOLUTION FUNDING CORPORATION

SUBCHAPTER A—GENERAL PROVISIONS

PART 1500—MERCHANT BANKING INVESTMENTS

Sec.

AUTHORITY: 12 U.S.C. 1843(k).

SOURCE: Reg. Y, 66 FR 8489, Jan. 31, 2001, unless otherwise noted.

§ 1500.1 What type of investments are permitted by this part, and under what conditions may they be made?

(a) *What types of investments are permitted by this part?* Section 4(k)(4)(H) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(H)) and this part authorize a financial holding company, directly or indirectly and as principal or on behalf of one or more persons, to acquire or control any amount of shares, assets or ownership interests of a company or other entity that is engaged in any activity not otherwise authorized for the financial holding company under section 4 of the Bank Holding Company Act. For purposes of this part, shares, assets or ownership interests acquired or controlled under section 4(k)(4)(H) and this part are referred to as ''merchant banking investments.'' A financial holding company may not directly or indirectly acquire or control any merchant banking investment except in compliance with the requirements of this part.

(b) *Must the investment be a bona fide merchant banking investment?* The acquisition or control of shares, assets or ownership interests under this part is not permitted unless it is part of a bona fide underwriting or merchant or investment banking activity.

(c) *What types of ownership interests may be acquired?* Shares, assets or ownership interests of a company or other entity include any debt or equity security, warrant, option, partnership interest, trust certificate or other instrument representing an ownership interest in the company or entity, whether voting or nonvoting.

(d) *Where in a financial holding company may merchant banking investments be made?* A financial holding company and any subsidiary (other than a depository institution or subsidiary of a depository institution) may acquire or control merchant banking investments. A financial holding company and its subsidiaries may not acquire or control merchant banking investments on behalf of a depository institution or subsidiary of a depository institution.

(e) *May assets other than shares be held directly?* A financial holding company may not under this part acquire or control assets, other than debt or equity securities or other ownership interests in a company, unless:

(1) The assets are held by or promptly transferred to a portfolio company;

(2) The portfolio company maintains policies, books and records, accounts, and other indicia of corporate, partnership or limited liability organization and operation that are separate from the financial holding company and limit the legal liability of the financial holding company for obligations of the portfolio company; and

(3) The portfolio company has management that is separate from the financial holding company to the extent required by § 1500.2.

(f) *What type of affiliate is required for a financial holding company to make merchant banking investments?* A financial holding company may not acquire or control merchant banking investments under this part unless the financial holding company qualifies under at least one of the following paragraphs:

(1) *Securities affiliate.* The financial holding company is or has an affiliate that is registered under the Securities Exchange Act of 1934 (15 U.S.C. 78c, 78o, 78o–4) as:

(i) A broker or dealer; or

(ii) A municipal securities dealer, including a separately identifiable department or division of a bank that is registered as a municipal securities dealer.

(2) *Insurance affiliate with an investment adviser affiliate.* The financial holding company controls:

(i) An insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance), or providing and issuing annuities; and

(ii) A company that:

(A) Is registered with the Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*); and

(B) Provides investment advice to an insurance company.

§ 1500.2 What are the limitations on managing or operating a portfolio company held as a merchant banking investment?

(a) *May a financial holding company routinely manage or operate a portfolio company?* Except as permitted in paragraph (e) of this section, a financial holding company may not routinely manage or operate any portfolio company.

(b) *When does a financial holding company routinely manage or operate a company?*—(1) *Examples of routine management or operation*—(i) *Executive officer interlocks at the portfolio company.* A financial holding company routinely manages or operates a portfolio company if any director, officer or employee of the financial holding company serves as or has the responsibilities of an executive officer of the portfolio company.

(ii) *Interlocks by executive officers of the financial holding company*—(A) *Prohibition.* A financial holding company routinely manages or operates a portfolio company if any executive officer of the financial holding company serves as or has the responsibilities of an officer or employee of the portfolio company.

(B) *Definition.* For purposes of paragraph (b)(1)(ii)(A) of this section, the term ''financial holding company'' includes the financial holding company and only the following subsidiaries of the financial holding company:

(*1*) A securities broker or dealer registered under the Securities Exchange Act of 1934;

(*2*) A depository institution;

(*3*) An affiliate that engages in merchant banking activities under this part or insurance company investment activities under section 4(k)(4)(I) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(I));

(*4*) A small business investment company (as defined in section 302(b) of the Small Business Investment Act of 1958 (15 U.S.C. 682(b)) controlled by the financial holding company or by any depository institution controlled by the financial holding company; and

(*5*) Any other affiliate that engages in significant equity investment activities that are subject to a special capital charge under the capital adequacy rules or guidelines of the Board.

(iii) *Covenants regarding ordinary course of business.* A financial holding company routinely manages or operates a portfolio company if any covenant or other contractual arrangement exists between the financial holding company and the portfolio company that would restrict the portfolio company's ability to make routine business decisions, such as entering into transactions in the ordinary course of business or hiring officers or employees other than executive officers.

(2) *Presumptions of routine management or operation.* A financial holding company is presumed to routinely manage or operate a portfolio company if:

(i) Any director, officer, or employee of the financial holding company serves as or has the responsibilities of an officer (other than an executive officer) or employee of the portfolio company; or

(ii) Any officer or employee of the portfolio company is supervised by any director, officer, or employee of the financial holding company (other than

in that individual's capacity as a director of the portfolio company).

(c) *How may a financial holding company rebut a presumption that it is routinely managing or operating a portfolio company?* A financial holding company may rebut a presumption that it is routinely managing or operating a portfolio company under paragraph (b)(2) of this section by presenting information to the Board demonstrating to the Board's satisfaction that the financial holding company is not routinely managing or operating the portfolio company.

(d) *What arrangements do not involve routinely managing or operating a portfolio company?*—(1) *Director representation at portfolio companies.* A financial holding company may select any or all of the directors of a portfolio company or have one or more of its directors, officers, or employees serve as directors of a portfolio company if:

(i) The portfolio company employs officers and employees responsible for routinely managing and operating the company; and

(ii) The financial holding company does not routinely manage or operate the portfolio company, except as permitted in paragraph (e) of this section.

(2) *Covenants or other provisions regarding extraordinary events.* A financial holding company may, by virtue of covenants or other written agreements with a portfolio company, restrict the ability of the portfolio company, or require the portfolio company to consult with or obtain the approval of the financial holding company, to take actions outside of the ordinary course of the business of the portfolio company. Examples of the types of actions that may be subject to these types of covenants or agreements include, but are not limited to, the following:

(i) The acquisition of significant assets or control of another company by the portfolio company or any of its subsidiaries;

(ii) Removal or selection of an independent accountant or auditor or investment banker by the portfolio company;

(iii) Significant changes to the business plan or accounting methods or policies of the portfolio company;

(iv) Removal or replacement of any or all of the executive officers of the portfolio company;

(v) The redemption, authorization or issuance of any equity or debt securities (including options, warrants or convertible shares) of the portfolio company or any borrowing by the portfolio company outside of the ordinary course of business;

(vi) The amendment of the articles of incorporation or by-laws (or similar governing documents) of the portfolio company; and

(vii) The sale, merger, consolidation, spin-off, recapitalization, liquidation, dissolution or sale of substantially all of the assets of the portfolio company or any of its significant subsidiaries.

(3) *Providing advisory and underwriting services to, and having consultations with, a portfolio company.* A financial holding company may:

(i) Provide financial, investment and management consulting advice to a portfolio company in a manner consistent with and subject to any restrictions on such activities contained in §225.28(b)(6) or §225.86(b)(1) of the Board's Regulation Y (12 CFR 225.28(b)(6) and 225.86(b)(1));

(ii) Provide assistance to a portfolio company in connection with the underwriting or private placement of its securities, including acting as the underwriter or placement agent for such securities; and

(iii) Meet with the officers or employees of a portfolio company to monitor or provide advice with respect to the portfolio company's performance or activities.

(e) *When may a financial holding company routinely manage or operate a portfolio company?*—(1) *Special circumstances required.* A financial holding company may routinely manage or operate a portfolio company only when intervention by the financial holding company is necessary or required to obtain a reasonable return on the financial holding company's investment in the portfolio company upon resale or other disposition of the investment, such as to avoid or address a significant operating loss or in connection with a loss of senior management at the portfolio company.

(2) *Duration Limited.* A financial holding company may routinely manage or operate a portfolio company only for the period of time as may be necessary to address the cause of the financial holding company's involvement, to obtain suitable alternative management arrangements, to dispose of the investment, or to otherwise obtain a reasonable return upon the resale or disposition of the investment.

(3) *Notice required for extended involvement.* A financial holding company may not routinely manage or operate a portfolio company for a period greater than nine months without prior written notice to the Board.

(4) *Documentation required.* A financial holding company must maintain and make available to the Board upon request a written record describing its involvement in routinely managing or operating a portfolio company.

(f) *May a depository institution or its subsidiary routinely manage or operate a portfolio company?*—(1) *In general.* A depository institution and a subsidiary of a depository institution may not routinely manage or operate a portfolio company in which an affiliated company owns or controls an interest under this part.

(2) *Definition applying provisions governing routine management or operation.* For purposes of this section other than paragraph (e) and for purposes of §1500.4(d), a financial holding company includes a depository institution controlled by the financial holding company and a subsidiary of such a depository institution.

(3) *Exception for certain subsidiaries of depository institutions.* For purposes of paragraph (e) of this section, a financial holding company includes a financial subsidiary held in accordance with section 5136A of the Revised Statutes (12 U.S.C. 24a) or section 46 of the Federal Deposit Insurance Act (12 U.S.C. 1831w), and a subsidiary that is a small business investment company and that is held in accordance with the Small Business Investment Act (15 U.S.C. 661 *et seq.*), and such a subsidiary may, in accordance with the limitations set forth in this section, routinely manage or operate a portfolio company in which an affiliated company owns or controls an interest under this part.

§1500.3 What are the holding periods permitted for merchant banking investments?

(a) *Must investments be made for resale?* A financial holding company may own or control shares, assets and ownership interests pursuant to this part only for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the financial holding company's merchant banking investment activities.

(b) *What period of time is generally permitted for holding merchant banking investments?*—(1) *In general.* Except as provided in this section or §1500.4, a financial holding company may not, directly or indirectly, own, control or hold any share, asset or ownership interest pursuant to this part for a period that exceeds 10 years.

(2) *Ownership interests acquired from or transferred to companies held under this part.* For purposes of paragraph (b)(1) of this section, shares, assets or ownership interests—

(i) Acquired by a financial holding company from a company in which the financial holding company held an interest under this part will be considered to have been acquired by the financial holding company on the date that the share, asset or ownership interest was acquired by the company; and

(ii) Acquired by a company from a financial holding company will be considered to have been acquired by the company on the date that the share, asset or ownership interest was acquired by the financial holding company if—

(A) The financial holding company held the share, asset, or ownership interest under this part; and

(B) The financial holding company holds an interest in the acquiring company under this part.

(3) *Interests previously held by a financial holding company under limited authority.* For purposes of paragraph (b)(1) of this section, any shares, assets, or ownership interests previously owned or controlled, directly or indirectly, by a financial holding company under any other provision of the Federal banking laws that imposes a limited holding period will if acquired under this part be

considered to have been acquired by the financial holding company under this part on the date the financial holding company first acquired ownership or control of the shares, assets or ownership interests under such other provision of law. For purposes of this paragraph (b)(3), a financial holding company includes a depository institution controlled by the financial holding company and any subsidiary of such a depository institution.

(4) *Approval required to hold interests held in excess of time limit.* A financial holding company may seek Board approval to own, control or hold shares, assets or ownership interests of a company under this part for a period that exceeds the period specified in paragraph (b)(1) of this section. A request for approval must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for the request, including information that addresses the factors in paragraph (b)(5) of this section; and

(iii) Explain the financial holding company's plan for divesting the shares, assets or ownership interests.

(5) *Factors governing Board determinations.* In reviewing any proposal under paragraph (b)(4) of this section, the Board may consider all the facts and circumstances related to the investment, including:

(i) The cost to the financial holding company of disposing of the investment within the applicable period;

(ii) The total exposure of the financial holding company to the company and the risks that disposing of the investment may pose to the financial holding company;

(iii) Market conditions;

(iv) The nature of the portfolio company's business;

(v) The extent and history of involvement by the financial holding company in the management and operations of the company; and

(vi) The average holding period of the financial holding company's merchant banking investments.

(6) *Restrictions applicable to investments held beyond time period.* A financial holding company that directly or indirectly owns, controls or holds any share, asset or ownership interest of a company under this part for a total period that exceeds the period specified in paragraph (b)(1) of this section must—

(i) For purposes of determining the financial holding company's regulatory capital, apply to the financial holding company's adjusted carrying value of such shares, assets, or ownership interests a capital charge determined by the Board that must be:

(A) Higher than the maximum marginal Tier 1 capital charge applicable under the Board's capital adequacy rules or guidelines (*see* 12 CFR 225 appendix A) to merchant banking investments held by that financial holding company; and

(B) In no event less than 25 percent of the adjusted carrying value of the investment; and

(ii) Abide by any other restrictions that the Board may impose in connection with granting approval under paragraph (b)(4) of this section.

§ 1500.4 How are investments in private equity funds treated under this part?

(a) *What is a private equity fund?* For purposes of this part, a ''private equity fund'' is any company that:

(1) Is formed for the purpose of and is engaged exclusively in the business of investing in shares, assets, and ownership interests of financial and nonfinancial companies for resale or other disposition;

(2) Is not an operating company;

(3) No more than 25 percent of the total equity of which is held, owned or controlled, directly or indirectly, by the financial holding company and its directors, officers, employees and principal shareholders;

(4) Has a maximum term of not more than 15 years; and

(5) Is not formed or operated for the purpose of making investments inconsistent with the authority granted under section 4(k)(4)(H) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(H)) or evading the limitations governing merchant banking investments contained in this part.

(b) *What form may a private equity fund take?* A private equity fund may be a corporation, partnership, limited

liability company or other type of company that issues ownership interests in any form.

(c) *What is the holding period permitted for interests in private equity funds?*—(1) *In general.* A financial holding company may own, control or hold any interest in a private equity fund under this part and any interest in a portfolio company that is owned or controlled by a private equity fund in which the financial holding company owns or controls any interest under this part for the duration of the fund, up to a maximum of 15 years.

(2) *Request to hold interest for longer period.* A financial holding company may seek Board approval to own, control or hold an interest in or held through a private equity fund for a period longer than the duration of the fund in accordance with §1500.3(b) of this part.

(3) *Application of rules.* The rules described in §1500.3(b)(2) and (3) governing holding periods of interests acquired, transferred or previously held by a financial holding company apply to interests in, held through, or acquired from a private equity fund.

(d) *How do the restrictions on routine management and operation apply to private equity funds and investments held through a private equity fund?*—(1) Portfolio companies held through a private equity fund. A financial holding company may not routinely manage or operate a portfolio company that is owned or controlled by a private equity fund in which the financial holding company owns or controls any interest under this part, except as permitted under §1500.2(e).

(2) *Private equity funds controlled by a financial holding company.* A private equity fund that is controlled by a financial holding company may not routinely manage or operate a portfolio company, except as permitted under §1500.2(e).

(3) *Private equity funds that are not controlled by a financial holding company.* A private equity fund may routinely manage or operate a portfolio company so long as no financial holding company controls the private equity fund or as permitted under §1500.2(e).

(4) *When does a financial holding company control a private equity fund?* A financial holding company controls a private equity fund for purposes of this part if the financial holding company, including any director, officer, employee or principal shareholder of the financial holding company:

(i) Serves as a general partner, managing member, or trustee of the private equity fund (or serves in a similar role with respect to the private equity fund);

(ii) Owns or controls 25 percent or more of any class of voting shares or similar interests in the private equity fund;

(iii) In any manner selects, controls or constitutes a majority of the directors, trustees or management of the private equity fund; or

(iv) Owns or controls more than 5 percent of any class of voting shares or similar interests in the private equity fund and is the investment adviser to the fund.

§1500.5 What aggregate thresholds apply to merchant banking investments?

(a) *In general.* A financial holding company may not, without Board approval, directly or indirectly acquire any additional shares, assets or ownership interests under this part or make any additional capital contribution to any company the shares, assets or ownership interests of which are held by the financial holding company under this part if the aggregate carrying value of all merchant banking investments held by the financial holding company under this part exceeds:

(1) 30 percent of the Tier 1 capital of the financial holding company; or

(2) After excluding interests in private equity funds, 20 percent of the Tier 1 capital of the financial holding company

(b) *How do these thresholds apply to a private equity fund?* Paragraph (a) of this section applies to the interest acquired or controlled by the financial holding company under this part in a private equity fund. Paragraph (a) of this section does not apply to any interest in a company held by a private equity fund or to any interest held by

a person that is not affiliated with the financial holding company.

(c) *How long do these thresholds remain in effect?* This §1500.5 shall cease to be effective on the date that a final rule issued by the Board that specifically addresses the appropriate regulatory capital treatment of merchant banking investments becomes effective.

§1500.6 What risk management, record keeping and reporting policies are required to make merchant banking investments?

(a) *What internal controls and records are necessary?*—(1) *General.* A financial holding company, including a private equity fund controlled by a financial holding company, that makes investments under this part must establish and maintain policies, procedures, records and systems reasonably designed to conduct, monitor and manage such investment activities and the risks associated with such investment activities in a safe and sound manner, including policies, procedures, records and systems reasonably designed to:

(i) Monitor and assess the carrying value, market value and performance of each investment and the aggregate portfolio;

(ii) Identify and manage the market, credit, concentration and other risks associated with such investments;

(iii) Identify, monitor and assess the terms, amounts and risks arising from transactions and relationships (including contingent fees or contingent interests) with each company in which the financial holding company holds an interest under this part;

(iv) Ensure the maintenance of corporate separateness between the financial holding company and each company in which the financial holding company holds an interest under this part and protect the financial holding company and its depository institution subsidiaries from legal liability for the operations conducted and financial obligations of each such company; and

(v) Ensure compliance with this part.

(2) *Availability of records.* A financial holding company must make the policies, procedures and records required by paragraph (a)(1) of this section available to the Board or the appropriate Reserve Bank upon request.

(b) Certain additional recordkeeping and reporting requirements for merchant banking investments are set forth in the Board's Regulation Y, 12 CFR 225.175.

§1500.7 How do the statutory cross marketing and sections 23A and B limitations apply to merchant banking investments?

Certain cross-marketing limitations and limitations under sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c, 371c-1) applicable to merchant banking investments are set forth in the Board's Regulation Y, 12 CFR 225.176.

§1500.8 Definitions.

(a) *What do references to a financial holding company include?*—(1) Except as otherwise expressly provided, the term ''financial holding company'' as used in this part means the financial holding company and all of its subsidiaries, including a private equity fund or other fund controlled by the financial holding company.

(2) Except as otherwise expressly provided, the term ''financial holding company'' does not include a depository institution or subsidiary of a depository institution or any portfolio company controlled directly or indirectly by the financial holding company.

(b) *What do references to a depository institution include?* For purposes of this part, the term ''depository institution'' includes a U.S. branch or agency of a foreign bank.

(c) *What is a portfolio company?* A portfolio company is any company or entity:

(1) That is engaged in any activity not authorized for the financial holding company under section 4 of the Bank Holding Company Act (12 U.S.C. 1843); and

(2) Any shares, assets or ownership interests of which are held, owned or controlled directly or indirectly by the financial holding company pursuant to this part, including through a private equity fund that the financial holding company controls.

(d) *Who are the executive officers of a company?*—(1) An executive officer of a

company is any person who participates or has the authority to participate (other than in the capacity as a director) in major policymaking functions of the company, whether or not the officer has an official title, the title designates the officer as an assistant, or the officer serves without salary or other compensation.

(2) The term ''executive officer'' does not include—

(i) Any person, including a person with an official title, who may exercise a certain measure of discretion in the performance of his duties, including the discretion to make decisions in the ordinary course of the company's business, but who does not participate in the determination of major policies of the company and whose decisions are limited by policy standards fixed by senior management of the company; or

(ii) Any person who is excluded from participating (other than in the capacity of a director) in major policymaking functions of the company by resolution of the board of directors or by the bylaws of the company and who does not in fact participate in such policymaking functions.

(e) *What is the Board?* The Board means the Board of Governors of the Federal Reserve System.

(f) *How are other terms that are used in this part defined?* Unless otherwise defined in this part, all terms used have the meanings given such terms in the Board's Regulation Y (12 CFR Part 225).

PART 1501—FINANCIAL SUBSIDIARIES

Sec.

AUTHORITY: Section 5136A of the Revised Statutes of the United States (12 U.S.C. 24a).

SOURCE: 65 FR 14821, Mar. 20, 2000, unless otherwise noted.

§ 1501.1 How do you request the Secretary to determine that an activity is financial in nature or incidental to a financial activity?

(a) *Requests regarding activities that may be financial in nature or incidental to a financial activity.* A national bank or other interested party may request the Secretary to determine that an activity not defined to be financial in nature or incidental to a financial activity in Section 4(k)(4) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)), is financial in nature or incidental to a financial activity.

(b) *What information must the request contain?* A request submitted under this section must be in writing and must:

(1) Identify and define the activity for which the determination is sought, specifically describing what the activity would involve and how the activity would be conducted;

(2) Explain in detail why the activity should be considered financial in nature or incidental to a financial activity; and

(3) Provide information supporting the requested determination and any other information required by the Secretary concerning the proposed activity.

(c) *What factors will the Secretary take into account in making his determination?* (1) Section 121 of the Gramm-Leach-Bliley Act (GLBA) (Public Law 106–102, 113 Stat. 1373) requires the Secretary to take into account the following factors in making his determination:

(i) The purposes of section 5136A of the Revised Statutes (12 U.S.C. 24a) and the GLBA;

(ii) Changes or reasonably expected changes in the marketplace in which banks compete;

(iii) Changes or reasonably expected changes in the technology for delivering financial services; and

(iv) Whether the activity is necessary or appropriate to allow a bank and the subsidiaries of a bank to—

(A) Compete effectively with any company seeking to provide financial services in the United States;

(B) Efficiently deliver information and services that are financial in nature through the use of technological

means, including any application necessary to protect the security or efficacy of systems for the transmission of data or financial transactions; and

(C) Offer customers any available or emerging technological means for using financial services or for the document imaging of data.

(2) Because the Secretary is required to consider the factors in paragraph (c)(1) of this section in making his determination, any request should address the factors in paragraph (c)(1) of this section. The Secretary may also consider other relevant factors.

(d) *What action will the Secretary take after receiving a request?*—(1) *Consultation with the Board of Governors of the Federal Reserve System (Board).* Upon receiving the request, the Secretary will send a copy to the Board and consult with the Board in accordance with section 5136A(b)(1)(B)(i) of the Revised Statutes (12 U.S.C. 5136A(b)(1)(B)(i)).

(2) *Public notice.* The Secretary may, as appropriate and after consultation with the Board, publish a description of the proposal in the FEDERAL REGISTER with a request for public comment.

(e) *How and when will the Secretary act on a request?* In the case of each request, the Secretary:

(1) Will inform the requester of the Secretary's final determination regarding the requested activity; and

(2) Will endeavor to inform the requester of the Secretary's final determination within 60 days of completion of both the consultative process described in paragraph (d)(1) of this section and the public comment period, if any.

(f) *What must a national bank do in order for a financial subsidiary to engage in activities that the Secretary has determined are financial in nature or incidental to financial activities?* Once the Secretary determines that an activity is financial in nature or incidental to a financial activity (either in accordance with this section or after evaluation of a proposal raised by the Board under section 5136A(b)(1)(B)(ii) of the Revised Statutes), a financial subsidiary may engage in the activity subject to the requirements of 12 CFR part 5 and in accordance with any terms or conditions established by the Secretary in connection with authorizing the activity.

§ 1501.2 What activities has the Secretary determined to be financial in nature or incidental to a financial activity?

(a) *Activities permitted under section 5136A(b)(3) of the Revised Statutes (12 U.S.C. 24a(b)(3)).* (1) The following types of activities are financial in nature or incidental to a financial activity when conducted pursuant to a determination by the Secretary under paragraph (a)(2) of this section:

(i) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities;

(ii) Providing any device or other instrumentality for transferring money or other financial assets; and

(iii) Arranging, effecting, or facilitating financial transactions for the account of third parties.

(2) *Review of specific activities*— (i) *Is a specific request required?* A financial subsidiary that wishes to engage on the basis of paragraph (a)(1) of this section in an activity that is not otherwise permissible for a financial subsidiary must obtain a determination from the Secretary that the activity is permitted under paragraph (a)(1).

(ii) *Consultation with the Board of Governors of the Federal Reserve System.* After receiving a request under this section, the Secretary will provide the Board of Governors of the Federal Reserve System (Board) with a copy of the request and consult with the Board in accordance with section 5136A(b)(1)(B)(i) of the Revised Statutes (12 U.S.C. 24a(b)(1)(B)(i)).

(iii) *Secretary action on requests.* After consultation with the Board, the Secretary will promptly make a written determination regarding whether the specific activity described in the request is included in an activity category listed in paragraph (a)(1) of this section and is therefore either financial in nature or incidental to a financial activity.

(3) *What factors will the Secretary consider?* In evaluating a request made under this section, the Secretary will take into account the factors listed in

section 5136A(b)(2) of the Revised Statutes (12 U.S.C. 24a(b)(2)) that the Secretary must consider when determining whether an activity is financial in nature or incidental to a financial activity.

(4) *What information must the request contain?* Any request by financial subsidiary under this section must be in writing and must:

(i) Identify and define the activity for which the determination is sought, specifically describing what the activity would involve and how the activity would be conducted; and

(ii) Provide information supporting the requested determination, including information regarding how the proposed activity falls into one of the categories listed in paragraph (a)(1) of this section, and any other information required by the Secretary concerning the proposed activity.

(b) [Reserved]

[66 FR 260, Jan. 3, 2001]

§ 1501.3 Comparable ratings requirement for national banks among the second 50 largest insured banks.

(a) *Scope and purpose.* Section 5136A of the Revised Statutes permits a national bank that is within the second 50 largest insured banks to own or control a financial subsidiary only if, among other requirements, the bank satisfies the eligible debt requirement set forth in section 5136A or an alternative criteria jointly established by the Secretary of the Treasury and the Board of Governors of the Federal Reserve System. This section establishes the alternative criteria that a national bank among the second 50 largest insured banks may meet, which criteria is comparable to and consistent with the purposes of the eligible debt requirement established by section 5136A.

(b) *Alternative criteria.* A national bank satisfies the alternative criteria referenced in Section 5136A(a)(2)(E) of the Revised Statutes (12 U.S.C. 24a) and 12 CFR 5.39(g)(3) if the bank has a current long-term issuer credit rating from at least one nationally recognized statistical rating organization that is within the three highest investment grade rating categories used by the organization.

(c) *Definition of long-term issuer credit rating.* A ''long-term issuer credit rating'' is a written opinion issued by a nationally recognized statistical rating organization of the bank's overall capacity and willingness to pay on a timely basis its unsecured, dollar-denominated financial obligations maturing in not less than one year.

[66 FR 8750, Feb. 2, 2001]

PARTS 1502–1503 [RESERVED]

PARTS 1505–1507 [RESERVED]

SUBCHAPTER B—RESOLUTION FUNDING CORPORATION

PART 1510—RESOLUTION FUNDING CORPORATION OPERATIONS

Sec.

AUTHORITY: 12 U.S.C. 1441b; Sec. 14(d), Pub. L. 105–216, 112 Stat. 910.

SOURCE: 65 FR 12069, Mar. 8, 2000, unless otherwise noted.

§ 1510.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the authority of section 14(d) of the Homeowners Protection Act of 1998 (Public Law 105–216, 112 Stat. 910) and section 21B(l) of the Federal Home Loan Bank Act (12 U.S.C. 1441b(l)).

(b) *Purpose and scope.* The purpose of this part is to provide direction to the Funding Corporation in carrying out its statutory mandate to make interest payments on its outstanding debt obligations. This part also provides direction to the Funding Corporation regarding funding the administrative costs of its operations. This part does not provide direction to the Funding Corporation, however, on activities that the Funding Corporation is authorized to carry out under the Act, but that it previously has completed or is not likely to undertake in the future, such as raising capital and issuing obligations. Although the Funding Corporation continues to have statutory authority to undertake these activities, the circumstances under which it would do so are limited. If such circumstances were to arise, the Secretary has the authority to provide any necessary direction to the Funding Corporation.

(c) *Authority of the Funding Corporation.* The Funding Corporation may exercise all authority granted to it by the Act in accordance with its bylaws, whether or not specifically implemented by regulation, subject to the requirements of this part and such other regulations, orders and directions as the Secretary may prescribe.

§ 1510.2 Definitions.

The following definitions apply to terms used in this part unless the context requires otherwise:

Act means the Federal Home Loan Bank Act (12 U.S.C. 1421 *et seq.*).

Administrative expenses means costs incurred as necessary to carry out the functions of the Funding Corporation, including custodian fees, but does not include any interest on obligations.

Bank means a Federal Home Loan Bank established under the authority of the Act.

Custodian fee means any fee incurred by the Funding Corporation in connection with the transfer of any security to, or the maintenance of any security in, the Funding Corporation Principal Fund and any other expense incurred in connection with the establishment or maintenance of the Funding Corporation Principal Fund.

Directorate means the Directorate of the Funding Corporation established pursuant to section 21B(c) of the Act (12 U.S.C. 1421b(c)).

FDIC means the Federal Deposit Insurance Corporation established pursuant to section 1 of the Federal Deposit Insurance Act (12 U.S.C. 1811, *et seq.*).

Finance Board means the Federal Housing Finance Board established pursuant to section 2A(a)(1) of the Act.

FSLIC Resolution Fund means the Federal Savings and Loan Insurance Corporation Resolution Fund established pursuant to section 11A(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1811, *et seq.*).

Funding Corporation means the Resolution Funding Corporation established pursuant to section 21B(b) of the Act.

Funding Corporation Principal Fund means the separate account established under section 21B(g)(2) of the Act.

Interest payment due date means the date on which the next quarterly interest payments on obligations are due.

Net earnings means net earnings after deducting expenses relating to section 10(j) of the Act (Affordable Housing Program) and operating expenses, but without reduction for chargeoffs and payments to fund interest payments on obligations.

Obligations means bonds issued by the Funding Corporation under section 21B(f) of the Act.

RTC means the Resolution Trust Corporation established pursuant to section 21A(b)(1)(A) of the Act and which terminated on December 31, 1995, pursuant to section 21A(m) of the Act.

Secretary means the Secretary of the Treasury or the designee of the Secretary of the Treasury.

§ 1510.3 How does the Funding Corporation pay administrative expenses?

(a) *The Directorate proposes a budget.* By November 15 of each year, the Directorate must approve and submit to the Secretary a proposed budget for the administrative expenses of the Funding Corporation for the following year.

(b) *The Secretary approves the budget.* The Funding Corporation's budget is subject to the Secretary's prior approval. The proposed budget submitted by the Directorate shall be deemed to be approved by the Secretary unless the Secretary disapproves it within 45 days of the date submitted. The Funding Corporation must transmit a copy of the approved budget to each Bank.

(c) *Budget changes must be approved by the Secretary.* If the Funding Corporation projects or anticipates incurring expenses exceeding its approved budget, the Directorate must submit an amended budget to the Secretary for approval.

(d) *The Funding Corporation collects funds from the Banks to pay its administrative expenses.* At least semiannually, the Funding Corporation must request that each Bank submit within 10 business days of the request payment for a portion of the administrative expenses in the Funding Corporation's budget for the current calendar year. The amount of each Bank's payment must be pro rated according to the percentage of the total outstanding Funding Corporation capital stock owned by the Bank. The Funding Corporation must adjust the amount of each Bank's payment as necessary to reflect differences between aggregate projected and actual administrative expenses incurred during the calendar year and to reflect any changes in estimated aggregate administrative expenses for the coming period. The Funding Corporation must not request payments from the Banks that, in the aggregate, exceed the administrative expenses in the Funding Corporation's approved budget.

§ 1510.4 Who may act as the depositary and fiscal agent for the Funding Corporation?

(a) *In general, the Federal Reserve Banks.* The Funding Corporation must use one or more Federal Reserve Banks as depositaries for or fiscal agents or custodians of the Funding Corporation.

(b) *For administrative accounts, insured depository institutions.* Subject to approval by the Secretary, the Funding Corporation may establish demand deposit accounts at one or more federally insured depository institutions for the management of funds used to pay administrative expenses.

§ 1510.5 How does the Funding Corporation make interest payments on its obligations?

(a) *The Funding Corporation must obtain funds from up to four sources.* The Funding Corporation must pay the interest due on its obligations with funds it obtains from the following sources and in the following order:

(1) Earnings on assets of the Funding Corporation not invested in the Funding Corporation Principal Fund.

(2) To the extent funds identified in paragraph (a)(1) of this section are insufficient, the Funding Corporation must obtain from each Bank in each calendar year payments totaling 20 percent of the net earnings of the Bank. The Funding Corporation must not obtain funds from a Bank under this paragraph after the date upon which the term of the Bank's payment obligation has ended, as determined by the Finance Board pursuant to section 21B(f)(2)(C)(iii) of the Act.

(3) To the extent funds identified in paragraphs (a)(1) and (2) of this section are insufficient, the Funding Corporation must obtain from the FSLIC Resolution Fund amounts available from any net proceeds from the sale of assets received from the RTC by the FSLIC Resolution Fund.

(4) To the extent that funds from the sources identified in paragraphs (a)(1) through (3) of this section are insufficient, the Funding Corporation must obtain from the Secretary the additional amount due.

(b) *The Funding Corporation must obtain projections of funds availability from the Banks and the FSLIC Resolution Fund.* Not later than March 15, June 15, September 15, and December 15 of each year:

(1) The Funding Corporation must obtain from each Bank a statement signed by an officer of such Bank containing sufficient information on the Banks net earnings to enable the Funding Corporation to make quarterly projections of funds available from the Bank for the current quarter and the next three quarters; and

(2) The Funding Corporation must obtain from an authorized representative of the FSLIC Resolution Fund projections of the amount of funds available in the current quarter and the next three quarters from the net proceeds from the sale of received from the RTC.

(c) *The Funding Corporation must report funding projections to the Secretary.* Not later than March 20, June 20, September 20, and December 20 of each year, the Funding Corporation must submit to the Secretary a report containing:

(1) The aggregate amounts of each of the next four quarterly interest payments due on obligations; and

(2) The amounts projected to be available to fund such payments from:

(i) Earnings on assets of the Funding Corporation not invested in the Funding Corporation Principal Fund;

(ii) Payments from the Banks; and

(iii) Funds transferred from the FSLIC Resolution Fund.

(d) *The Funding Corporation must request funds from the Banks, the FSLIC Resolution Fund, and the Secretary*—(1) *Requests to the Banks.* Not less than four business days prior to the interest payment due date, the Funding Corporation must obtain from each Bank a report of its actual net earnings for the prior quarter and notify each Bank in writing of the interest payment due date and the amount of the payment due from the Bank. To the extent funds identified in paragraph (a)(1) of this section are insufficient to pay the interest due, the amount of each Bank's payment must be 20 percent of the Bank's actual quarterly net earnings, taking into account any adjustment to the Bank's earnings for any previous quarters. The Funding Corporation must request the Bank to provide payment through wiring immediately available and finally collected funds to the Funding Corporation no later than the interest payment due date.

(2) *Request to the FSLIC Resolution Fund.* On the day the Funding Corporation notifies the Banks of the payments due from them under paragraph (d)(1) of this section, the Funding Corporation must:

(i) Notify the FSLIC Resolution Fund in writing of:

(A) The interest payment due date;

(B) The aggregate amount of the quarterly interest payment due on that date; and

(C) The amount of the quarterly interest payment that will be funded by earnings on assets of the Funding Corporation not invested in the Funding Corporation Principal Fund and payments due from the Banks; and

(ii) Request that the FSLIC Resolution Fund transfer to the Funding Corporation by noon on the third business day prior to the interest payment due date any funds available from the net proceeds from the sale of assets received from the RTC, to the extent funds identified in paragraphs (a)(1) and (2) of this section are insufficient to pay the interest due.

(3) *Request to the Secretary.* No less than three business days prior to the interest payment due date, the Funding Corporation must request payment from the Secretary by providing a certification, in a form satisfactory to the Secretary, stating the total amounts of the quarterly interest payment to be paid by the Funding Corporation from sources other than the Secretary and

the amounts necessary to make up the deficiency. Any amount paid by the Secretary becomes a liability of the Funding Corporation to be repaid to the Secretary upon the dissolution of the Funding Corporation, to the extent of its remaining assets.

[65 FR 12069, Mar. 8, 2000, as amended at 66 FR 47071, Sept. 11, 2001]

§ 1510.6 What must the Funding Corporation do with surplus funds?

If the Funding Corporation has funds that are not needed for current interest payments on obligations, it must invest the funds in obligations of the United States issued by the Secretary, in accordance with an investment policy approved by the Secretary.

§ 1510.7 What are the Funding Corporation's reporting requirements?

In addition to the budget submission required by §1510.3 and the funding projection reports required by §1510.5, the Funding Corporation must prepare such reports as the Secretary may require, including reports necessary to assist the Secretary in making the annual report to Congress and the President on the Funding Corporation under section 21B(i) of the Act.

§ 1510.8 What are the audit requirements for the Funding Corporation?

The Funding Corporation must obtain an audit of its books and records by an independent external auditor at least annually.

PART 1511—BOOK-ENTRY PROCEDURE

Sec.

AUTHORITY: 12 U.S.C. 1441b.

SOURCE: 61 FR 66875, Dec. 19, 1996, unless otherwise noted.

§ 1511.0 Applicability.

The regulations in this part apply to Book-entry Funding Corporation Securities.

§ 1511.1 Definitions of terms.

In this part, unless the context indicates otherwise:

Act means the Federal Home Loan Bank Act as amended (12 U.S.C. 1421 *et seq.*).

Adverse Claim means a claim that a claimant has a property interest in a Book-entry Funding Corporation Security and that it is a violation of the rights of the claimant for another Person to hold, transfer, or deal with the Book-entry Funding Corporation Security.

Book-entry Funding Corporation Security means a Funding Corporation Security in book-entry form that is issued or maintained in the Book-entry System. Solely for the purposes of this Part, it also means the separate interest and principal components of a Book-entry Funding Corporation Security if such security has been divided into such components as authorized by the Securities Documentation and the components are maintained separately on the books of one or more Federal Reserve Banks.

Book-entry System means the automated book-entry system operated by the Federal Reserve Banks acting as the fiscal agent for the Funding Corporation, on which Book-entry Funding Corporation Securities are issued, recorded, transferred and maintained in book-entry form.

Entitlement Holder means a Person to whose account an interest in a Book-entry Funding Corporation Security is credited on the records of a Securities Intermediary.

Federal Reserve Bank or Reserve Bank means a Federal Reserve Bank or Branch.

Federal Reserve Bank Operating Circular means the publication issued by each Federal Reserve Bank that sets forth the terms and conditions under which the Reserve Bank maintains

book-entry Securities accounts (including Book-entry Funding Corporation Securities) and transfers book-entry Securities (including Book-entry Funding Corporation Securities).

Funding Corporation means the Resolution Funding Corporation established pursuant to section 21B(b) of the Act.

Funding Corporation Security or *Security* means a Funding Corporation bond, note, debenture and similar obligations issued under section 21B of the Act.

Funds Account means a reserve and/or clearing account at a Federal Reserve Bank to which debits or credits are posted for transfers against payment, book-entry securities transaction fees, or principal and interest payments.

Participant means a Person that maintains a Participant's Securities Account with a Federal Reserve Bank.

Participant's Securities Account means an account in the name of a Participant at a Federal Reserve Bank to which Book-entry Funding Corporation Securities held for a Participant are or may be credited.

Person means and includes an individual, corporation, company, governmental entity, association, firm, partnership, trust, estate, representative, and any other similar organization, but does not mean or include the United States, the Funding Corporation, or a Federal Reserve Bank.

Revised Article 8 means Uniform Commercial Code, Revised Article 8, Investment Securities (with Conforming and Miscellaneous Amendments to Articles 1, 3, 4, 5, 9, and 10) 1994 Official Text. Revised Article 8 of the Uniform Commercial Code is incorporated by reference in this Part pursuant to 5 U.S.C. 552(a) and 1 CFR Part 51. Article 8 was adopted by the American Law Institute and the National Conference of Commissioners on Uniform State laws and approved by the American Bar Association on February 14, 1995. Copies of this publication are available from the Executive Office of the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, IL 60611. Copies are also available for public inspection at the Department of the Treasury Library, Room 5030, main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington DC 20220, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Securities Documentation means the applicable offering circular, supplement, or other documents establishing the terms of a Book-entry Funding Corporation Security.

Securities Intermediary means:

(1) A Person that is registered as a ''clearing agency'' under the Federal securities laws; a Federal Reserve Bank; any other Person that provides clearance or settlement services with respect to a Book-entry Funding Corporation Security that would require it to register as a clearing agency under the Federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a Federal or State governmental authority; or

(2) A Person (other than an individual, unless such individual is registered as a broker or dealer under the federal securities laws) including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

Security Entitlement means the rights and property interest of an Entitlement Holder with respect to a Book-entry Funding Corporation Security.

State means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.

Transfer message means an instruction of a Participant to a Federal Reserve Bank to effect a transfer of a Book-entry Funding Corporation Security, as set forth in Federal Reserve Bank Operating Circulars.

[61 FR 66875, Dec. 19, 1996, as amended at 69 FR 18803, Apr. 9, 2004]

§ 1511.2 Law governing rights and obligations of the Funding Corporation and Federal Reserve Banks; rights of any Person against the Funding Corporation and the Federal Reserve Banks.

(a) Except as provided in paragraph (b) of this section, the following are governed solely by the regulations contained in this part 1511, the Securities Documentation and Federal Reserve Bank Operating Circulars:

(1) The rights and obligations of the Funding Corporation and the Federal Reserve Banks with respect to:

(i) A Book-entry Funding Corporation Security or Security Entitlement; and

(ii) The operation of the Book-entry System as it applies to Funding Corporation Securities; and

(2) The rights of any Person, including a Participant, against the Funding Corporation and the Federal Reserve Banks with respect to:

(i) A Book-entry Funding Corporation Security or Security Entitlement; and

(ii) The operation of the Book-entry System as it applies to Funding Corporation Securities.

(b) A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Participant and that is not recorded on the books of a Federal Reserve Bank pursuant to §1511.4(c)(1), is governed by the law (not including the conflict-of-law rules) of the jurisdiction where the head office of the Federal Reserve Bank maintaining the Participant's Securities Account is located. A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Person that is not a Participant, and that is not recorded on the books of a Federal Reserve Bank pursuant to §1511.4(c)(1), is governed by the law determined in the manner specified in §1511.3.

(c) If the jurisdiction specified in the first sentence of paragraph (b) of this section is a State that has not adopted Revised Article 8 (incorporated by reference, see §1511.1), then the law specified in paragraph (b) shall be the law of that State as though Revised Article 8 had been adopted by that State.

§ 1511.3 Law governing other interests.

(a) To the extent not inconsistent with the regulations in this part, the law (not including the conflict-of-law rules) of a Securities Intermediary's jurisdiction governs:

(1) The acquisition of a Security Entitlement from the Securities Intermediary;

(2) The rights and duties of the Securities Intermediary and Entitlement Holder arising out of a Security Entitlement;

(3) Whether the Securities Intermediary owes any duties to an adverse claimant to a Security Entitlement;

(4) Whether an Adverse Claim can be asserted against a Person who acquires a Security Entitlement from the Securities Intermediary or a Person who purchases a Security Entitlement or interest therein from an Entitlement Holder; and

(5) Except as otherwise provided in paragraph (c) of this section, the perfection, effect of perfection or non-perfection and priority of a security interest in a Security Entitlement.

(b) The following rules determine a ''Securities Intermediary's jurisdiction'' for purposes of this section:

(1) If an agreement between the Securities Intermediary and its Entitlement Holder specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the Securities Intermediary's jurisdiction.

(2) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify the governing law as provided in paragraph (b)(1) of this section, but expressly specifies that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the Securities Intermediary's jurisdiction.

(3) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify a jurisdiction as provided in paragraph (b)(1) or (b)(2) of this section, the Securities Intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the Entitlement Holder's account.

(4) If an agreement between the Securities Intermediary and its Entitlement Holder does not specify a jurisdiction as provided in paragraph (b)(1) or (b)(2) of this section and an account statement does not identify an office serving the Entitlement Holder's account as provided in paragraph (b)(3) of this section, the Securities Intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the Securities Intermediary.

(c) Notwithstanding the general rule in paragraph (a)(5) of this section, the law (but not the conflict-of-law rules) of the jurisdiction in which the Person creating a security interest is located governs whether and how the security interest may be perfected automatically or by filing a financing statement.

(d) If the jurisdiction specified in paragraph (b) of this section is a State that has not adopted Revised Article 8 (incorporated by reference, see §1511.1), then the law for the matters specified in paragraph (a) of this section shall be the law of that State as though Revised Article 8 had been adopted by that State. For purposes of the application of the matters specified in paragraph (a) of this section, the Federal Reserve Bank maintaining the Securities Account is a clearing corporation, and the Participant's interest in a Book-entry Funding Corporation Security is a Security Entitlement.

§1511.4 Creation of Participant's Security Entitlement; security interests.

(a) A Participant's Security Entitlement is created when a Federal Reserve Bank indicates by book-entry that a Book-entry Funding Corporation Security has been credited to a Participant's Securities Account.

(b) A security interest in a Security Entitlement of a Participant in favor of the United States to secure deposits of public money, including without limitation deposits to the Treasury tax and loan accounts, or other security interest in favor of the United States that is required by Federal statute, regulation, or agreement, and that is marked on the books of a Federal Reserve Bank is thereby effected and perfected, and has priority over any other interest in the securities. Where a security interest in favor of the United States in a Security Entitlement of a Participant is marked on the books of a Federal Reserve Bank, such Reserve Bank may rely, and is protected in relying, exclusively on the order of an authorized representative of the United States directing the transfer of the security. For purposes of this paragraph, an ''authorized representative of the United States'' is the official designated in the applicable regulations or agreement to which a Federal Reserve Bank is a party, governing the security interest.

(c)(1) The Funding Corporation and the Federal Reserve Banks have no obligation to agree to act on behalf of any Person or to recognize the interest of any transferee of a security interest or other limited interest in favor of any Person except to the extent of any specific requirement of Federal law or regulation or to the extent set forth in any specific agreement with the Federal Reserve Bank on whose books the interest of the Participant is recorded. To the extent required by such law or regulation or set forth in an agreement with a Federal Reserve Bank, or the Federal Reserve Bank Operating Circular, a security interest in a Security Entitlement that is in favor of a Federal Reserve Bank, the Funding Corporation, or a Person may be created and perfected by a Federal Reserve Bank marking its books to record the security interest. Except as provided in paragraph (b) of this section, a security interest in a Security Entitlement marked on the books of a Federal Reserve Bank shall have priority over any other interest in the securities.

(2) In addition to the method provided in paragraph (c)(1) of this section, a security interest in a Security Entitlement, including a security interest in favor of a Federal Reserve Bank, may be perfected by any method by which a security interest may be perfected under applicable law as described in §1511.2(b) or §1511.3. The perfection, effect of perfection or non-perfection and priority of a security interest are governed by such applicable law. A security interest in favor of a Federal Reserve Bank shall be treated as a security interest in favor of a

clearing corporation in all respects under such law, including with respect to the effect of perfection and priority of such security interest. A Federal Reserve Bank Operating Circular shall be treated as a rule adopted by a clearing corporation for such purposes.

§ 1511.5 Obligations of Funding Corporation; no adverse claims.

(a) Except in the case of a security interest in favor of the United States or a Federal Reserve Bank or otherwise as provided in § 1511.4(c)(1), for the purposes of this part 1511, the Funding Corporation and the Federal Reserve Banks shall treat the Participant to whose Securities Account an interest in a Book-entry Funding Corporation Security has been credited as the Person exclusively entitled to issue a Transfer Message, to receive interest and other payments with respect thereof and otherwise to exercise all the rights and powers with respect to such Security, notwithstanding any information or notice to the contrary. Neither the Federal Reserve Banks nor the Funding Corporation is liable to a Person asserting or having an Adverse Claim to a Security Entitlement or to a Book-entry Funding Corporation Security in a Participant's Securities Account, including any such claim arising as a result of the transfer or disposition of a Book-entry Funding Corporation Security by a Federal Reserve Bank pursuant to a Transfer Message that the Federal Reserve Bank reasonably believes to be genuine.

(b) The obligation of the Funding Corporation to make payments of interest and principal with respect to Book-entry Funding Corporation Securities is discharged at the time payment in the appropriate amount is made as follows:

(1) Interest on Book-entry Funding Corporation Securities is either credited by a Federal Reserve Bank to a Funds Account maintained at such Bank or otherwise paid as directed by the Participant.

(2) Book-entry Funding Corporation Securities are redeemed in accordance with their terms by a Federal Reserve Bank withdrawing the securities from the Participant's Securities Account in which they are maintained and by either crediting the amount of the redemption proceeds, including both principal and interest where applicable, to a Funds Account at such Bank or otherwise paying such principal and interest, as directed by the Participant. The principal of such Securities shall be paid using the proceeds of the noninterest bearing instruments maintained by the Funding Corporation for such purpose.

§ 1511.6 Authority of Federal Reserve Banks.

(a) Each Federal Reserve Bank is hereby authorized as fiscal agent of the Funding Corporation to perform functions with respect to the issuance of Book-entry Funding Corporation Securities offered and sold by the Funding Corporation, in accordance with the Securities Documentation, and Federal Reserve Bank Operating Circulars; to service and maintain Book-entry Funding Corporation Securities in accounts established for such purposes; to make payments of principal and interest with respect to such Book-entry Funding Corporation Securities as directed by the Funding Corporation; to effect transfer of Book-entry Funding Corporation Securities between Participants' Securities Accounts as directed by the Participants; and to perform such other duties as fiscal agent as may be requested by the Funding Corporation.

(b) Each Federal Reserve Bank may issue Operating Circulars not inconsistent with this Part, governing the details of its handling of Book-entry Funding Corporation Securities, Security Entitlements, and the operation of the Book-Entry System under this Part.

§ 1511.7 Liability of the Funding Corporation and Federal Reserve Banks.

The Funding Corporation and the Federal Reserve Banks may rely on the information provided in a Transfer Message, or other documentation, and are not required to verify the information. The Funding Corporation and the Federal Reserve Banks shall not be liable for any action taken in accordance with the information set out in a

Transfer Message, other documentation, or evidence submitted in support thereof.

§ 1511.8 Notice of attachment.

The interest of a debtor in a Security Entitlement may be reached by a creditor only by legal process upon the Securities Intermediary with whom the debtor's securities account is maintained, except where a Security Entitlement is maintained in the name of a secured party, in which case the debtor's interest may be reached by legal process upon the secured party. The regulations in this part do not purport to establish whether a Federal Reserve Bank is required to honor an order or other notice of attachment in any particular case or class of cases.

PARTS 1512–1599 [RESERVED]

CHAPTER XVI—OFFICE OF FINANCIAL RESEARCH, DEPARTMENT OF THE TREASURY

PART 1600—ORGANIZATION AND FUNCTIONS OF THE OFFICE OF FINANCIAL RESEARCH

AUTHORITY: 5 U.S.C. 301, 7301, 31 U.S.C. 321, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) (Pub. L. 111–203); E.O. 12674, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 3 CFR, 1990 Comp., p. 306.

SOURCE: 76 FR 60708, Sept. 30, 2011, unless otherwise noted.

§ 1600.1 Standards of ethical conduct.

This section applies to the employees of the Office of Financial Research and is in addition to 5 CFR 3101.101–104, and 31 CFR part 0:

(a) *Definitions*—For purposes of this subpart:

(1) ''Business confidential information'' shall include trade secret or other formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers. This shall include nonpublic position and transaction data, as well as data provided to supervisors or regulators that is unpublished.

(2) ''Position data'' is defined as:

(i) Data on financial assets or liabilities held on the balance sheet of a financial company, where positions are created or changed by the execution of a financial transaction; and

(ii) Includes information that identifies counterparties, the valuation by the financial company of the position, and information that makes possible an independent valuation of the position.

(3) ''Transaction data'' is defined as the structure and legal description of a financial contract, with sufficient detail to describe the rights and obligations between counterparties and make possible an independent valuation.

(4) ''Micro-level data'' is defined as information specific to an individual transaction or position.

(5) ''Masked data'' is defined as data that has been altered to prevent attribution to a particular financial company.

(6) ''Financial company'' has the same meaning given to such term in title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301 *et seq.* (2010), and includes an insured depository institution and an insurance company.

(b) *One-year post-employment restriction.* (1) A current or former employee of the Office of Financial Research who has had access to the transaction or position data or business confidential information maintained by the Data Center about financial entities required to report to the Office may not, within one year after last having had access in the course of official duties to such transaction or position data or business confidential information, be employed by or provide advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(2) A current or former employee of the Office of Financial Research who has had limited access to the transaction or position data or business confidential information maintained by the Data Center about financial entities required to report to the Office may request a written waiver pursuant to paragraph (c) of this section from the Designated Agency Ethics Official to be employed by or provide advice or consulting services to a financial company, provided that the issuance of the waiver would not compromise any data or business confidential information.

(c) *Waivers*—The post-employment restrictions set forth in section 152(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act may be waived in whole or in part for an employee with limited access to the transaction or position data or business confidential information maintained by the Data Center if—

(1) The Designated Agency Ethics Official, in consultation with the Director of the Office of Financial Research or the Department's General Counsel in instances where consultation with the Director poses a conflict or the Director's position is vacant, determines in writing that such waiver is unlikely to compromise any financial company's business confidential information, unfairly advantage or disadvantage any financial company, or affect

the integrity or effectiveness of the Office of Financial Research.

(2) Relevant factors to be considered by the Designated Agency Ethics Official and the Director or General Counsel include—

(i) The nature and importance of the employee's position and the degree to which the employee had access to nonpublic or business confidential data for the purpose of analysis, standardization, or performing applied research or essential long-term research;

(ii) Whether the information to which the employee had access revealed positions or transactions of an individual financial company;

(iii) Whether the data, especially position data, remains sensitive considering changing circumstances or the passage of time;

(iv) Whether the employee had access to micro-level data, as compared to aggregated information;

(v) If the employee had access to micro-level data, whether it was sufficiently masked or coded to protect the identity of the provider or the subject financial company;

(vi) Whether the information to which the employee had access would provide a financial company employer with a competitive commercial advantage;

(vii) Whether the financial company employer has made a satisfactory representation that it has adopted screening measures which will effectively prevent a potential employee from sharing any transaction or position data or business confidential information acquired at the Office of Financial Research one year prior to accepting employment with the company;

(viii) Whether granting the waiver would affect the willingness of a financial company to continue to provide transaction or position data or business confidential information to the Office; and

(ix) Whether the proposed employment would create an appearance of impropriety or would otherwise adversely affect the interests of the government or compromise the integrity of the office.

(d) The following examples are illustrative of how the OFR post-employment prohibitions would apply under certain circumstances:

(1) *Example 1.* (i) Fact pattern: OFR employs a business data manager and such employee has no access to the transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to OFR.

(ii) Designated Agency Ethics Official's Determination: Upon termination of their employment by OFR, such employee would not be prohibited from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(2) *Example 2.* (i) Fact pattern: OFR employs a data analyst and such employee has access to transaction or position data across all sectors maintained by the Data Center or other business confidential information about specific financial entities required to report to OFR.

(ii) Designated Agency Ethics Official's Determination: Upon termination of their employment by OFR, such employee would be prohibited, for a period of one year immediately after leaving OFR, from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(3) *Example 3.* (i) Fact pattern: OFR employs a data analyst and such employee has access to transaction or position data across all sectors maintained by the Data Center or other business confidential information about specific financial entities required to report to OFR. Employee last had access to such data six months before termination of her employment at OFR.

(ii) Designated Agency Ethics Official's Determination: Upon termination of employment by OFR, such employee would be prohibited, for a period of six months immediately after leaving OFR, from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(4) *Example 4.* (i) Fact pattern: OFR employs a researcher and such employee has access only to ''aggregated'' or ''masked'' transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to OFR.

(ii) Designated Agency Ethics Official's Determination: Upon termination of their employment by OFR, such employee would not be prohibited from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(5) *Example 5.* (i) Fact pattern: OFR employs a data analyst and such employee has access to transaction or position data maintained by the Data Center or other business confidential information *relating to a particular sector (i.e. banking).*

(ii) Designated Agency Ethics Official's Determination: Upon termination of employment by OFR, such employee would be prohibited, for a period of one year immediately after leaving OFR, from being employed by or providing advice or consulting services to a financial company *in that particular sector (i.e. banking)* where such employment or services involves employment or advice or consulting services, regardless of whether that financial company is required to report to the Office. Such employee would be granted a waiver to work in other designated sectors immediately after leaving OFR.

(6) *Example 6.* (i) Fact pattern: OFR employs a data analyst and such employee has access to business confidential information in an area where data, such as equity mutual fund holdings, changes frequently. Employee last had access to such data six months before termination of her employment at OFR and, because of portfolio turnover, there is no risk of compromising business confidential information.

(ii) Designated Agency Ethics Official's Determination: Upon termination of their employment by OFR, such employee would not be prohibited from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

(7) *Example 7.* (i) Fact pattern: OFR employs an information technology specialist and such employee has access only to ''masked'' transaction or position data maintained by the Data Center or other ''masked'' business confidential information about specific financial entities required to report to OFR.

(ii) Designated Agency Ethics Official's Determination: Upon termination of their employment by OFR, such employee would not be prohibited from being employed by or providing advice or consulting services to a financial company, regardless of whether that financial company is required to report to the Office.

PARTS 1601–1609 [RESERVED]

PART 1610—REGULATORY DATA COLLECTIONS

Subpart A—Collections Generally

Sec.

Subpart B—Specific Collections

AUTHORITY: 12 U.S.C. 5343 and 5344.

SOURCE: 84 FR 4984, Feb. 20, 2019, unless otherwise noted.

Subpart A—Collections Generally

§ 1610.1 General authority.

The collections under this part are made pursuant to the authority contained in 12 U.S.C. 5343(a) and (c)(1) and 5344(b).

§ 1610.2 General definitions.

Council means the Financial Stability Oversight Council.

Legal Entity Identifier or LEI for an entity means the global legal entity identifier maintained for such entity by a utility accredited by the Global LEI Foundation or by a utility endorsed by the Regulatory Oversight

Committee that satisfies the standards implemented by the Global LEI Foundation. As used in this definition:

(1) Regulatory Oversight Committee means the Regulatory Oversight Committee (of the Global LEI System), whose charter was set forth by the Finance Ministers and Central Bank Governors of the Group of Twenty and the Financial Stability Board, or any successor thereof; and

(2) Global LEI Foundation means the not-for-profit organization organized under Swiss law by the Financial Stability Board in 2014, or any successor thereof.

Office means the U.S. Department of the Treasury's Office of Financial Research.

§ 1610.3 Treatment of collected information.

The Office will treat any financial transaction data or position data submitted to the Data Center under this part in accordance with the relevant provisions of law, including 12 U.S.C. 5343(b) and 5344(b).

§§ 1610.4–1610.9 [Reserved]

Subpart B—Specific Collections

§ 1610.10 Centrally cleared repurchase agreement data.

(a) *Definitions.*

Central counterparty means a clearing agency that interposes itself between the counterparties to transactions, acting functionally as the buyer to every seller and the seller to every buyer.

Clearing agency has the same meaning as set forth in 15 U.S.C. 78c(a)(23).

Covered reporter means any central counterparty for repurchase agreement transactions that meets the criteria set forth in paragraph (b)(2) of this section; provided, however, that any covered reporter shall cease to be a covered reporter only if it does not meet the dollar threshold specified in paragraph (b)(2) for at least four consecutive calendar quarters.

General collateral trade means a repurchase agreement transaction in which the trade reported to the central counterparty is for a category of securities as opposed to a specific security.

Repurchase agreement transaction or transaction means an agreement of a counterparty to transfer securities to another counterparty in exchange for the receipt of cash, and the simultaneous agreement of the former counterparty to later reacquire the same securities (or any subsequently substituted securities) from that same counterparty in exchange for the payment of cash; or an agreement of a counterparty to acquire securities from another counterparty in exchange for the payment of cash, and the simultaneous agreement of the former party to later transfer back the same securities (or any subsequently substituted securities) to the latter counterparty in exchange for the receipt of cash.

Specific-security trade means a repurchase agreement transaction where the trade as reported to the central counterparty is for a mutually agreed upon specific security.

(b) *Purpose and scope*—(1) *Purpose.* The purpose of this data collection is to require the reporting of certain information to the Office about repurchase agreement transactions cleared through a central counterparty. The information will be used by the Office to support the Council and Council member agencies by facilitating financial stability monitoring including research consistent with support of the Council and its member agencies, and to support the calculation of certain reference rates.

(2) *Scope of application.* Reporting under this Section is required by any central counterparty for repurchase agreement transactions that meets the definition of financial company set forth in 12 U.S.C. 5341(2) and whose average daily total open commitments in repurchase agreement contracts (gross cash positions prior to netting) across all services over all business days during the prior calendar quarter is at least $50 billion.

(c) *Data required.* (1) Covered reporters shall report trade and collateral information on all repurchase agreement transactions cleared through any of its services, subject to paragraph (c)(2) of this section, in accordance with the prescribed reporting format in this section.

(2) Covered reporters shall only report trade and collateral information with respect to any repurchase agreement transaction for which there is a current or future delivery obligation as of the file observation date, including forward-starting transactions.

(3) Covered reporters shall submit the following data elements for all general collateral trades:

TABLE 1 TO § 1610.10(c)—GENERAL COLLATERAL TRADES

Data element	Explanation
File Observation Date	The observation date of the file (typically one business day before the day the file is submitted).
Covered Reporter LEI	The Legal Entity Identifier of the covered reporter.
Transaction ID	Respondent-generated unique transaction identifier.
Submission Timestamp	Time that trade is first submitted to clearing service.
Match Timestamp	Time that trade is matched by clearing service.
Securities Asset Class Identifier Value	Asset class identifier.
Securities Asset Class Identifier Type	Type of securities identifier used (the numbering system to which the identifier belongs).
Cash Provider LEI	The Legal Entity Identifier of the cash provider.
Cash Provider Name	The legal name of the cash provider.
Cash Provider Internal Identifier	The internal identifier assigned by the covered reporter to the cash provider.
Cash Provider Direct Clearing Member LEI	The Legal Entity Identifier of the direct clearing member through which the cash provider accessed the clearing service.
Cash Provider Direct Clearing Member Name.	The legal name of the of the direct clearing member through which the cash provider accessed the clearing service.
Cash Provider Direct Clearing Member Internal Identifier.	The internal identifier assigned by the covered reporter to the direct clearing member through which the cash provider accessed the clearing service.
Securities Provider LEI	The Legal Entity Identifier of the securities provider.
Securities Provider Name	The legal name of the securities provider.
Securities Provider Internal Identifier	The internal identifier assigned by the covered reporter to the securities provider.
Securities Provider Direct Clearing Member LEI.	The Legal Entity Identifier of the direct clearing member through which the securities provider accessed the clearing service.
Securities Provider Direct Clearing Member Name.	The legal name of the direct clearing member through which the securities provider accessed the clearing service.
Securities Provider Direct Clearing Member Internal Identifier.	The internal identifier assigned by the covered reporter to the direct clearing member through which the securities provider accessed the clearing service.
Broker LEI	The Legal Entity Identifier of the broker.
Broker Name	The legal name of the broker.
Broker Internal Identifier	The internal identifier assigned by the covered reporter to the broker.
Start Date	The start date of the repurchase agreement.
End Date	The date the repurchase agreement matures.
Rate	The repurchase agreement rate, expressed as an annual percentage rate on an actual/360-day basis.
Principal	The amount of cash borrowed or lent.
Optionality	The type of optionality, if any, in the repurchase agreement.
Minimum Maturity	The earliest possible date on which the transaction could end in accordance with its contractual terms (taking into account optionality).

(4) Covered reporters shall submit the following data elements on the collateral delivered against net general collateral exposures for all general collateral trades:

TABLE 2 TO § 1610.10(c)—GENERAL COLLATERAL NET EXPOSURE

Data element	Explanation
File Observation Date	The observation date of the file (typically one business day before the day the file is submitted).
Covered Reporter LEI	The Legal Entity Identifier of the covered reporter.
Direct Clearing Member LEI	The Legal Entity Identifier of the direct clearing member of the clearing service.
Direct Clearing Member Name	The legal name of the direct clearing member.
Direct Clearing Member Internal Identifier.	The internal identifier assigned by the covered reporter to the direct clearing member.
Transaction Side	Indicates the side of the transaction: Collateral was received by or delivered from the covered reporter.
Securities Identifier Value	Identifier of securities transferred.

TABLE 2 TO § 1610.10(c)—GENERAL COLLATERAL NET EXPOSURE—Continued

Data element	Explanation
Securities Identifier Type	Type of securities identifier used (the numbering system to which the identifier belongs).
Securities Quantity	Par value or quantity (as applicable) of securities transferred.
Securities Value	The market value as of most recent valuation of securities transferred, including accrued interest.

(5) Covered reporters shall submit the following data elements for all specific-security trades:

TABLE 3 TO § 1610.10(c)—SPECIFIC-SECURITY TRADES

Data element	Explanation
File Observation Date	The observation date of the file (typically one business day before the day the file is submitted).
Covered Reporter LEI	The Legal Entity Identifier of the covered reporter.
Transaction ID	Respondent-generated unique transaction identifier.
Cash Provider LEI	The Legal Entity Identifier of the cash provider.
Cash Provider Name	The legal name of the cash provider.
Cash Provider Internal Identifier	The internal identifier assigned by the covered reporter to the cash provider.
Cash Provider Direct Clearing Member LEI	The Legal Entity Identifier of the direct clearing member through which the cash provider accessed the clearing service.
Cash Provider Direct Clearing Member Name.	The legal name of the of the direct clearing member through which the cash provider accessed the clearing service.
Cash Provider Direct Clearing Member Internal Identifier.	The internal identifier assigned by the covered reporter to the direct clearing member through which the cash provider accessed the clearing service.
Securities Provider LEI	The Legal Entity Identifier of the securities provider.
Securities Provider Name	The legal name of the securities provider.
Securities Provider Internal Identifier	The internal identifier assigned by the covered reporter to the securities provider.
Securities Provider Direct Clearing Member LEI.	The Legal Entity Identifier of the direct clearing member through which the securities provider accessed the clearing service.
Securities Provider Direct Clearing Member Name.	The legal name of the direct clearing member through which the securities provider accessed the clearing service.
Securities Provider Direct Clearing Member Internal Identifier.	The internal identifier assigned by the covered reporter to the direct clearing member through which the securities provider accessed the clearing service.
Broker LEI	The Legal Entity Identifier of the broker.
Broker Name	The legal name of the broker.
Broker Internal Identifier	The internal identifier assigned by the covered reporter to the broker.
Submission Timestamp	Time that trade is first submitted to clearing service.
Match Timestamp	Time that trade is matched by clearing service.
Start Date	The start date of the repurchase agreement.
End Date	The date when the repurchase agreement matures; the close leg settlement date.
Optionality	The type of optionality, if any.
Minimum Maturity	The earliest possible date on which the transaction could end in accordance with its contractual terms (taking into account optionality).
Security Identifier Value	Identifier of pledged security.
Securities Identifier Type	Type of securities identifier used (the numbering system to which the identifier belongs).
Securities Quantity	Par value or quantity (as applicable) of securities transferred.
Substitution Collateral Identifier Value	Asset class identifier or no substitution.
Substitution Collateral Identifier Type	Type of securities identifier used (the numbering system to which the identifier belongs).
Cash Provider Start Leg Amount	The amount of cash transferred by the cash provider on the open leg of the transaction.
Securities Provider Start Leg Amount	The amount of cash received by the securities provider on the open leg of the transaction.
Cash Provider Rate	The rate of interest received by the cash provider, expressed as an annual percentage rate on an actual/360-day basis.
Securities Provider Rate	The rate of interest paid by the securities provider, expressed as an annual percentage rate on an actual/360-day basis.
Cash Provider Close Leg Settlement Amount.	The amount of cash received by the cash provider on the close leg of the transaction.
Securities Provider Close Leg Settlement Amount.	The amount of cash paid by the securities provider on the close leg of the transaction.

(d) *Reporting process and collection agent.* The Office may designate a collection agent for the data reporting. Covered reporters shall submit the required data for each business day by 6:00 a.m. Eastern time on the following business day.

(e) *Compliance.* (1) Any central counterparty that is a covered reporter as of the effective date of this Section shall comply with the reporting requirements pursuant to this Section in the following manner:

(i) Subject to paragraph (e)(1)(iii) of this section, a covered reporter shall begin reporting all data elements required to be submitted pursuant to paragraph (c)(5) of this section within 180 days after April 22, 2019.

(ii) Subject to paragraph (e)(1)(iii) of this section, a covered reporter shall begin reporting all data elements required to be submitted pursuant to paragraphs (c)(3) and (4) of this section within 240 days after April 22, 2019.

(iii) If a covered reporter is able to effect a rulemaking through the Securities and Exchange Commission requiring each direct clearing member, counterparty, and broker associated with a repurchase agreement transaction to obtain an LEI and provide it to the covered reporter, the covered reporter shall begin reporting all data elements requiring an LEI other than its own pursuant to paragraphs (c)(3) through (5) of this section by the later of the effective date of its rulemaking, or 420 days April 22, 2019, and continue to report all data elements requiring a legal name or internal identifier until 365 days after the date the covered reporter begins reporting all data elements requiring an LEI pursuant to this section. If a covered reporter is unable to effect such a rulemaking, the covered reporter is not required to report any data elements requiring an LEI other than its own pursuant to paragraphs (c)(3) through (5) of this section, except, if available, the LEI for any direct clearing member, counterparty, or broker associated with a repurchase agreement transaction that has an LEI, and shall report all data elements requiring a legal name or internal identifier in any report submitted under this section regardless of whether the relevant entity has an LEI. A covered reporter shall report its own LEI in accordance with the schedules set forth in paragraphs (e)(1)(i) and (ii) of this section.

(2) The first submission by any central counterparty that is a covered reporter as of the effective date of this Section shall be submitted on the first business day after the applicable compliance date under paragraph (e)(1) of this section.

NOTE 1 TO PARAGRAPH (e)(2): For example, if this section became effective on March 20, 2019, a central counterparty that meets the dollar threshold specified in paragraph (b)(2) of this section for the calendar quarter ending December 31, 2018, would be required to submit its first report under paragraph (e)(1)(i) of this section on the first business day after September 16, 2019, its first report under paragraph (e)(1)(ii) of this section on November 15, 2019, and its first report with data elements requiring an LEI (other than that of the covered reporter) on May 13, 2020 (if the covered reporter effected the rulemaking described in paragraph (e)(1)(iii) of this section).

(3) Any central counterparty that becomes a covered reporter after the effective date of this Section shall comply with the reporting requirements pursuant to this Section beginning on the later of the schedule set forth in paragraphs (e)(1)(i) through (iii) of this section or the first business day of the third calendar quarter following the calendar quarter in which such central counterparty meets the dollar threshold specified in paragraph (b)(2) of this section.

NOTE 2 TO PARAGRAPH (e)(3): For example, if this section became effective on March 20, 2019, a central counterparty that first meets the dollar threshold specified in paragraph (b)(2) of this section for the calendar quarter ending June 30, 2019, would be required to submit its first report under paragraphs (e)(1)(i) and (ii) of this section on January 2, 2020, and its first report with data elements requiring an LEI (other than that of the covered reporter) on May 13, 2020 (if the covered reporter effected the rulemaking described in paragraph (e)(1)(iii) of this section by May 13, 2020).

NOTE 3 TO PARAGRAPH (e)(3): For example, if this section became effective on March 20, 2019, a central counterparty that first met the dollar threshold specified in paragraph (b)(2) for the calendar quarter ending June 30, 2020, would be required to comply with all of the reporting requirements under this section on January 2, 2021 (and would continue

to be required to report all data elements requiring a legal name or internal identifier for at least 365 days after the effective date of the covered reporter's rulemaking described in paragraph (e)(1)(iii) if such effective date occurred after January 2, 2021).

PARTS 1611–1699 [RESERVED]

CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SUBCHAPTER A—OFHEO ORGANIZATION AND FUNCTIONS [RESERVED]

SUBCHAPTER B [RESERVED]

SUBCHAPTER C—SAFETY AND SOUNDNESS

SUBCHAPTER A—OFHEO ORGANIZATION AND FUNCTIONS [RESERVED]
SUBCHAPTER B [RESERVED]
SUBCHAPTER C—SAFETY AND SOUNDNESS

PARTS 1700–1709 [RESERVED]

PART 1777—PROMPT CORRECTIVE ACTION

Sec.

Subpart A—Prompt Supervisory Response

Subpart B—Capital Classifications and Orders Under Section 1366 of the 1992 Act

AUTHORITY: 12 U.S.C. 1452(b)(2), 1456(c), 1718(c)(2), 1723a(k), 4513(a), 4513(b), 4514, 4517, 4611–4619, 4622, 4623, 4631, 4635.

SOURCE: 67 FR 3598, Jan. 25, 2002, unless otherwise noted.

§ 1777.1 Authority, purpose, scope, and implementation dates.

(a) *Authority.* This part is issued by the Office of Federal Housing Enterprise Oversight (OFHEO) pursuant to sections 1313, 1371, 1372, and 1376 of the Federal Housing Enterprises Financial Safety and Soundness Act (1992 Act) (12 U.S.C. 4513, 4631, 4632, and 4636). These provisions broadly authorize OFHEO to take such actions as are deemed appropriate by the Director of OFHEO to ensure that the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, the Enterprises) maintain adequate capital and operate in a safe and sound manner.

(b) *Authority, purpose and scope of subpart A.* In addition to the authority set forth in paragraph (a) of this section, subpart A of this part is also issued pursuant to section 1314 of the 1992 Act (12 U.S.C. 4514), section 307(c) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1456(c)), and section 309(k) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1723a(k)), requiring each Enterprise to submit such reports to OFHEO as the Director of OFHEO determines, in his or her judgment, are necessary to carry out the purposes of the 1992 Act. Subpart A of this part is also issued in reliance on section 1317 of the 1992 Act (12 U.S.C. 4517) authorizing OFHEO to conduct examinations of the Enterprises. The purpose of subpart A of this part is to set forth a framework of early intervention supervisory measures, other than formal enforcement actions, that OFHEO may take to address emerging developments that merit supervisory review to ensure they do not pose a current or future threat to the safety and soundness of an Enterprise. OFHEO's initiation of procedures under subpart A does not necessarily indicate that any unsound condition exists. The supervisory responses enumerated in §1777.11 do not constitute orders under the 1992 Act for purposes of sections 1371 and 1376 thereof (12 U.S.C. 4631 and 4636).

(c) *Authority, purpose, and scope of subpart B.* In addition to the authority set forth in paragraph (a) of this section, subpart B of this part is also issued pursuant to subtitle B of the 1992 Act (12 U.S.C. 4611 through 4623), section 303(b)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1452(b)(2)), and section 303(c)(2) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1718(c)(2)). These provisions authorize OFHEO to administer certain capital

requirements for the Enterprises, to classify the capital of the Enterprises based on capital levels specified in the 1992 Act, and, in appropriate circumstances, to exercise discretion to reclassify an Enterprise into a lower capital category. Under these provisions, there are also automatic consequences for an Enterprise that is not classified as adequately capitalized, as well as discretionary authority for OFHEO to require an Enterprise to take remedial actions. Subpart B implements the provisions of sections 1364 through 1368, 1369(b) through (e), 1369C, and 1369D of the 1992 Act as they apply to the Enterprises (12 U.S.C. 4614 through 4618, 4619(b) through (e), 4622 and 4623). The principal purposes of subpart B are to identify the capital measures and capital levels that OFHEO uses in determining the capital classification of an Enterprise; to set out the procedures OFHEO uses in determining such capital classifications; to establish procedures for submission and review of capital restoration plans of an Enterprise that is not classified as adequately capitalized; and to establish procedures under which OFHEO issues orders pursuant to section 1366(b)(1) through (4) of the 1992 Act (12 U.S.C. 4616(b)(1) through (4)).

(d) *Effective dates of capital classifications.* Section 1364 of the 1992 Act (12 U.S.C. 4614(d)) directs OFHEO to determine capital classifications for the Enterprises by reference to two capital standards, consisting of the minimum or critical capital level on the one hand, and the risk-based capital level on the other. Section 1364(d) of the 1992 Act (12 U.S.C. 4614(d)) excludes consideration of whether the Enterprises meet the risk-based capital level in determining capital classifications or reclassifications under 1364, until one year after the effective date of OFHEO's regulation implementing OFHEO's risk-based capital test (issued under section 1361(e) of the 1992 Act (12 U.S.C. 4611(e)), until such time, section 1364(d) provides that an Enterprise is to be classified as adequately capitalized so long as it meets the minimum capital level. Subpart B contains a currently effective set of capital classifications omitting consideration of the risk-based capital level, as well as another set of capital classifications which will take effect, and displace the current set of capital classifications, on September 13, 2002 that is, one year after the effective date of OFHEO's risk-based capital rule published at 66 FR 47730, September 13, 2001.

§ 1777.2 Preservation of other authority.

(a) *Supervisory standards.* Notwithstanding the existence of procedures in §1777.10 for the Director of OFHEO to designate certain developments for supervisory response under subpart A of this part, nothing in this part in any way limits the authority of OFHEO otherwise to take such actions with respect to any issue as is deemed appropriate by the Director of OFHEO to ensure that the Enterprises maintain adequate capital, operate in a safe and sound manner, and comply with the 1992 Act and regulations, orders, and agreements thereunder.

(b) *Capital floor.* Classification of an Enterprise as adequately capitalized in accordance with subtitle B of the 1992 Act and subpart B of this part indicates that the Enterprise meets the capital levels under sections 1361 and 1362 of the 1992 Act (12 U.S.C. 4611 and 4612) and regulations promulgated thereunder as of the times specified in the classification determination. Nothing in subpart B of this part or subtitle B of the 1992 Act limits OFHEO's authority otherwise to address circumstances that would require additional capital through regulations, orders, notices, guidance, or other actions.

(c) *Form of supervisory action or response.* In addition to the supervisory responses contemplated under subpart A of this part, and the authority to classify and reclassify the Enterprises, to issue orders, and to appoint conservators under subpart B of this part, the 1992 Act grants OFHEO broad discretion to take such other supervisory actions as may be deemed by OFHEO to be appropriate, including issuing temporary and permanent cease and desist orders, imposing civil money penalties, appointing a conservator under section 1369(a)(1) through (2) of the 1992 Act (12 U.S.C. 4619(a)(1) through (2)), entering into a written

agreement the violation of which is actionable through enforcement proceedings, or entering into any other formal or informal agreement with an Enterprise. Neither the 1992 Act nor this part in any way limit OFHEO's discretion over the selection of the type of these actions, and the selection of one type of action under this part or under these other statutory authorities, or a combination thereof, does not foreclose OFHEO from pursuing any other action.

§ 1777.3 Definitions.

For purposes of this part, the following definitions will apply:

1992 Act means the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. 4501 *et seq*.

Affiliate means an entity that controls an Enterprise, is controlled by an Enterprise, or is under common control with an Enterprise.

Capital distribution means:

(1) Any dividend or other distribution in cash or in kind made with respect to any shares of, or other ownership interest in, an Enterprise, except a dividend consisting only of shares of the Enterprise; and

(2) Any payment made by an Enterprise to repurchase, redeem, retire, or otherwise acquire any of its shares or other ownership interests, including any extension of credit made to finance an acquisition by the Enterprise of such shares or other ownership interests, except to the extent the Enterprise makes a payment to repurchase its shares for the purpose of fulfilling an obligation of the Enterprise under an employee stock ownership plan that is qualified under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401 *et seq*.) or any substantially equivalent plan as determined by the Director of OFHEO in writing in advance.

Core capital has the same meaning as provided in 12 CFR 1750.2.

Critical capital level means the amount of core capital that is equal to the sum of one half of the amount determined under 12 CFR 1750.4(a)(1) and five-ninths of the amounts determined under 12 CFR 1750.4(a)(2) through 1750.4(a)(7).

Enterprise means the Federal National Mortgage Association and any affiliate thereof, and the Federal Home Loan Mortgage Corporation and any affiliate thereof.

Minimum capital level means the minimum amount of core capital specified for an Enterprise pursuant to section 1362 of the 1992 Act (12 U.S.C. 4612), as determined under 12 CFR 1750.4.

OFHEO means the Office of Federal Housing Enterprise Oversight.

Risk-based capital level means the amount of total capital specified for an Enterprise pursuant to section 1361 of the 1992 Act (12 U.S.C. 4611), as determined under OFHEO's regulations implementing section 1361.

Total capital has the same meaning as provided at 12 CFR 1750.11(n).

Subpart A—Prompt Supervisory Response

§ 1777.10 Developments prompting supervisory response.

In the event of any of the following developments, OFHEO shall undertake one of the supervisory responses enumerated in §1777.11, or a combination thereof:

(a) OFHEO's national House Price Index (HPI) for the most recent quarter is more than two percent less than the national HPI four quarters previously, or for any Census Division or Divisions in which are located properties securing more than 25 percent of single-family mortgages owned or securing securities guaranteed by an enterprise, the HPI for the most recent quarter for such Division or Divisions is more than five percent less than the HPI for that Division or Divisions four quarters previously;

(b) An Enterprise's publicly reported net income for the most recent calendar quarter is less than one-half of its average quarterly net income for any four-quarter period during the prior eight quarters;

(c) An Enterprise's publicly reported net interest margin (NIM) for the most recent quarter is less than one-half of its average NIM for any four-quarter period during the prior eight quarters;

(d) For single-family mortgage loans owned or securities by an Enterprise that are delinquent ninety days or more or in foreclosure, the proportion

of such loans in the most recent quarter has increased more than one percentage point compared to the lowest proportion of such loans in any of the prior four quarters; or

(e) Any other development, including conduct of an activity by an Enterprise, that OFHEO determines in its discretion presents a risk to the safety and soundness of the Enterprise or a possible violation of applicable law, regulation, or order.

§ 1777.11 Supervisory response.

(a) *Level I supervisory response*—(1) *Supervisory letter.* Not later than five business days after OFHEO determines that a development enumerated in §1777.10 has transpired, OFHEO shall deliver a supervisory letter alerting the chief executive officer or the board of directors of the Enterprise to OFHEO's determination.

(2) *Contents of supervisory letter.* The supervisory letter shall notify the Enterprise that, pursuant to this subpart, OFHEO is commencing review of a potentially adverse development. As is appropriate under the particular circumstances and the nature of the potentially adverse development, the letter may direct the Enterprise to undertake one or more of the following actions, as of such time as OFHEO directs:

(i) Provide OFHEO with any relevant information known to the Enterprise about the potentially adverse development, in such format as OFHEO directs;

(ii) Respond to specific questions and concerns that OFHEO poses about the potentially adverse development; and

(iii) Take appropriate action.

(3) *Review; further action.* Based on the Enterprise's response to the supervisory letter and consideration of other relevant factors, OFHEO shall promptly determine whether the Level I supervisory response is adequate to resolve any supervisory issues implicated by the potentially adverse development, or whether additional supervisory response under this section is warranted.

(4) *Sequence of supervisory responses.* The Level II through Level IV supervisory responses in paragraphs (b) through (d) of this section may be carried out in any sequence, including simultaneous performance of two or more such responses. OFHEO may also carry out one or more such responses simultaneously with a Level I supervisory response pursuant to this paragraph (a).

(b) *Level II supervisory response*—(1) *Special review.* In addition to any other supervisory response described in this section, OFHEO may conduct a special review of an Enterprise in order to assess the impact of the potentially adverse development on the Enterprise.

(2) *Review; further action.* Based on the results of the special review and consideration of other factors deemed by OFHEO to be relevant, OFHEO shall promptly determine whether additional supervisory response under this section is warranted.

(c) *Level III supervisory response*—(1) *Action plan.* In addition to any other supervisory response described in this section, OFHEO may direct the Enterprise to prepare and submit an action plan to OFHEO, in such format and at such time as OFHEO directs.

(2) *Contents of action plan.* Such action plan shall include, subject to additional direction by OFHEO, the following:

(i) In the case of any potentially adverse development arising from conditions or practices internal to the Enterprise, any relevant information known to the Enterprise about the circumstances that led to the potentially adverse development;

(ii) An assessment of likely consequences that the potentially adverse development may have for the Enterprise; and

(iii) The proposed course of action the Enterprise will undertake in response to the potentially adverse development, including an explanation as to why such approach is preferred to any other alternative actions by the Enterprise and how such approach will address the concerns of OFHEO.

(3) *Review; further action.* If OFHEO in its discretion determines that the information, assessment, or proposed course of action contained in the action plan is incomplete or inadequate, OFHEO shall promptly direct the Enterprise to correct such deficiencies to the extent OFHEO determines such

corrections will aid in resolving supervisory issues implicated by the potentially adverse development, and will promptly determine whether additional supervisory response under this section is warranted.

(d) *Level IV supervisory response*—(1) *Notice to show cause.* In addition to any other supervisory response described in this section, OFHEO may issue written notice to the chief executive officer or the board of directors of the Enterprise directing the Enterprise to show cause, on or before the date specified in the notice, why OFHEO should not issue one or more of the following:

(i) A notice of charges to the Enterprise under section 1371 of the 1992 Act (12 U.S.C. 4631) and the procedures in 12 CFR part 1780 commencing an action to order the Enterprise to cease and desist conduct, conditions, or violations specified in the notice to show cause;

(ii) A temporary order to the Enterprise under section 1372 of the 1992 Act (12 U.S.C. 4632) and the procedures in 12 CFR part 1780 to cease and desist from, and take affirmative actions to prevent or remedy harm from, conduct, conditions, or violations specified in the notice to show cause;

(iii) A notice of charges under section 1376 of the 1992 Act (12 U.S.C. 4636) and the procedures in 12 CFR part 1780 commencing imposition of a civil money penalty against the Enterprise; or

(iv) A notice of discretionary reclassification of the Enterprise's capital classification under section 1364(b) of the 1992 Act (12 U.S.C. 4614(b)) and subpart B of this part.

(2) *Review; further action.* Based on the Enterprise's response to the notice to show cause and consideration of other relevant factors, OFHEO shall promptly determine whether to commence the actions described in the notice, and whether additional supervisory response under this section is warranted.

§ 1777.12 Other supervisory action.

Notwithstanding the pendency or completion of one or more supervisory responses described in § 1777.11, OFHEO may at any time undertake additional supervisory steps and actions in the form of any informal or formal supervisory tool available to OFHEO under the 1992 Act, including, but not limited to, issuing guidance or directives under section 1313 (12 U.S.C. 4513), requiring reports under section 1314 (12 U.S.C. 4514), conducting other examinations under section 1317 (12 U.S.C. 4517), issuing discretionary reclassification under section 1364 (12 U.S.C. 4614), initiating discretionary action under section 1366(b) (12 U.S.C. 4616(b)), appointing a conservator under section 1369(a) (12 U.S.C. 4619(a)), or initiating administrative enforcement action under sections 1371, 1372, and 1376 (12 U.S.C. 4631, 4632 and 4636). In addition, OFHEO may take any such steps or actions with respect to an Enterprise that fails to make a submission or comply with a directive as required by § 1777.11, or to address an Enterprise's failure to implement an appropriate action in response to a supervisory letter or under an action plan under § 1777.11.

Subpart B—Capital Classifications and Orders Under Section 1366 of the 1992 Act

§ 1777.20 Capital classifications.

(a) *Capital classifications after the effective date of section 1365 of the 1992 Act.* The capital classification of an Enterprise for purposes of subpart B of this part is as follows:

(1) *Adequately capitalized.* Except as otherwise provided under paragraph (a)(5) of this section, an Enterprise will be classified as adequately capitalized if the Enterprise:

(i) As of the date specified in the notice of proposed capital classification, holds total capital equaling or exceeding the risk-based capital level; and

(ii) As of the date specified in the notice of proposed capital classification, holds core capital equaling or exceeding the minimum capital level.

(2) *Undercapitalized.* Except as otherwise provided under paragraph (a)(5) of this section or § 1777.23(c) or § 1777.23(h), an Enterprise will be classified as undercapitalized if the Enterprise:

(i) As of the date specified in the notice of proposed capital classification, holds total capital less than the risk-based capital level; and

(ii) As of the date specified in the notice of proposed capital classification,

holds core capital equaling or exceeding the minimum capital level.

(3) *Significantly undercapitalized.* Except as otherwise provided under paragraph (a)(5) of this section or §1777.23(c) or §1777.23(h), an Enterprise will be classified as significantly undercapitalized if the Enterprise:

(i) As of the date specified in the notice of proposed capital classification, holds core capital less than the minimum capital level; and

(ii) As of the date specified in the notice of proposed capital classification, holds core capital equaling or exceeding the critical capital level.

(4) *Critically undercapitalized.* An Enterprise will be classified as critically undercapitalized if, as of the date specified in the notice of proposed capital classification, the Enterprise holds core capital less than the critical capital level.

(5) *Discretionary reclassification—determination to reclassify.* If OFHEO determines in writing that an Enterprise is engaging in action or inaction (including a failure to respond appropriately to changes in circumstances or unforeseen events) that could result in a rapid depletion of core capital, or that the value of property subject to mortgages held or securitized by the Enterprise has decreased significantly, or that reclassification is otherwise deemed necessary to ensure that the Enterprise holds adequate capital and operates safely, OFHEO may reclassify the Enterprise as:

(i) Undercapitalized if the Enterprise is otherwise classified as adequately capitalized;

(ii) Significantly undercapitalized if the Enterprise is otherwise classified as undercapitalized; or

(iii) Critically undercapitalized if the Enterprise is otherwise classified as significantly undercapitalized.

(b) *Duration of reclassification; successive reclassifications.* (1) A reclassification of an Enterprise based on action, inaction, or conditions under paragraph (a)(5) or (c)(5) of this section shall be considered in the determination of each subsequent capital classification of the Enterprise, and shall only cease being considered in the determination of the Enterprise's capital classification after OFHEO determines that the action, inaction or condition upon which the reclassification was based has ceased or been eliminated and remedied to OFHEO's satisfaction.

(2) If the action, inaction, or condition upon which a reclassification was based under paragraph (a)(5) or (c)(5) of this section has not ceased or been eliminated and remedied to OFHEO's satisfaction within such reasonable time as is determined by OFHEO to be appropriate, OFHEO may consider such failure to be the basis for additional reclassification under such paragraph (a)(5) or (c)(5) of this section into a lower capital classification.

(c) *Capital classifications before the effective date of section 1365 of the 1992 Act.* Notwithstanding paragraph (a) of this section, until September 13, 2002, the capital classification of an Enterprise for purposes of subpart B of this part is as follows:

(1) *Adequately capitalized.* Except as otherwise provided in paragraph (c)(5) of this section, an Enterprise will be classified as adequately capitalized if the Enterprise, as of the date specified in the notice of proposed capital classification, holds core capital equaling or exceeding the minimum capital level.

(2) *Undercapitalized.* An Enterprise will be classified as undercapitalized if the Enterprise:

(i) As of the date specified in the notice of proposed capital classification, holds core capital equaling or exceeding the minimum capital level; and

(ii) Is reclassified as undercapitalized by OFHEO under paragraph (c)(5) of this section.

(3) *Significantly undercapitalized.* Except as otherwise provided under paragraph (c)(5) of this section or §1777.23(c) or §1777.23(h), an Enterprise will be classified as significantly undercapitalized if the Enterprise:

(i) As of the date specified in the notice of proposed capital classification, held core capital less than the minimum capital level; and

(ii) As of the date specified in the notice of proposed capital classification, held core capital equaling or exceeding the critical capital level.

(4) *Critically undercapitalized.* An Enterprise will be classified as critically undercapitalized if, as of the date specified in the notice of proposed capital

classification, the Enterprise held core capital less than the critical capital level.

(5) *Discretionary reclassification.* If OFHEO determines in writing that an Enterprise is engaging in action or inaction (including a failure to respond appropriately to changes in circumstances or unforeseen events) that could result a rapid depletion of core capital, or that the value of the property subject to mortgages held or securitized by the Enterprise has decreased significantly or that reclassification is deemed necessary to ensure that the Enterprise holds adequate capital and operates safely, OFHEO may reclassify the Enterprise as:

(i) Undercapitalized if the Enterprise is otherwise classified as adequately capitalized:

(ii) Significantly undercapitalized if the Enterprise is otherwise classified as undercapitalized; or

(iii) Critically undercapitalized if the Enterprise is otherwise classified as significantly undercapitalized.

(d) *Prior approvals.* In making a determination to reclassify an Enterprise under paragraph (a)(5) or (c)(5) of this section, OFHEO will not base its decision to reclassify solely on action or inaction that previously was given specific approval by the Director of OFHEO in connection with the Director's approval of the Enterprise's capital restoration plan under section 1369C of the 1992 Act (12 U.S.C. 4622), or of a written agreement with the Enterprise that is enforceable in accordance with section 1371 of the 1992 Act.

§ 1777.21 Notice of capital category, and adjustments.

(a) *Notice of capital classification.* OFHEO will classify each Enterprise according to the capital classifications in § 1777.20(a) or § 1777.20(c) on at least a quarterly basis. OFHEO may classify an Enterprise according to the capital classifications in § 1777.20(a) or § 1777.20(c), or reclassify an Enterprise as set out in § 1777.20(a)(5), § 1777.20(c)(5), § 1777.23(c), or § 1777.23(h), at such other times as OFHEO deems appropriate.

(1) *Notice of proposed capital classification.* (i) Before OFHEO classifies or reclassifies an Enterprise, OFHEO will provide the Enterprise with written notice containing the proposed capital classification, the information upon which the proposed classification is based, and the reason for the proposed classification.

(ii) Notices proposing to classify or reclassify an Enterprise as undercapitalized or significantly undercapitalized may be combined with a notice that OFHEO may further reclassify the Enterprise under § 1777.23(c), without additional notice.

(iii) Notices proposing to classify or reclassify an Enterprise as significantly undercapitalized or critically undercapitalized may be combined with a notice under § 1777.24 that OFHEO intends to issue an order under section 1366 of the 1992 Act (12 U.S.C. 4616).

(iv) Notices proposing to classify an Enterprise as undercapitalized or significantly undercapitalized may be combined with a notice proposing to simultaneously reclassify the Enterprise under § 1777.20(a)(5) or § 1777.20(c)(5).

(2) *Response by the Enterprise.* The Enterprise may submit a response to OFHEO containing information for OFHEO's consideration in classifying or reclassifying the Enterprise.

(i) The Enterprise may, within thirty calendar days from receipt of a notice of proposed capital classification, submit a response to OFHEO, unless OFHEO determines the condition of the Enterprise requires a shorter period or the Enterprise consents to a shorter period.

(ii) The Enterprise's response period may be extended for up to an additional thirty calendar days if OFHEO determines there is good cause for such extension.

(iii) The Enterprise's failure to submit a response during the response period (as extended or shortened, if applicable) shall waive any right of the Enterprise to comment on or object to the proposed capital classification.

(3) *Classification determination and written notice of capital classification.* After the Enterprise has submitted its response under paragraph (a)(2) of this section or the response period (as extended or shortened, if applicable) has expired, whichever occurs first, OFHEO

will make its determination of the Enterprise's capital classification, taking into consideration such relevant information as is provided by the Enterprise in its response, if any, under paragraph (a)(2) of this section. OFHEO will provide the Enterprise with a written notice of capital classification, which shall include a description of the basis for OFHEO's determination.

(4) *Timing.* OFHEO may, in its discretion, issue a notice of proposed capital classification to an Enterprise at any time. If a notice of proposed classification is pending (under the process set out in paragraphs (a)(1) through (3) of this section) at that time, OFHEO may, in its discretion, specify whether the subsequent notice of proposed capital classification supersedes the pending notice.

(b) *Developments warranting possible change to capital classification*—(1) *Notice to OFHEO.* An Enterprise shall promptly provide OFHEO with written notice of any material development that would result in the Enterprise's core or total capital to fall to a point causing the Enterprise to be placed in a lower capital classification than the capital classification assigned to the Enterprise in its most recent notice of capital classification from OFHEO, or than is proposed to be assigned in the Enterprise's most recent notice of proposed capital classification from OFHEO. The Enterprise shall deliver such notice to OFHEO no later than ten calendar days after the Enterprise becomes aware of such development.

(2) OFHEO, in its discretion, will determine whether to issue a new notice of proposed capital classification under paragraph (a) of this section, based on OFHEO's review of the notice under paragraph (b)(1) of this section from the Enterprise and any other information deemed relevant by OFHEO.

§ 1777.22 Limitation on capital distributions.

(a) *Capital distributions in general.* An Enterprise shall make no capital distribution that would decrease the total capital of the Enterprise to an amount less than the risk-based capital level or the core capital of the Enterprise to an amount less than the minimum capital level without the prior written approval of OFHEO.

(b) *Capital distributions by an Enterprise that is not adequately capitalized*—(1) *Prohibited distributions.* An Enterprise that is not classified as adequately capitalized shall make no capital distribution that would result in the Enterprise being classified into a lower capital classification than the one to which it is classified at the time of such distribution.

(2) *Restricted distributions.* An Enterprise classified as significantly or critically undercapitalized shall make no capital distribution without the prior written approval of OFHEO. OFHEO may grant a request for such a capital distribution only if OFHEO determines, in its discretion, that the distribution:

(i) Will enhance the ability of the Enterprise to meet the risk-based capital level and the minimum capital level promptly;

(ii) Will contribute to the long-term financial safety and soundness of the Enterprise; or

(iii) Is otherwise in the public interest.

§ 1777.23 Capital restoration plans.

(a) *Schedule for filing plans*—(1) *In general.* An Enterprise shall file a capital restoration plan in writing with OFHEO within ten days of receiving a notice of capital classification under §1777.21(a)(3) stating that the Enterprise is classified as undercapitalized, significantly undercapitalized, or critically undercapitalized, unless OFHEO in its discretion determines an extension of the ten-day period is necessary and provides the Enterprise with written notice of the date the plan is due.

(2) *Successive capital classifications.* Notwithstanding paragraph (a)(1) of this section, an Enterprise that has already submitted and is operating under a capital restoration plan approved by OFHEO under this part is not required to submit an additional capital restoration plan based on a subsequent notice of capital classification, unless OFHEO notifies the Enterprise that it must submit a new or amended capital restoration plan. An Enterprise that receives such a notice to submit a new or amended capital restoration plan shall file in writing with OFHEO a

complete plan that is responsive to the terms of and within the deadline specified in such notice.

(b) *Contents of capital restoration plan.* (1) The capital restoration plan submitted under paragraph (a)(1) or (2) of this section shall:

(i) Specify the level of capital the Enterprise will achieve and maintain;

(ii) Describe the actions that the Enterprise will take to become classified as adequately capitalized;

(iii) Establish a schedule for completing the actions set forth in the plan;

(iv) Specify the types and levels of activities (including existing and new programs) in which the Enterprise will engage during the term of the plan;

(v) Describe the actions that the Enterprise will take to comply with any mandatory or discretionary requirements to be imposed under Subtitle B of the 1992 Act (12 U.S.C. 4611 through 4623) or subpart B of this part;

(vi) To the extent the Enterprise is required to submit or revise a capital restoration plan as the result of a reclassification of the Enterprise under §1777.20(a)(5) or §1777.20(c)(5), describe the steps the Enterprise will take to cease or eliminate and remedy the action, inaction, or conditions that caused the reclassification; and

(vii) Provide any other information or discuss any other issues as instructed by OFHEO.

(2) The plan shall include a declaration by the chief executive officer, treasurer, or other officer designated by the Board of Directors of the Enterprise to make such declaration, that the material contained in the plan is true and correct to the best of such officer's knowledge and belief.

(c) *Failure to submit*—(1) *Failure to submit; submission of unacceptable plan.* If, upon the expiration of the period provided in paragraph (a)(1) or (2) of this section for an Enterprise to submit a capital restoration plan, an Enterprise fails to comply with the requirement to file a complete capital restoration plan, or if the capital restoration plan is disapproved after review under paragraph (d) of this section, OFHEO may, in accordance with §1777.21(a)(1)(ii) without additional notice, reclassify the Enterprise:

(i) As significantly undercapitalized if it is otherwise classified as undercapitalized; or

(ii) As critically undercapitalized if it is otherwise classified as significantly undercapitalized.

(2) *Duration of reclassification.* An Enterprise's failure to submit an approved capital restoration plan as described in paragraph (c)(1) of this section shall continue to be grounds for reclassification at each subsequent capital classification of the Enterprise, and shall only cease being considered grounds for reclassification after the Enterprise files a capital restoration plan that receives OFHEO's approval under paragraph (d) of this section.

(3) *Successive reclassifications.* If an Enterprise has not remedied its failure to file a complete capital restoration plan or an acceptable capital restoration plan within such period as is determined by OFHEO to be appropriate, OFHEO may consider such failure to be the basis for additional reclassification under paragraph (c)(1) of this section into a lower capital classification. Such reclassification may be made without additional notice in accordance with §1777.21(a)(1)(ii).

(d) *Order approving or disapproving plan.* Not later than thirty calendar days after receipt of the Enterprise's complete or amended capital restoration plan under this section (subject to extension upon written notice to the Enterprise for an additional thirty calendar days as OFHEO deems necessary), OFHEO shall issue an order to the Enterprise approving or disapproving the plan. An order disapproving a plan shall include the reasons therefore.

(e) *Resubmission.* An Enterprise that receives an order disapproving its capital restoration plan shall submit an amended capital plan acceptable to OFHEO within thirty calendar days of the date of such order, or a longer period if OFHEO determines an extension is in the public interest.

(f) *Amendment.* An Enterprise that has received an order approving its capital restoration plan may amend the capital restoration plan only after written notice to OFHEO and OFHEO's written approval of the modification. Pending OFHEO's review and approval

of the amendment in OFHEO's discretion, the Enterprise shall continue to implement the capital restoration plan under the original approval order.

(g) *Termination*—(1) *Termination under the terms of the plan.* An Enterprise that has received an order approving its capital restoration plan remains bound by each of its obligations under the plan until each such obligation terminates under express terms of the plan itself identifying a date, event, or condition upon which such obligation shall terminate.

(2) *Termination orders.* To the extent the plan does not include such express terms for any obligation thereunder, the Enterprise's obligation continues until OFHEO issues an order terminating such obligation under the plan. The Enterprise may also submit a written request to OFHEO seeking termination of such obligations. OFHEO will approve termination of such obligation to the extent that OFHEO determines, in its discretion, that the obligation's purpose under the plan has been fulfilled and that termination of the obligation is consistent with the overall safety and soundness of the Enterprise.

(h) *Implementation*—(1) An Enterprise that has received an order approving its capital restoration plan is required to implement the plan.

(i) If OFHEO determines, in its discretion, that an Enterprise has failed to make, in good faith, reasonable efforts necessary to comply with the capital restoration plan and fulfill the schedule thereunder, OFHEO may reclassify the Enterprise:

(A) As significantly undercapitalized if it is otherwise classified as undercapitalized; or

(B) As critically undercapitalized if it is otherwise classified as significantly undercapitalized.

(ii) *Duration of reclassification.* An Enterprise's failure to implement an approved capital restoration plan as described in paragraph (h)(1)(i) of this section shall continue to be grounds for reclassification at each subsequent capital classification of the Enterprise, and shall only cease being considered grounds for reclassification after OFHEO determines, in its discretion, that the Enterprise is making such efforts as are reasonably necessary to comply with the capital restoration plan and fulfill the schedule thereunder.

(iii) *Successive reclassifications.* If an Enterprise has not remedied its failure to implement an approved capital restoration plan within such period as is determined by OFHEO to be appropriate, OFHEO may consider such failure to be the basis for additional reclassification under paragraph (h)(1)(i) of this section into a lower capital classification.

(2) *Administrative enforcement action.* A capital plan that has received an approval order from OFHEO under this section shall constitute an order under the 1992 Act. An Enterprise, regardless of its capital classification, as well as its executive officers, and directors may be subject to action by OFHEO under sections 1371, 1372, and 1376 of the 1992 Act (12 U.S.C. 4631, 4632, and 4636) and 12 CFR part 1780 for failure to comply with such plan.

§ 1777.24 Notice of intent to issue an order.

(a) *Orders under section 1366 of the 1992 Act (12 U.S.C. 4616).* In addition to any other action taken under this part, part 1780 of this chapter, or any other applicable authority, OFHEO may, in its discretion, issue an order to an Enterprise that is classified as significantly undercapitalized or critically undercapitalized, or is in conservatorship, directing the Enterprise to take one or more of the following actions:

(1) Limit any increase in, or reduce, any obligations of the Enterprise, including off-balance sheet obligations;

(2) Limit or eliminate growth of the Enterprise's assets or reduce the amount of the Enterprise's assets;

(3) Acquire new capital, in such form and amount as determined by OFHEO; or

(4) Terminate, reduce, or modify any activity of the Enterprise that OFHEO determines creates excessive risk to the Enterprise.

(b) *Notice of intent to issue an order.* Before OFHEO issues an order to an Enterprise pursuant to section 1366 of the 1992 Act (12 U.S.C. 4616), OFHEO will provide the Enterprise with written notice containing the proposed order.

(c) *Contents of notice.* A notice of intent to issue an order under this subpart shall include:

(1) A statement of the Enterprise's capital classification and its minimum capital level or critical capital level, and its risk-based capital level;

(2) A description of the restrictions, prohibitions, or affirmative actions that OFHEO proposes to impose or require; and

(3) The proposed date when such restrictions or prohibitions would become effective or the proposed date for the commencement and/or completion of the affirmative actions.

§ 1777.25 Response to notice.

(a) *Content of response.* The Enterprise may submit a response to OFHEO containing information for OFHEO's consideration in connection with the proposed order. The response should include, but is in no way limited to, the following:

(1) Any relevant information, mitigating circumstances, documentation, or other information the Enterprise wishes OFHEO to consider in support of the Enterprise's position regarding the proposed order; and

(2) Any recommended modification to the proposed order, and justification thereof.

(b) *Time to respond.* The Enterprise may, within thirty calendar days after receipt of the notice of proposed order, submit a response to OFHEO, unless OFHEO determines a shorter period to be appropriate or the Enterprise consents to a shorter period. OFHEO may extend the Enterprise's response period for up to an additional thirty calendar days if OFHEO determines, in its discretion, that there is good cause for such extension.

(c) *Waiver and consent.* The Enterprise's failure to submit a response during the response period (as extended or shortened, if applicable) shall waive any right of the Enterprise to comment on or object to the proposed order.

§ 1777.26 Final notice of order.

(a) *Determination and notice.* After the Enterprise has submitted its response under § 1777.25 or the response period (as extended or shortened, if applicable) has expired, whichever occurs first, OFHEO will determine, in its discretion, whether to take into consideration such relevant information as is provided by the Enterprise in its response, if any, under § 1777.25. OFHEO will provide the Enterprise with a written final notice of any order issued by OFHEO under this subpart, which is to include a description of the basis for OFHEO's determination.

(b) *Termination or modification.* An Enterprise that has received an order under paragraph (a) of this section remains subject to each provision of the order until each such provision terminates under the express terms of the order. The Enterprise may submit a written request to OFHEO seeking modification or termination of one or more provisions of the order. Pending OFHEO's review and approval, in OFHEO's discretion of the Enterprise's request, the Enterprise shall remain subject to the provisions of the order.

(c) *Enforcement of order*—(1) *Judicial enforcement.* An order issued under paragraph (a) of this section is an order for purposes of section 1375 of the 1992 Act (12 U.S.C. 4635). An Enterprise in any capital classification may be subject to enforcement of such order in the United States District Court for the District of Columbia pursuant to such section.

(2) *Administrative enforcement.* An order issued under paragraph (a) of this section constitutes an order under the 1992 Act. An Enterprise, regardless of its capital classification, as well as its executive officers and directors may be subject to action by OFHEO under sections 1371, 1372, and 1376 of the 1992 Act (12 U.S.C. 4631, 4632, and 4636) and 12 CFR part 1780 for failure to comply with such order.

§ 1777.27 Exhaustion and review.

(a) *Judicial review*—(1) *Review of certain actions.* An Enterprise that is not classified as critically undercapitalized may seek judicial review of a final notice of capital classification issued pursuant to § 1777.21(a)(3) or a final notice of order issued pursuant to § 1777.26(a) in accordance with section 1369D of the 1992 Act (12 U.S.C. 4623)

(2) *Other review barred.* Except as set out in paragraph (a)(1) of this section,

or review of conservatorship appointments to the limited extent provided in section 1369(b) of the 1992 Act (12 U.S.C. 4619(b)) and §1777.28(c), no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of a capital classification or any other action of OFHEO pursuant to this subpart B, as provided in section 1369D of the 1992 Act (12 U.S.C. 4623).

(b) *Exhaustion of administrative remedies.* In connection with any issue for which an Enterprise seeks judicial review in connection with an action described in paragraph (a)(1) of this section, the Enterprise must have first exhausted its administrative remedies, by presenting all its objections, arguments, and information relating to such issue for OFHEO's consideration pursuant to §1777.21(a)(2), as part of the Enterprise's response to OFHEO's notice of capital classification, or pursuant to §1777.25, as part of the Enterprise's response to OFHEO's notice of intent to issue an order.

(c) *No stay pending review.* The commencement of proceedings for judicial review of a final capital classification or order as described in paragraph (a)(1) of this section shall not operate as a stay thereof.

§1777.28 Appointment of conservator for a significantly undercapitalized or critically undercapitalized Enterprise.

(a) *Significantly undercapitalized Enterprise.* At any time after an Enterprise is classified as significantly undercapitalized, OFHEO may issue an order appointing a conservator for the Enterprise upon determining that:

(1) The amount of core capital of the Enterprise is less than the minimum capital level; and

(2) The alternative remedies available to OFHEO under the 1992 Act are not satisfactory.

(b) *Critically undercapitalized Enterprise*—(1) *Appointment upon classification.* Not later than thirty days after issuing a final notice of capital classification pursuant to §1777.21(a)(3) classifying an Enterprise as significantly undercapitalized, OFHEO shall issue an order appointing a conservator for the Enterprise.

(2) *Exception.* Notwithstanding paragraph (b)(1) of this section, OFHEO may determine not to appoint a conservator if OFHEO makes a written finding, with the written concurrence of the Secretary of the Treasury, that:

(i) The appointment of a conservator would have serious adverse effects on economic conditions of national financial markets or on the financial stability of the housing finance market; and

(ii) The public interest would be better served by taking some other enforcement action authorized under this title.

(c) *Judicial review.* An Enterprise for which a conservator has been appointed pursuant to paragraph (a) or (b) of this section may seek judicial review of the appointment in accordance with section 1369(b) of the 1992 Act (12 U.S.C. 4619(b)). Except as provided therein, no court may take any action regarding the removal of a conservator or otherwise restrain or affect the exercise of the powers or functions of a conservator.

(d) *Termination*—(1) *Upon reaching the minimum capital level.* OFHEO will issue an order terminating a conservatorship appointment under paragraph (a) or (b) of this section upon a determination that the Enterprise has maintained an amount of core capital that is equal to or exceeds the minimum capital level.

(2) *In OFHEO's discretion.* OFHEO may, in its discretion, issue an order terminating a conservatorship appointment under paragraph (a) or (b) of this section upon a determination that such termination order is in the public interest and may safely be accomplished.

PARTS 1778–1799 [RESERVED]

CHAPTER XVIII—COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND, DEPARTMENT OF THE TREASURY

PARTS 1800–1804 [RESERVED]

PART 1805—COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS PROGRAM

Sec.

AUTHORITY: 12 U.S.C. 4703, 4703 note, 4710, 4717; and 31 U.S.C. 321.

SOURCE: 80 FR 52382, Aug. 31, 2015, unless otherwise noted.

Subpart A—General Provisions

§ 1805.100 Purpose.

The purpose of the Community Development Financial Institutions (CDFI) Program is to promote economic revitalization and community development through investment in and assistance to Community Development Financial Institutions.

§ 1805.101 Summary.

Through the Community Development Financial Institutions Program, the CDFI Fund provides financial and technical assistance to Recipients selected by the CDFI Fund in order to enhance their ability to provide Financial Products, Financial Services and Development Services to and in their Target Markets. Each Recipient must serve an Investment Area(s), a Targeted Population(s), or both. The CDFI Fund will select Recipients to receive financial or technical assistance through a merit-based, qualitative application process. Each Recipient must enter into an Assistance Agreement that requires it to achieve specific performance goals and abide by other terms and conditions pertinent to any assistance received under this part, as well as the Uniform Requirements, as applicable. All CDFI Program awards shall be made subject to funding availability.

§ 1805.102 Relationship to other CDFI Fund programs.

Restrictions on applying for, receiving, and using CDFI Program awards in conjunction with awards under other programs administered by the CDFI Fund (including, but not limited to, the Bank Enterprise Award Program, the Capital Magnet Fund, the CDFI

Bond Guarantee Program, the Native American CDFI Assistance (NACA) Program, and the New Markets Tax Credit Program) are as set forth in the applicable Notice of Funds Availability, Notice of Guarantee Availability, or Notice of Allocation Availability.

§ 1805.103 Recipient not instrumentality.

No Recipient (or its Community Partner) shall be deemed to be an agency, department, or instrumentality of the United States.

§ 1805.104 Definitions.

For the purpose of this part, the following terms shall have the following definitions:

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

Affiliate means any company or entity that Controls, is Controlled by, or is under common Control with another company;

Applicant means any entity submitting an application for CDFI Program assistance or funding under this part;

Appropriate Federal Banking Agency has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), and includes, with respect to Insured Credit Unions, the National Credit Union Administration;

Appropriate State Agency means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union;

Assistance Agreement means a formal agreement between the CDFI Fund and a Recipient, which agreement specifies the terms and conditions of assistance under this part;

Community Development Financial Institution (or *CDFI*) means an entity currently meeting the requirements described in § 1805.201;

Community Development Financial Institutions Fund (or *CDFI Fund*) means the Community Development Financial Institutions Fund established pursuant to section 104(a) (12 U.S.C. 4703(a)) of the Act;

Community Development Financial Institution Intermediary (or *CDFI Intermediary*) means an entity that meets the CDFI Program eligibility requirements described in § 1805.200 and whose primary business activity is the provision of Financial Products to CDFIs and/or emerging CDFIs;

Community Development Financial Institutions Program (or *CDFI Program*) means the program authorized by sections 105–108 of the Act (12 U.S.C. 4704–4707) and implemented under this part;

Community Facility means a facility where health care, childcare, educational, cultural, or social services are provided;

Community-Governed means an entity in which the residents of an Investment Area(s) or members of a Targeted Population(s) represent greater than 50 percent of the governing body;

Community-Owned means an entity in which the residents of an Investment Area(s) or members of a Targeted Population(s) have an aggregate ownership interest of greater than 50 percent;

Community Partner means a person (other than an individual) that provides loans, Equity Investments, or Development Services and enters into a Community Partnership with an Applicant or a Recipient. A Community Partner may include a Depository Institution Holding Company, an Insured Depository Institution, an Insured Credit Union, a State-Insured Credit Union, a non-profit or for-profit organization, a State or local government entity, a quasi-government entity, or an investment company authorized pursuant to the Small Business Investment Act of 1958 (15 U.S.C. 661 *et se.*);

Community Partnership means an agreement between an Applicant or Recipient and a Community Partner to provide collaboratively Financial Products and/or Financial Services or Development Services to an Investment Area(s) or a Targeted Population(s);

Comprehensive Business Plan means a document, covering not less than the next five years, that demonstrates that the Applicant will be properly managed and will have the capacity to operate as a CDFI that will not be dependent upon assistance from the CDFI Fund for continued viability, and that meets the requirements described in an applicable Notice of Funds Availability;

Control or Controlling means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities of any company, directly or indirectly or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any company; or

(3) Power to exercise, directly or indirectly, a controlling influence over the management, credit or investment decisions, or policies of any company.

Depository Institution Holding Company means a bank holding company or a savings and loan holding company as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1));

Development Services means activities undertaken by a CDFI, its Affiliate or contractor that promote community development and shall prepare or assist current or potential borrowers or investees to use the CDFI's Financial Products or Financial Services. For example, such activities include, financial or credit counseling; homeownership counseling; and business planning and management assistance;

Equity Investment means an investment made by a CDFI that, in the judgment of the CDFI Fund, supports or enhances activities serving the CDFI's Investment Area(s) or a Targeted Population(s). Such investments must be made through an arms-length transaction with a third party that does not have a relationship with the CDFI as an Affiliate. Equity Investments may comprise a stock purchase, a purchase of a partnership interest, a purchase of a limited liability company membership interest, a loan made on such terms that it has sufficient characteristics of equity (and is considered as such by the CDFI Fund); a purchase of secondary capital, or any other investment deemed by the CDFI Fund to be an Equity Investment;

Financial Products means loans, Equity Investments and similar financing activities (as determined by the CDFI Fund) including the purchase of loans originated by certified CDFIs and the provision of loan guarantees; in the case of CDFI Intermediaries, Financial Products may also include loans to CDFIs and/or emerging CDFIs and deposits in Insured Credit Union CDFIs, emerging Insured Credit Union CDFIs, and/or State-Insured Credit Union CDFIs;

Financial Services means providing checking, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and other similar services;

Indian Reservation means any geographic area that meets the requirements of section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(10)), and shall include: land held by incorporated Native groups, regional corporations, and village corporations, as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1602); public domain Indian allotments; and former Indian reservations in the State of Oklahoma;

Indian Tribe means any Indian Tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et se.*). Each such Indian Tribe must be recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians;

Insider means any director, officer, employee, principal shareholder (owning, individually or in combination with family members, five percent or more of any class of stock), or agent (or any family member or business partner of any of the above) of any Applicant, Subsidiary, Affiliate, or Community Partner;

Insured CDFI means a CDFI that is an Insured Depository Institution or an Insured Credit Union;

Insured Credit Union means any credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund;

Insured Depository Institution means any bank or thrift, the deposits of which are insured by the Federal Deposit Insurance Corporation;

Investment Area means a geographic area meeting the requirements of § 1805.201(b)(3);

Low-Income means income, adjusted for family size, of not more than:

(1) For Metropolitan Areas, 80 percent of the area median family income; and

(2) For non-Metropolitan Areas, the greater of:

(i) 80 percent of the area median family income; or

(ii) 80 percent of the statewide non-Metropolitan Area median family income;

Metropolitan Area means an area designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d) and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

Non-Regulated CDFI means any entity meeting the eligibility requirements described in §1805.200 and that is not a Depository Institution Holding Company, Insured Depository Institution, Insured Credit Union, or State-Insured Credit Union;

Nonvoting Securities or Nonvoting Shares. Preferred shares, limited partnership shares or interests, or similar interests are Nonvoting Securities if:

(1) Any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preferences of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears:

(2) The shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and

(3) The shares or interest do not entitle the holder, by statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.

Recipient means an Applicant selected by the CDFI Fund to receive assistance pursuant to this part;

State means any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands;

State-Insured Credit Union means any credit union that is regulated by, and/or the member accounts of which are insured by, a State agency or instrumentality;

Subsidiary means any company that is owned or Controlled directly or indirectly by another company and includes any service corporation owned in whole or part by an Insured Depository Institution or any Subsidiary of such a service corporation, except as provided in §1805.200(b)(4);

Targeted Population means individuals or an identifiable group of individuals meeting the requirements of §1805.201(b)(3);

Target Market means an Investment Area(s) and/or a Targeted Population(s);

Uniform Requirements means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 1000), which is the Department of the Treasury's codification of the Office of Management and Budget (OMB) government-wide framework for grants management at 2 CFR part 200;

Voting Securities means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder:

(1) To vote for or select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or

(2) To vote on or to direct the conduct of the operations or other significant policies of the issuing company.

§1805.105 Uniform Requirements; Waiver authority.

(a) *Uniform Requirements*. The Uniform Requirements will be applied to all awards made pursuant to this part, as applicable.

(b) *Waiver authority*. The CDFI Fund may waive any requirement of this part that is not required by law upon a determination of good cause. Each such waiver shall be in writing and supported by a statement of the facts and

the grounds forming the basis of the waiver. For a waiver in an individual case, the CDFI Fund must determine that application of the requirement to be waived would adversely affect the achievement of the purposes of the Act. For waivers of general applicability, the CDFI Fund will publish notification of granted waivers in the FEDERAL REGISTER.

§ 1805.106 OMB control number.

The collection of information requirements in this part have been approved by the Office of Management and Budget and assigned applicable, approved OMB Control Numbers associated with the CDFI Fund under 1559.

Subpart B—Eligibility

§ 1805.200 Applicant eligibility.

(a) *General requirements.* (1) An entity that meets the requirements described in §1805.201(b) and paragraph (b) of this section will be considered a CDFI and, subject to paragraph (a)(3) of this section, will be eligible to apply for assistance under this part.

(2)(i) An entity that proposes to become a CDFI is eligible to apply for assistance under this part if the CDFI Fund:

(A) Receives a complete application for certification from the entity within the time period set forth in an applicable Notice of Funds Availability; and

(B) Determines that such entity's application materials provide a realistic course of action to ensure that it will meet the requirements described in §1805.201(b) and paragraph (b) of this section within the period set forth in an applicable Notice of Funds Availability.

(ii) The CDFI Fund will not, however, make a payment of any financial assistance to such an entity before or unless it meets the requirements described in this section. Moreover, notwithstanding paragraphs (a)(1) and (a)(2)(i)(B) of this section, the CDFI Fund reserves the right to require an entity to have been certified as described in §1805.201(a) prior to its submission of an application for assistance, as set forth in an applicable Notice of Funds Availability.

(3) The CDFI Fund shall require an entity to meet any additional eligibility requirements that the CDFI Fund deems appropriate.

(4) The CDFI Fund, in its sole discretion, shall determine whether an entity fulfills the requirements set forth in this section and §1805.201(b).

(b) *Provisions applicable to Depository Institution Holding Companies and Insured Depository Institutions.* (1) A Depository Institution Holding Company may qualify as a CDFI only if it and its Affiliates collectively satisfy the requirements described in this section.

(2) No Affiliate of a Depository Institution Holding Company may qualify as a CDFI unless the holding company and all of its Affiliates collectively meet the requirements described in this section.

(3) No Subsidiary of an Insured Depository Institution may qualify as a CDFI if the Insured Depository Institution and its Subsidiaries do not collectively meet the requirements described in this section.

(4) For the purposes of paragraphs (b)(1) through (3) of this section, an entity will be considered to be a Subsidiary of any Insured Depository Institution or Depository Institution Holding Company that controls 25 percent or more of any class of the entity's voting shares, or otherwise controls, in any manner, the election of a majority of directors of the entity.

§ 1805.201 Certification as a Community Development Financial Institution.

(a) *General.* An entity may apply to the CDFI Fund for certification that it meets the CDFI eligibility requirements regardless of whether it is seeking financial or technical assistance from the CDFI Fund. Entities seeking such certification shall provide the information set forth in the application for certification. Certification by the CDFI Fund will verify that the entity meets the CDFI eligibility requirements. However, such certification shall not constitute an opinion by the CDFI Fund as to the financial viability of the CDFI or that the CDFI will be selected to receive an award from the CDFI Fund. The CDFI Fund, in its sole

discretion, shall have the right to decertify a certified entity after a determination that the eligibility requirements of paragraph (b) of this section or §1805.200(b) are no longer met.

(b) *Eligibility verification.* An entity shall demonstrate whether it meets the eligibility requirements described in this paragraph (b) by providing the information described in the application for certification demonstrating that the entity meets the eligibility requirements described in paragraphs (b)(1) through (6) of this section. The CDFI Fund, in its sole discretion, shall determine whether an entity has satisfied the requirements of this paragraph.

(1) *Primary mission.* A CDFI must have a primary mission of promoting community development. In determining whether an entity has such a primary mission, the CDFI Fund will consider whether the activities of the entity are purposefully directed toward improving the social and/or economic conditions of underserved people (which may include Low-Income persons or persons who lack adequate access to capital and/or Financial Services) and/or residents of economically distressed communities (which may include Investment Areas).

(2) *Financing entity.* (i) A CDFI shall be an entity whose predominant business activity is the provision, in arms-length transactions, of Financial Products and/or Financial Services. An entity may demonstrate that it meets this requirement if it is a(n):

(A) Depository Institution Holding Company;

(B) Insured Depository Institution, Insured Credit Union, or State-Insured Credit Union; or

(C) Organization that is deemed by the CDFI Fund to have such a predominant business activity as a result of analysis of its financial statements, organizing documents, and any other information required to be submitted as part of its certification application. In conducting such analysis, the CDFI Fund may take into consideration an entity's total assets and its use of personnel.

(ii) For the sole purpose of participating as an Eligible CDFI in the CDFI Bond Guarantee Program (see 12 CFR1808), an Affiliate of a Controlling CDFI may be deemed to meet the financing entity requirement of this section by relying on the CDFI Fund's determination that the Controlling CDFI has met said requirement; provided, however, that the CDFI Fund reserves the right, in its sole discretion, to set additional parameters and restrictions on such, which parameters and restrictions shall be set forth in the applicable Notice of Guarantee Availability for a CDFI Bond Guarantee Program application round.

(iii) Further, for the sole purpose of participating as an Eligible CDFI in the CDFI Bond Guarantee Program, the provision of Financial Products, Development Services, and/or other similar financing by an Affiliate of a Controlling CDFI need not be arms-length if such transaction is by and between the Affiliate and the Controlling CDFI, pursuant to an operating agreement that includes management and ownership provisions and is in form and substance acceptable to the CDFI Fund.

(3) *Target Market*—(i) *General.* A CDFI must serve a Target Market by virtue of serving one or more Investment Areas and/or Targeted Populations. An entity may demonstrate that it meets this requirement by demonstrating that it provides Financial Products and/or Financial Services in an Investment Areas and/or Targeted Populations as described in this section. An Investment Area shall meet specific geographic and other criteria described in paragraph (b)(3)(ii) of this section, and a Targeted Population shall meet the criteria described in paragraph (b)(3)(iii) of this section.

(ii) *Investment Area*—(A) *General.* A geographic area will be considered eligible for designation as an Investment Area if it:

(*1*) Is entirely located within the geographic boundaries of the United States (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands); and either

(*2*) Meets at least one of the objective criteria of economic distress as set

forth in paragraph (b)(3)(ii)(D) of this section and has significant unmet needs for loans, Equity Investments, Financial Products or Financial Services as described in paragraph (b)(3)(ii)(E) of this section; or

(*3*) Encompasses (*i.e.*, wholly consists of) or is wholly located within an Empowerment Zone or Enterprise Community designated under section 1391 of the Internal Revenue Code of 1986 (26 U.S.C. 1391).

(B) *Geographic units.* Subject to the remainder of this paragraph (B), an Investment Area shall consist of a geographic unit that is a county (or equivalent area), minor civil division that is a unit of local government, incorporated place, census tract, or Indian Reservation. However, geographic units in Metropolitan Areas that are used to comprise an Investment Area shall be limited to census tracts, and Indian Reservations. An entity may designate one or more Investment Areas as part of a single certification application.

(C) *Designation.* An entity may designate an Investment Area by selecting:

(*1*) A geographic unit(s) that individually meets one of the criteria in paragraph (b)(3)(ii)(D) of this section; or

(*2*) A group of contiguous geographic units that together meet one of the criteria in paragraph (b)(3)(ii)(D) of this section, provided that the combined population residing within individual geographic units not meeting any such criteria does not exceed 15 percent of the total population of the entire Investment Area.

(D) *Distress criteria.* An Investment Area (or the units that comprise an area) must meet at least one of the following objective criteria of economic distress (as reported in the most recently completed decennial census published by the U.S. Bureau of the Census):

(*1*) The percentage of the population living in poverty is at least 20 percent;

(*2*) In the case of an Investment Area located:

(*i*) Within a Metropolitan Area, the median family income shall be at or below 80 percent of the Metropolitan Area median family income or the national Metropolitan Area median family income, whichever is greater; or

(*ii*) Outside of a Metropolitan Area, the median family income shall be at or below 80 percent of the statewide non-Metropolitan Area median family income or the national non-Metropolitan Area median family income, whichever is greater;

(*3*) The unemployment rate is at least 1.5 times the national average;

(*4*) In counties located outside of a Metropolitan Area, the county population loss during the period between the most recent decennial census and the previous decennial census is at least 10 percent; or

(*5*) In counties located outside of a Metropolitan Area, the county net migration loss during the five-year period preceding the most recent decennial census is at least five percent.

(E) *Unmet needs.* An Investment Area will be deemed to have significant unmet needs for loans or Equity Investments if a narrative analysis provided by the entity demonstrates a pattern of unmet needs for Financial Products or Financial Services within such area.

(F) *Serving Investment Areas.* An entity may serve an Investment Area directly or through borrowers or investees that serve the Investment Area.

(iii) *Targeted Population*—(A) *General.* Targeted Population shall mean individuals, or an identifiable group of individuals, who are Low-Income persons or lack adequate access to Financial Products or Financial Services in the entity's Target Market. The members of a Targeted Population shall reside within the boundaries of the United States (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands).

(B) *Serving Targeted Populations.* An entity may serve the members of a Targeted Population directly or indirectly or through borrowers or investees that directly serve such members.

(4) *Development Services.* A CDFI directly, through an Affiliate, or through a contract with another provider, must

have a track record of providing Development Services in conjunction with its Financial Products and/or Financial Services. An entity applying for CDFI certification must demonstrate that it meets this requirement.

(5) *Accountability.* A CDFI must maintain accountability to residents of its Investment Area(s) or Targeted Population(s) through representation on its governing board and/or advisory board(s). An entity applying for CDFI certification must demonstrate that it meets this requirement.

(6) *Non-government.* A CDFI shall not be an agency or instrumentality of the United States, or any State or political subdivision thereof. An entity applying for CDFI certification must demonstrate that it meets this requirement. An entity that is created by, or that receives substantial assistance from, one or more government entities may be a CDFI provided it is not Controlled by such entities and maintains independent decision-making power over its activities.

(c) *Records and Review.* The CDFI Fund will review a CDFI's certification status from time to time, as deemed appropriate by the CDFI Fund, to ensure that it meets the certification requirements of this section, as well as review its organizational capacity, lending activity, community impacts, and such other information that the CDFI Fund deems appropriate. Upon request, a CDFI shall provide such information and documentation to the CDFI Fund as is necessary to undertake such review.

Subpart C—Use of Funds/Eligible Activities

§ 1805.300 Purposes of financial assistance.

The CDFI Fund may provide financial assistance through investment instruments described under subpart D of this part. Such financial assistance is intended to increase available capital and enhance the ability of a Recipient to provide Financial Products, Financial Services, and Development Services.

§ 1805.301 Eligible activities.

Recipients may use financial assistance provided under this part to serve Investment Area(s) or Targeted Population(s) by developing or supporting, through lending, investing, enhancing liquidity, or other means of finance:

(a) Commercial facilities that promote revitalization, community stability or job creation or retention;

(b) Businesses that:

(1) Provide jobs for Low-Income persons;

(2) Are owned by Low-Income persons; or

(3) Increase the availability of products and services to Low-Income persons;

(c) Community Facilities;

(d) The provision of Financial Services;

(e) Housing that is principally affordable to Low-Income persons, except that assistance used to facilitate homeownership shall only be used for services and lending products that serve Low-Income persons and that:

(1) Are not provided by other lenders in the area; or

(2) Complement the services and lending products provided by other lenders that serve the Investment Area(s) or Targeted Population(s);

(f) The provision of consumer loans (a loan to one or more individuals for household, family, or other personal expenditures); or

(g) Other businesses or activities as requested by the Applicant and deemed appropriate by the CDFI Fund.

§ 1805.302 Restrictions on use of assistance.

(a) A Recipient shall use assistance provided by the CDFI Fund and its corresponding matching funds only for the eligible activities approved by the CDFI Fund and described in the Assistance Agreement.

(b) A Recipient may not distribute assistance to an Affiliate without the CDFI Fund's consent.

(c) Assistance provided upon approval of an application involving a Community Partnership shall only be distributed to the Recipient and shall not be used to fund any activities carried out by a Community Partner or an Affiliate of a Community Partner.

§ 1805.303 Technical assistance.

(a) *General.* The CDFI Fund may provide technical assistance to build the capacity of a CDFI or an entity that proposes to become a CDFI. Such technical assistance may include: training for management and other personnel; development of programs, products and services; improving financial management and internal operations; enhancing a CDFI's community impact; or other activities deemed appropriate by the CDFI Fund. The CDFI Fund, in its sole discretion, may provide technical assistance in amounts or under terms and conditions that are different from those requested by an Applicant or Recipient. The CDFI Fund may not provide any technical assistance funding to an Applicant for the purpose of assisting in the preparation of an application for federal assistance. The CDFI Fund may provide technical assistance to a CDFI directly, through grants, or by contracting with organizations that possess the appropriate expertise.

(b) The CDFI Fund may provide technical assistance regardless of whether the Recipient also receives financial assistance under this part. Technical assistance provided pursuant to this part is subject to the assistance limits described in § 1805.402.

(c) An Applicant seeking technical assistance must meet the eligibility requirements described in § 1805.200 and submit an application as described in § 1805.600.

(d) Applicants for technical assistance pursuant to this part will be evaluated pursuant to the merit-based qualitative review criteria in subpart G of this part, except as otherwise may be provided in the applicable Notice of Funds Availability. In addition, the requirements for matching funds are not applicable to technical assistance requests.

Subpart D—Investment Instruments

§ 1805.400 Investment instruments—general.

The CDFI Fund will provide financial assistance to a Recipient through one or more of the investment instruments described in § 1805.401, and under such terms and conditions as described in this subpart D. The CDFI Fund, in its sole discretion, may provide financial assistance in amounts, through investment instruments, or under rates, terms and conditions that are different from those requested by an Applicant.

§ 1805.401 Forms of investment instruments.

(a) *Equity.* The CDFI Fund may make non-voting equity investments in a Recipient, including, without limitation, the purchase of non-voting stock. Such stock shall be transferable and, in the discretion of the CDFI Fund, may provide for convertibility to voting stock upon transfer. The CDFI Fund shall not own more than 50 percent of the equity of a Recipient and shall not control its operations.

(b) *Grants.* The CDFI Fund may award grants.

(c) *Loans.* The CDFI Fund may make loans, if and as permitted by applicable law and regulation.

(d) *Deposits and credit union shares.* The CDFI Fund may make deposits (which shall include credit union shares) in Insured CDFIs and State-Insured Credit Unions. Deposits in an Insured CDFI or a State-Insured Credit Union shall not be subject to any requirement for collateral or security.

§ 1805.402 Assistance limits.

(a) *General.* Except as provided in paragraph (b) of this section, the Fund may not provide, pursuant to this part, more than $5 million, in the aggregate, in financial and technical assistance to a Recipient and its Subsidiaries and Affiliates during any three-year period.

(b) *Additional amounts.* If a Recipient proposes to establish a new Subsidiary or Affiliate to serve an Investment Area(s) or Targeted Population(s) outside of any State, and outside of any Metropolitan Area, currently served by the Recipient or its Subsidiaries or Affiliates, the Recipient may receive additional assistance pursuant to this Part up to a maximum of $3.75 million during the same three-year period. Such additional assistance:

(1) Shall be used only to finance activities in the new or expanded Investment Area(s) or Targeted Population(s); and

(2) Must be distributed to a new Subsidiary or Affiliate that meets the eligibility requirements described in §1805.200 and is selected for assistance pursuant to subpart G of this part.

(c) A Recipient may receive the assistance described in paragraph (b) of this section only if no other application to serve substantially the same Investment Area(s) or Targeted Population(s) that meets the requirements of §1805.701(a) was submitted to the CDFI Fund prior to the receipt of the application of said Recipient and within the current funding round.

§1805.403 Authority to sell.

The CDFI Fund may, at any time, sell its equity investments and loans, provided the CDFI Fund shall retain the authority to enforce the provisions of the Assistance Agreement until the performance goals specified therein have been met.

Subpart E—Matching Funds Requirements

§1805.500 Matching funds—general.

All financial assistance awarded under this part shall be matched with funds from sources other than the Federal government. Except as provided in §1805.502, such matching funds shall be provided on the basis of not less than one dollar for each dollar provided by the CDFI Fund. Funds that have been used to satisfy a legal requirement for obtaining funds under either the CDFI Program or another Federal grant or award program may not be used to satisfy the matching requirements described in this section. Community Development Block Grant Program and other funds provided pursuant to the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 *et seq.*), shall be considered Federal government funds and shall not be used to meet the matching requirements. Matching funds shall be used as provided in the applicable Notice of Funds Availability and/or the corresponding Assistance Agreement. Funds that are used prior to the execution of the Assistance Agreement may nevertheless qualify as matching funds provided they were used as provided in the applicable Notice of Funds Availability and/or Assistance Agreement.

§1805.501 Comparability of form and value.

(a) Matching funds shall be at least comparable in form (*e.g.*, equity investments, deposits, credit union shares, loans and grants) and value to financial assistance provided by the CDFI Fund (except as provided in §1805.502). The CDFI Fund shall have the discretion to determine whether matching funds pledged are comparable in form and value to the financial assistance requested.

(b) In the case of a Recipient that raises matching funds from more than one source, through different investment instruments, or under varying terms and conditions, the CDFI Fund may provide financial assistance in a manner that represents the combined characteristics of such instruments.

(c) A Recipient may meet all or part of its matching requirements by committing available earnings retained from its operations.

§1805.502 Severe constraints waiver.

(a) In the case of an Applicant with severe constraints on available sources of matching funds, the CDFI Fund, in its sole discretion, may permit such Applicant to comply with the matching requirements by:

(1) Reducing such requirements by up to 50 percent; or

(2) Permitting an Applicant to provide matching funds in a form to be determined at the discretion of the CDFI Fund, if such an Applicant:

(i) Has total assets of less than $100,000;

(ii) Serves an area that is not a Metropolitan Area; and

(iii) Is not requesting more than $25,000 in assistance.

(b) Not more than 25 percent of the total funds available for obligation under this part in any fiscal year may be matched as described in paragraph (a) of this section.

(c) The terms of the severe constraints waiver shall be provided in the applicable Notice of Funds Availability and Assistance Agreement.

§ 1805.503 Time frame for raising match.

Applicants and Recipients shall satisfy matching funds requirements within the period set forth in the applicable Notice of Funds Availability and/or the corresponding Assistance Agreement.

§ 1805.504 Retained earnings.

(a) *General.* An Applicant or Recipient may use its retained earnings to match a request for a financial assistance grant from the CDFI Fund. An Applicant or Recipient that proposes to meet all or a portion of its matching funds requirements by committing available retained earnings from its operations shall be subject to the restrictions described in this section. Retained earnings shall be calculated as directed by the CDFI Fund in the applicable Notice of Funds Availability, the financial assistance application, and/or related guidance materials. The CDFI Fund shall make the final determination of the eligible amount of retained earnings that an Applicant or Recipient has available as matching funds.

(b) *Applicants other than Insured Credit Unions, State-Insured Credit Unions and Insured Depository Institutions.* In the case of an Applicant or Recipient that is not an Insured Credit Union, State-Insured Credit Union or Insured Depository Institution, retained earnings that may be used for matching funds purposes shall consist of:

(1) The increase in retained earnings (meaning, for purposes of §1805.504(b), revenue minus expenses less any dividend payments) that has occurred over the Applicant's or Recipient's fiscal year as set forth in the applicable Notice of Funds Availability; or

(2) The annual average of such increases that occurred over the Applicant's or Recipient's three consecutive fiscal years as set forth in the applicable Notice of Funds Availability.

(c) *Insured Credit Unions, State-Insured Credit Unions, and Insured Depository Institutions.* (1) In the case of an Applicant or Recipient that is an Insured Credit Union, State-Insured Credit Union or Insured Depository Institution, retained earnings that may be used for matching funds purposes shall consist of:

(i) The increase in retained earnings that has occurred over the Applicant's or Recipient's fiscal year as set forth in the applicable Notice of Funds Availability;

(ii) The annual average of such increases that has occurred over the Applicant's or Recipient's three consecutive fiscal years as set forth in the applicable Notice of Funds Availability; or

(iii) The entire retained earnings that have been accumulated since the inception of the Applicant or Recipient, provided that the Assistance Agreement shall require that:

(A) The Recipient shall increase its member shares, non-member shares, outstanding loans and/or other measurable activity as defined in and by an amount that is set forth in an applicable Notice of Funds Availability;

(B) Such increase must be achieved by a date certain set forth in the applicable Notice of Funds Availability;

(C) The level from which the achievement of said increases will be measured will be as of the date set forth in the applicable Notice of Funds Availability; and

(D) Financial assistance shall be paid by the CDFI Fund only as the amount of increases described in paragraph (c)(1)(iii)(A) of this section is achieved.

(2) The CDFI Fund will allow an Applicant or Recipient to utilize the option described in paragraph (c)(1)(iii) of this section for matching funds only if it determines, in its sole discretion, that the Applicant or Recipient will have a high probability of success in achieving said increases to the specified amounts.

Subpart F—Applications for Assistance

§ 1805.600 Notice of Funds Availability.

Each Applicant shall submit an application for financial or technical assistance under this part in accordance with the applicable Notice of Funds Availability published in the FEDERAL REGISTER. The Notice of Funds Availability will advise prospective Applicants on how to obtain an application packet and will establish deadlines and other requirements. The Notice of

Funds Availability may specify the application scoring criteria and any limitations, special rules, procedures, and restrictions for a particular funding round. After receipt of an application, the CDFI Fund may request clarifying or technical information on the materials submitted as part of such application.

Subpart G—Evaluation and Selection of Applications

§ 1805.700 Evaluation and selection—general.

Applicants will be evaluated and selected, at the sole discretion of the CDFI Fund, to receive assistance based on a review process that may include an interview(s) and/or site visit(s) and that is intended to:

(a) Ensure that Applicants are evaluated on a merit basis and in a fair and consistent manner;

(b) Consider the unique characteristics of Applicants that vary by institution type, total asset size, stage of organizational development, markets served, products and services provided, and location;

(c) Ensure that each Recipient can successfully meet the goals of its Comprehensive Business Plan and achieve community development impact;

(d) Ensure that Recipients represent a geographically diverse group of Recipients serving Metropolitan Areas, non-Metropolitan Areas, and Indian Reservations from different regions of the United States; and

(e) Consider other factors as described in the applicable Notice of Funds Availability.

§ 1805.701 Evaluation of applications.

(a) *Eligibility and completeness.* An Applicant will not be eligible to receive assistance pursuant to this part if it fails to meet the eligibility requirements described in § 1805.200 or if it has not submitted complete application materials. For the purposes of this paragraph (a), the CDFI Fund reserves the right to request additional information from the Applicant, if the CDFI Fund deems it appropriate.

(b) *Substantive review.* In evaluating and selecting applications to receive assistance, the CDFI Fund will evaluate the feasibility of the Applicant's Comprehensive Business Plan goals, the likelihood of the Applicant meeting such goals, and the likelihood of the Applicant achieving its proposed community development impacts, by considering factors such as:

(1) Community development track record, including, in the case of an Applicant with a prior history of serving a Target Market, the extent of success in serving such Target Market and whether it will expand its operations into a new Investment Area or serve a new Targeted Population, offer more Development Services, Financial Products and/or Financial Services, or increase the volume of its current business;

(2) Operational capacity and risk mitigation strategies;

(3) Financial track record and strength;

(4) Capacity, skills, experience and background of the management team;

(5) Understanding of its market context, including an analysis of the needs of the Investment Area or Targeted Population and a strategy for how the Applicant will attempt to meet those needs; such analysis of current and prospective customers will include the extent of economic distress within the designated Investment Area(s) or the extent of need within the designated Targeted Population(s), as those factors are measured by objective criteria, the extent of need for Loans, Equity Investments, Financial Products, Financial Services and Development Services within the designated Target Market, and the extent of demand within the Target Market for the Applicant's products and services;

(6) Program design and implementation plan, including: A plan to coordinate use of a financial assistance award with existing Federal State, local and Tribal government assistance programs, and private sector financial services; A description of how the Applicant will coordinate with community organizations and financial institutions which will provide equity investments, loans, secondary markets, or other services to the Investment Area or Targeted Population; an assessment of its products and services,

marketing and outreach efforts, delivery strategy, and coordination with other institutions and/or a Community Partner, or participation in a secondary market for purposes of increasing the Applicant's resources. In the case of an Applicant submitting an application with a Community Partner, the CDFI Fund will evaluate: the extent to which the Community Partner will participate in carrying out the activities of the Community Partnership; the extent to which the Community Partner will enhance the likelihood of success of the Comprehensive Business Plan; and the extent to which service to the designated Target Market will be better performed by a Community Partnership than by the Applicant alone;

(7) Projections for financial performance, capitalization and the raising of needed external resources, including a detailed description of the Applicant's plans and likely sources of funds to match the amount of financial assistance requested from the CDFI Fund, the amount of firm commitments and matching funds in hand to meet or exceed the matching funds requirements and, if applicable, the likely success of the plan for raising the balance of the matching funds in a timely manner, the extent to which the matching funds are, or will be, derived from private sources, and whether an Applicant is, or will become, an Insured CDFI or a State-Insured Credit Union;

(8) Projections for community development impact, including the extent to which an Applicant will concentrate its activities on serving its Target Market(s), the extent of support from the designated Target Market, the extent to which an Applicant is, or will be, Community-Owned or Community-Governed, and the extent to which the activities proposed in the Comprehensive Business Plan are consistent with existing economic, community, and housing development plans adopted by or applicable to the Investment Area or Targeted Population and will expand economic opportunities or promote community development within the designated Target Market;

(9) The extent of need for the CDFI Fund's assistance, as demonstrated by the extent of economic distress in the Applicant's Target Market and the extent to which the Applicant needs the CDFI Fund's assistance to carry out its Comprehensive Business Plan;

(10) In the case of an Applicant that has previously received assistance under the CDFI Program, the CDFI Fund also will consider the Applicant's level of success in meeting its performance goals, financial soundness covenants (if applicable), and other requirements contained in the previously negotiated and executed Assistance Agreement(s) with the CDFI Fund, the unexpended balance of assistance, and whether the Applicant will, with additional assistance from the CDFI Fund, expand its operations into a new Target Market, offer more products or services, and/or increase the volume of its activities; and

(11) The CDFI Fund may consider any other factors, as it deems appropriate, in reviewing an application as set forth in an applicable Notice of Funds Availability.

(c) *Consultation with Appropriate Federal Banking Agencies.* The CDFI Fund will consult with, and consider the views of, the Appropriate Federal Banking Agency prior to providing assistance to:

(1) An Insured CDFI;

(2) A CDFI that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency; or

(3) A CDFI that has as its Community Partner an institution that is examined by, or subject to, the reporting requirements of an Appropriate Federal Banking Agency.

(d) *Consultation with Appropriate State Agencies.* Prior to providing assistance to a State-Insured Credit Union, the CDFI Fund may consult with, and consider the views of, the Appropriate State Agency.

(e) *Recipient selection.* The CDFI Fund will select Recipients based on the criteria described in paragraph (b) of this section and any other criteria set forth in this part or the applicable Notice of Funds Availability.

Subpart H—Terms and Conditions of Assistance

§ 1805.800 Safety and soundness.

(a) *Regulated institutions.* Nothing in this part, or in an Assistance Agreement, shall affect any authority of an Appropriate Federal Banking Agency or Appropriate State Agency to supervise and regulate any institution or company.

(b) *Non-Regulated CDFIs.* The CDFI Fund will, to the maximum extent practicable, ensure that Recipients that are Non-Regulated CDFIs are financially and managerially sound and maintain appropriate internal controls.

§ 1805.801 Assistance Agreement; sanctions.

(a) Prior to providing any Financial or Technical Assistance, the CDFI Fund and a Recipient shall execute an Assistance Agreement that requires a Recipient to comply with performance goals and abide by other terms and conditions of assistance. Such performance goals may be modified at any time by mutual consent of the CDFI Fund and a Recipient or as provided in paragraph (c) of this section. If a Community Partner or an Affiliate is part of an application that is selected for assistance, such partner must be a party to the Assistance Agreement, if deemed appropriate by the CDFI Fund.

(b) A Recipient shall comply with performance goals that have been established or negotiated with the CDFI Fund and which are based upon the Comprehensive Business Plan submitted as part of the Recipient's application. Such performance goals may include measures that require a Recipient to:

(1) Be financially sound;

(2) Be managerially sound;

(3) Maintain appropriate internal controls; and/or

(4) Achieve specific lending, investment, and development service objectives.

Performance goals for Insured CDFIs shall be determined in consultation with the Appropriate Federal Banking Agency, as applicable. Such goals shall be incorporated in, and enforced under, the Recipient's Assistance Agreement. Performance goals for State-Insured Credit Unions may be determined in consultation with the Appropriate State Agency, if deemed appropriate by the CDFI Fund.

(c) The Assistance Agreement shall provide that, in the event of fraud, mismanagement, noncompliance with the Act and the CDFI Fund's regulations, or noncompliance with the terms and conditions of the Assistance Agreement on the part of the Recipient (or the Community Partner, if applicable), the CDFI Fund, in its discretion, may:

(1) Require changes in the performance goals set forth in the Assistance Agreement;

(2) Require changes in the Recipient's Comprehensive Business Plan;

(3) Revoke approval of the Recipient's application;

(4) Reduce or terminate the Recipient's assistance;

(5) Require repayment of any assistance that has been distributed to the Recipient;

(6) Bar the Recipient from reapplying for any assistance from the CDFI Fund; or

(7) Take such other actions as the CDFI Fund deems appropriate.

(d) In the case of an Insured CDFI, the Assistance Agreement shall provide that the provisions of the Act, this part, and the Assistance Agreement shall be enforceable under 12 U.S.C. 1818 of the Federal Deposit Insurance Act by the Appropriate Federal Banking Agency, as applicable, and that any violation of such provisions shall be treated as a violation of the Federal Deposit Insurance Act. Nothing in this paragraph (d) precludes the CDFI Fund from directly enforcing the Assistance Agreement as provided for under the terms of the Act.

(e) The CDFI Fund shall notify the Appropriate Federal Banking Agency before imposing any sanctions on an Insured CDFI or other institution that is examined by or subject to the reporting requirements of that agency. The CDFI Fund shall not impose a sanction described in paragraph (c) of this section if the Appropriate Federal Banking Agency, in writing, and to the satisfaction of the CDFI Fund, not later than 30 calendar days after receiving notice from the CDFI Fund:

(1) Objects to the proposed sanction;
(2) Determines that the sanction would:
(i) Have a material adverse effect on the safety and soundness of the institution; or
(ii) Impede or interfere with an enforcement action against that institution by that agency;
(3) Proposes a comparable alternative action; and
(4) Specifically explains:
(i) The basis for the determination under paragraph (e)(2) of this section and, if appropriate, provides documentation to support the determination; and
(ii) How the alternative action suggested pursuant to paragraph (e)(3) of this section would be as effective as the sanction proposed by the CDFI Fund in securing compliance and deterring future noncompliance.

(f) In reviewing the performance of a Recipient in which its Investment Area(s) includes an Indian Reservation or Targeted Population(s) includes an Indian Tribe, the CDFI Fund shall consult with, and seek input from, the appropriate tribal government.

(g) Prior to imposing any sanctions pursuant to this section or an Assistance Agreement, the CDFI Fund shall, to the maximum extent practicable, provide the Recipient (or the Community Partner, if applicable) with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide a Recipient or Community Partner with the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

§ 1805.802 Payment of funds.

Assistance provided pursuant to this part may be provided in a lump sum or over a period of time, as determined appropriate by the CDFI Fund. The CDFI Fund shall not provide any assistance under this part until a Recipient has satisfied any required conditions set forth in its Assistance Agreement and, if the Recipient is to receive financial assistance, the Recipient has secured in-hand and/or firm commitments for the matching funds required for such assistance pursuant to the applicable Notice of Funds Availability.

§ 1805.803 Data collection and reporting.

(a) *Data—General.* A Recipient shall maintain such records as may be prescribed by the CDFI Fund that are necessary to:

(1) Disclose the manner in which CDFI Fund assistance is used;

(2) Demonstrate compliance with the requirements of this part and an Assistance Agreement; and

(3) Evaluate the impact of the CDFI Program.

(b) *Customer profiles.* A Recipient (and a Community Partner, if appropriate) shall compile such data on the gender, race, ethnicity, national origin, or other information on individuals that utilize its products and services as the CDFI Fund shall prescribe in an Assistance Agreement. Such data will be used to determine whether residents of Investment Area(s) or members of Targeted Population(s) are adequately served and to evaluate the impact of the CDFI Program.

(c) *Access to records.* A Recipient (and a Community Partner, if appropriate) must submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by the CDFI Fund or the Department of the Treasury to ensure compliance with the requirements of this part and to evaluate the impact of the CDFI Program. The United States Government, including the Department of the Treasury, the Comptroller General, and their duly authorized representatives, shall have full and free access to the Recipient's offices and facilities and all books, documents, records, and financial statements relating to use of Federal funds and may copy such documents as they deem appropriate. The CDFI Fund, if it deems appropriate, may prescribe access to record requirements for entities that are borrowers of, or that receive investments from a Recipient.

(d) *Retention of records.* A Recipient shall comply with all record retention requirements as set forth in the Uniform Requirements (as applicable).

(e) *Data collection and reporting.* Each Recipient shall submit to the CDFI Fund information and documentation

that will permit the CDFI Fund to review the Recipient's progress (and the progress of its Affiliates, Subsidiaries, and/or Community Partners, if appropriate) in implementing its Comprehensive Business Plan and satisfying the terms and conditions of its Assistance Agreement. The information and documentation shall include, but not be limited to, an audit and an annual report, which shall comprise the following components:

(1) *Audits and Audited Financial Statements.* (i) All non-profit organizations that are required to have their financial statements audited pursuant to the Uniform Requirements, must submit their single-audits no later than nine months after the end of the Recipient's fiscal year. Non-profit organizations (excluding Insured CDFIs and State-Insured Credit Unions) that are not required to have financial statements audited pursuant to the Uniform Requirements, must submit to the CDFI Fund a statement signed by the Recipient's Authorized Representative or certified public accountant, asserting that the Recipient is not required to have a single audit pursuant to the Uniform Requirements as indicated in the Assistance Agreement. In such instances, the CDFI Fund may require additional audits to be performed as stated in the applicable Notice of Funds Availability.

(ii) For-profit organizations (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements audited in conformity with generally accepted auditing standards as promulgated by the American Institute of Certified Public Accountants, no later than six months after the end of the Recipient's fiscal year.

(iii) Insured CDFIs are not required to submit financial statements to the CDFI Fund. The CDFI Fund will obtain the necessary information from publicly available sources. State-Insured Credit Unions must submit to the CDFI Fund copies of the financial statements that they submit to the Appropriate State Agency.

(iv) If multiple for-profit organizations sign the Assistance Agreement: The Recipient may submit combined financial statements and footnotes for the Recipient and other entities that signed the Assistance Agreement as long as the financial statements of each signatory are shown separately (for example, in combining financial statements).

(2) *Annual Report.* (i) Each Recipient shall submit to the CDFI Fund a performance and financial report at the times that shall be specified in the Assistance Agreement (Annual Report). The Annual Report consists of several components which may include, but are not limited to, an institution level report, transaction level report, use of financial or technical assistance report, explanation of any Recipient noncompliance, and shareholder report. The Annual Report components shall be specified and described in the Assistance Agreement.

(ii) The CDFI Fund will use the Annual Report to collect data to assess the Recipient's compliance with its Performance Goals and the impact of the CDFI Program and the CDFI industry.

(iii) Recipients are responsible for the timely and complete submission of the Annual Report, even if all or a portion of the documents actually are completed by another entity or signatory to the Assistance Agreement. If such other entities or signatories are required to provide Annual Reports, or other documentation that the CDFI Fund may require, the Recipient is responsible for ensuring that the information is submitted timely and complete. The CDFI Fund reserves the right to contact such additional signatories to the Assistance Agreement and require that additional information and documentation be provided.

(3) The CDFI Fund's review of the progress of an Insured CDFI, a Depository Institution Holding Company or a State-Insured Credit Union in implementing its Comprehensive Business Plan and satisfying the terms and conditions of its Assistance Agreement may also include information from the Appropriate Federal Banking Agency or Appropriate State Agency, as the case may be.

(4) *Public Access.* The CDFI Fund shall make reports described in this section available for public inspection

after deleting or redacting any materials necessary to protect privacy or proprietary interests.

(f) *Exchange of information with Appropriate Federal Banking Agencies and Appropriate State Agencies.* (1) Except as provided in paragraph (f)(4) of this section, prior to directly requesting information from or imposing reporting or record keeping requirements on an Insured CDFI or other institution that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency, the CDFI Fund shall consult with the Appropriate Federal Banking Agency to determine if the information requested is available from or may be obtained by such agency in the form, format, and detail required by the CDFI Fund.

(2) If the information, reports, or records requested by the CDFI Fund pursuant to paragraph (f)(1) of this section are not provided by the Appropriate Federal Banking Agency within 15 calendar days after the date on which the material is requested, the CDFI Fund may request the information from or impose the record keeping or reporting requirements directly on such institutions with notice to the Appropriate Federal Banking Agency.

(3) The CDFI Fund shall use any information provided by an Appropriate Federal Banking Agency or Appropriate State Agency under this section to the extent practicable to eliminate duplicative requests for information and reports from, and record keeping by, an Insured CDFI, State-Insured Credit Union or other institution that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency or Appropriate State Agency.

(4) Notwithstanding paragraphs (f)(1) and (2) of this section, the CDFI Fund may require an Insured CDFI, State-Insured Credit Union, or other institution that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency or Appropriate State Agency to provide information with respect to the institution's implementation of its Comprehensive Business Plan or compliance with the terms of its Assistance Agreement, after providing notice to the Appropriate Federal Banking Agency or Appropriate State Agency, as the case may be.

(5) Nothing in this part shall be construed to permit the CDFI Fund to require an Insured CDFI, State-Insured Credit Union, or other institution that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency or Appropriate State Agency to obtain, maintain, or furnish an examination report of any Appropriate Federal Banking Agency or Appropriate State Agency, or records contained in or related to such report.

(6) The CDFI Fund and the Appropriate Federal Banking Agency shall promptly notify each other of material concerns about a Recipient that is an Insured CDFI or that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency, and share appropriate information relating to such concerns.

(7) Neither the CDFI Fund nor the Appropriate Federal Banking Agency (or Appropriate State Agency, as the case may be) shall disclose confidential information obtained pursuant to this section from any party without the written consent of that party.

(8) The CDFI Fund, the Appropriate Federal Banking Agency (or Appropriate State Agency, as the case may be), and any other party providing information under this paragraph (f) shall not be deemed to have waived any privilege applicable to the any information or data, or any portion thereof, by providing such information or data to the other party or by permitting such data or information, or any copies or portions thereof, to be used by the other party.

§ 1805.804 Information.

The CDFI Fund and each Appropriate Federal Banking Agency shall cooperate and respond to requests from each other and from other Appropriate Federal Banking Agencies in a manner that ensures the safety and soundness of Insured CDFIs or other institution that is examined by or subject to the reporting requirements of an Appropriate Federal Banking Agency.

§ 1805.805 Compliance with government requirements.

In carrying out its responsibilities pursuant to an Assistance Agreement, the Recipient shall comply with all applicable Federal, State, and local laws, regulations, and ordinances, OMB Circulars, and Executive Orders. Furthermore, Recipients must comply with the CDFI Fund's Environmental Quality Regulations (12 CFR part 1815) as well as all other federal environmental requirements applicable to federal awards.

§ 1805.806 Conflict of interest requirements.

(a) *Provision of credit to Insiders.* (1) A Recipient that is a Non-Regulated CDFI may not use any monies provided to it by the CDFI Fund to make any credit (including loans and Equity Investments) available to an Insider, unless it meets the following restrictions:

(i) The credit must be provided pursuant to standard underwriting procedures, terms and conditions;

(ii) The Insider receiving the credit, and any family member or business partner thereof, shall not participate in any way in the decision making regarding such credit;

(iii) The board of directors or other governing body of the Recipient shall approve the extension of the credit; and

(iv) The credit must be provided in accordance with a policy regarding credit to Insiders that has been approved in advance by the CDFI Fund.

(2) A Recipient that is an Insured CDFI, a Depository Institution Holding Company or a State-Insured Credit Union shall comply with the restrictions on Insider activities and any comparable restrictions established by its Appropriate Federal Banking Agency or Appropriate State Agency, as applicable.

(b) *Recipient standards of conduct.* A Recipient that is a Non-Regulated CDFI shall maintain a code or standards of conduct acceptable to the CDFI Fund that shall govern the performance of its Insiders engaged in the awarding and administration of any credit (including loans and Equity Investments) and contracts using monies from the CDFI Fund. No Insider of a Recipient shall solicit or accept gratuities, favors, or anything of monetary value from any actual or potential borrowers, owners, or contractors for such credit or contracts. Such policies shall provide for disciplinary actions to be applied for violation of the standards by the Recipient's Insiders.

§ 1805.807 Lobbying restrictions.

No assistance made available under this part may be expended by a Recipient to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or local government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or local government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. 1352.

§ 1805.808 Criminal provisions.

The criminal provisions of 18 U.S.C. 657 regarding embezzlement or misappropriation of funds are applicable to all Recipients and Insiders.

§ 1805.809 CDFI Fund deemed not to control.

The CDFI Fund shall not be deemed to Control a Recipient by reason of any assistance provided under the Act for the purpose of any applicable law.

§ 1805.810 Limitation on liability.

The liability of the CDFI Fund and the United States Government arising out of any assistance to a CDFI in accordance with this part shall be limited to the amount of the investment in the CDFI. The CDFI Fund shall be exempt from any assessments and other liabilities that may be imposed on controlling or principal shareholders by any Federal law or the law of any State. Nothing in this section shall affect the application of any Federal tax law.

§ 1805.811 Fraud, waste and abuse.

Any person who becomes aware of the existence or apparent existence of fraud, waste, or abuse of assistance provided under this part should report such incidences to the Office of Inspector General of the U.S. Department of the Treasury.

PART 1806—BANK ENTERPRISE AWARD PROGRAM

Subpart A—General Provisions

Subpart B—Eligibility

Subpart C—Use of Funds/Eligible Activities

Subpart D—Award Determinations

Subpart E—Terms and Conditions of Assistance

AUTHORITY: 12 U.S.C. 1834a, 4703, 4703 note, 4713, 4717; 31 U.S.C. 321.

SOURCE: 81 FR 52743, Aug. 10, 2016, unless otherwise noted.

Subpart A—General Provisions

§ 1806.100 Purpose.

The purpose of the Bank Enterprise Award (BEA) Program is to provide grants to Insured Depository Institutions that provide financial and technical assistance to Community Development Financial Institutions and increase their activities in Distressed Communities.

§ 1806.101 Summary.

Through the BEA Program, the CDFI Fund will provide monetary awards in the form of grants to Applicants selected by the CDFI Fund that increase their investments in or provide other support of CDFIs, increase their lending and investment activities in Distressed Communities, or increase their provision of certain services and assistance. Distressed Communities must meet minimum geographic, poverty, and unemployment criteria. Applicants are selected to receive BEA Program Awards through a merit-based, competitive application process. The amount of a BEA Program Award is based on the increase in Qualified Activities that are carried out by the Applicant during the Assessment Period. BEA Program Awards are disbursed by the CDFI Fund after the Recipient has successfully completed projected Qualified Activities. Each Recipient will enter into an Award Agreement, which will require it to abide by terms and conditions pertinent to any assistance received under this part, including the requirement that BEA Program Award proceeds must be used for Eligible Activities, and in accordance with the Uniform Administrative Requirements, as applicable. All BEA Program Awards are made subject to funding availability.

§ 1806.102 Relationship to other CDFI Fund programs.

(a) *Restrictions using BEA Program Award in conjunction with other awards.* (1) Restrictions are in place on applying for, receiving, and using BEA Program Awards in conjunction with awards under other programs administered by the CDFI Fund.

(2) Other programs include, but not limited to, the Capital Magnet Fund, the CDFI Program, the CDFI Bond Guarantee Program, the Native American CDFI Assistance Program, and the New Markets Tax Credit Program, are as set forth in the applicable notice of funding opportunity or Notice of Allocation Availability.

(b) *Prohibition against double funding.* (1) Qualified Activities may not include transactions funded in whole or in part with award proceeds from another

CDFI Fund program or Federal program.

(2) An Applicant that is a CDFI may not receive a BEA Program Award, either directly or through a community partnership if it has:

(i) Received a CDFI Program award within the preceding 12-month period, or has a CDFI Program application pending; or

(ii) Ever received a CDFI Program award based on the same activity during the same semiannual period for which the institution seeks a BEA Program Award.

§ 1806.103 Definitions.

For purposes of this part, the following terms shall have the following definitions:

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

Affordable Housing Development Loan means origination of a loan to finance the acquisition, construction, and/or development of single- or multi-family residential real property, where at least 60 percent of the units in such property are affordable, as may be defined in the applicable NOFA, to Eligible Residents who meet Low- and Moderate-Income requirements;

Affordable Housing Loan means origination of a loan to finance the purchase or improvement of the borrower's primary residence, and that is secured by such property, where such borrower is an Eligible Resident who meets Low- and Moderate-Income requirements. Affordable Housing Loan may also refer to second (or otherwise subordinated) liens or ''soft second'' mortgages and other similar types of down payment assistance loans, but may not necessarily be secured by such property originated for the purpose of facilitating the purchase or improvement of the borrower's primary residence, where such borrower is an Eligible Resident who meets Low- and Moderate-Income requirements;

Applicant means any insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813)) that is applying for a Bank Enterprise Award;

Appropriate Federal Banking Agency has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

Assessment Period means an annual or semi-annual period specified in the applicable NOFA in which an Applicant will carry out, or has carried out, Qualified Activities;

Award Agreement means a formal agreement between the CDFI Fund and a Recipient pursuant to § 1806.500;

Bank Enterprise Award (or *BEA Program Award*) means an award made to an Applicant pursuant to this part;

Bank Enterprise Award Program (or *BEA Program*) means the program authorized by section 114 of the Act and implemented under this part;

Baseline Period means an annual or a semi-annual period specified in the applicable NOFA, in which an Applicant has previously carried out Qualified Activities;

CDFI Partner means a CDFI that has been provided assistance in the form of CDFI Related Activities by an unaffiliated Applicant;

CDFI Related Activities means Equity Investments, Equity-Like Loans and CDFI Support Activities;

CDFI Support Activity means assistance provided by an Applicant or its Subsidiary to a CDFI that meets criteria set forth by the CDFI Fund in the applicable NOFA and that is Integrally Involved in a Distressed Community, in the form of the origination of a loan, Technical Assistance, or deposits, as further specified in the applicable NOFA;

Commercial Loans and Investments means the following lending activity types: Affordable Housing Development Loans and related Project Investments; Small Business Loans and related Project Investments; and Commercial Real Estate Loans and related Project Investments;

Commercial Real Estate Loan means an origination of a loan (other than an Affordable Housing Development Loan or Affordable Housing Loan) that is secured by real estate and used to finance the acquisition or rehabilitation of a building in a Distressed Community, or the acquisition, construction and or development of property in a

Distressed Community, used for commercial purposes;

Community Development Financial Institution (or *CDFI*) means an entity that has been certified as a CDFI by the CDFI Fund as of the date specified in the applicable NOFA;

Community Development Financial Institutions Fund (or *CDFI Fund*) means the Community Development Financial Institutions Fund established pursuant to section 104(a)(12 U.S.C. 4703(a)) of the Act;

Community Services means the following forms of assistance provided by officers, employees or agents (contractual or otherwise) of the Applicant:

(1) Provision of Technical Assistance and financial education to Eligible Residents regarding managing their personal finances;

(2) Provision of Technical Assistance and consulting services to newly formed small businesses and nonprofit organizations located in the Distressed Community;

(3) Provision of Technical Assistance and financial education to, or servicing the loans of, homeowners who are Eligible Residents and meet Low- and Moderate-Income requirements; and

(4) Other services provided to Eligible Residents who meet Low- and Moderate-Income requirements or enterprises that are Integrally Involved in a Distressed Community, as deemed appropriate by the CDFI Fund, and other comparable services as may be specified by the CDFI Fund in the applicable NOFA;

Consumer Loans means the following lending activity types: Affordable Housing Loans; Education Loans; Home Improvement Loans; and Small Dollar Consumer Loans;

Deposit Liabilities means time or savings deposits or demand deposits. Any such deposit must be accepted from Eligible Residents at the offices of the Applicant or of the Subsidiary of the Applicant and located in the Distressed Community. Deposit Liabilities may only include deposits held by individuals in transaction accounts (*e.g.,* demand deposits, negotiable order of withdrawal accounts, automated transfer service accounts, and telephone or preauthorized transfer accounts) or non-transaction accounts (*e.g.,* money market deposit accounts, other savings deposits, and all time deposits), as defined by the Appropriate Federal Banking Agency;

Development Service Activities means activities that promote community development and are integral to the Applicant's provision of financial products and Financial Services. Such services shall prepare or assist current or potential borrowers or investees to utilize the financial products or Financial Services of the Applicant. Development Service Activities include financial or credit counseling to individuals for the purpose of facilitating home ownership, promoting self-employment, or enhancing consumer financial management skills; or technical assistance to borrowers or investees for the purpose of enhancing business planning, marketing, management, financial management skills, and other comparable services as may be specified by the CDFI Fund in the applicable NOFA.

Distressed Community means a geographically defined community that meets the minimum area eligibility requirements specified in §1806.401 and such additional criteria as may be set forth in the applicable NOFA;

Distressed Community Financing Activities means:

(1) Consumer Loans; or

(2) Commercial Loans and Investments;

Education Loan means an advance of funds to a student who is an Eligible Resident who meets Low- and Moderate-Income requirements for the purpose of financing a college or vocational education;

Electronic Transfer Account (or *ETA*) means an account that meets the following requirements, and with respect to which the Applicant has satisfied the requirements:

(1) Be an individually owned account at a Federally insured financial institution;

(2) Be available to any individual who receives a Federal benefit, wage, salary, or retirement payment;

(3) Accept electronic Federal benefit, wage, salary, and retirement payments and such other deposits as a financial institution agrees to permit;

(4) Be subject to a maximum price of $3.00 per month;

(5) Have a minimum of four cash withdrawals and four balance inquiries per month, to be included in the monthly fee, through:

(i) The financial institution's proprietary (on-us) automated teller machines (ATMs);

(ii) Over-the-counter transactions at the main office or a branch of the financial institution; or

(iii) Any combination of on-us ATM access and over-the-counter access at the option of the financial institution;

(6) Provide the same consumer protections that are available to other account holders at the financial institution, including, for accounts that provide electronic access, Regulation E (12 CFR part 205) protections regarding disclosure, limitations on liability, procedures for reporting lost or stolen cards, and procedures for error resolution;

(7) For financial institutions that are members of an on-line point-of-sale (POS) network, allow on-line POS purchases, cash withdrawals, and cash back with purchases at no additional charge by the financial institution offering the ETA;

(8) Require no minimum balance, except as required by Federal or State law;

(9) At the option of the financial institution, be either an interest-bearing or a non-interest-bearing account; and

(10) Provide a monthly statement.

Eligible Activities means CDFI Related Activities, Distressed Community Financing Activities, and Service Activities, and as further described in the applicable NOFA and the Award Agreement;

Eligible Resident means an individual who resides in a Distressed Community;

Equity Investment means financial assistance provided by an Applicant or its Subsidiary to a CDFI, which CDFI meets such criteria as set forth in the applicable NOFA, in the form of a grant, a stock purchase, a purchase of a partnership interest, a purchase of a limited liability company membership interest, or any other investment deemed to be an Equity Investment by the CDFI Fund;

Equity-Like Loan means a loan provided by an Applicant or its Subsidiary to a CDFI, and made on such terms that it has characteristics of an Equity Investment that meets such criteria as set forth in the applicable NOFA;

Financial Services means check-cashing, providing money orders and certified checks, automated teller machines, safe deposit boxes, new branches, and other comparable services as may be specified by the CDFI Fund in the applicable NOFA, that are provided by the Applicant to Eligible Residents or enterprises that are Integrally Involved in the Distressed Community;

Geographic Units means counties (or equivalent areas), incorporated places, minor civil divisions that are units of local government, census tracts, block numbering areas, block groups, and Indian Areas or Native American Areas (as each is defined by the U.S. Bureau of the Census), or other areas deemed appropriate by the CDFI Fund;

Home Improvement Loan means an advance of funds, either unsecured or secured by a one-to-four family residential property, the proceeds of which are used to improve the borrower's primary residence, where such borrower is an Eligible Resident who meets Low- and Moderate-Income requirements;

Indian Reservation means a geographic area that meets the requirements of section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(10)), and shall include land held by incorporated Native groups, regional corporations, and village corporations, as defined in and pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), public domain Indian allotments, and former Indian Reservations in the State of Oklahoma;

Individual Development Account (or *IDA*) means a special savings account that matches the deposits of Eligible Residents who meet Low- and Moderate-Income requirements individuals and that enables such individuals to save money for a particular financial goal including, but not limited to, and as determined by the CDFI Fund: buying a home, paying for post-secondary education, or starting or expanding a small business;

Insured Depository Institution means any bank or thrift, the deposits of

which are insured by the Federal Deposit Insurance Corporation;

Integrally Involved means, for a CDFI Partner, having provided or transacted the percentage of financial transactions or dollars (*i.e.*, loans or Equity Investments), or Development Service Activities, in the Distressed Community identified by the Applicant or the CDFI Partner, as applicable, or having attained the percentage of market share for a particular product in a Distressed Community, set forth in the applicable NOFA;

Low- and Moderate-Income or Low- and Moderate-Income requirements means borrower income that does not exceed 80 percent of the median income of the area involved, according to the U.S. Census Bureau data, set forth in the Applicable NOFA;

Metropolitan Area means an area designated as such (as of the date of the BEA Program application) by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e)(3), 31 U.S.C. 1104(d), and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

Notice of Funding Availability (or *NOFA*) means the public notice of funding opportunity that announces the availability of BEA Program Award funds for a particular funding round and that advises prospective Applicants with respect to obtaining application materials, establishes application submission deadlines, and establishes other requirements or restrictions applicable for the particular funding round;

Priority Factor means a numeric value assigned to the following, as established by the CDFI Fund in the applicable NOFA:

(1) Each subcategory within the Distressed Community Financing Activities category of Qualified Activities; or

(2) Each activity-type within the Service Activities and CDFI Related Activities categories of Qualified Activities.

(3) A priority factor represents the CDFI Fund's assessment of the degree of difficulty, the extent of innovation, and the extent of benefits accruing to the Distressed Community for each type of activity;

Project Investment means providing financial assistance in the form of a purchase of stock, limited partnership interest, other ownership instrument, or a grant to an entity that is Integrally Involved in a Distressed Community and formed for the sole purpose of engaging in a project or activity (approved by the CDFI Fund), including Affordable Housing Development Loans, Affordable Housing Loans, Commercial Real Estate Loans, and Small Business Loans;

Qualified Activities means CDFI Related Activities, Distressed Community Financing Activities, and Service Activities;

Recipient means an Applicant that receives a BEA Program Award pursuant to this part and the applicable NOFA;

Service Activities means the following activities: Deposit Liabilities; Financial Services; Community Services; Targeted Financial Services; and Targeted Retail Savings/Investment Products;

Small Business Loan means an origination of a loan used for commercial or industrial activities (other than an Affordable Housing Loan, Affordable Housing Development Loan, Commercial Real Estate Loan, Home Improvement Loan) to a business or farm that meets the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) and is located in a Distressed Community;

Small Dollar Consumer Loan means affordable consumer lending products that serve as available alternatives in the marketplace for individuals who are Eligible Residents who meet Low- and Moderate-Income requirements and meet criteria further specified in the applicable NOFA;

State means any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands;

Subsidiary has the same meaning as in section 3 of the Federal Deposit Insurance Act, except that a CDFI shall not be considered a Subsidiary of any Insured Depository Institution or any

depository institution holding company that controls less than 25 percent of any class of the voting shares of such corporation and does not otherwise control, in any manner, the election of a majority of directors of the corporation;

Targeted Financial Services means ETAs, IDAs, and such other banking products targeted to Eligible Residents, as may be specified by the CDFI Fund in the applicable NOFA;

Targeted Retail Savings/Investment Products means certificates of deposit, mutual funds, life insurance, and other similar savings or investment vehicles targeted to Eligible Residents, as may be specified by the CDFI Fund in the applicable NOFA;

Technical Assistance means the provision of consulting services, resources, training, and other nonmonetary support relating to an organization, individual, or operation of a trade or business, as may be specified by the CDFI Fund in the applicable NOFA; and

Unit of General Local Government means any city, county town, township, parish, village, or other general-purpose political subdivision of a State or Commonwealth of the United States, or general-purpose subdivision thereof, and the District of Columbia.

§ 1806.104 Uniform Administrative Requirements; waiver authority.

(a) *Uniform Administrative Requirements.* The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Administrative Requirements), codified by the Department of the Treasury at 2 CFR part 1000, apply to awards, regardless of type of award Recipient, made pursuant to this part.

(b) *Waiver authority.* The CDFI Fund may waive any requirement of this part that is not required by law, upon a determination of good cause. Each such waiver will be in writing and supported by a statement of the facts and grounds forming the basis of the waiver. For a waiver in any individual case, the CDFI Fund must determine that application of the requirement to be waived would adversely affect the achievement of the purposes of the Act. For waivers of general applicability, the CDFI Fund will publish notification of granted waivers in the FEDERAL REGISTER.

§ 1806.105 OMB control number.

The collections of information contained in this part have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 and assigned the applicable, approved OMB Control Numbers associated with the CDFI Fund under 1559.

Subpart B—Eligibility

§ 1806.200 Applicant eligibility.

An entity that is an Insured Depository Institution is eligible to apply for a BEA Program Award if the CDFI Fund receives a complete BEA Program Award application by the deadline set forth in the applicable Notice of Funding Availability (NOFA). Additional eligibility requirements are set forth in the applicable NOFA.

Subpart C—Use of Funds/Eligible Activities

§ 1806.300 Eligible Activities.

Recipients of BEA Program Awards must use their payments for the following Eligible Activities:

(a) CDFI Related Activities;

(b) Distressed Community Financing Activities; and

(c) Service Activities, and to comply with the Uniform Administrative Requirements as further described in the applicable NOFA and the Award Agreement.

§ 1806.301 Restrictions of use of award.

A Recipient may not distribute BEA Program Award funds to an Affiliate without the CDFI Fund's prior written consent.

Subpart D—Award Determinations

§ 1806.400 General.

The amount of a BEA Program Award shall be based on the Applicant's increases in Qualified Activities from the Baseline Period to the Assessment Period, as set forth in the applicable NOFA. When determining this increase, Applicants must consider all

BEA Qualified Activities and all BEA qualified census tracts, as it relates to a given subcategory or activity type, as applicable.

§ 1806.401 Community eligibility and designation.

(a) *General.* If an Applicant reports that it has provided or engaged in Service Activities or Distressed Community Financing Activities, the Applicant shall identify one or more Distressed Communities in which it has provided or engaged in such activities. The Applicant may identify different Distressed Communities for each category or subcategory of activity. If an Applicant reports that it has provided or engaged in CDFI Support Activities, the Applicant shall provide evidence that the CDFI that the Applicant supported is Integrally Involved in a Distressed Community, as specified in the applicable NOFA.

(b) *Minimum area and eligibility requirements.* A Distressed Community must meet the following minimum area and eligibility requirements:

(1) *Minimum area requirements.* A Distressed Community:

(i) Must be an area that is located within the jurisdiction of one (1) Unit of General Local Government;

(ii) The boundaries of the area must be contiguous; and

(iii) The area must:

(A) Have a population, as determined by the most recent U.S. Bureau of the Census data available, of not less than 4,000 if any portion of the area is located within a Metropolitan Area with a population of 50,000 or greater; or

(B) Have a population, as determined by the most recent U.S. Bureau of the Census data available, of not less than 1,000 in any other case; or

(C) Be located entirely within an Indian Reservation.

(2) *Eligibility requirements.* A Distressed Community must be a geographic area where:

(i) At least 30 percent of the Eligible Residents have incomes that are less than the national poverty level, as published by the U.S. Bureau of the Census or in other sources as set forth in guidance issued by the CDFI Fund;

(ii) The unemployment rate is at least 1.5 times greater than the national average, as determined by the U.S. Bureau of Labor Statistics' most recently published data, including estimates of unemployment developed using the U.S. Bureau of Labor Statistics' Census-Share calculation method, or in other sources as set forth in guidance issued by the CDFI Fund; and

(iii) Such additional requirements as may be specified by the CDFI Fund in the applicable NOFA.

(c) *Area designation.* An Applicant shall designate an area as a Distressed Community by:

(1) Selecting Geographic Units which individually meet the minimum area and eligibility requirements set forth in paragraph (b) of this section; or

(2) Selecting two or more Geographic Units which, in the aggregate, meet the minimum area and eligibility requirements set forth in paragraph (b) of this section, provided that no Geographic Unit selected by the Applicant within the area has a poverty rate of less than 20 percent.

(d) *Designation.* The CDFI Fund will provide a prospective Applicant with data and other information to help it identify areas eligible to be designated as a Distressed Community. If requested, applicants shall submit designation materials as instructed in the applicable NOFA.

§ 1806.402 Measuring and reporting Qualified Activities.

(a) *General.* An Applicant may receive a BEA Program Award for engaging in any of the following categories of Qualified Activities during an Assessment Period: CDFI Related Activities, Distressed Community Financing Activities, or Service Activities. The CDFI Fund may further qualify such Qualified Activities in the applicable NOFA, including such additional geographic and transaction size limitations as the CDFI Fund deems appropriate.

(b) *Reporting Qualified Activities.* An Applicant should report only its Qualified Activities for the category or subcategory for which it is seeking a BEA Program Award.

(1) If an Applicant elects to apply for an award in the CDFI Related Activities category, it may elect to report on

one or both types of activities within the CDFI Related Activities category.

(2) If an Applicant elects to apply for an award in the Distressed Community Financing Activities category, the Applicant must report on the following subcategories:

(i) Aggregate Consumer Loans; or

(ii) Aggregate Commercial Loans and Investments; or

(iii) Both paragraphs (b)(2)(i) and (ii) separately; unless the Applicant provides a reasonable explanation, acceptable to the CDFI Fund, in its sole discretion, as to why the Applicant cannot report on aggregated activities in such subcategories.

(3) If an Applicant elects to apply for an award in the Service Activities category, it may elect to report on one or more types of activities within the Service Activities category.

(c) *Area served.* CDFI Related Activities must be provided to a CDFI. CDFI Partners that are the recipients of CDFI Support Activities must demonstrate that they are Integrally Involved in a Distressed Community. Service Activities and Distressed Community Financing Activities must serve a Distressed Community. An activity is considered to serve a Distressed Community if it is:

(1) Undertaken in the Distressed Community; or

(2) Provided to Eligible Residents or enterprises that are Integrally Involved in the Distressed Community.

(d) *Certain limitations on Qualified Activities.* Activities funded with the proceeds of Federal funding or tax credit programs are ineligible for purposes of calculating or receiving a Bank Enterprise Award. Please see the applicable NOFA for each funding round's limitations on Qualified Activities. Qualified Activities shall not include loans to or investments in those business types set forth in the Uniform Administrative Requirements.

(e) *Measuring the value of Qualified Activities.* Subject to such additional or alternative valuations as the CDFI Fund may specify in the applicable NOFA, the CDFI Fund will assess the value of:

(1) Equity Investments, Equity-Like Loans, loans, grants and certificates of deposits, at the original amount of such Equity Investments, Equity-Like Loans, loans, grants or certificates of deposits. Where a certificate of deposit matures and is then rolled over during the Baseline Period or the Assessment Period, as applicable, the CDFI Fund will assess the value of the full amount of the rolled-over deposit. Where an existing loan is refinanced (meaning, a new loan is originated to pay off an existing loan, whether or not there is a change in the applicable loan terms), the CDFI Fund will only assess the value of any increase in the principal amount of the refinanced loan;

(2) Project Investments at the original amount of the purchase of stock, limited partnership interest, other ownership interest, or grant;

(3) Deposit Liabilities at the dollar amount deposited as measured by comparing the net change in the amount of applicable funds on deposit at the Applicant during the Baseline Period with the net change in the amount of applicable funds on deposit at the Applicant during the Assessment Period, as described in paragraphs (e)(3)(i) and (ii) of this section:

(i) The Applicant shall calculate the net change in deposits during the Baseline Period by comparing the amount of applicable funds on deposit at the close of business the day before the beginning of the Baseline Period and at the close of business on the last day of the Baseline Period; and

(ii) The Applicant shall calculate the net change in such deposits during the Assessment Period by comparing the amount of applicable funds on deposit at the close of business the day before the beginning of the Assessment Period and at the close of business on the last day of the Assessment Period;

(4) Financial Services and Targeted Financial Services based on the predetermined amounts as set forth by the CDFI Fund in the applicable NOFA; and

(5) Financial Services (other than those for which the CDFI Fund has established a predetermined value), Community Services, and CDFI Support Activities consisting of Technical Assistance based on the administrative costs of providing such services.

(f) *Closed transactions.* A transaction shall be considered to have been closed

and carried out during the Baseline Period or the Assessment Period if the documentation evidencing the transaction:

(1) Is executed on a date within the applicable Baseline Period or Assessment Period, respectively; and

(2) Constitutes a legally binding agreement between the Applicant and a borrower or investee, which agreement specifies the final terms and conditions of the transaction, except that any contingencies included in the final agreement must be typical of such transaction and acceptable (both in the judgment of the CDFI Fund); and

(3) An initial cash disbursement of loan or investment proceeds has occurred in a manner that is consistent with customary business practices and is reasonable given the nature of the transaction (as determined by the CDFI Fund), unless it is normal business practice to make no initial disbursement at closing and the Applicant demonstrates that the borrower has access to the proceeds, subject to reasonable conditions as may be determined by the CDFI Fund.

(g) *Reporting period.* An Applicant must only measure the amount of a Qualified Activity that it reasonably expects to disburse to an investee, borrower, or other recipient within one year of the end of the applicable Assessment Period, or such other period as may be set forth by the CDFI Fund in the applicable NOFA.

§ 1806.403 Estimated award amounts.

(a) *General.* An Applicant must calculate and submit to the CDFI Fund an estimated award amount as part of its BEA Program Award application.

(b) *Award percentages.* The CDFI Fund will establish the award percentage for each category and subcategory of Qualified Activities in the applicable NOFA. Applicable award percentages for Qualified Activities undertaken by Applicants that are CDFIs will be equal to three times the award percentages for Qualified Activities undertaken by Applicants that are not CDFIs.

(c) *Calculating the estimated award amount for Qualified Activities.* (1) The estimated award amount for the CDFI Related Activities category will be equal to the applicable award percentage of the net increase in each activity-type (*i.e.*, Equity Investments/Equity Like-Loans; and CDFI Support Activities) under the CDFI Related Activities category between the Baseline Period and Assessment Period.

(2) The estimated award amount for the Distressed Community Financing Activities category will be equal to the applicable award percentage of the weighted value of each subcategory of Distressed Community Financing Activities (*i.e.*, Consumer Loans; and Commercial Loans and Investments) between the Baseline Period and Assessment Period. The weighted value of the applicable subcategories shall be calculated by:

(i) Subtracting the Baseline Period value of such subcategory from the Assessment Period value of such subcategory to yield a difference; and

(ii) Multiplying the difference by the applicable Priority Factor (as set forth in the applicable NOFA).

(3) The estimated award amount for the Service Activities category will be equal to the applicable award percentage of the weighted value of each activity type between the Baseline Period and Assessment Period. The weighted value of the applicable activity type shall be calculated by:

(i) Subtracting the Baseline Period value of such Qualified Activity from the Assessment Period value of such Qualified Activity to yield a difference; and

(ii) Multiplying the difference by the applicable Priority Factor (as set forth in the applicable NOFA).

(d) *Estimated award eligibility review.* The CDFI Fund will determine the eligibility of each transaction for which an Applicant has applied for a BEA Program Award. Based upon this review, the CDFI Fund will calculate the actual award amount for which such Applicant is eligible.

§ 1806.404 Selection process; actual award amounts.

(a) *Sufficient funds available to cover estimated awards.* All BEA Program Awards are subject to the availability of funds. If the amount of appropriated funds available during a funding round is sufficient to cover all estimated award amounts for which Applicants

are eligible, in the CDFI Fund's determination, and an Applicant meets all of the program requirements specified in this part, then such Applicant shall receive an actual award amount that is calculated by the CDFI Fund in the manner specified in §1806.403.

(b) *Insufficient funds available to cover estimated awards.* If the amount of funds available during a funding round is insufficient to cover all estimated award amounts for which Applicants are eligible, in the CDFI Fund's determination, then the CDFI Fund will select Recipients and determine actual award amounts based on the process described in paragraph (c) of this section and any established maximum dollar amount of awards that may be awarded for the Distressed Community Financing Activities subcategories, as described in the applicable NOFA.

(c) *Priority of awards.* In circumstances where there are insufficient funds to cover estimated awards, the CDFI Fund will rank Applicants based on whether the Applicant is a CDFI or a non-CDFI, and in each category of Qualified Activity (*e.g.,* Service Activities) according to the priorities described in this paragraph (c). Selections within each priority category will be based on the Applicants' relative rankings within each category, and based on whether the Applicant is a CDFI or a non-CDFI, subject to the availability of funds.

(1) *First priority.* If the amount of funds available during a funding round is insufficient for all estimated award amounts, first priority will be given to CDFI Applicants that engaged in CDFI Related Activities, followed by non-CDFI Applicants that engaged in CDFI Related Activities ranked in the ratio as set forth in the applicable NOFA.

(2) *Second priority.* If the amount of funds available during a funding round is sufficient for all first priority Applicants but insufficient for all remaining estimated award amounts, second priority will be given to CDFI Applicants that engaged in Distressed Community Financing Activities, followed by non-CDFI Applicants that engaged in Distressed Community Financing Activities, ranked in the ratio as set forth in the applicable NOFA.

(3) *Third priority.* If the amount of funds available during a funding round is sufficient for all first and second priority Applicants, but insufficient for all remaining estimated award amounts, third priority will be given to CDFI Applicants that engaged in Service Activities, followed by non-CDFI Applicants that engaged in Service Activities, ranked in the ratio as set forth in the applicable NOFA.

(d) *Calculating actual award amounts.* The CDFI Fund will determine actual award amounts based upon the availability of funds, increases in Qualified Activities from the Baseline to the Assessment Period, and an Applicant's priority ranking. If an Applicant receives an award for more than one priority category described in this section, the CDFI Fund will combine the award amounts into a single BEA Program Award.

(e) *Unobligated or deobligated funds.* The CDFI Fund, in its sole discretion, may use any deobligated funds or funds not obligated during a funding round:

(1) To select Applicants not previously selected, using the calculation and selection process contained in this part;

(2) To make additional monies available for a subsequent funding round; or

(3) As otherwise authorized by the Act.

(f) *Limitation.* The CDFI Fund, in its sole discretion, may deny or limit the amount of a BEA Program Award for any reason.

§1806.405 Applications for BEA Program Awards.

(a) *Notice of funding availability; applications.* Applicants must submit applications for BEA Program Awards in accordance with this section and the applicable NOFA. An Applicant's application must demonstrate a realistic course of action to ensure that it will meet the requirements described in subpart D of this part within the period set forth in the applicable NOFA. Detailed application content requirements are found in the related application and applicable NOFA. The CDFI Fund will not disburse an award to an Applicant before it meets the eligibility requirements described in the applicable NOFA. The CDFI Fund shall

require an Applicant to meet any additional eligibility requirements that the CDFI Fund deems appropriate. After receipt of an application, the CDFI Fund may request clarifying or technical information related to materials submitted as part of such application and/or to verify that Qualified Activities were carried out in the manner prescribed in this part. The CDFI Fund, in its sole discretion, shall determine whether an applicant fulfills the requirements set for forth in this part and the applicable NOFA.

(b) *Application contents.* An application for a BEA Program Award must contain:

(1) A completed electronic application module that reports the increases in Qualified Activities actually carried out during the Assessment Period as compared to those carried out during the Baseline Period. If an Applicant has merged with another institution during the Assessment Period, it must determine the Baseline Period amounts and Assessment Period amounts of the Qualified Activities of the merged institutions, and report the increase;

(2) An electronic application module which includes transactions to be considered for award calculation purposes. The transactions will include Qualified Activities that were closed during the Assessment Period. Applicants shall describe the original amount, census tract served (if applicable), dates of execution, initial disbursement, and final disbursement of the instrument for each transaction;

(3) Documentation of Qualified Activities that meets the required thresholds and conditions described in §1806.402(f) and the applicable NOFA;

(4) Information necessary for the CDFI Fund to complete its environmental review requirements pursuant to part 1815 of this chapter;

(5) Certifications, as described in the applicable NOFA and BEA Program Award application, that the information provided to the CDFI Fund is true and accurate and that the Applicant will comply with all relevant provisions of this chapter and all applicable Federal, State, and local laws, ordinances, regulations, policies, guidelines, and requirements;

(6) In the case of an Applicant that engaged in Service Activities, or Distressed Community Financing Activities, the Applicant must confirm, by submitting documentation as described in the applicable NOFA and BEA Program application, the Service Activities or Distressed Community Financing Activities were provided to:

(i) Eligible Residents; or

(ii) A business located in a Distressed Community.

(7) Information that indicates that each CDFI to which an Applicant has provided CDFI Support Activities is Integrally Involved in a Distressed Community, as described in the applicable NOFA and BEA Program application; and

(8) Any other information requested by the CDFI Fund, or specified by the CDFI Fund in the applicable NOFA or the BEA Program application, in order to document or otherwise assess the validity of information provided by the Applicant to the CDFI Fund.

Subpart E—Terms and Conditions of Assistance

§1806.500 Award Agreement; sanctions.

(a) *General.* After the CDFI Fund selects a Recipient, the CDFI Fund and the Recipient will enter into an Award Agreement. In addition to the requirements of the Uniform Administrative Requirements, the Award Agreement will require that the Recipient:

(1) Must carry out its Eligible Activities in accordance with applicable law, the approved BEA Program application, and all other applicable requirements;

(2) Must comply with such other terms and conditions that the CDFI Fund may establish;

(3) Will not receive any BEA Program Award payment until the CDFI Fund has determined that the Recipient has fulfilled all applicable requirements;

(4) Must comply with performance goals that have been established by the CDFI Fund. Such performance goals will include measures that require the Recipient to use its BEA Program Award funds for Eligible Activities; and

(5) Must comply with all data collection and reporting requirements. Each Recipient must submit to the CDFI Fund such information and documentation that will permit the CDFI Fund to review the Recipient's progress in satisfying the terms and conditions of its Award Agreement, including:

(i) *Annual report.* Each Recipient shall submit to the CDFI Fund at least annually and within 90 days after the end of each year of the Recipient's performance period, an annual report that will provide data that, among other things, demonstrates the Recipient's compliance with its performance goals (including a description of any noncompliance), its uses of the BEA Program Award funds, and the impact of the BEA Program and the CDFI industry. Recipients are responsible for the timely and complete submission of the annual report.

(ii) *Financial statement.* A Recipient is not required to submit its financial statement to the CDFI Fund. The CDFI Fund may obtain the necessary information from publicly available sources.

(b) *Sanctions.* In the event of any fraud, misrepresentation, or noncompliance with the terms of the Award Agreement by the Recipient, the CDFI Fund may terminate, reduce, or recapture the award, bar the Recipient and/or its Affiliates from applying for an award from the CDFI Fund for a period to be decided by the CDFI Fund in its sole discretion, and pursue any other available legal remedies.

(c) *Compliance with other CDFI Fund awards.* In the event that an Applicant, Recipient, or its Subsidiary or Affiliate is not in compliance, as determined by the CDFI Fund, with the terms and conditions of any CDFI Fund award, the CDFI Fund may, in its sole discretion, bar said Applicant or Recipient from applying for future BEA Program Awards or withhold payment (either initial or subsequent) of BEA Program Award funds.

(d) *Notice.* Prior to imposing any sanctions pursuant to this section or an Award Agreement, the CDFI Fund will provide the Recipient with written notice of the proposed sanction and an opportunity to respond. Nothing in this section, however, will provide a Recipient with the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

§ 1806.501 Compliance with government requirements.

In carrying out its responsibilities pursuant to an Award Agreement, the Recipient must comply with all applicable Federal, State, and local laws, regulations (including but not limited to the Uniform Administrative Requirements, ordinances, and Executive Orders).

§ 1806.502 Fraud, waste, and abuse.

Any person who becomes aware of the existence or apparent existence of fraud, waste, or abuse of assistance provided under this part should report such incidences to the Office of Inspector General of the U.S. Department of the Treasury.

§ 1806.503 Books of account, records, and government access.

(a) A Recipient shall submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such supporting data, as required by the CDFI Fund and the U.S. Department of the Treasury to ensure compliance with the requirements of this part. The United States Government, including the U.S. Department of the Treasury, the Comptroller General, and its duly authorized representatives, shall have full and free access to the Recipient's offices and facilities, and all books, documents, records, and financial statements relevant to the award of the Federal funds and may copy such documents as they deem appropriate.

(b) The Award Agreement provides that the provisions of the Act, this part, and the Award Agreement are enforceable under 12 U.S.C. 1818 of the Federal Deposit Insurance Act by the Appropriate Federal Banking Agency, as applicable, and that any violation of such provisions shall be treated as a violation of the Federal Deposit Insurance Act. Nothing in this paragraph (b) precludes the CDFI Fund from directly enforcing the Award Agreement as provided for under the terms of the Act.

(c) The CDFI Fund will notify the Appropriate Federal Banking Agency before imposing any sanctions on a Recipient that is examined by or subject to the reporting requirements of that agency. The CDFI Fund will not impose a sanction described in §1806.500(b) if the Appropriate Federal Banking Agency, in writing, not later than 30 calendar days after receiving notice from the CDFI Fund:

(1) Objects to the proposed sanction;

(2) Determines that the sanction would:

(i) Have a material adverse effect on the safety and soundness of the Recipient; or

(ii) Impede or interfere with an enforcement action against that Recipient by the Appropriate Federal Banking Agency;

(3) Proposes a comparable alternative action; and

(4) Specifically explains:

(i) The basis for the determination under paragraph (c)(2) of this section and, if appropriate, provides documentation to support the determination; and

(ii) How the alternative action suggested pursuant to paragraph (c)(3) of this section would be as effective as the sanction proposed by the CDFI Fund in securing compliance and deterring future noncompliance.

(d) Prior to imposing any sanctions pursuant to this section or an Award Agreement, the CDFI Fund shall, to the maximum extent practicable, provide the Recipient with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide a Recipient to any formal or informal hearing or comparable proceeding not otherwise required by law.

§1806.504 Retention of records.

A Recipient must comply with all record retention requirements as set forth in the Uniform Administrative Requirements.

PART 1807—CAPITAL MAGNET FUND

Subpart A—General Provisions

Sec.

Subpart B—Eligibility

Subpart C—Eligible Purposes; Eligible Activities; Restrictions

Subpart D—Qualification as Affordable Housing

Subpart E—Leveraged Costs; Eligible Project Costs; Commitment Requirements

Subpart F—Tracking Funds; Uniform Administrative Requirements; Nature of Funds

Subpart G—Notice of Funds Availability; Applications

Subpart H—Evaluation and Selection of Applications

Subpart I—Terms and Conditions of CMF Award

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Subpart A—General Provisions

§ 1807.100 Purpose.

The purpose of the Capital Magnet Fund (CMF) is to attract private capital for and increase investment in Affordable Housing Activities and related Economic Development Activities.

§ 1807.101 Summary.

(a) Through the CMF, the CDFI Fund competitively awards grants to CDFIs and qualified Nonprofit Organizations to leverage dollars for:

(1) The Development, Preservation, Rehabilitation or Purchase of Affordable Housing primarily for Low-Income Families; and

(2) Financing Economic Development Activities.

(b) The CDFI Fund will select Recipients to receive CMF Awards through a merit-based, competitive application process. CMF Awards may only be used for eligible uses set forth in subpart C of this part. Each Recipient will enter into an Assistance Agreement that will require it to leverage the CMF Award amount and abide by other terms and conditions pertinent to any assistance received under this part.

§ 1807.102 Relationship to other CDFI Fund programs.

Restrictions on applying for, receiving, and using CMF Awards in conjunction with awards under other programs administered by the CDFI Fund (including, but not limited to, the Bank Enterprise Award Program, the CDFI Program, the CDFI Bond Guarantee Program, the Native American CDFI Assistance (NACA) Program, and the New Markets Tax Credit Program) are as set forth in the applicable Notice of Funds Availability, Notice of Guarantee Availability, or Notice of Allocation Availability.

§ 1807.103 Recipient not instrumentality.

No Recipient shall be deemed to be an agency, department, or instrumentality of the United States.

§ 1807.104 Definitions.

For the purpose of this part:

Act means the Housing and Economic Recovery Act of 2008, as amended, Public Law 110–289, section 1131;

Affiliate means any entity that Controls, is Controlled by, or is under common Control with, an entity;

Affordable Housing means housing that meets the requirements set forth in subpart D of this part;

Affordable Housing Activities means the Development, Preservation, Rehabilitation, and/or Purchase of Affordable Housing;

Affordable Housing Fund means a revolving loan, grant or investment fund that is:

(1) Managed by the Recipient; and

(2) Uses its capital to finance Affordable Housing Activities;

Applicant means any entity submitting an application for a CMF Award;

Appropriate Federal Banking Agency has the same meaning as in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), and includes, with respect to Insured Credit Unions, the National Credit Union Administration;

Appropriate State Agency means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union;

Assistance Agreement means a formal, written agreement between the CDFI Fund and a Recipient, which agreement specifies the terms and conditions of assistance under this part;

Capital Magnet Fund (or CMF) means the program authorized by the Act and implemented under this part;

CMF Award means the financial assistance in the form of a grant made by the CDFI Fund to a Recipient pursuant to this part;

Certified Community Development Financial Institution (or Certified CDFI) means an entity that has been determined by the CDFI Fund to meet the certification requirements set forth in 12 CFR 1805.201;

Committed means that the Recipient is able to demonstrate, in written form and substance that is acceptable to the CDFI Fund, a commitment for use of CMF Award, as set forth in §1807.501;

Community Development Financial Institutions Fund (or CDFI Fund) means the Community Development Financial Institutions Fund, the U.S. Department of the Treasury, established pursuant to the Community Development Banking and Financial Institutions Act of 1994, as amended, 12 U.S.C. 4701 *et seq.;*

Community Service Facility means the physical structure in which service programs for residents or service programs for the broader community (including, but not limited to, health care, childcare, educational programs including literacy and after school programs, job training, food and nutrition services, cultural programs, and/or social services) operate that, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

Concerted Strategy means a formal planning document that evidences the connection between Affordable Housing Activities and Economic Development Activities. Such documents include, but are not limited to, a comprehensive, consolidated, or redevelopment plan, or some other local or regional planning document adopted or approved by the jurisdiction;

Control means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities of any company, directly or indirectly or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management, credit or investment decisions, or policies of any company;

Depository Institution Holding Company means a bank holding company or a savings and loan holding company as each are defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(w);

Development means any combination of the following Project activities: Land acquisition, demolition of existing facilities, and construction of new facilities, which may include site improvement, utilities development and rehabilitation of utilities, necessary infrastructure, utility services, conversion, and other related activities resulting in Affordable Housing;

Direct Administrative Expenses means direct costs incurred by the Recipient, related to the financing of the Project as described in 2 CFR 200.413 of the Uniform Administrative Requirements;

Economic Development Activity means the development, preservation, acquisition and/or rehabilitation of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

Effective Date means the date that the Assistance Agreement is effective; such date is determined by the CDFI Fund after the Recipient has returned an executed, original Assistance Agreement, along with all required supporting documentation, including the opinion of counsel, if required;

Eligible-Income means:

(1) Having, in the case of owner-occupied Housing units, annual income not in excess of 120 percent of the area median income adjusted for Family size in the same manner as HUD makes these adjustments for its other published income limits; and

(2) Having, in the case of rental Housing units, annual income not in excess of 120 percent of the area median income, adjusted for Family size in the same manner as HUD makes these adjustments for its published income limits;

Eligible Project Costs means Leveraged Costs plus those costs funded directly by a CMF Award;

Extremely Low-Income means:

(1) Having, in the case of owner-occupied Housing units, income not in excess of 30 percent of the area median income, adjusted for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 30 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes and

(2) Having, in the case of rental Housing units, income not in excess of 30 percent of the area median income, adjusted for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 30 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes;

Family or Families means households that reside within the boundaries of the United Sates (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, including Puerto Rico, Guam, American Samoa, the U. S. Virgin Islands, and the Northern Mariana Islands);

HOME Program means the HOME Investment Partnership Program established by the HOME Investment Partnerships Act under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.;*

Homeownership means ownership in fee simple title interest in one- to four-unit Housing or in a condominium unit, or equivalent form of ownership approved by the CDFI Fund. The Recipient must determine whether ownership or membership in a cooperative or mutual housing project constitutes Homeownership under State law. The ownership interest is subject to the following additional requirements:

(1) Except as otherwise provided in paragraphs (1)(i), (ii), and (iii) of this definition, the land may be owned in fee simple or the homeowner may have a 99-year ground lease;

(i) For Housing located on Indian trust or restricted Indian lands, the ground lease must be for 50 years or more;

(ii) For Housing located in Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and American Samoa, the ground lease must be 40 years or more;

(iii) For manufactured housing, the ground lease must be for a minimum period of 10 years or such other applicable time period regarding location set forth in this definition of Homeownership at the time of purchase by the homeowner;

(2) Ownership interest may not merely consist of a right to possession under a contract for deed, installment contract, or land contract (pursuant to which the deed is not given until the final payment is made);

(3) Ownership interest may only be subject to the restrictions on resale permitted under the Assistance Agreement and this part; mortgages, deeds of trust, or other liens or instruments securing debt on the property; or any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest;

Housing means Single-family and Multi-family residential units including, but not limited to, manufactured housing and manufactured housing lots, permanent housing for disabled and/or homeless persons, transitional housing, single-room occupancy housing, and group homes. Housing also includes elder cottage housing opportunity (ECHO) units that are small, free- standing, barrier-free, energy-efficient, removable, and designed to be installed adjacent to existing single-family dwellings. Housing does not include emergency shelters (including shelters for disaster victims) or facilities such as nursing homes, convalescent homes, hospitals, residential treatment facilities, correctional facilities, halfway houses, housing for students, or dormitories (including farmworker dormitories);

HUD means the Department of Housing and Urban Development established under the Department of Housing and Urban Development Act of 1965, 42 U.S.C. 3532 *et seq.;*

In Conjunction With Affordable Housing means:

(1) Physically proximate to; and

(2) Reasonably available to residents of Affordable Housing that is subject to Affordable Housing Activities. For a Metropolitan Area, In Conjunction With means located within the same census tract or within 1 mile of such Affordable Housing. For a Non-Metropolitan Area, In Conjunction With means located within the same county, township, or village, or within 10 miles of such Affordable Housing;

Insured CDFI means a Certified CDFI that is an Insured Depository Institution or an Insured Credit Union;

Insured Credit Union means any credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund by the National Credit Union Administration pursuant to authority granted in 12 U.S.C. 1783 *et seq.;*

Insured Depository Institution means any bank or thrift, the deposits of which are insured by the Federal Deposit Insurance Corporation as determined in 12 U.S.C. 1813(c)(2);

Investment Period means the period beginning with the Effective Date and ending on the fifth year anniversary of the Effective Date, or such other period as may be established by the CDFI Fund in the Assistance Agreement;

Leveraged Costs means costs for Affordable Housing Activities and Economic Development Activities that exceed the dollar amount of the CMF Award, as further described in § 1807.500;

Loan Guarantee means the Recipient's use of CMF Award to support an agreement to indemnify the holder of a loan all or a portion of the unpaid principal balance in case of default by the borrower. The proceeds of the loan that is guaranteed with the CMF Award must be used for Affordable Housing Activities and/or Economic Development Activities;

Loan Loss Reserves means proceeds from the CMF Award that the Recipient will set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable for Affordable Housing Activities and/or Economic Development Activities, or for related purposes that the CDFI Fund deems appropriate;

Low-Income means:

(1) Having, in the case of owner-occupied Housing units, income not in excess of 80 percent of area median income, adjusted for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes; and

(2) Having, in the case of rental Housing units, income not in excess of 80 percent of area median income, adjusted for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes;

Low-Income Area or LIA means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located. With respect to a census tract or block numbering area located within a Metropolitan Area, the median Family income shall be at or below 80 percent of the Metropolitan Area median Family income or the national Metropolitan Area median Family income, whichever is greater. In the case of a census tract or block numbering area located outside of a Metropolitan Area, the median Family income shall be at or below 80 percent of the statewide Non-Metropolitan Area median Family income or the national Non-Metropolitan Area median Family income, whichever is greater;

Low Income Housing Credits (or LIHTCs) means credits against income tax under section 42 of the Internal Revenue Code of 1986, as amended, 26 U.S.C. 42;

Metropolitan Area means an area designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d) and

Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

Multi-family housing means residential properties consisting of five or more dwelling units, such as a condominium unit, cooperative unit, apartment, or townhouse;

Non-Metropolitan Area means counties that are designated as Non-Metropolitan Counties by the Office of Management and Budget (OMB) pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d) and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended, and as made available by the CDFI Fund for a specific application funding round;

Nonprofit Organization means any corporation, trust, association, cooperative, or other organization that is:

(1) Designated as a nonprofit or not-for-profit entity under the laws of the organization's State of formation; and

(2) Exempt from Federal income taxation pursuant to the Internal Revenue Code of 1986;

Participating Jurisdiction means a jurisdiction designated by HUD as such under the HOME Program in accordance with the requirements of 24 CFR 92.105;

Payment means the transmission of CMF Award dollars from the CDFI Fund to the Recipient;

Preservation means:

(1) Activities to refinance, with or without Rehabilitation, Single-family housing or Multi-family housing (rental) mortgages that, at the time of refinancing, are subject to affordability and use restrictions under the LIHTC statute or under State or Federal affordable housing programs, including but not limited to, the HOME Program, properties with Federal project-based rental assistance, or the USDA rental housing programs, hereinafter referred to as ''similar State or Federal affordable housing programs,'' where such refinancing has the effect of extending the term of any existing affordability and use restrictions on the properties by a minimum 10 years or as otherwise specified in the Assistance Agreement;

(2) Activities to refinance and acquire Single-family housing or Multi-family housing that, at the time of refinancing or acquisition, were subject to affordability and use restrictions under similar State or Federal affordable housing programs or under the LIHTC statute, by the former tenants of such properties, where such refinancing has the effect of extending the term of any existing affordability and use restrictions on the properties by a minimum 10 years or as otherwise specified in the Assistance Agreement;

(3) Activities to refinance the mortgages of owner-occupied, Single-family housing that, at the time of refinancing, are subject to affordability and use restrictions under similar State or Federal affordable housing programs, where such refinancing has the effect of extending the term of any existing affordability and use restrictions on the properties by a minimum 10 years or as otherwise specified in the Assistance Agreement;

(4) Activities to acquire Single-family housing or Multi-family housing, with or without Rehabilitation, with the commitment to subject the properties to the affordability qualifications set forth in subpart D of this part; or

(5) Activities to refinance, with or without Rehabilitation, Single-family housing or Multi-family housing, with the commitment to subject the properties to the affordability qualifications set forth in subpart D of this part;

Program Income means gross income, as further described in 2 CFR part 1000;

Project means the Affordable Housing Activity and/or Economic Development Activity that is financed with the CMF Award;

Project Completion means that all of the requirements set forth at §1807.503 for a Project have been met;

Purchase means to provide direct financing to a Family for purposes of Homeownership. Before the Recipient provides any financing to a Family for Homeownership purposes, the Recipient must verify that the Family and the Single-family housing meet the qualifications set forth in subparts D and E of this part;

Recipient means an Applicant selected by the CDFI Fund to receive a CMF Award pursuant to this part;

Rehabilitation means any repairs and/or capital improvements that contribute to the long-term preservation,

current building code compliance, habitability, sustainability, or energy efficiency of Affordable Housing;

Revolving Loan Fund means a pool of funds managed by the Applicant or the Recipient wherein repayments on loans for Affordable Housing Activities or Economic Development Activities are used to refinance additional loans;

Risk-Sharing Loan means loans for Affordable Housing Activities and/or Economic Development Activities in which the risk of borrower default is shared by the Applicant or Recipient with other lenders (*e.g.*, participation loans);

Service Area means the geographic area in which the Applicant proposes to use the CMF Award, and the geographic area approved by the CDFI Fund in which the Recipient must use the CMF Award as set forth in its Assistance Agreement;

Single-family housing means a one- to four-Family residence, a condominium unit, a cooperative unit, a combination of manufactured housing and lot, or a manufactured housing lot;

State means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Island, Guam, the U.S. Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory of the United States;

State-Insured Credit Union means any credit union that is regulated by, and/or the member accounts of which are insured by, a State agency or instrumentality;

Subsidiary means any company that is owned or Controlled directly or indirectly by another company;

Underserved Rural Area means:

(1) A Non-Metropolitan Area that:

(i) Qualifies as a Low-Income Area; and

(ii) Is experiencing economic distress evidenced by 30 percent or more of resident households with one or more of these four housing conditions in the most recent census for which data are available:

(A) Lacking complete plumbing;

(B) Lacking complete kitchen;

(C) Paying 30 percent or more of income for owner costs or tenant rent; or

(D) Having more than 1 person per room;

(2) An area as specified in the applicable NOFA and/or Assistance Agreement;

Uniform Administrative Requirements means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 1000);

Very Low-Income means:

(1) Having, in the case of owner-occupied Housing, income not greater than 50 percent of the area median income with adjustments for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes; and

(2) Having, in the case of rental Housing, income not greater than 50 percent of the area median income, with adjustments for Family size, as determined by HUD, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low Family incomes.

§ 1807.105 Waiver authority.

The CDFI Fund may waive any requirement of this part that is not required by law upon a determination of good cause. Each such waiver shall be in writing and supported by a statement of the facts and the grounds forming the basis of the waiver. For a waiver in an individual case, the CDFI Fund must determine that application of the requirement to be waived would adversely affect the achievement of the purposes of the Act. For waivers of general applicability, the CDFI Fund will publish notification of granted waivers in the FEDERAL REGISTER.

§ 1807.106 OMB control number.

The OMB control number for the CMF Award application is 1559–0036. The compliance date requirements for the collection of information in § 1807.902 is stayed indefinitely, pending

Office of Management and Budget approval and assignment of an OMB control number.

§ 1807.107 Applicability of regulations for CMF Awards.

As of February 8, 2016, the regulations of this part are applicable for CMF Awards made pursuant to Notices of Funds Availability published after February 8, 2016.

Subpart B—Eligibility

§ 1807.200 Applicant eligibility.

(a) *General requirements*. An Applicant will be deemed eligible to apply for a CMF Award if it is:

(1) A Certified CDFI. An entity may meet the requirements described in this paragraph (a)(1) if it is:

(i) A Certified CDFI, as set forth in 12 CFR 1805.201,

(ii) A Certified CDFI that has been in existence as a legally formed entity as set forth in the applicable Notice of Funds Availability (NOFA); or

(2) A Nonprofit Organization having as one of its principal purposes the development or management of affordable housing. An entity may meet the requirements described in this paragraph (a)(2) if it:

(i) Has been in existence as a legally formed entity as set forth in the applicable NOFA;

(ii) Demonstrates, through articles of incorporation, by-laws, or other board-approved documents, that the development or management of affordable housing are among its principal purposes; and

(iii) Can demonstrate that a certain percentage, set forth in the applicable NOFA, of the Applicant's total assets are dedicated to the development or management of affordable housing.

(b) *Eligibility verification*. An Applicant shall demonstrate that it meets the eligibility requirements described in paragraph (a)(2) of this section by providing information described in the application, NOFA, and/or supplemental information, as may be requested by the CDFI Fund. For an Applicant seeking eligibility under paragraph (a)(1) of this section, the CDFI Fund will verify that the Applicant is a Certified CDFI during the application eligibility review.

Subpart C—Eligible Purposes; Eligible Activities; Restrictions

§ 1807.300 Eligible purposes.

Each Recipient must use its CMF Award for the eligible activities described in § 1807.301 so long as such eligible activities increase private capital for and increase investment in:

(a) Development, Preservation, Rehabilitation, and/or Purchase of Affordable Housing for primarily Extremely Low-Income, Very Low-Income, and Low-Income Families; and/or

(b) Economic Development Activities.

(1) Economic Development Activity must support Affordable Housing;

(2) The Recipient may undertake Economic Development Activity In Conjunction With Affordable Housing Activities that are undertaken by parties other than the Recipient;

(3) If the Recipient uses its CMF Award to fund an Economic Development Activity In Conjunction With Affordable Housing Activity, it must track the resulting Affordable Housing, as set forth in subpart D of this part, to the extent the Affordable Housing was financed by the CMF Award. For the purposes of meeting the 10-year affordability period requirement, Recipients are not required to track Affordable Housing that was financed by sources other than the CMF Award.

§ 1807.301 Eligible activities.

The Recipient must use its CMF Award to finance and support Affordable Housing Activities and/or Economic Development Activities through the following eligible activities:

(a) To capitalize Loan Loss Reserves;

(b) To capitalize a Revolving Loan Fund;

(c) To capitalize an Affordable Housing Fund;

(d) To capitalize a fund to support Economic Development Activities;

(e) To make Risk-Sharing Loans; and

(f) To provide Loan Guarantees.

§ 1807.302 Restrictions on use of CMF Award.

(a) The Recipient may not use its CMF Award for the following:

(1) Political activities;

(2) Advocacy;

(3) Lobbying, whether directly or through other parties;

(4) Counseling services (including homebuyer or financial counseling);

(5) Travel expenses;

(6) Preparing or providing advice on tax returns;

(7) Emergency shelters (including shelters for disaster victims);

(8) Nursing homes;

(9) Convalescent homes;

(10) Residential treatment facilities;

(11) Correctional facilities; or

(12) Student dormitories.

(b) The Recipient shall not use the CMF Award to finance or support Projects that include:

(1) The operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises; or

(2) Farming activities (within the meaning of Internal Revenue Code (IRC) section 2032A(e)(5)(A) or (B)), if, as of the close of the taxable year of the taxpayer conducting such trade or business, the sum of the aggregate unadjusted bases (or, if greater, the fair market value) of the assets owned by the taxpayer that are used in such a trade or business, and the aggregate value of the assets leased by the taxpayer that are used in such a trade or business, exceeds $500,000.

(c) In any given application round, no more than 30 percent of a CMF Award may be used for Economic Development Activities.

(d) Any Recipient that uses its CMF Award for a Loan Guarantee or Loan Loss Reserves must ensure the underlying loan(s) are made to support Affordable Housing Activities and Economic Development Activities. The Affordable Housing resulting from the Recipient's Loan Guarantee or Loan Loss Reserve shall be tracked for 10 years, as set forth in subpart D of this part.

(e) If loans that are made pursuant to a Loan Guarantee or Loan Loss Reserves are repaid during the Investment Period, the Recipient must use the repaid funds for Loan Guarantees or Loan Loss Reserves targeted to the income population (Extremely Low-Income, Very Low-Income, Low-Income) set forth in the Recipient's Assistance Agreement, for the duration of the Investment Period.

(f) The Recipient may not use more than five (5) percent of its CMF Award for Direct Administrative Expenses.

§ 1807.303 Authorized uses of Program Income.

(a) Program Income earned in the form of principal and equity repayments must be used by the Recipient for the approved, eligible CMF Award uses as further set forth in the Assistance Agreement for the duration of the Investment Period.

(b) Program Income earned in the form of interest payments, and all other forms of Program Income (except for that which is earned as described in paragraph (a) of this section, must be used by the Recipient as set forth in the Assistance Agreement and in accordance with 2 CFR part 1000.

Subpart D—Qualification as Affordable Housing

§ 1807.400 Affordable Housing—general.

Each Recipient that uses its CMF Award for Affordable Housing Activities must ensure that 100 percent of Eligible Project Costs are attributable to Affordable Housing; meaning, that they comply with the affordability qualifications set forth in this subpart for Eligible-Income Families. Further, as a subset of said 100 percent, greater than 50 percent of the Eligible Project Costs must be attributable to Affordable Housing that comply with the affordability qualifications set forth in this subpart for Low-Income, Very Low-Income, or Extremely Low-Income Families, or as further set forth in the applicable NOFA and/or Assistance Agreement.

§ 1807.401 Affordable Housing—Rental Housing.

To qualify as Affordable Housing, each rental Multi-family housing Project financed with CMF Award must have at least 20 percent of the units occupied by any combination of Low-Income, Very Low-Income, or Extremely Low-Income Families and must comply with the rent limits set forth herein. However, the CDFI Fund may require a greater percentage of the units per Project to be income-targeted and/or require a specific targeted income commitment in any given application round, as set forth in the NOFA and Assistance Agreement for that application round.

(a) *Rent limitation.* The gross rent limits for Affordable Housing are determined under the provisions in IRC section 42(g)(2). In this determination, if this part imposes an income restriction on a unit that is greater than 60 percent of area median income, adjusted for Family size, then the provisions of IRC section 42(g)(2) are applied as if that income restriction on the unit satisfied IRC section 42(g)(1). The maximum rent is a rent that does not exceed:

(1) For an Eligible-Income Family, 30 percent of the annual income of a Family whose annual income equals 120 percent of the area median income, with adjustments for number of bedrooms in the unit, as set forth in IRC section 42(g)(2).

(2) For a Low-Income Family, 30 percent of the annual income of a Family whose annual income equals 80 percent of the area median income, with adjustments for number of bedrooms in the unit, as set forth in IRC section 42(g)(2). If the unit or tenant receives Federal or State rental subsidy, and the Family pays as a contribution towards rent not more than 30 percent of the Family's income, the maximum rent (*i.e.*, tenant contribution plus rental subsidy) is the rent allowable under the Federal or State rental subsidy program;

(3) For a Very Low-Income Family, 30 percent of the annual income of a Family whose annual income equals 50 percent of the area median income, with adjustments for number of bedrooms in the unit as described in paragraph (a) of this section. If the unit or tenant receives Federal or State rental subsidy, and the Family pays as a contribution towards rent not more than 30 percent of the Family's income, the maximum rent (*i.e.*, tenant contribution plus rental subsidy) is the rent allowable under the Federal or State rental subsidy program; or

(4) For an Extremely Low-Income Family, 30 percent of the annual income of a Family whose annual income equals 30 percent of the area median income, with adjustments for number of bedrooms in the unit as described in paragraph (a) of this section. If the unit or tenant receives Federal or State rental subsidy, and the Family pays as a contribution toward rent not more than 30 percent of the Family's income, the maximum rent (*i.e.*, tenant contribution plus rental subsidy) is the rent allowable under the Federal or State rental subsidy program.

(b) *Nondiscrimination against rental assistance subsidy holders.* The Recipient shall require that the owner of a rental unit cannot refuse to lease the unit to a Section 8 Program certificate or voucher holder (24 CFR part 982, Section 8 Tenant-Based Assistance: Unified Rule for Tenant-Based Assistance under the Section 8 Rental Certificate Program and the Section 8 Rental Voucher Program) or to the holder of a comparable document evidencing participation in a HOME tenant-based rental assistance program because of the status of the prospective tenant as a holder of such certificate, voucher, or comparable HOME tenant-based assistance document.

(c) *Initial rent schedule and utility allowances.* The Recipient shall ensure that utility allowances and submetering rules are consistent with regulations concerning utility allowances and submetering in buildings that are subject to gross rent restrictions under IRC section 42(g)(2).

(d) *Periods of affordability.* Housing under this section must meet the affordability requirements for not less than 10 years, beginning after Project Completion and at initial occupancy. The affordability requirements apply without regard to the term of any loan

or mortgage or the transfer of ownership and must be imposed by deed restrictions, covenants running with the land, or other recordable mechanisms. Other recordable mechanisms must be approved in writing and in advance by the CDFI Fund. The affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure. However, the affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the Project.

(e) *Subsequent rents during the affordability period.* Any increase in rent for a CMF-financed unit requires that tenants of those units be given at least 30 days prior written notice before the implementation of the rent increase. Regardless of changes in annual rents and in median income over time, the CMF rents for a Project are not required to be lower than the CMF rent limits for the Project in effect at the time when the Project is Committed for use.

(f) *Tenant income determination.* (1) Each year during the period of affordability, the tenant's income shall be reexamined; tenant income examination and verification is ultimately the responsibility of the Recipient. Annual income shall include income from all household members. The Recipient must require the Project owner to obtain information on rents and occupancy of Affordable Housing financed or assisted with a CMF Award in order to demonstrate compliance with this section.

(2) One of the following two definitions of ''annual income'' must be used to determine whether a Family is income-eligible:

(i) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes; or

(ii) ''Annual Income'' as defined at 24 CFR 5.609 (except that when determining the income of a homeowner for an owner-occupied Rehabilitation Project, the value of the homeowner's principal residence may be excluded from the calculation of Net Family Assets, as defined in 24 CFR 5.603).

(3) Although either of the above two definitions of ''annual income'' is permitted, in order to calculate adjusted income, exclusions from income set forth at 24 CFR 5.611 shall be applied.

(4) The CDFI Fund reserves the right to deem certain government programs, under which a Low-Income Family is a recipient, as income eligible for purposes of meeting the tenant income requirements under this section.

(g) *Over-income tenants.* (1) CMF-financed or assisted units continue to qualify as Affordable Housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to the CDFI Fund are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(2) Tenants whose incomes no longer qualify must pay rent no greater than the lesser of the amount payable by the tenant under State or local law or 30 percent of the Family's annual income, except if the gross rent of a unit is subject to the restrictions in IRC section 42(g)(2) or the restrictions in an extended low-income housing commitment under IRC section 42(h)(6), then the tenants of that unit must pay rent governed by those restrictions. Tenants who no longer qualify as Eligible-Income are not required to pay rent in excess of the market rent for comparable, unassisted units in the neighborhood.

(3) If the income of a tenant of a CMF-financed or assisted unit no longer qualifies, the Recipient may designate another unit, within the CMF-financed or assisted Project, as a replacement unit that meets the affordability qualifications for the same income category as the original unit, as further set forth in the Recipient's Assistance Agreement. If there is not an available replacement unit, the Recipient must fill the first available vacancy with a tenant that meets the affordability qualifications for the same income category of the original unit as necessary to maintain compliance with

the CMF requirements and the Assistance Agreement.

§ 1807.402 Affordable Housing—Homeownership.

(a) *Purchase with or without Rehabilitation.* A Recipient that uses the CMF Award for the eligible activities set forth in § 1807.301 for Purchase must ensure the purchasing Family and Housing meets the affordability requirements of this subpart.

(1) The Housing must be Single-family housing.

(2) The Single-family housing price does not exceed 95 percent of the median purchase price for the area as used in the HOME Program and as determined by HUD and the applicable Participating Jurisdiction.

(3) The Single-family housing must be purchased by a qualifying Family as set forth in § 1807.400. The Single-family housing must be the principal residence of the Family throughout the period described in paragraph (a)(4) of this section.

(4) *Periods of affordability.* Single-family housing under this section must meet the affordability requirements for at least 10 years at the time of purchase by the Family.

(5) *Resale.* To ensure that CMF Awards are being used for qualifying Families for the entire 10-year affordability period, recoupment and redeployment or resale strategies must be imposed by the Recipient. A recoupment strategy must ensure that, in the event the qualifying homeowner sells the Housing before the end of the 10-year affordability period and the new homeowner does not meet the affordability qualifications set forth in § 1807.400, an amount equal to the amount of the CMF Award investment in the Housing, whether recouped or not, is used to finance additional Affordable Housing Activities for a qualifying Family in the same income category for Affordable Housing Homeownership in the manner set forth in this section, except that the Housing must meet the affordability requirements only for the remaining duration of the affordability period. The Recipient may design and implement its own recoupment strategy. Deed restrictions, covenants running with the land, or other similar mechanisms may be used as the mechanism to impose a resale strategy. The Recipient shall report to the CDFI Fund the event of resale and/or recoupment and redeployment of the CMF Award, or an equivalent amount, in the manner described in the Assistance Agreement. The affordability restrictions may terminate upon occurrence of any of the following termination events: Foreclosure, transfer in lieu of foreclosure, or assignment of an FHA-insured mortgage to HUD. The Recipient may use purchase options, rights of first refusal or other preemptive rights to purchase the Housing before foreclosure to preserve affordability. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the termination event, obtains an ownership interest in the Housing. If there is a sale of Single-family housing funded by a CMF Award prior to the completion of the 10-year affordability period, the Recipient must demonstrate that it placed into service Single-family housing targeting the same income population (*i.e.,* Extremely Low-Income, Very Low-Income, Low-Income) as the original Single-family housing, as set forth in the Assistance Agreement, financed with an equivalent amount to the recouped portion of the CMF Award, that will be tracked for the duration of the affordability period of the original Single-family housing.

(b) *Rehabilitation not involving Purchase.* Single-family housing that is currently owned by a qualifying Family, as set forth in § 1807.400, qualifies as Affordable Housing if it meets the requirements of this paragraph (b).

(1) The estimated value of the Single-family housing, after Rehabilitation, does not exceed 95 percent of the median purchase price for the area, as used in the HOME Program and as determined by the applicable Participating Jurisdiction; or

(2) The Single-family housing is the principal residence of a qualifying Family as set forth in § 1807.400, at the time that the CMF Award is Committed to the Single-family housing.

(3) Single-family housing under this paragraph (b) must meet the affordability requirements for at least 10 years after Rehabilitation is completed or meet the resale provisions of paragraph (a)(5) of this section.

(c) *Ownership interest.* The ownership in the Single-family housing assisted under this section must meet the definition of Homeownership as defined in §1807.104.

(d) *New construction without Purchase.* Newly constructed Single-family housing that is built on property currently owned by a Family that will occupy the Single-family housing upon completion, qualifies as Affordable Housing if it meets the requirements under paragraph (a) of this section.

(e) *Converting rental units to Homeownership units for existing tenants.* CMF-financed rental units may be converted to Homeownership units by selling, donating, or otherwise conveying the units to the existing tenants to enable the tenants to become homeowners in accordance with the requirements of this section. The Homeownership units are subject to a minimum period of affordability equal to the remaining affordability period.

Subpart E—Leveraged Costs; Eligible Project Costs; Commitment Requirements

§1807.500 Leveraged Costs; Eligible Project Costs.

(a) Each CMF Award must result in Eligible Project Costs in an amount that equals at least 10 times the amount of the CMF Award or some higher standard established by the CDFI Fund in the Recipient's Assistance Agreement. Such Eligible Project Costs must be for Affordable Housing Activities and Economic Development Activities, as set forth in the Assistance Agreement.

(b) *Leveraged Costs.* (1) The applicable NOFA and/or the Assistance Agreement may set forth a required percentage of Leveraged Costs that must be funded by non-governmental sources.

(2) The Recipient must report to the CDFI Fund all Leveraged Costs, with the following limitations:

(i) No costs attributable to prohibited uses as set forth in §1807.302(a) and (b) may be reported as Leveraged Costs;

(ii) All Leveraged Costs attributable to Affordable Housing Activities must be for Affordable Housing, as set forth in §1807.401 or §1807.402, and as further described in the Assistance Agreement;

(iii) All eligible Leveraged Costs attributable to Economic Development Activities shall be described in the Assistance Agreement.

(c) Recipients must report Leveraged Costs information through forms or electronic systems provided by the CDFI Fund. Consequently, Recipients must maintain appropriate documentation, such as audited financial statements, wire transfers documents, proformas, and other relevant records, to support such reports.

§1807.501 Commitments; Payments.

(a) The CMF Award must be Committed by the Recipient for use by the date designated in its Assistance Agreement.

(b) The Recipient must evidence such commitment with a written, legally binding agreement to provide CMF Award proceeds to the qualifying Family, developer or project sponsor for a Project whose:

(1) Construction can reasonably be expected to start within 12 months of the commitment agreement date;

(2) Property title will be transferred within 6 months of the commitment agreement date; or

(3) Construction schedule ensures Project Completion within 5 years of a date specified in the Assistance Agreement.

(c) The CDFI Fund will make Payment of CMF Award based on a deployment schedule contained in the CMF Award application, in addition to any other documentation and/or forms that the CDFI Fund may require.

(d) Upon receipt of CMF Award, the Recipient must make an initial disbursement of said CMF Award by the date designated in its Assistance Agreement. The CDFI Fund may make Payment of CMF Award in a lump sum or other manner, as determined appropriate by the CDFI Fund. The CDFI Fund will not provide any Payment until the Recipient has satisfied all

conditions set forth in the applicable NOFA and Assistance Agreement.

§ 1807.502 CMF Award limits.

An eligible Applicant and its Subsidiaries and Affiliates may not be awarded more than 15 percent of the aggregate funds available for CMF Awards during any year.

§ 1807.503 Project Completion; Property standards.

(a) Upon Project Completion, the Project must be placed into service by the date designated in the Assistance Agreement. Project Completion occurs, as determined by the CDFI Fund, when:

(1) All necessary title transfer requirements and construction work have been performed;

(2) The property standards of paragraph (b) of this section have been met; and

(3) The final drawdown of the CMF Award has been made to the project sponsor or developer;

(4) When a CMF Award is used for Preservation, Project Completion occurs when the refinance and/or Rehabilitation is completed in addition to the requirements set forth in this paragraph (a).

(b) By the Project Completion date, the Project must meet the requirements of this part, including the following property standards (which must be met for a period of at least 10 years after the Project Completion date):

(1) Projects that are constructed or Rehabilitated with a CMF Award must meet all applicable State and local codes, Rehabilitation standards, ordinances, and zoning requirements at the time of Project Completion or, in the absence of a State or local building code, the International Residential Code or International Building Code (as applicable) of the International Code Council.

(2) In addition, Projects must meet the following requirements:

(i) *Accessibility*. The Project must meet all applicable accessibility requirements set forth at 24 CFR part 8, which implements section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. Multifamily housing, as defined in 24 CFR 100.201, must also meet all applicable design and construction requirements set forth in 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619).

(ii) *Disaster mitigation*. The Project must meet all applicable State and local codes, ordinances, or other disaster mitigation requirements (*e.g.*, earthquake, hurricanes, flooding, wild fires), or other requirements as the Department of Housing and Urban Development has established in 24 CFR part 93.

(iii) *Lead-based paint*. The Project must meet all applicable lead-based paint requirements, including those set forth in 24 CFR part 35.

(3) *Rehabilitation standards*. In addition, all Rehabilitation that is financed with a CMF Award must meet the following requirements:

(i) For rental Housing, if the remaining useful life of one or more major systems is less than the 10-year period of affordability, the Recipient must ensure that, at Project Completion, the developer or Project sponsor establishes a replacement reserve and that monthly payments are made to the reserve that are adequate to repair or replace the systems as needed. Major systems include: Structural support; roofing; cladding and weatherproofing (*e.g.*, windows, doors, siding, gutters); plumbing; electrical; heating, ventilation, and air conditioning.

(ii) For Homeownership Single-family housing, the Recipient must ensure that, at Project Completion, the Housing is decent, safe, sanitary, and in good repair. The Recipient must ensure that timely corrective and remedial actions are taken by the Project owner to address identified life threatening deficiencies.

(4) *Manufactured housing*. Construction of all manufactured housing must meet the Manufactured Home Construction and Safety Standards set forth in 24 CFR part 3280. These standards preempt State and local laws or codes, which are not identical to the Federal standards for the new construction of manufactured housing. The installation of all manufactured

housing units must comply with applicable State and local laws or codes. In the absence of such laws or codes, the installation must comply with the manufacturer's written instructions for installation of manufactured housing units. Manufactured housing that is rehabilitated using a CMF Award must meet the requirements set out in paragraph (b)(1) of this section.

Subpart F—Tracking Funds; Uniform Administrative Requirements; Nature of Funds

§ 1807.600 Tracking funds.

The Recipient shall develop and maintain an internal tracking and reporting system that ensures that the CMF Award is used in accordance with this part and the Assistance Agreement.

§ 1807.601 Uniform Administrative Requirements.

The Uniform Administrative Requirements apply to all CMF Awards.

§ 1807.602 Nature of funds.

CMF Awards are Federal financial assistance with regard to the application of Federal civil rights laws. CMF Award funds retain their Federal character until the end of the Investment Period.

Subpart G—Notice of Funds Availability; Applications

§ 1807.700 Notice of funds availability.

Each Applicant must submit a CMF Award application in accordance with the applicable Notice of Funds Availability (NOFA) published in the FEDERAL REGISTER. The NOFA will advise prospective Applicants on how to obtain and complete an application and will establish deadlines and other requirements. The NOFA will specify application evaluation factors and any limitations, special rules, procedures, and restrictions for a particular application round. After receipt of an application, the CDFI Fund may request clarifying or technical information on the materials submitted as part of the application.

Subpart H—Evaluation and Selection of Applications

§ 1807.800 Evaluation and selection—general.

Each Applicant will be evaluated and selected, at the sole discretion of the CDFI Fund, to receive a CMF Award based on a review process that will include a paper or electronic application, and may include an interview(s) and/or site visit(s), and that is intended to:

(a) Ensure that Applicants are evaluated on a merit basis and in a fair and consistent manner;

(b) Ensure that each Recipient can successfully meet its leveraging goals and achieve Affordable Housing Activity and Economic Development Activity impacts;

(c) Ensure that Recipients represent a geographically diverse group of Applicants serving Metropolitan Areas and Underserved Rural Areas across the United States that meet criteria of economic distress, which may include:

(1) The percentage of Low-Income Families or the extent of poverty;

(2) The rate of unemployment or underemployment;

(3) The extent of disinvestment;

(4) Economic Development Activities that target Extremely Low-Income, Very Low-Income, and Low-Income Families within the Recipient's Service Area; and

(5) Any other criteria the CDFI Fund shall set forth in the applicable NOFA; and

(d) Take into consideration other factors as set forth in the applicable NOFA.

§ 1807.801 Evaluation of applications.

(a) *Eligibility and completeness.* An Applicant will not be eligible to receive a CMF Award if it fails to meet the eligibility requirements described in §1807.200 and in the applicable NOFA, or if the Applicant has not submitted complete application materials. For the purposes of this paragraph (a), the CDFI Fund reserves the right to request additional information from the Applicant, if the CDFI Fund deems it appropriate.

(b) *Substantive review.* In evaluating and selecting applications to receive

assistance, the CDFI Fund will evaluate the Applicant's likelihood of success in meeting the factors set forth in the applicable NOFA including, but not limited to:

(1) The Applicant's ability to use a CMF Award to generate additional investments, including private sources of funding;

(2) The need for affordable housing in the Applicant's Service Area;

(3) The ability of the Applicant to obligate amounts and undertake activities in a timely manner; and

(4) In the case of an Applicant that has previously received assistance under any CDFI Fund program, the Applicant's level of success in meeting its performance goals, reporting requirements, and other requirements contained in the previously negotiated and executed assistance, allocation or award agreement(s) with the CDFI Fund, any undisbursed balance of assistance, and compliance with applicable Federal laws.

(c) The CDFI Fund may consider any other factors that it deems appropriate in reviewing an application, as set forth in the applicable NOFA, the application and related guidance materials.

(d) *Consultation with appropriate regulatory agencies.* In the case of an Applicant that is a Federally regulated financial institution, the CDFI Fund may consult with the Appropriate Federal Banking Agency or Appropriate State Agency prior to making a final award decision and prior to entering into an Assistance Agreement.

(e) *Recipient selection.* The CDFI Fund will select Recipients based on the criteria described in paragraph (b) of this section and any other criteria set forth in this part or the applicable NOFA.

Subpart I—Terms and Conditions of CMF Award

§ 1807.900 Assistance agreement.

(a) Each Applicant that is selected to receive a CMF Award must enter into an Assistance Agreement with the CDFI Fund. The Assistance Agreement will set forth certain required terms and conditions for the CMF Award that may include, but are not limited to, the following:

(1) The amount of the CMF Award;

(2) The approved uses of the CMF Award;

(3) The approved Service Area;

(4) The time period by which the CMF Award proceeds must be Committed;

(5) The required documentation to evidence Project Completion; and

(6) Performance goals that have been established by the CDFI Fund pursuant to this part, the NOFA, and the Recipient's application.

(b) The Assistance Agreement shall provide that, in the event of fraud, mismanagement, noncompliance with the Act or these regulations, or noncompliance with the terms and conditions of the Assistance Agreement, on the part of the Recipient, the CDFI Fund, in its discretion, may make a determination to:

(1) Require changes in the performance goals set forth in the Assistance Agreement;

(2) Revoke approval of the Recipient's application;

(3) Reduce or terminate the CMF Award;

(4) Require repayment of any CMF Award that have been paid to the Recipient;

(5) Bar the Recipient from applying for any assistance from the CDFI Fund; or

(6) Take such other actions as the CDFI Fund deems appropriate or as set forth in the Assistance Agreement.

(c) Prior to making a determination that the Recipient has failed to comply substantially with the Act or these regulations or an Assistance Agreement, the CDFI Fund shall provide the Recipient with reasonable notice and opportunity for hearing.

§ 1807.901 Payment of funds.

CMF Awards provided pursuant to this part may be provided in a lump sum payment or in some other manner, as determined appropriate by the CDFI Fund. The CDFI Fund shall not provide any Payment under this part until a Recipient has satisfied all conditions set forth in the applicable NOFA and Assistance Agreement.

§ 1807.902 Data collection and reporting.

(a) *Data; General.* The Recipient must maintain such records as may be prescribed by the CDFI Fund that are necessary to:

(1) Disclose the manner in which the CMF Award is used, including providing documentation to demonstrate Project Completion;

(2) Demonstrate compliance with the requirements of this part and the Assistance Agreement; and

(3) Evaluate the impact of the CMF Award.

(b) *Customer profiles.* The Recipient must compile such data on the gender, race, ethnicity, national origin, or other information on individuals that are benefiting from the CMF Award, as the CDFI Fund shall prescribe in the Assistance Agreement. Such data will be used to determine whether residents of the Recipient's Service Area are adequately served and to evaluate the impact of the CMF Award.

(c) *Access to records.* The Recipient must submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by the CDFI Fund or the U.S. Department of the Treasury to ensure compliance with the requirements of this part and to evaluate the impact of the CMF Award. The United States Government, including the U.S. Department of the Treasury, the Comptroller General, and their duly authorized representatives, shall have full and free access to the Recipient's offices and facilities and all books, documents, records, and financial statements relating to use of Federal funds and may copy such documents as they deem appropriate and audit or provide for an audit at least annually. The CDFI Fund, if it deems appropriate, may prescribe access to record requirements for entities that receive a CMF Award from the Recipient.

(d) *Retention of records.* The Recipient shall comply with all applicable record retention requirements set forth in the Uniform Administrative Requirements (as applicable) and the Assistance Agreement.

(e) *Data collection and reporting*—(1) *Financial reporting,* (i) All Nonprofit Organization Recipients that are required to have their financial statements audited pursuant to the Uniform Administrative Requirements, must submit their single-audits by a time set forth in the applicable NOFA or Assistance Agreement. Nonprofit Organization Recipients (excluding Insured CDFIs and State-Insured Credit Unions) that are not required to have financial statements audited pursuant to the Uniform Administrative Requirements, must submit to the CDFI Fund a statement signed by the Recipient's authorized representative or certified public accountant, asserting that the Recipient is not required to have a single-audit pursuant to the Uniform Administrative Requirements as indicated in the Assistance Agreement. In such instances, the CDFI Fund may require additional audits to be performed and/or submitted to the CDFI Fund as stated in the applicable Notice of Funds Availability and Assistance Agreement.

(ii) For-profit Recipients (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements audited in conformity with generally accepted auditing standards as promulgated by the American Institute of Certified Public Accountants by a time set forth in the applicable NOFA or Assistance Agreement.

(iii) Insured CDFIs are not required to submit financial statements to the CDFI Fund. The CDFI Fund will obtain the necessary information from publicly available sources. State-Insured Credit Unions must submit to the CDFI Fund copies of the financial statements that they submit to the Appropriate State Agency.

(2) *Annual report.* (i) The Recipient shall submit a performance and financial report that shall be specified in the Assistance Agreement (annual report). The annual report consists of several components which may include, but are not limited to, a report on performance goals and measures, explanation of any Recipient noncompliance, and such other information as may be required by the CDFI Fund. The annual report components shall be specified

and described in the Assistance Agreement.

(ii) The CDFI Fund will use the annual report to collect data to assess the Recipient's compliance with its performance goals and the impact of the CMF and the CDFI industry.

(iii) The Recipient is responsible for the timely and complete submission of the annual report, even if all or a portion of the documents actually are completed by another entity. If such other entities are required to provide information for the annual report, or such other documentation that the CDFI Fund might require, the Recipient is responsible for ensuring that the information is submitted timely and complete. The CDFI Fund reserves the right to contact such other entities and require that additional information and documentation be provided.

(iv) The CDFI Fund's review of the compliance of an Insured CDFI, a Depository Institution Holding Company or a State-Insured Credit Union with the terms and conditions of its Assistance Agreement may also include information from the Appropriate Federal Banking Agency or Appropriate State Agency, as the case may be.

(f) *Public access.* The CDFI Fund shall make reports described in this section available for public inspection after deleting or redacting any materials necessary to protect privacy or proprietary interests.

§ 1807.903 Compliance with government requirements.

In carrying out its responsibilities pursuant to an Assistance Agreement, the Recipient shall comply with all applicable Federal, State, and local laws, regulations, and ordinances, Uniform Administrative Requirements, and Executive Orders. Furthermore, Recipients must comply with the CDFI Fund's environmental quality regulations (12 CFR part 1815) as well as all other Federal environmental requirements applicable to Federal awards.

§ 1807.904 Lobbying restrictions.

No CMF Award may be expended by a Recipient to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or local government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or local government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. 1352.

§ 1807.905 Criminal provisions.

The criminal provisions of 18 U.S.C. 657 regarding embezzlement or misappropriation of funds are applicable to all Recipients and insiders.

§ 1807.906 CDFI Fund deemed not to control.

The CDFI Fund shall not be deemed to control a Recipient by reason of any CMF Award provided under the Act for the purpose of any applicable law.

§ 1807.907 Limitation on liability.

The liability of the CDFI Fund and the United States Government arising out of any CMF Award shall be limited to the amount of the CMF Award. The CDFI Fund shall be exempt from any assessments and other liabilities that may be imposed on controlling or principal shareholders by any Federal law or the law of any State. Nothing in this section shall affect the application of any Federal tax law.

§ 1807.908 Fraud, waste and abuse.

Any person who becomes aware of the existence or apparent existence of fraud, waste or abuse of a CMF Award should report such incidences to the Office of Inspector General of the U.S. Department of the Treasury.

PART 1808—COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS BOND GUARANTEE PROGRAM

Subpart A—General Provisions

Sec.

AUTHORITY: The Small Business Jobs Act of 2010, Pub. L. 111–240, §§1134 and 1703; 12 U.S.C. 4713a.

SOURCE: 78 FR 8310, Feb. 5, 2013, unless otherwise noted.

Subpart A—General Provisions

§ 1808.100 Purpose.

The purpose of the Community Development Financial Institutions (CDFI) Bond Guarantee Program is to support CDFI lending by providing Guarantees for Bonds issued as part of a Bond Issue for Eligible Community or Economic Development Purposes, as authorized by sections 1134 and 1703 of the Small Business Jobs Act of 2010 (Pub. L. 111–240; 12 U.S.C. 4713a).

§ 1808.101 Summary.

This section provides a summary overview of certain key provisions of the interim rule, the detailed requirements of which are set forth in subsequent subparts.

(a) *Guarantee.* Through the CDFI Bond Guarantee Program, the Guarantor will provide a Guarantee for Bonds issued by Qualified Issuers as part of a Bond Issue.

(b) *Bonds.* Pursuant to the Act at 12 U.S.C. 4713a(e), a Bond Issue shall comprise Bonds having a minimum aggregate principal amount of $100,000,000 and a maximum aggregate principal amount of $1,000,000,000. The principal amount of each Bond (or series of Bonds) shall not be less than $10,000,000. A Bond Rate for each advance of funds under a Bond will be established by the Bond Purchaser as of the date of the respective advance, as provided in the Bond.

(c) *Bond Loans to Eligible CDFIs.* The Qualified Issuer will use Bond Proceeds to make Bond Loans to Eligible CDFIs for Eligible Purposes, as those terms are defined in section 1808.102. The CDFI Fund will evaluate each Eligible CDFI using standard Bond Loan Requirements to assess their creditworthiness and capacity to receive a Bond Loan. Each Eligible CDFI may borrow a Bond Loan in an amount that is at least $10,000,000. The Bond Loan Rate shall be the same as the Bond Rate on the particular advance of funds under the Bond that funds the Bond Loan. The aggregate of the principal amounts of the Bond Loans must not exceed the maximum principal amount of the corresponding Bond Issue. The Qualified Issuer must execute Bond Loan documents for 100 percent of the principal amount of each Bond on the Bond Issue Date. Bond Loan proceeds may not be drawn down from the Qualified Issuer until the Eligible CDFI has an immediate use for the Bond Loan proceeds. Five percent, or such other amount that is determined by the CDFI Fund in its sole discretion, of Bond Loan proceeds may be used by an Eligible CDFI to capitalize Loan Loss Reserves.

(d) *Secondary Loans to Secondary Borrowers.* If the Eligible CDFI uses Bond Loan proceeds to make Secondary Loans, the Eligible CDFI must execute Secondary Loan documents (in the form of promissory notes) with Secondary Borrowers as follows:

(1) Not later than 12 months after the Bond Issue Date, Secondary Loan documents representing at least 50 percent of such Eligible CDFI's Bond Loan proceeds allocated for Secondary Loans; and

(2) Not later than 24 months after the Bond Issue Date, Secondary Loan documents representing 100 percent of such Eligible CDFI's Bond Loan proceeds allocated for Secondary Loans (excluding any amounts used for payment of Bond Issuance Fees pursuant to section 1808.304(b)).

(e) *Terms and conditions.* Bonds, Bond Loans and Secondary Loans shall have terms and conditions as set forth in Subpart F of this interim rule including at a minimum, that:

(1) Each Bond shall be a nonrecourse obligation of the Qualified Issuer, payable solely from amounts available pursuant to the Bond Documents. Each promissory note evidencing a Bond Loan shall be a general recourse obligation of the Eligible CDFI and secured by a first lien on collateral. Each Secondary Loan shall be secured by a first lien on collateral and payable solely from amounts available pursuant to the Secondary Loan documents;

(2) The maturity date of a Bond shall not be later than 30 years after the Bond Issue Date. The maturity date of Bond Loans and Secondary Loans may be earlier than, but may not be later than, the maturity date of the corresponding Bond;

(3) The Bonds shall be purchased by the Bond Purchaser on terms and conditions that are satisfactory to the Bond Purchaser, the Guarantor, and the CDFI Fund (under specific requirements set forth in §1808.302 and the Bond Documents); and

(4) The Guarantor shall guarantee payments on Bonds issued as part of a Bond Issue in such forms and on such terms and conditions and subject to such covenants, representations, warranties and requirements (including requirements for audits) as set forth in this interim rule in Subpart F. These requirements may be expanded upon through the program's Notice of Guarantee Availability, the Bond Documents, and the Bond Loan documents. The Qualified Issuer shall enter into the applicable Bond Documents to evidence its acceptance of the terms and conditions of the Guarantee.

§ 1808.102 Definitions.

For purposes of this part, capitalized terms used herein and not defined elsewhere are defined as follows:

(a) *Act* means the Small Business Jobs Act of 2010, Pub. L. 111–240, sections 1134 and 1703, 12 U.S.C. 4713a;

(b) *Affiliate* means any entity that Controls, is Controlled by, or is under common Control with, another entity. Control is defined as:

(1) Ownership, control or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities (as that term is defined in 12 CFR 1805.104(mm)) of any legal entity, directly or indirectly or acting through one or more other persons; or

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any legal entity; or

(3) The power to exercise, directly or indirectly, a controlling influence, as determined by the CDFI Fund, over the management, credit decisions, investment decisions, or policies of any legal entity;

(c) *Agency Administrative Fee* means a fee in an amount equal to 10 basis points (0.1 percent) of the amount of the unpaid principal of the Bond Issue, payable annually to the CDFI Fund by a Qualified Issuer;

(d) *Agreement to Guarantee* means the written agreement between the Guarantor and the Qualified Issuer which sets forth the terms and conditions on which the Guarantor will provide the Guarantee;

(e) *Appropriate Federal Banking Agency* has the same meaning as in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), and includes, with respect to an Insured Credit Union (as such term is defined in 12 CFR 1805.104(bb)), the National Credit Union Administration;

(f) *Appropriate State Agency* means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union (as such term is defined in 12 CFR 1805.104(e));

(g) *Bond* means a security in the form of a draw-down bond or note issued by the Qualified Issuer, with each advance of funds thereunder bearing interest at an applicable Bond Rate established by the Bond Purchaser in accordance with section 1808.300 of this part, and sold to the Bond Purchaser, the proceeds of which will be used for Eligible Purposes, and which benefit from a Guarantee;

(h) *Bond Documents* mean, for each Bond, the respective Bond, Bond Trust Indenture, Agreement to Guarantee, Bond purchase agreement, and all other instruments and documentation pertaining to the issuance of the Bond;

(i) *Bond Issuance Fees* mean amounts paid by an Eligible CDFI for reasonable and appropriate expenses, administrative costs, and fees for services incurred in connection with the issuance of the Bond (but not including the Agency Administrative Fee) and the making of the Bond Loan;

(j) *Bond Issue* means at least $100,000,000, and no more than $1,000,000,000, in aggregate principal amount of Bonds secured by a single Guarantee; each Bond (or series of Bonds) in the Bond Issue being in the minimum principal amount of at least $10,000,000;

(k) *Bond Issue Date* means the date on which the Bond is deemed to be issued or originated;

(l) *Bond Loan* means a loan of Bond Proceeds by a Qualified Issuer to an Eligible CDFI. A Bond Loan must be in an initial principal amount that is not less than $10,000,000, and Bond Loan proceeds must be used for Eligible Purposes;

(m) *Bond Loan Payment Default Rate* means, in the event of a Bond Loan payment default, the applicable interest rate on any overdue amount from its due date to the date of actual payment and shall be calculated in the same manner as a late charge rate is calculated in the underlying Bond;

(n) *Bond Loan Rate* means the rate of interest for each advance of funds under a Bond Loan, which shall be the same as the Bond Rate;

(o) *Bond Loan Requirements* means the credit criteria, established by the CDFI Fund, for assessing the creditworthiness and capacity of each Eligible CDFI applicant to receive a Bond Loan;

(p) *Bond Proceeds* means the funds that are advanced by the Bond Purchaser to the Qualified Issuer under a Bond;

(q) *Bond Purchaser (or Bondholder)* means the Federal Financing Bank, the body corporate and instrumentality of the Federal Government created by the Federal Financing Bank Act of 1973 (12 U.S.C. 2281 *et seq.*);

(r) *Bond Rate* means the rate of interest for each advance of funds under a Bond;

(s) *Bond Trust Indenture* means the agreement between the Qualified Issuer and the Master Servicer/Trustee that sets forth the rights, duties, responsibilities and remedies of the Qualified Issuer and Master Servicer/Trustee with respect to the Bonds, to include responsibilities regarding the management of the collateral, the management of the funds and accounts, the repayment and redemption of the Bonds, and the circumstances and processes surrounding any default;

(t) *Capital Distribution Plan* means the component of the Guarantee Application that demonstrates the Qualified Issuer's comprehensive plan for lending, disbursing, servicing, and monitoring each Bond Loan and that meets the requirements of §1808.401 of this interim rule and such other requirements as may be designated in the applicable Notice of Guarantee Availability. The Capital Distribution Plan includes, among other components (specified in §1808.401 of this interim rule), a Statement of Proposed Sources and Uses of Funds, and shall include one or more Secondary Capital Distribution Plans;

(u) *CDFI Bond Guarantee Program (or Program)* means the program of providing Guarantees for Bonds issued as part of a Bond Issue by Qualified Issuers to make Bond Loans to Eligible CDFIs for Eligible Purposes, as authorized by subsections 1134 and 1703 of the Act (12 U.S.C. 4713a), and implemented under this part;

(v) *Certified Community Development Financial Institution (or Certified CDFI*) means a financing entity that has a primary mission of promoting community development and that has been certified by the CDFI Fund as meeting the eligibility requirements set forth in 12 CFR 1805.201;

(w) *Community Development Financial Institutions Fund (or CDFI Fund*) means the Community Development Financial Institutions Fund, a wholly owned government corporation within the U.S. Department of the Treasury, established under the Riegle Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*), as amended;

(x) *Credit Enhancement* means such instrument or document proffered by an Eligible CDFI to enhance the credit quality of a Bond and/or Bond Loan. Credit Enhancements may include, but are not limited to, pledges of financial resources and lines and letters of credit issued by: an Eligible CDFI; an Affiliate; a regulated financial institution; a foundation; or another entity. The Risk-Share Pool is not a form of Credit Enhancement;

(y) *Department Opinion* means an internal opinion by the CDFI Fund regarding compliance by the Qualified Issuer with the requirements for approval of a Guarantee;

(z) *Designated Bonding Authority (or DBA)* means a Qualified Issuer selected by the CDFI Fund to issue Bonds on behalf of certain Eligible CDFIs and make Bond Loans to such Eligible CDFIs, pursuant to this interim rule;

(aa) *Eligible Community Development Financial Institution (or Eligible CDFI)* means a Certified CDFI that has submitted an application to a Qualified Issuer for a Bond Loan, has been deemed creditworthy based on the Bond Loan Requirements, and has received a Bond Loan;

(bb) *Eligible Community or Economic Development Purpose (or Eligible Purpose)* means the allowable uses of Bond Proceeds and Bond Loan proceeds, which includes financing or Refinancing for community or economic development purposes described in 12 U.S.C. 4707(b), including but not limited to community or economic development purposes in Low-Income Areas or Underserved Rural Areas, as deemed eligible by the CDFI Fund in its sole discretion; Bond Issuance Fees in an amount not to exceed one percent of Bond Loan proceeds; and capitalization of Loan Loss Reserves in an amount that is up to five percent of the par amount of the Bond Loan, or such

other amount that is determined by the CDFI Fund in its sole discretion;

(cc) *Guarantee* means the guarantee by the Guarantor, pursuant to an Agreement to Guarantee, of the repayment of 100 percent of the Verifiable Losses of Principal, Interest, and Call Premium, if any, on the corresponding Bonds issued as part of a Bond Issue; each Guarantee shall be for a Bond Issue of at least $100,000,000, plus the related interest and call premiums;

(dd) *Guarantee Application* means the application document that a Qualified Issuer submits in order to apply for a Guarantee;

(ee) *Guarantor* means the Secretary of the Treasury or the Secretary's designee;

(ff) *Investment Area* means a geographic area meeting the requirements of 12 CFR 1805.201(b)(3)(ii);

(gg) *Loan Loss Reserves* means the use of Bond Loan proceeds (secured by a Principal Loss Collateral Provision) for a set aside in the form of cash reserves that serve as a safeguard to protect the Eligible CDFI against future losses for any loans for community or economic development purposes described in 12 U.S.C. 4707 (b), including community or economic development purposes in Low-Income Areas or Underserved Rural Areas, within the Eligible CDFI's portfolio;

(hh) *Low-Income* means an income, adjusted for family size, of not more than: (1) for Metropolitan Areas, 80 percent of the area median family income; and (2) for non-Metropolitan Areas, the greater of: (1) 80 percent of the area median family income; or (2) 80 percent of the Statewide non-Metropolitan Area median family income;

(ii) *Low-Income Area* means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located. With respect to a census tract or block numbering area located within a Metropolitan Area, the median family income shall be at or below 80 percent of the Metropolitan Area median family income or the national Metropolitan Area median family income, whichever is greater. In the case of a census tract or block numbering area located outside of a Metropolitan Area, the median family income shall be at or below 80 percent of the statewide non-Metropolitan Area median family income or the national non-Metropolitan Area median family income, whichever is greater;

(jj) *Master Servicer/Trustee* means a third party trust company or financial institution that is in the business of administering facilities similar to the Bonds and Bond Loans, has been deemed acceptable by the CDFI Fund, and whose duties include, among others, exercising fiduciary powers to enforce the terms of Bonds and Bond Loans pursuant to the Bond Trust Indenture entered into by and between the Master Servicer/Trustee and the Qualified Issuer, overseeing the activities of Servicers, and facilitating Bond principal and interest payments to the Bond Purchaser;

(kk) *Metropolitan Area* means an area that contains an urban core based statistical area of 50,000 or more population and is designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e), 31 U.S.C. 1104(d) and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

(ll) *Notice of Guarantee Availability (or NOGA)* means the notice, published by the CDFI Fund, that announces to all interested parties the opportunity to submit Qualified Issuer Applications and Guarantee Applications pursuant sections 1808.400 and 1808.401 of this interim rule;

(mm) *Principal Loss Collateral Provision* means a cash or cash equivalent guarantee or facility provided in lieu of pledged collateral set forth in the Bond Documents and Bond Loan documents;

(nn) *Program Administrator* means the Qualified Issuer, or an entity designated by the Qualified Issuer and approved by the CDFI Fund, that performs certain administrative duties related to application preparation, compliance monitoring, and reporting, as well as other duties set forth under section 1808.606 of this interim rule;

(oo) *Qualified Issuer* means a Certified CDFI, or any entity designated by a Certified CDFI to issue Bonds on its behalf, that meets the qualification requirements set forth in section 1808.200

of this interim rule, and that has been approved as such by the CDFI Fund pursuant to review and evaluation of the Qualified Issuer Application;

(pp) *Qualified Issuer Application* means the application document that a Certified CDFI (or any entity designated by a Certified CDFI to issue Bonds on its behalf) submits to the CDFI Fund in order to be approved as a Qualified Issuer prior to, or simultaneously with, a Guarantee Application;

(qq) *Qualified Secondary Loan Receivable* means payment receivables from the Secondary Loan(s) relating to the corresponding Bond Loan;

(rr) *Refinance (or Refinancing)* means the use of Bond Proceeds to refinance an Eligible CDFI's or Secondary Borrower's existing loan, which must have been used for an Eligible Purpose;

(ss) *Relending Fund* means the fund maintained by the Master Servicer/Trustee to allow an Eligible CDFI to relend Secondary Loan repayments for Eligible Purposes, not to exceed 10 percent of the principal amount outstanding of the Bonds, minus the Risk Share Pool; the Relending Fund will include a Relending Account for each Bond Issue; and each Relending Account will include a Relending Subaccount for each Bond Loan;

(tt) *Risk-Share Pool* means an account maintained by the Master Servicer/Trustee throughout the term of a Guarantee to cover losses before the Guarantee is exercised; the Risk-Share Pool is capitalized by pro rata payments equal to three percent of the amount disbursed on the Bonds from all Eligible CDFIs within a Bond Issue; payments must be funded at each disbursement under the Bond and associated Bond Loan; amounts in the Risk-Share Pool will not be returned to the Eligible CDFIs until maturity of all of the Bonds, and termination of all Bond Loans, within a Bond Issue;

(uu) *Secondary Borrower* means an entity that has made application to the Eligible CDFI for a Secondary Loan, been deemed creditworthy by the Eligible CDFI, meets the criteria set forth in the applicable Secondary Loan Requirements to receive a Secondary Loan, and has received a Secondary Loan;

(vv) *Secondary Capital Distribution Plan* means the component of the Capital Distribution Plan that pertains to the making of Secondary Loans, demonstrates the Eligible CDFI's comprehensive plan for lending, disbursing, servicing and monitoring Secondary Loans, includes a description of how the proposed Secondary Loan will meet Eligible Purposes and meets such other the requirements as may be designated in the applicable Notice of Guarantee Availability;

(ww) *Secondary Loan* means the use of Bond Loan proceeds by an Eligible CDFI to finance or Refinance a loan to a Secondary Borrower for Eligible Purposes, which meets the applicable Secondary Loan Requirements;

(xx) *Secondary Loan Requirements* mean the minimum required criteria used by each Eligible CDFI (in addition to the Eligible CDFI's underwriting criteria) to evaluate a request by a Secondary Borrower applicant for a Secondary Loan. The Secondary Loan Requirements will be established by the CDFI Fund and incorporated into the Bond Loan documents;

(yy) *Servicer* means the Qualified Issuer, or an entity designated by the Qualified Issuer and approved by the CDFI Fund, to perform various Bond Loan servicing duties, as set forth in this part;

(zz) *Special Servicer* means the Master Servicer/Trustee, or an entity designated by the Master Servicer/Trustee and approved by the CDFI Fund, that performs certain administrative duties related to the restructuring of Bond Loans that are in or about to enter into an event of default as well as other duties set forth under section 1808.606(d) of this interim rule;

(aaa) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Island, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory of the United States;

(bbb) *Statement of Proposed Sources and Uses of Funds* means the component of the Guarantee Application that describes the proposed uses of Bond Proceeds and the proposed sources of

funds to repay principal and interest on the Bonds and the Bond Loans;

(ccc) *Targeted Population* means individuals or an identifiable group of individuals who are Low-Income persons or lack adequate access to Financial Products or Financial Services and meet the requirements of 12 CFR 1805.201(b)(3)(iii);

(ddd) *Trust Estate* means the Bond Loan agreement and promissory notes evidencing the Bond Loan, all funds and accounts related to the Bonds and held by the Master Servicer/Trustee pursuant to the Bond Trust Indenture including, but not limited to, the Revenue Accounts and the Relending Accounts (as such terms are defined in subsection 1808.606(f)), and any additional collateral pledged directly by the Eligible CDFI;

(eee) *Underserved Rural Area* means an area that has significant unmet needs for loans, Equity Investments, or Financial Services (as those terms are defined in 12 CFR 1805.104) and is not contained within either a Consolidated Metropolitan Statistical Areas (CMSA) or Primary Metropolitan Statistical Areas (PMSA), as such areas are defined in OMB Bulletin No. 99–04 (Revised Statistical Definitions of Metropolitan Areas (MAs) and Guidance on Uses of MA Definitions); and

(fff) *Verifiable Losses of Principal, Interest, and Call Premium* means any portion of required debt payments related to or arising out of a Bond and Bond Loan, or the enforcement of either of them, that the Qualified Issuer is unable satisfy.

§ 1808.103 Participant not instrumentality.

No participant in the CDFI Bond Guarantee Program shall be deemed to be an agency, department, or instrumentality of the United States.

§ 1808.104 Deviations.

To the extent that such requirements are not specified by statute, the Secretary of the Treasury in consultation with the Office of Management and Budget, may authorize deviations on an individual or general basis from the requirements of this interim rule upon a finding that such deviation is essential to program objectives, and the special circumstances stated in the proposal make such deviation clearly in the best interest of the Federal Government. All proposals must be in writing and supported by a statement of the facts and the grounds forming the basis of the deviation. For deviations of general applicability, after a determination is made by the Secretary of the Treasury based on the deviation proposal, the CDFI Fund must publish notification of granted deviations in the FEDERAL REGISTER. Any deviation that was not captured in the original credit subsidy cost estimate will require either additional fees, or discretionary appropriations to cover the cost.

§ 1808.105 Relationship to other CDFI Fund programs.

Award funds received under any other CDFI Fund program cannot be used by any participant, including Qualified Issuers, Eligible CDFIs and Secondary Borrowers, to pay principal, interest, fees, administrative costs, or issuance costs (including Bond Issuance Fees) related to the CDFI Bond Guarantee Program, or to fund the Risk-Share Pool.

§ 1808.106 OMB control number.

The collection of information requirements in this part are subject to the review of the Office of Management and Budget (OMB).

Subpart B—Eligibility

§ 1808.200 Qualified Issuers.

(a) *Requirements and qualifications.* An applicant shall be deemed a Qualified Issuer if it is determined, in writing by the CDFI Fund, to meet the following criteria:

(1) The applicant must be a Certified CDFI, or an entity designated by a Certified CDFI to issue Bonds on its behalf;

(2) The applicant must have appropriate expertise, capacity, and experience, or otherwise be qualified to issue Bonds for Eligible Purposes;

(3) The applicant must have appropriate expertise, capacity, and experience, or otherwise be qualified to make Bond Loans for Eligible Purposes;

(4) The applicant must have appropriate expertise, capacity, and experience to serve or have identified qualified entities that will serve as its Program Administrator and Servicer; and

(5) The applicant must meet such other criteria as may be required by the CDFI Fund pursuant to this interim rule and the applicable Notice of Guarantee Availability.

(b) *Approval.* The designation of an applicant as a Qualified Issuer does not ensure that the Guarantor will approve a Guarantee Application or issue a Guarantee. In order for the Guarantor to approve a Qualified Issuer's Guarantee Application, the Qualified Issuer must meet all applicable Guarantee Application requirements including, but not limited to, creditworthiness and other requirements.

(c) *Qualified Issuer responsibilities.* The responsibilities of a Qualified Issuer shall include, but are not limited to:

(1) Preparing and submitting the Guarantee Application on behalf of Eligible CDFI applicants that designated it to serve as Qualified Issuer, including providing any additional information needed for review by the CDFI Fund;

(2) During the CDFI Fund's review and evaluation of the Guarantee Application, serving as primary point of contact between the CDFI Fund and the Eligible CDFI applicants that designated the Qualified Issuer to serve on their behalf;

(3) Issuing the Bond for purchase by the Bond Purchaser;

(4) Making Bond Loans to Eligible CDFIs, ensuring that 100 percent of Bond Proceeds are used to make Bond Loans;

(5) Charging interest on the Bond Loans as set forth in this interim rule and Bond Loan documents, and providing for such a schedule of repayment of Bond Loans as will, upon the timely repayment of the Bond Loans, provide adequate and timely funds for the payment of principal and interest on the Bonds;

(6) During the duration of the Bonds and the Bond Loans, serving as primary point of contact between the CDFI Fund and Eligible CDFIs;

(7) Overseeing the work of, or serving in the capacity of, the Program Administrator and Servicer;

(8) Enforcing the terms and requirements of the Bond Trust Indenture including, but not limited to: ensuring the repayment of Bond Loans in a timely manner pursuant to the terms of Bond Loan documents; assigning delinquent Bond Loans to the Guarantor upon demand by the CDFI Fund or the Guarantor; and ensuring that the Master Servicer/Trustee establishes and maintains the Risk-Share Pool throughout the term of the Guarantee;

(9) Reviewing collateral and Credit Enhancement requirements for each Bond Loan and providing information on such collateral and Credit Enhancement, as requested, to the CDFI Fund;

(10) Making payment of the Agency Administrative Fee to the CDFI Fund;

(11) Submitting all required reports and additional documentation (including reconciling financial data and Capital Distribution Plan updates, as necessary); and

(12) Such other duties and responsibilities as the CDFI Fund, the Guarantor, or the Bondholder may require.

(d) *Bond Issuance Fees.* The Qualified Issuer may charge Bond Issuance Fees and all fees reasonable and necessary for administering and servicing the Bonds or the Bond Loans, post issuance, to Eligible CDFIs.

(e) *Restriction.* A Qualified Issuer may not receive a Bond Loan under any Bond Issuance for which it serves as a Qualified Issuer.

§ 1808.201 Designated Bonding Authority.

(a) *General.* In its sole discretion, the CDFI Fund may solicit Qualified Issuer Applications from entities proposing to serve as the Designated Bonding Authority (DBA). The CDFI Bond Guarantee Program shall only have one DBA at any given time. In order to be selected to serve as the DBA, the entity must meet all qualifications of a Qualified Issuer set forth in section 1808.200 of this interim rule; additional qualifications may be set forth in the applicable NOGA as determined by the CDFI Fund.

(b) *Selection.* The DBA will serve as a CDFI Fund-selected Qualified Issuer

and designated Qualified Issuer for Eligible CDFIs that do not elect to designate another Qualified Issuer. The DBA will prepare and submit a Guarantee Application on behalf of such Eligible CDFI applicants, in accordance with such criteria set forth in this interim rule, the applicable Notice of Guarantee Availability and the Qualified Issuer Application.

§ 1808.202 Eligible CDFIs.

Each Eligible CDFI applicant seeking a Bond Loan must meet the following criteria:

(a) Be certified by the CDFI Fund as meeting the eligibility requirements set forth in 12 CFR 1805.201;

(b) Have the appropriate expertise, capacity, and experience, or otherwise be qualified to use the proceeds of Bond Loans for Eligible Purposes; and

(c) Meet such other criteria and requirements set forth in the applicable Notice of Guarantee Availability, the Guarantee Application, the Bond Loan Requirements, related Bond and Bond Loan documents, and such other requirements of the CDFI Fund.

Subpart C—Interest Rates; Terms and Conditions of Bonds, Bond Loans, and Secondary Loans

§ 1808.300 Interest rates.

(a) *Interest rates.* (1) A Bond Rate will be established by the Bond Purchaser as of the date of the respective advance of funds, as provided in the Bond. The Bond Rate for each advance of funds must be fixed and consistent with Federal credit policies outlined in OMB Circular A–129. The FFB, as Bond Purchaser, will set rates to the borrower pursuant to section 6(b) of the Federal Financing Bank Act (12 U.S.C. 2285(b)) and the FFB Lending Policy. This rate will be indexed to the appropriate Treasury rate based on the Treasury yield curve and include a spread to be determined by the Bond Purchaser; variable Bond Rates are not permitted.

(2) Interest on each advance of funds under a Bond shall be computed as provided in the Bond.

(3) A principal and interest payment schedule will be determined and provided to the Qualified Issuer for each advance of funds under a Bond, based on the Bond Rate established for the respective advance. The final principal and interest payment schedule for amounts due under a Bond will be the aggregation of the individual principal and interest payment schedules for all advances of funds under the Bond.

(4) The Bond Loan Rate shall be the same as the Bond Rate on the particular advance of funds under the Bond that funds the Bond Loan.

(5) The rate of interest for each Secondary Loan shall be established by the Eligible CDFI in accordance with subsection 1808.307(c), and may be subject to limitations specified in the applicable NOGA.

(b) *Bond Loan payment default interest rate.* In the event of a payment default on a Bond Loan, the Eligible CDFI shall pay interest on any overdue amount from its due date to the date of actual payment at the Bond Loan Payment Default Rate. The Bond Loan Payment Default Rate shall be calculated in the same manner as a late charge is calculated under the underlying Bond.

§ 1808.301 Eligible uses of Bond Proceeds.

Bond Proceeds must be used by a Qualified Issuer to finance Bond Loans or Refinance loans to Eligible CDFIs for Eligible Purposes as defined in section 1808.102 of this interim rule. A Qualified Issuer that is also a Certified CDFI may not finance a Bond Loan to itself or refinance its own loan. One hundred percent of the principal amount of each Bond must be used to make Bond Loans. As a Bond Loan is repaid, such repaid Bond Loan proceeds in excess of those required for debt service payments on the Bond must be used to repay the Bond or held in the Relending Account and used for additional Secondary Loans, to the extent authorized under § 1808.308.

§ 1808.302 Bond terms and conditions.

(a) *Maturity date.* As required by 12 U.S.C. 4713a(e)(1)(D), the maturity date of a Bond shall not be later than 30 years after the Bond Issue Date. The maturity date for any advance of funds

under a Bond shall not be later than the maturity date of the Bond.

(b) *Nonrecourse obligation.* Each Bond shall be a nonrecourse obligation of the Qualified Issuer, payable solely from amounts available pursuant to the Bond Documents.

(c) *Terms.* The Bonds may contain only terms that are consistent with the lending policies and terms of the Bond Purchaser.

(d) *No subordination.* The Bonds or Bond Loans may not be subordinated to any new or existing liability and effective subordination of the Bonds or Bond Loans to tax-exempt obligations will render the Guarantee void, in accordance with OMB Circular No. A–129 (Policies for Federal Credit Programs and Non-Tax Receivables) and applicable provisions of the Internal Revenue Code.

(e) *Other limitations.* The CDFI Fund may impose other limitations as appropriate to administer the CDFI Bond Guarantee Program including, but not limited to, requiring Qualified Issuers to obtain Credit Enhancement to safeguard against the risk of default.

(f) *Terms for Bond issuance and disbursement of Bond Proceeds.* (1) The Qualified Issuer must execute Bond Loan documents for 100 percent of the principal amount of each Bond on the Bond Issue Date. There will be an annual assessment to determine whether the Qualified Issuer is subject to the repayment provision established in 12 U.S.C. 4713a(c)(4). Terms and conditions for the annual assessment will be set forth in the applicable Notice of Guarantee Availability.

(2) Disbursements of Bond Proceeds to the Qualified Issuer shall be made pursuant to an advance request process established by the Bond Purchaser and the CDFI Fund under which the Qualified Issuer shall request an advance of funds under a Bond.

(g) *Amortization of Bond.* The principal amount of each advance of funds under a Bond shall amortize in level debt service payments of principal and interest, which payments shall be due either quarterly or semi-annually, as determined by the Qualified Issuer and the Bond Purchaser, and which shall begin on the first principal payment date specified in the Bond, as determined by the Qualified Issuer and the Bond Purchaser. Prior to the first principal payment date, interest accrued shall be due on the payment dates specified in the Bond, as determined by the Qualified Issuer and the Bond Purchaser.

(h) *Optional prepayment of Bonds.* All or a portion of any advance of funds under a Bond, or the Bond in its entirety, may be prepaid by the Qualified Issuer at any time. Any partial prepayment of an advance shall be in an amount equal to at least $100,000 of principal. Each partial prepayment of an advance of funds under a Bond shall be applied in the manner set forth in the Bond. Any partial or full prepayment of an advance of funds under a Bond shall be subject to the payment of a prepayment price, as provided in the Bond Documents.

(i) *Mandatory prepayment of Bonds.* (1) Any Bond shall be subject to mandatory prepayment if Bond Loans or Secondary Loans are not made in a timely manner, as follows:

(i) On the Calculation Date (as defined in subsection 1808.308(e)) of each year, any amount retained in the Relending Subaccount that exceeds the Relending Subaccount Maximum (as defined in subsection 1808.308(d)) by $100,000 or more shall be applied to prepay Bonds on the next succeeding payment date.

(ii) Any amounts derived from the liquidation of collateral from the Bond Loan and/or Secondary Loan in connection with the exercise by the Guarantor, the Qualified Issuer or the Bondholder of remedies upon default of the Bond Loan shall be applied, immediately upon liquidation, in the following order (inclusive of reasonable fees and expenses associated therewith):

(A) To the repayment of any amounts drawn under the Guarantee;

(B) To the prepayment of Bonds, in a like amount;

(C) To the replenishment of any funds drawn from the Risk-Share Pool Fund; and

(D) To the Eligible CDFI for application in accordance with the Secondary Loan documents.

(2) When an amount is required to be applied as a mandatory prepayment of

Bonds, the Qualified Issuer may select which advances of funds under a Bond are to be prepaid. Any amount applied as a partial prepayment of an advance under a Bond shall be applied as provided in the Bond. Any partial or full prepayment of an advance of funds under a Bond shall be subject to the payment of a prepayment price, as provided in the Bond Documents.

§ 1808.303 Risk-Share Pool.

The Master Servicer/Trustee, on behalf of the Qualified Issuer and for the benefit of the Bondholder, shall establish a Risk-Share Pool that is funded at each disbursement of the Bond Loan proceeds by payment from each Eligible CDFI in accordance with 12 U.S.C. 4713a(d). The Risk-Share Pool must remain in place throughout the term of the Guarantee. Amounts in the Risk Share Pool Fund will not be returned to Eligible CDFIs until maturity of all of the Bonds, and termination of all of the Bond Loans, within a Bond Issue.

(a) At each disbursement of the Bond Loan proceeds, each Eligible CDFI shall deposit an amount that is equal to three percent of the disbursement, for a total of three percent of the guaranteed amount outstanding of the Bond, from monies other than Bond Loan proceeds, into the applicable subaccount of the Risk-Share Pool Fund. Such monies shall remain in said account throughout the term of the Bond.

(b) Any interest on a Bond Loan in excess of the Bond Loan Rate derived by the Qualified Issuer during any period during which the Bond Loan Payment Default Rate applies shall also be deposited in the Risk-Share Pool Fund.

(c) The Risk-Share Pool Fund shall be applied by the Master Servicer/Trustee to payments of debt service on the Bond Issue in the event that the Eligible CDFI defaults in the corresponding payment of debt service on the Bond Loan. The defaulted Eligible CDFI's deposit shall be applied first to any such payment of debt service. After depletion of the defaulted Eligible CDFI's deposit, each remaining Eligible CDFI's deposit shall be applied prorata to any such payment of debt service. Monies on deposit in the Risk-Share Pool Fund shall be applied to such payments and shall be depleted in full prior to any draw on the Guarantee.

(d) Eligible CDFIs (excluding the Eligible CDFI in default and responsible for a draw) shall not be required to replenish the Risk-Share Pool Fund in the event of a draw.

(e) The Risk Share Pool deposit shall be sufficient collateral to secure any draw on Bond Loan proceeds related to the costs of issuance pursuant to 1808.304(b).

(f) In the event of a payment default on the Bond Loan by an Eligible CDFI, the Qualified Issuer shall notify the CDFI Fund and request permission to draw from the Risk-Share Pool to cover any default of principal and interest payments due to the Bond Purchaser.

(g) Amounts in the Risk Share Pool Fund will not be returned to Eligible CDFIs until maturity of all of the Bonds, and termination of all of the Bond Loans, within a Bond Issue. Upon maturity of all of the Bonds, and termination of the Bond Loans, within a Bond Issue, the pro rata amount of each Eligible CDFI's payments in the Risk-Share Pool shall be returned to each Eligible CDFI; provided however, that such Eligible CDFI has properly replenished any draws on the Risk-Share Pool attributed to nonpayment of its Bond Loan and the corresponding Bond.

§ 1808.304 Eligible uses of Bond Loan proceeds.

(a) *Eligible uses.* Bond Loan proceeds shall be only used for Eligible Purposes, to prefund one monthly installment of Bond Loan payments, and to pay Bond Issuance Fees. As a Bond Loan is repaid, such repaid Bond Loan proceeds must be held in the Relending Account and used for additional Secondary Loans, to the extent authorized under § 1808.308.

(b) *Bond Issuance Fees.* (1) Amounts not to exceed one percent of Bond Loan proceeds may be applied to pay Bond Issuance Fees. Bond Loan proceeds that are used to pay Bond Issuance Fees shall be applied in the following order of priority:

(i) To pay reasonable transaction fees and expenses of the Qualified Issuer, its

advisors and consultants, related to the Bond issuance (but not including any salaries or administrative costs of the Qualified Issuer unrelated to the Bond issuance);

(ii) To pay reasonable transaction fees and expenses of the Master Servicer/Trustee, its advisors and consultants, related to the Bond issuance; and

(iii) To pay reasonable transaction fees and expenses of the Eligible CDFI, its advisors and consultants, related to the making of the Bond Loan.

(2) Any fees and expenses arising out of each transaction which, in the aggregate, exceed the one percent limit on Bond Issuance Fees payable from Bond Loan proceeds must be paid by the Eligible CDFI from monies other than Bond Loan proceeds.

(c) *Prefunding of Bond Loan payments.* Bond Loan proceeds may be used to prefund one monthly installment of Bond Loan payments.

§ 1808.305 Bond Loan terms and conditions.

(a) *Maturity date.* The maturity date of a Bond Loan shall not be later than 30 years after the Bond Issue Date. The maturity date of Bond Loans may be earlier than, but may not be later than, the maturity date of the corresponding Bond.

(b) *Bond Loan general recourse obligation; Collateral.* (1) The Bond Loan shall be a general recourse obligation of the Eligible CDFI.

(2) The Bond Loan shall be further secured by a first lien of the Master Servicer/Trustee, on behalf of the Bondholder, on:

(i) The Trust Estate;

(ii) Qualified Secondary Loan Receivables; and

(iii) Either:

(A) An assignment of the Secondary Loan collateral (other than a Principal Loss Collateral Provision) from the Eligible CDFI to the Master Servicer/Trustee; or

(B) Provision of a Principal Loss Collateral Provision for the benefit of the Master Servicer/Trustee, in accordance with the Bond Loan Requirements and the Secondary Loan Requirements, as applicable.

(3) The CDFI Fund may, in its sole discretion, approve alternative forms of Bond Loan collateral.

(4) A parity first lien on pledged collateral may be accepted, in the sole discretion of the CDFI Fund.

(5) If any collateral becomes non-performing during the term of the Bond Loan, the Guarantor may require the applicable Eligible CDFI to substitute other collateral that is of equal quality to the initial collateral, when performing, acceptable to the Guarantor in its sole discretion.

(6) An Eligible CDFI's parent organization, Affiliate, or an entity that is related to the Eligible CDFI through its management structure, may assume limited recourse obligation for the Bond Loan if it provides Credit Enhancement and/or pledges financial resources or such other financial support or risk mitigation that would enhance the Eligible CDFI's creditworthiness and its ability to repay the Bond Loan, thereby decreasing the risk underlying the Guarantee.

(c) *Disbursement of Bond Loan proceeds.* (1) Bond Loans shall be drawdown loans. Disbursements of Bond Loan proceeds to the Eligible CDFI shall be made pursuant to a requisition process established by the Bond Purchaser and the CDFI Fund, which shall include a process by which the Qualified Issuer shall request an advance from the Bondholder under the Bond and a process by which the Eligible CDFI shall request disbursement from the Qualified Issuer.

(2) Each requisition shall be accompanied by invoices and certifications by the Eligible CDFI (and the Secondary Borrower, if applicable) as to expenditure of proceeds for Eligible Purposes.

(3) No Bond Loan proceeds may be disbursed later than 60 months after the Bond Issue Date. Any Bond Loan proceeds not disbursed will have been forfeited by the Eligible CDFI.

(4) Disbursements to capitalize the Eligible CDFI's Loan Loss Reserves shall be made pursuant to a requisition process established by the Qualified Issuer and the CDFI Fund.

(d) *Amortization of Bond Loan.* Each Bond Loan shall amortize in the same manner as the corresponding Bond;

provided that principal and/or interest on each Bond Loan shall be payable to the Qualified Issuer in monthly installments based on the required quarterly or semi-annual installments, as applicable, due on the corresponding Bond; provided further, that each Eligible CDFI shall prefund one monthly payment installment not later than the thirtieth day prior to the first payment date of the corresponding Bond so that on the thirtieth day prior to such Bond payment date, the Eligible CDFI shall have paid in full all amounts due on the Bond payment date.

(e) *Optional prepayment of Bond Loan.* The Bond Loan shall be subject to prepayment, in whole or in part, at the option of the Eligible CDFI in accordance with the optional prepayment provisions of the corresponding Bond (including the required prepayment minimums of $100,000) and shall be subject to the payment of a prepayment price, as determined by the Bondholder in accordance with the corresponding Bond.

(f) *Mandatory prepayment of Bond Loan.* The Bond Loan shall be subject to mandatory prepayment by the Eligible CDFI in accordance with the mandatory prepayment provisions of the corresponding Bond.

§ 1808.306 Conditions precedent to Bond and Bond Loan.

The ability of the Qualified Issuer to issue a Bond and make a Bond Loan shall be subject to the satisfaction of the following conditions precedent:

(a) Evidence satisfactory to the Qualified Issuer that the Eligible CDFI will comply with the terms and conditions of the Bond Loan documents, including repayment of the Bond Loan;

(b) Evidence satisfactory to the Qualified Issuer, the Guarantor, and the CDFI Fund that the Eligible CDFI has the authority to enter into the Bond Loan, has secured the Credit Enhancement, if any, demonstrated a reasonable prospect of repayment of the Bond Loan, and pledged the collateral (including executed security documents, UCC–1 financing statements or mortgages, as applicable);

(c) A Guarantee Application that has been approved by the Guarantor;

(d) A satisfactory credit review by the CDFI Fund and in compliance with the Bond Loan Requirements, including submission of complete and accurate Guarantee Application materials, submitted in a timely manner, demonstrating the Eligible CDFI's ability to repay the Bond Loan;

(e) Opinions of legal counsel to the Qualified Issuer and the Eligible CDFI;

(f) Executed Bond Loan documents;

(g) Organizational documents of the Eligible CDFI;

(h) Certifications by the Qualified Issuer and Eligible CDFIs that Bond Proceeds and Bond Loan proceeds will not be used for lobbying by recipients of Federal loans or guarantees;

(i) A statement that no default, event of default, or due and unsatisfied liability has occurred and is continuing with respect to any obligations of the Qualified Issuer and each Eligible CDFI to the CDFI Fund, the Guarantor, the Bond Purchaser, the U.S. Internal Revenue Service, or any other agency, authority or instrumentality of the Federal Government; and

(j) Any other conditions precedent set forth in the Bond Loan documents, including documentation that any credit enhancements have been secured by the Eligible CDFI.

§ 1808.307 Secondary Loan Eligible Purposes; Terms and conditions.

(a) *Eligible Purposes.* Eligible CDFIs must make Secondary Loans for Eligible Purposes. Secondary Loan proceeds may not be used to capitalize loan loss reserves.

(b) *Making Secondary Loans.* (1) If the Eligible CDFI uses Bond Loan proceeds to make Secondary Loans, the Eligible CDFI must execute Secondary Loan documents (in the form of promissory notes) with Secondary Borrowers as follows:

(i) Not later than 12 months after the Bond Issue Date, Secondary Loan documents representing at least 50 percent of the Eligible CDFIs' Bond Loan proceeds allocated for Secondary Loans; and

(ii) Not later than 24 months after the Bond Issue Date, Secondary Loan documents representing 100 percent of the Eligible CDFIs' Bond Loan proceeds allocated for Secondary Loans

(excluding any amounts used for payment of Bond Issuance Fees pursuant to section 1808.304(b)).

(2) In the event that the Eligible CDFI does not comply with the foregoing requirements of paragraphs (b)(1)(i) and (ii) of this section, the available Bond Loan proceeds at the end of the applicable period shall be reduced by an amount equal to the difference between the amount required by paragraphs (b)(1)(i) and (ii) minus the amount previously committed to the Secondary Loans in the applicable period. Consistent with the corresponding Bond Loan, the Secondary Loans shall be drawn down by the Secondary Borrowers upon demonstration of an Eligible Purpose.

(c) *Secondary Loan interest rate.* The rate of interest with respect to each Secondary Loan shall be determined by each Eligible CDFI in accordance with the following limitations:

(1) With respect to each Secondary Loan, the Eligible CDFI will be required to propose to the CDFI Fund:

(i) A minimum and maximum spread over the corresponding Bond Loan Rate which will represent the standard minimum and maximum interest rate (Minimum Secondary Loan Rate and Maximum Secondary Loan Rate, respectively); and

(ii) A maximum spread over the Maximum Secondary Loan Rate in event of a Secondary Loan default (Maximum Secondary Loan Default Spread).

(2) The CDFI Fund reserves the right to evaluate, approve, modify, or disapprove the proposed Minimum Secondary Loan Rate, Maximum Secondary Loan Rate, and Maximum Secondary Loan Default Spread before approving any Guarantee Application.

(d) *Secondary Loan default rate.* The Eligible CDFI may charge a default rate on the Secondary Loan so long as such rate does not exceed the Maximum Secondary Rate, plus the Maximum Secondary Loan Default Spread.

(e) *Secondary Loan maturity.* The maturity date with respect to the Secondary Loan shall be in accordance with the requirements of the applicable Secondary Loan Requirements. The maturity date of Secondary Loans may be earlier than, but may not be later than, the maturity date of the corresponding Bond.

(f) *Secondary Loan collateral.* (1) The Secondary Loan shall be payable from amounts made available pursuant to the Secondary Loan documents, and secured by:

(i) A first lien of the Eligible CDFI on pledged collateral in an amount that is consistent with the loan-to-value ratio requirements set forth in the Secondary Loan Requirements; or

(ii) A Principal Loss Collateral Provision for the benefit of the Master Servicer/Trustee, in accordance with the Bond Loan Requirements and the Secondary Loan Requirements, as applicable.

(2) Qualified Secondary Loan Receivables may be used as collateral; provided however, that such collateral is secured by a first lien on the Secondary Loan collateral in accordance with the Bond Loan Requirements and the Secondary Loan Requirements, as applicable.

(3) A parity first lien on pledged collateral may be accepted, in the sole discretion of the CDFI Fund.

(g) *Commitments for Secondary Loans.* Each proposed Secondary Loan shall be approved by the credit committee of the Eligible CDFI or its equivalent, in accordance with the applicable Secondary Loan Requirements and the Eligible CDFI's own underwriting requirements.

(h) *Disbursement of Secondary Loan proceeds.* (1) Consistent with the corresponding Bond Loan, Secondary Loans shall be draw-down loans. Disbursements of Secondary Loan proceeds to the Secondary Borrower shall be made pursuant to a requisition process established by the Qualified Issuer and the CDFI Fund and shall mirror the requirements for the disbursement of Bond Proceeds.

(2) Each requisition shall be accompanied by invoices and certifications by the Secondary Borrower as to expenditure of proceeds for Eligible Purposes. The Eligible CDFI must also attest that the Secondary Loan conforms to the requirements set forth in the applicable Secondary Loan Requirements. In the case of Refinancings, the Eligible CDFI must also attest that the

original loan was used for an Eligible Purpose.

(3) Secondary Loan proceeds shall be disbursed in accordance with the applicable Secondary Loan Requirements which shall set forth, among other requirements, that Secondary Loan disbursements shall be made in accordance with commercially reasonable standards and timeframes for disbursement based on the nature of the Eligible Purposes. The Secondary Loan Requirements shall also specify what constitutes a commercially reasonable timeframe for disbursement in connection with specific types of Eligible Purposes. Notwithstanding the foregoing, each Eligible CDFI shall propose a timeframe for disbursement in connection with each Secondary Loan, which timeframe shall be subject to the requirements set forth in the Secondary Loan Requirements.

(i) *Amortization of Secondary Loans.* Secondary Loans shall amortize as determined by the Eligible CDFI; provided that Secondary Loan amortization installments shall conform to the requirements of the applicable Secondary Loan Requirements.

(j) *Prepayment of Secondary Loans.* Secondary Loans shall be subject to prepayment as determined by the Eligible CDFI; provided that the Secondary Loan documents may provide for modification of Secondary Loan terms (so long as such modification does not affect the corresponding Bond or Bond Loan) and shall provide for mandatory prepayment of the Secondary Loan from liquidation of collateral upon the exercise of default remedies by the Eligible CDFI, the Qualified Issuer or the Guarantor as required by the Bond, the Bond Loan documents, or the Agreement to Guarantee, as applicable.

(k) *Repayment of Secondary Loans.* As Secondary Loans are repaid, the Eligible CDFI may, through the Relending Fund, Refinance and substitute as collateral for the Bond Loan other loan(s) for Eligible Purposes that meet the required Secondary Loan Requirements, provided that the Eligible CDFI makes Bond Loan payments as required. If the outstanding principal balance of the Bond Loan exceeds the outstanding principal balance of the Bond Loan in use for the Eligible Purposes, the Eligible CDFI shall repay the difference, which shall be deposited in the Relending Account, and credited to the corresponding Relending Subaccount.

§ 1808.308 Relending Fund; Relending Account.

(a) *General.* As Bond Loans are repaid, such amounts in excess of those required for debt service payments on the Bonds may be held in the Relending Account and used for additional Secondary Loans, to the extent authorized in this section.

(b) *Application of funds to Secondary Loans.* Amounts on deposit in the Relending Account shall be applied by the Eligible CDFI to make additional Secondary Loans, the term of which shall not exceed the maturity of the Bond.

(c) *Requirements of Secondary Loans from Relending Account.* Secondary Loans made from the Relending Account shall meet all the requirements of the Secondary Loan Requirements, and conform to the following additional conditions:

(1) The Qualified Issuer has received and approved a Bond Loan commitment request submitted by the Eligible CDFI;

(2) No material event has occurred and is continuing or is threatened at the Eligible CDFI level or Qualified Issuer level that adversely affects the Eligible CDFI, the Bond or the Bond Loan;

(3) No Eligible CDFI event of default has occurred and is continuing with respect to the Bond Loan;

(4) No Qualified Issuer event of default has occurred and is continuing with respect to the Bond;

(5) There exists no unreplenished draw on the Risk-Share Pool Fund by the Eligible CDFI;

(6) The maturity of Secondary Loans made from the Relending Fund shall not extend beyond the maturity date of the corresponding Bond; and

(7) Any other conditions set forth in this interim rule, the applicable Notice of Guarantee Availability, the Secondary Loan Requirements or the Bond Loan documents.

(d) *Relending Subaccounts.* The balance of each subaccount of the Relending Fund (each a Relending Subaccount) shall not equal more than 10 percent of the principal amount outstanding of the Bond Loan, minus the prorata share of the Risk-Share Pool, as of the Calculation Date (the Relending Subaccount Maximum).

(e) *Notification Date.* For purposes of this section, Notification Date means the date on which the Master Servicer/Trustee notifies the Eligible CDFI that the balance in the applicable Relending Subaccount exceeds the applicable Relending Subaccount Maximum. Calculation Date means, following the Notification Date, the earlier of:

(1) The date on which the balance in such Relending Subaccount becomes less than or equal to the applicable Relending Subaccount Maximum, or

(2) Six months following the Notification Date.

(f) *Mandatory redemption.* Any amounts retained in the Relending Subaccount that exceeds the Relending Subaccount Maximum by $100,000 or more as of the applicable Calculation Date shall be transferred to the Redemption Account of the Debt Service Fund (as defined in §1808.606(f)) to effectuate a mandatory redemption of the corresponding Bond in accordance with the terms of the Bond Trust Indenture. The determination of the actual amount on deposit on any Calculation Date shall exclude amounts then obligated pursuant to any executed promissory notes, whether then disbursed or undisbursed.

§ 1808.309 Restrictions on uses of Bond Proceeds and Bond Loan proceeds.

Pursuant to 12 U.S.C. 47123a(c)(5), Bond Loan proceeds shall not be used for:

(a) Political activities;

(b) Lobbying, whether directly or through other parties;

(c) Outreach;

(d) Counseling services;

(e) Travel expenses;

(f) For the salaries or administrative costs of the Qualified Issuer or any recipients of Bond Proceeds, other than those costs covered by Bond Issuance Fees;

(g) To fund the Risk-Share Pool;

(h) To pay fees other than Bond Issuance Fees; or

(i) Any other use as may be specified in the applicable Notice of Guarantee Availability.

Subpart D—Applications for Guarantee and Qualified Issuer

§ 1808.400 Notice of Guarantee Availability.

Interested parties will be invited to submit Qualified Issuer Applications and Guarantee Applications in accordance with this interim rule and the applicable Notice of Guarantee Availability. The NOGA will set forth application and eligibility requirements for an entity that wishes to be designated as a Qualified Issuer (including, in the CDFI Fund's sole discretion, the Designated Bonding Authority) and a Qualified Issuer that wishes to be approved to receive a Guarantee. The NOGA may also contain eligibility requirements, application procedures, and additional terms and conditions for entities wishing to serve as Servicers, Program Administrators, and other roles as may be determined by the CDFI Fund. The NOGA will advise interested parties on how to apply and will establish criteria, deadlines, and other Qualified Issuer and Guarantee Application requirements, including specifying any additional terms and conditions, limitations, special rules, procedures, and restrictions for a given application period.

§ 1808.401 Application requirements.

(a) *Qualified Issuer Application.* A Qualified Issuer applicant shall provide all required information in its Qualified Issuer Application to establish that it meets all criteria for designation as a Qualified Issuer and can carry out all Qualified Issuer responsibilities and requirements including, but not limited to, information that demonstrates that the applicant has the appropriate expertise, capacity, and experience and is qualified to make, administer and service Bond Loans for Eligible Purposes. After receipt of a Qualified Issuer Application, the CDFI Fund may request additional information and clarifying or technical information on the materials submitted as

part of the Qualified Issuer Application. The CDFI Fund will provide the template for the Qualified Issuer Application.

(b) *Guarantee Application*. (1) A Qualified Issuer shall provide all required information in its Guarantee Application to establish that it meets all criteria set forth in this interim rule to receive a Guarantee and can carry out all Guarantee requirements including, but not limited to, information that demonstrates that the Qualified Issuer has the appropriate expertise, capacity, and experience and is qualified to make, administer and service Bond Loans for Eligible Purposes. The Guarantee Application shall include a Capital Distribution Plan and a Secondary Capital Distribution Plan for each potential Eligible CDFI, as well as any other requirements set forth in the applicable Notice of Guarantee Availability or as may be required by the CDFI Fund in its sole discretion for the evaluation and selection of Guarantee applicants. After receipt of a Guarantee Application, the CDFI Fund may request additional information and clarifying or technical information on the materials submitted as part of the Guarantee Application. The CDFI Fund will provide the template for the Guarantee Application.

(2) The Capital Distribution Plan shall include, but not be limited to, the following information:

(i) Statement of Proposed Sources and Uses of Funds;

(ii) For the Qualified Issuer and each Certified CDFI seeking a Bond Loan, an organizational capacity statement, a plan that describes how the proposed Bond Loan will meet Eligible Purposes, and a description of Credit Enhancement, if any;

(iii) A Secondary Capital Distribution Plan, if applicable; and

(iv) Assurances and certifications that not less than 100 percent of the principal amount of Bonds will be used to make Bond Loans for Eligible Purposes beginning on the Bond Issue Date, and that Secondary Loans shall be made as set forth in subsection 1808.307(b).

Subpart E—Evaluation and Selection

§ 1808.500 Evaluation of Qualified Issuer Applications.

(a) *General*. Each Qualified Issuer Application will be evaluated by the CDFI Fund and, if acceptable, the applicant will be designated as a Qualified Issuer, at the sole discretion of the CDFI Fund. The Qualified Issuer Application review and evaluation process will be based on established standard operating procedures, which may include interviews of applicants and/or site visits to applicants conducted by the CDFI Fund. Through the application review process, the CDFI Fund will evaluate Qualified Issuer applicants on a merit basis and in a fair and consistent manner. Each Qualified Issuer applicant will be reviewed on its ability to successfully implement the activities proposed in its Qualified Issuer Application and carry out the responsibilities of a Qualified Issuer over the life of the Bond. The CDFI Fund will periodically reevaluate the Qualified Issuer over the life of the Bond to ensure it meets the performance standards over the life of the facilities.

(b) *Eligibility and completeness*. A Qualified Issuer applicant will not be eligible to be designated as a Qualified Issuer if it fails to meet the eligibility requirements described in §1808.200 of this part and the applicable NOGA, or if it has not submitted complete and timely Qualified Issuer Application materials. The CDFI Fund reserves the right to request additional information from the Qualified Issuer applicant, as the CDFI Fund deems appropriate.

(c) *Substantive review*. When evaluating Qualified Issuer Applications and selecting applicants to be designated as Qualified Issuers, the CDFI Fund will apply the criteria set forth in the Act at 12 U.S.C. 4713a(a)(8), this interim rule, and the applicable NOGA including, but not limited to, the following evaluation factors:

(1) The extent to which the Qualified Issuer Application demonstrates that the applicant possesses the appropriate expertise, capacity and experience, or other qualifications to manage the Bond Issue on the terms and conditions

set forth in this interim rule and the applicable NOGA;

(2) The expertise and experience of its Program Administrator and Servicers;

(3) The Qualified Issuer applicant's demonstrated performance of financially sound business practices relative to the industry norm for bond issuers, as evidenced by reports of Appropriate Federal Banking Agencies, Appropriate State Agencies, and/or auditors;

(4) Information that demonstrates the applicant, its Program Administrator and Servicers have the appropriate expertise, capacity, and experience or otherwise be qualified to originate, underwrite, service and monitor loan portfolios that serve Eligible Purposes and are targeted toward Low-Income and Underserved Rural Areas; and

(5) Such other criteria that the CDFI Fund deems appropriate for purposes of evaluating the merits of a Qualified Issuer Application.

§ 1808.501 Evaluation of Guarantee Applications.

(a) *General.* After being designated as a Qualified Issuer, the Qualified Issuer may submit a Guarantee Application, seeking authority to issue Bonds and receive a Guarantee on the proposed Bond Issue. A successful Guarantee Application must:

(1) Demonstrate that the Qualified Issuer and the proposed Eligible CDFIs have a feasible plan to successfully repay the Bond (including principal, interest, and call premium) and Bond Loans according to their respective terms, to the satisfaction of the CDFI Fund; and

(2) Meet any other requirements deemed appropriate by the CDFI Fund and the Guarantor.

(b) *Eligibility and completeness.* A Qualified Issuer will not be eligible to receive a Guarantee if it fails to meet the eligibility requirements set forth in § 1808.200 of this part and the applicable NOGA, or if it has not submitted complete and timely Guarantee Application materials. The CDFI Fund reserves the right to request additional information from the Qualified Issuer, or to reject a Guarantee Application as the CDFI Fund may deem appropriate.

(c) *Substantive review.* In evaluating Guarantee Applications and selecting a Qualified Issuer to receive a Guarantee, the CDFI Fund and the Guarantor will apply the criteria set forth in this interim rule and the applicable NOGA including, but not limited to, the following evaluation factors:

(1) The extent to which the Guarantee Application proposes strategies that demonstrate the Qualified Issuer's ability to implement the Capital Distribution Plan;

(2) The adequacy of proposed risk mitigation provisions designed to protect the financial interests of the Federal Government based on information that includes, but is not limited to: the amount and quality of any Credit Enhancements; the amount and quality of any other financial resources to be pledged or risk mitigation to be provided by an Affiliate to the Eligible CDFI through its management structure, that will assume limited obligation for the Bond Loan and enhance the Eligible CDFI's creditworthiness and its ability to repay the Bond Loan; and the provision for an orderly retirement of principal;

(3) The extent to which the Guarantee Application demonstrates that the Qualified Issuer possesses the appropriate expertise, capacity and experience, or other qualifications to manage the Bond Issue on the terms and conditions set forth in this interim rule and the applicable NOGA;

(4) The Qualified Issuer's demonstrated performance of financially sound business practices relative to the industry norm for bond issuers, as evidenced by financial audits and reports of Appropriate Federal Banking Agencies, Appropriate State Agencies, independent regulators, or auditors;

(5) Information that demonstrates that the Qualified Issuer has the appropriate expertise, capacity, and experience or is otherwise qualified to make, service and monitor Bond Loans;

(6) The extent to which the proposed Bond Loans are likely to serve Low-Income Areas or Underserved Rural Areas; and

(7) Such other criteria that the CDFI Fund and the Guarantor deem appropriate for purposes of evaluating the merits of a Guarantee Application.

§ 1808.502 Evaluation of Designated Bonding Authority Applications.

In addition to the evaluation criteria for Qualified Issuers set forth above, DBA applicants must demonstrate the existence of resources to perform functions of the DBA as set forth in section 1808.201 and meet any other criteria set forth in the applicable NOGA and that may be required by the CDFI Fund.

§ 1808.503 Consultation with Appropriate Regulatory Agencies.

In the case of any CDFI Bond Guarantee Program applicant that is a Federally regulated financial institution (or an Affiliate thereof), the CDFI Fund may consult with the Appropriate Federal Banking Agency or Appropriate State Agency prior to designating the applicant as a Qualified Issuer, Servicer, Master Servicer/Trustee, Program Administrator or other role, making a final Guarantee commitment, issuing a Guarantee, and/or entering into an Agreement to Guarantee. The CDFI Fund also reserves the right, in its sole discretion, to consult with the Appropriate Federal Banking Agency and Appropriate State Agency with respect to any Eligible CDFI that is proposed to receive a Bond Loan or any Secondary Borrower that is proposed to receive a Secondary Loan.

§ 1808.504 Selection of Qualified Issuers; Approval for Guarantee.

(a) *General.* Designation of an applicant as a Qualified Issuer shall be based on the foregoing evaluation criteria and processes, and any other requirements or processes that may be set forth in the applicable NOGA. An applicant may simultaneously apply for Qualified Issuer designation and a Guarantee; however, the entity must be designated as a Qualified Issuer before being selected to receive a Guarantee.

(b) The Guarantor will determine whether a Qualified Issuer will be authorized to issue Bonds and receive a Guarantee based on the foregoing evaluation criteria and processes, and any other requirements or processes set forth in the applicable NOGA.

(1) Not later than 30 days after receipt of a complete Guarantee Application (or 30 days after designation as a Qualified Issuer, if submitting simultaneous applications) by a Qualified Issuer, the CDFI Fund shall provide an internal Department Opinion regarding compliance by the Qualified Issuer with the requirements of the CDFI Bond Guarantee Program.

(2) The Guarantor shall approve or deny a Guarantee Application no later than 90 days after receipt of a complete Guarantee Application, and all other required information by the CDFI Fund or the Guarantor with respect to a request for such Guarantee.

(c) The Guarantor may limit the number of Guarantees made per year or Guarantee Applications accepted to ensure that a sufficient examination of Guarantee Applications is conducted.

(d) The CDFI Fund shall notify the Qualified Issuer in writing of the Guarantor's approval or disapproval of a Guarantee Application.

(e) The Guarantor reserves the sole discretion to approve a Guarantee Application for a Guarantee amount that is less than that which is requested.

(f) In the event that there are material changes after submission of a Guarantee Application (including, but not limited to, a revision of the Capital Distribution Plan or a change in the Certified CDFIs that are proposed for receiving Bond Loans) prior to or after the designation as a Qualified Issuer or approval of a Guarantee Application or Guarantee, the Qualified Issuer or Guarantee applicant must notify the CDFI Fund of such material changes information in a timely and complete manner. The Guarantor will evaluate such material changes, along with the Guarantee Application, to approve or deny the Guarantee Application and/or determine whether to modify the terms and conditions of the Guarantee.

Subpart F—Terms and Conditions of Guarantee

§ 1808.600 Full faith and credit and incontestability of Guarantee.

The full faith and credit of the Federal Government is pledged to the payment of all Bonds issued as part of a Bond Issue with respect to Verifiable Losses of Principal, Interest, and Call Premium. An executed Guarantee shall

be conclusive evidence that: the Guarantee has been properly authorized; the underlying Bond qualified for such Guarantee; and, but for fraud or material misrepresentation, such Guarantee will be presumed to be legally valid, binding, and enforceable.

§ 1808.601 Assignment and transfer of Guarantee.

The Guarantee shall be fully assignable and transferrable to the capital markets, on terms and conditions that are consistent with comparable bonds guaranteed by the Federal Government and satisfactory to the Guarantor and the CDFI Fund.

§ 1808.602 Offer of Guarantee.

Upon approval of the Guarantee Application, the Qualified Issuer will receive from the Guarantor an offer of Guarantee that will set forth certain required terms and conditions to be fulfilled prior to issuance of the Guarantee.

§ 1808.603 Issuance of Guarantee.

(a) *Conditions precedent.* The commitment of the Guarantor to issue a Guarantee shall be subject to conditions precedent that are usual and customary for financings of this type or otherwise deemed appropriate by the Guarantor including, but not limited to, the following:

(1) The conditions precedent to the Bond Issue and the making of the Bond Loan have been satisfied, including a credit review that indicates a reasonable prospect of repayment as demonstrated by the CDFI Fund's analysis of the cash flow and collateral provisions of the Eligible CDFI;

(2) The Qualified Issuer shall have submitted to the CDFI Fund a complete Guarantee Application, containing all required information relating to the Bond and the Bond Loan, as required by the Guarantor;

(3) There have been no material changes to the Bond and Bond Loan documents from the forms thereof approved by the Guarantor and the CDFI Fund;

(4) The Bond Purchaser and the Qualified Issuer shall have executed a Bond Purchase Agreement; and

(5) Such additional information or documents as may be required by the CDFI Fund, the Guarantor, or the Bond Purchaser.

(b) *Rescission of approval.* The Guarantor, in its sole discretion, may rescind its approval of a Guarantee Application if:

(1) The Guarantor or the CDFI Fund determines that the Qualified Issuer cannot, or is unwilling to, provide adequate documentation and proof of compliance with paragraph (a) of this section within the time provided for in the offer of Guarantee, or

(2) The Guarantor or the CDFI Fund determines, in its sole discretion, that the Qualified Issuer no longer meets applicable CDFI Bond Guarantee Program criteria and requirements.

§ 1808.604 Agreement to Guarantee.

(a) *General.* The Qualified Issuer must enter into an Agreement to Guarantee that sets forth the terms and conditions on which the Guarantor will provide the Guarantee of the Bonds issued as part of a Bond Issue.

(b) *Terms and conditions.* The terms and conditions of the Agreement to Guarantee may include, but are not limited to, the following:

(1) The form and amount of Guarantee;

(2) Any prohibited amendments of Bond Documents or limitations on transfer of the Guarantee;

(3) Terms and conditions of the Risk-Share Pool and any Credit Enhancement that may be required by the CDFI Fund and the Guarantor;

(4) Provisions regarding the Agency Administrative Fee;

(5) Representations and warranties of the Qualified Issuer;

(6) Pledged security;

(7) Financial covenants;

(8) Events of default and remedies;

(9) Assignment of Bond Loans to the Guarantor;

(10) Guarantor payment does not discharge Qualified Issuer; subrogation;

(11) Undertakings for the benefit of the Bondholder including: notices, registration, prohibited amendments, prohibited transfers, and indemnification;

(12) Governing law;

(13) Terms and conditions of Bond Loans;

(14) Prohibition against subordination; and

(15) Such other matters as the Guarantor or the CDFI Fund may deem necessary or appropriate.

(c) *Access to funds.* In the event that the Qualified Issuer does not execute Bond Loan agreements for 100 percent of the Bond principal on the Bond Issue Date, the Qualified Issuer will have no further access to the amount of funds for which Bond Loan agreements were not executed.

§ 1808.605 Agency Administrative Fee.

The Qualified Issuer shall pay the CDFI Fund annually a fee equal to 10 basis points (0.1 percent) of the amount of the unpaid principal of the Bond(s). The initial Agency Administrative Fee must be paid in full as a condition to closing any Agreement to Guarantee, no later than the effective date of the Agreement to Guarantee.

§ 1808.606 Program Administrator; Servicer; Master Servicer/Trustee.

(a) *General.* Bond Loans shall be overseen by qualified Program Administrators, Servicers, and a Master Servicer/Trustee. For purposes of maximizing efficiencies and minimizing costs, Program Administrator and Servicer duties may be consolidated and performed by Qualified Issuers.

(b) *Program Administrator*— (1) *Duties.* The duties of a Program Administrator, which may be performed by the Qualified Issuer, shall include, but not be limited to:

(i) Approving and qualifying Eligible CDFI applications for participation in the Guarantee Application;

(ii) Bond and Bond Loan packaging;

(iii) Reviewing and approving Secondary Loan commitments from Eligible CDFIs for funds from the Bondholder or the Relending Account based on the Secondary Loan Requirements;

(iv) Compliance monitoring of Bond Loans and Secondary Loans;

(v) Preparing and submitting reports required by this interim rule; and

(vi) All other duties and related services that are customarily expected of a Program Administrator, and as may be required by the CDFI Fund or the Guarantor.

(2) *Selection.* There shall be one Program Administrator for each Bond Issue. The Qualified Issuer applicant shall provide, in its Qualified Issuer Application, information on its proposed Program Administrator that demonstrates the appropriate expertise, capacity and experience, as well as any additional information that may be required to meet the criteria set forth in the applicable Notice of Guarantee Availability, including, but not limited to, information on the entity's management and organization, loan administration, and financial capability.

(3) *Fees and expenses.* The Program Administrator's administrative fees and expenses shall be paid by the Eligible CDFI in accordance with applicable financing documents.

(c) *Servicer*— (1) *Duties.* The duties of a Servicer, which may be performed by the Qualified Issuer, shall include, but not be limited to:

(i) Billing and collecting Bond Loan payments from Eligible CDFIs;

(ii) Initiating collection activities on past-due Bond Loans;

(iii) Transferring Bond Loan payments to the respective funds and accounts managed by the Master Servicer/Trustee;

(iv) Bond Loan administration and servicing;

(v) Systematic and timely reporting of Bond Loan performance through remittance and servicing reports, and providing such reports as may be required by this interim rule;

(vi) Proper measurement of annual outstanding Bond Loan requirements; and

(vii) All other duties and related services that are customarily expected of Servicers, and as may be required by the CDFI Fund or the Guarantor.

(2) *Selection.* There shall be one Servicer for each Bond Issue. Each Qualified Issuer applicant shall provide, in its Qualified Issuer Application, information on its proposed Servicer that demonstrates the appropriate expertise, capacity and experience, as well as any additional information that as may be required to meet the criteria set forth in the applicable Notice of Guarantee Availability

including, but not limited to, information on the entity's management and organization, loan servicing, and financial capability.

(3) *Fees and expenses.* The Servicer's administrative fees and expenses for each Bond Issue shall be paid by the associated Eligible CDFIs in accordance with applicable financing documents.

(d) *Special Servicer*— (1) *Duties.* The duties of the Special Servicer shall be performed by the Master Servicer/Trustee and shall include, but not be limited to:

(i) Negotiating the restructuring of Bond Loans that are in or about to enter into an event of Default;

(ii) Initiating foreclosure action and appointing a receiver; and

(iii) Enforcing deficiency judgments.

(2) *Evaluation.*The Master Servicer/Trustee applicant shall provide, in its Master Servicer/Trustee application, information on its proposed Special Servicer capabilities and experience. These capabilities may be performed by the Master Servicer/Trustee or an entity designated by the Master Servicer/Trustee. The CDFI Fund shall evaluate the Master Servicer/Trustee applicant's or its designee's ability to perform the duties of Special Servicer based on the capacity and experience in the following areas:

(i) Restructuring, recovery, and foreclosure of loans that are similar to Bond Loans;

(ii) Financial strength and capacity;

(iii) Managing regional or national intake, processing, or servicing operational systems and infrastructure of loans that are similar to Bond Loans;

(iv) Managing regional or national originator communication systems and infrastructure;

(v) Developing and implementing training and other risk management strategies on a regional or national basis;

(vi) Compliance monitoring and reporting; and

(vii) Such other criteria that may be required by the CDFI Fund.

(3) *Fees and expenses.* The Bond Trust Indenture will outline the Special Servicer's administrative fees and expenses; these fees shall be paid by the Eligible CDFI in accordance with the Bond Trust Indenture and related documents.

(e) *Master Servicer/Trustee*— (1) *Duties.* The duties of the Master Servicer/Trustee shall include, but not be limited to:

(i) The fiduciary power to enforce the terms of Bonds and the Bond Loans pursuant to the Bond Trust Indenture;

(ii) Establishing and managing the funds and accounts set forth in this interim rule;

(iii) Providing such reports as required;

(iv) Overseeing the activities of Servicers and managing loan administration;

(v) Servicing and monitoring of Bond Issues with respect to repayment obligations to the Bondholder and the terms of the Agreement to Guarantee;

(vi) Tracking the movement of funds between the accounts of the Master Servicer/Trustee and all Servicers;

(vii) Ensuring orderly receipt of the monthly remittance and servicing reports of the Servicers;

(viii) Monitoring collection and foreclosure actions;

(ix) Aggregating the reporting and distribution of funds to the Qualified Issuer, CDFI Fund, and the Bondholder, as necessary;

(x) Removing and replacing Servicers, as necessary;

(xi) Performing systematic and timely reporting of Bond Loan performance compiled from Servicers' reports, and providing such reports as required in this interim rule;

(xii) Ensuring proper distribution of funds to Eligible CDFIs, servicing the Bonds, and repayment to the Bondholder; and

(xiii) All other duties and related services that are customarily expected of a Master Servicer/Trustee, and as may be required by the CDFI Fund.

(2) *Selection.* There shall be one Master Servicer/Trustee for the CDFI Bond Guarantee Program. The CDFI Fund shall solicit applications and make a selection of a Master Servicer/Trustee based on the capacity and experience of the applicant in the areas set forth in paragraph (a)(1) of this section and in the following paragraphs (a)(2)(i) through (vi):

(i) Administration, servicing, and monitoring of loans that are similar to Bond Loans;

(ii) Financial strength and capacity;

(ii) Managing regional or national intake, processing, or servicing operational systems and infrastructure of loans that are similar to Bond Loans;

(iii) Managing regional or national originator communication systems and infrastructure;

(iv) Developing and implementing training and other risk management strategies on a regional or national basis;

(v) Compliance monitoring and reporting; and

(vi) Such other criteria that may be required by the CDFI Fund.

(3) *Fees and expenses.* The Master Servicer/Trustee's administrative fees and expenses shall be paid by the Eligible CDFI in accordance with the Bond Trust Indenture and related documents.

(f) *Funds and accounts.* The following funds shall be established by the Master Servicer/Trustee at the time of execution of the Bond Trust Indenture, on behalf of the Qualified Issuer and for the benefit of the Bondholder. On the Bond Issue Date, separate accounts shall be established therein for each Bond and, furthermore, within each account there shall be established a subaccount for each Bond Loan on the date of the closing of each Bond Loan:

(1) The Project Fund, and therein a Project Account for each Bond: All disbursements of Bond Proceeds from the Bondholder pursuant to the requisition processes shall be deposited in the applicable Project Account or Subaccount, and the Master Servicer/Trustee shall disburse advances with respect to the Bond Loan to the Eligible CDFI therefrom;

(2) The Revenue Fund, and therein a Revenue Account for each Bond: All payments of debt service or prepayments on the Bond Loan pursuant to the Bond Loan documents, other payments by the Eligible CDFI pursuant to the Bond Loan documents, and any investment income derived from the corresponding accounts or subaccounts in the Debt Service Fund shall be deposited in the accounts and subaccounts of the Revenue Fund;

(3) The Debt Service Fund, and therein an Interest Account, a Principal Account and a Redemption Account for each Bond: Not later than 30 days prior to a Bond payment date, the Master Servicer/Trustee shall make the following transfers from the applicable account or subaccount of the Revenue Fund:

(i) All scheduled payments (amortization installments or at maturity) of principal received from the Eligible CDFI on the Bond Loan shall be transferred to the Principal Account or Subaccount;

(ii) All scheduled payments (amortization installments or at maturity) of interest received from the Eligible CDFI on the Bond Loan shall be transferred to the Interest Account or Subaccount; and

(iii) All prepayments of principal, interest and premium, if any, received from the Eligible CDFI on the Bond Loan shall be transferred to the Redemption Account or Subaccount;

(4) The Administrative Fees Fund, and therein an Administrative Fees Account for each Bond: All fees necessary for administering and servicing the Bond or the Bond Loan (including the Agency Administrative Fee and Bond Issuance Fees), payable by the Eligible CDFI pursuant to the Bond Loan documents, shall be deposited in the applicable account or subaccount of the Administrative Fees Fund and, thereafter, shall be disbursed by the Master Servicer/Trustee to the subject recipient in accordance with the terms of each such payment;

(5) The Risk-Share Pool Fund, and therein a Risk-Share Pool Account for each Bond, in accordance with § 1808.303 of this part;

(6) The Relending Fund, and therein a Relending Account for each Bond, in accordance with § 1808.308 of this part; and

(7) Such other funds and accounts as may be required by the CDFI Fund and the Qualified Issuer in connection with a Bond Issue, Bond or Bond Loan.

(g) *Other funds and accounts.* The Master Servicer/Trustee shall be permitted to establish such other funds and accounts as deemed necessary to administer the requirements of the Bond Trust Indenture. Each account

shall be designated by the name of the applicable Bond and each subaccount shall be designated by the name of the applicable Bond Loan.

(h) *No commingling of funds.* No commingling of monies shall be permitted between accounts or subaccounts.

(i) *Permitted investments.* Monies on deposit in the Revenue Fund, the Debt Service Fund, the Risk-Share Pool Fund, the Relending Fund, if invested, shall be invested in U.S. Treasury securities with maturities that do not exceed the dates on which monies will be required for anticipated purposes and may be sold to the extent funds are needed sooner than anticipated. All interest shall be credited to the relevant account in the relevant fund.

EDITORIAL NOTE: At 78 FR 8310, Feb. 5, 2013, part 1808 was added with two paragraphs (e)(2)(ii) in § 1808.606.

§ 1808.607 Representations and warranties of Qualified Issuer with respect to Guarantee.

The Qualified Issuer shall represent and warrant to the Guarantor, at the execution of any Agreement to Guarantee to which it is a party and thereafter at the closing of any Bond Loan and the issuance of any Bond, the following:

(a) The Qualified Issuer is duly organized, validly existing and in good standing in its State of organization with the power and authority to enter into the agreements and consummate the transactions thereby contemplated;

(b) The information contained in the Qualified Issuer Application is true and correct;

(c) The Bonds, when executed, are and will be duly authorized, executed, valid, binding and enforceable obligations of the Qualified Issuer;

(d) Except as disclosed to the Guarantor, no claim or litigation is pending or threatened which would materially adversely affect the Qualified Issuer's ability to consummate the transactions contemplated by the Agreement to Guarantee, the Bond, or the Bond Loan;

(e) The consummation of the transactions contemplated by the Agreement to Guarantee, the Bond, and the Bond Loan will not conflict with or constitute an event of default under any law or agreement to which the Qualified Issuer is subject;

(f) No authorization, approval or consent of a governmental authority is necessary on the part of the Qualified Issuer to consummate the transactions contemplated by the Bond or the Bond Loan which has not been obtained;

(g) No funds from any other CDFI Fund program are being used to pay principal, interest, fees, administrative costs, or issuance costs (including Bond Issuance Fees) related to the CDFI Bond Guarantee Program, or to fund the Risk-Share Pool; and

(h) Any other representation or warranty deemed appropriate by the Guarantor, the CDFI Fund or the Bond Purchaser.

§ 1808.608 Representations and warranties of Eligible CDFI with respect to each Bond Loan.

The Eligible CDFI shall represent and warrant to the Qualified Issuer, at the execution of each set of Bond Loan documents and, thereafter, until repayment in full of such Bond Loan, the following:

(a) The performance by the Eligible CDFI under the Bond Loan documents is duly authorized, does not require consent or approval of any governmental authority not already obtained, does not constitute a default of any law or agreement to which the Eligible CDFI is subject, will not result in the imposition of any lien (other than pursuant to the Bond Loan), and constitutes a valid, binding and enforceable obligation of the Eligible CDFI;

(b) The information provided by the Eligible CDFI fairly represents the financial position (in conformity with generally accepted accounting principles), experience and capacity of the Eligible CDFI, and there have been no material adverse changes in the Eligible CDFI's financial condition since the date of such financial information;

(c) No claim or litigation is pending or threatened which would materially adversely affect the Eligible CDFI's ability to consummate the transactions contemplated by the Bond Loan, or repay the Bond Loan;

(d) No event of default or other material event which could become an event

of default has occurred and is continuing;

(e) The Eligible CDFI has filed all Federal, State and local tax returns required and paid all liabilities in connection therewith;

(f) The Eligible CDFI has good and marketable title to the collateral;

(g) The Bond Loan will be applied to Eligible Purposes;

(h) The information provided in the Guarantee Application is true and accurate;

(i) No default, event of default or due and unsatisfied liability has occurred and is continuing with respect to any obligations of the Eligible CDFI to the Guarantor, the CDFI Fund, the Bond Purchaser, the U. S. Internal Revenue Service, or any other agency, authority or instrumentality of the Federal Government;

(j) No funds from any other CDFI Fund program are being used to pay principal, interest, fees, administrative costs, or issuance costs (including Bond Issuance Fees) related to the CDFI Bond Guarantee Program, or to fund the Risk-Share Pool; and

(k) Any other representations and warranties set forth in the Bond Loan documents.

§ 1808.609 Representations and warranties of Secondary Borrower.

Each Secondary Borrower shall make identical representations and warranties as the Eligible CDFI and shall make specific representations and warranties with respect to the collateral and the project that is proposed to be financed by the Secondary Loan, upon which the Eligible CDFI, the Qualified Issuer, the Bondholder, the Guarantor, and the CDFI Fund may rely. These representation and warranties shall be to the satisfaction of the Guarantor and the CDFI Fund.

§ 1808.610 Covenants of Qualified Issuer with respect to Guarantee.

The Qualified Issuer shall covenant in the Agreement to Guarantee that it will:

(a) Furnish to the CDFI Fund, at the Qualified Issuer's expense, all annual and periodic financial reporting as described in § 1808.619 of this part;

(b) Maintain books and records related to each Bond Loan, the collateral and the project that is to be financed by Bond Proceeds, and allow inspection thereof;

(c) Preserve its corporate existence and Certified CDFI status, if applicable;

(d) Comply with all laws to which it is subject;

(e) Maintain its solvency;

(f) To the extent it assigns any of its obligations under the agreement to an Affiliate, guarantee performance of such obligations;

(g) Allow audits and investigations by the CDFI Fund, the Treasury Inspector General, the Comptroller General, or such other Federal Government offices as may be designated by the Guarantor or the CDFI Fund;

(h) Provide such reports as required in § 1808.619 of this part;

(i) Make, execute and deliver such instruments as the Guarantor or the CDFI Fund may reasonably request;

(j) Sign and certify as true and correct all Bond Documents and Bond Loan documents;

(k) Not amend or modify any agreement related to the Bond without the consent of the Bondholder, the Guarantor, or the CDFI Fund, as applicable;

(l) Comply with the terms and conditions of the Agreement to Guarantee, the Bond Trust Indenture, and the Bond and Bond Loan documents;

(m) Immediately notify the Guarantor and the CDFI Fund of any material change or event that affects any representation, warranty or covenant of the Guarantee, Bond or Bond Loan documents;

(n) Pay and discharge all Federal, State and local taxes; andand

(o) Comply with all other covenants set forth in the Bond Documents and Bond Loan documents.

§ 1808.611 Covenants of Eligible CDFI with respect to Bond and each Bond Loan.

The Eligible CDFI shall covenant in the Bond Loan agreement that it will:

(a) Furnish to the Qualified Issuer, at the Eligible CDFI's expense, certain annual and periodic financial and performance reporting;

(b) Maintain books and records related to the Bond Loan and Secondary Loans, the collateral and the project that is to be financed by Bond Loan proceeds, and allow inspection thereof;

(c) Preserve its corporate existence and Certified CDFI status;

(d) Comply with all laws to which it is subject;

(e) Maintain insurance, as required by the Qualified Issuer, against such risks as would customarily be maintained by commercially reasonable companies in a similar line of business;

(f) Pay and discharge all Federal, State and local taxes;

(g) Ensure proper use of proceeds of the Bond Loan;

(h) Pay all required administrative expenses;

(i) Indemnify the Guarantor, the CDFI Fund, the Qualified Issuer and the Master Servicer/Trustee and their Affiliates;

(j) Collaterally assign all rights, title, and interest in and to Secondary Loan collateral to the Master Servicer/Trustee;

(k) Maintain the collateral;

(l) Enforce the covenants against the Secondary Borrowers;

(m) Be bound, to the extent applicable, to provisions of the Bond Trust Indenture;

(n) Periodically, as directed by the CDFI Fund, furnish certain information designed to measure the impacts of the Bond Loan and the CDFI Bond Guarantee Program;

(o) Periodically, as directed by the CDFI Fund, furnish to the Qualified Issuer and/or the CDFI Fund updates to the Capital Distribution Plan; and

(p) Comply with all other representations and warranties set forth in the Bond Loan documents.

§ 1808.612 Specific financial covenants of Eligible CDFI.

The Eligible CDFI shall covenant in Bond Loan documents that it will comply with specific financial requirements as required by the Guarantor and the CDFI Fund. Such financial requirements will be determined based upon the quantity and the character of the existing loan facilities of the Eligible CDFI, among other factors. The specific financial covenants may include, but are not limited to, one or more of the following measures: consolidated net asset ratio; consolidated unrestricted net asset ratio; and minimum available liquidity (or, in the case of Eligible CDFIs that are regulated financial institutions, such ratios and information as may be required by the applicable Appropriate Federal Banking Agency or Appropriate State Agency). The specific financial requirements shall be measured based upon such Eligible CDFI's financial statements prepared in accordance with generally accepted accounting principles and consistent with historically applied accounting policies and practices.

§ 1808.613 Negative covenants of Eligible CDFI.

The Eligible CDFI will covenant in Bond Loan documents that it will comply with certain negative covenants, as required by the CDFI Fund including, but not limited to, that it will:

(a) Not incur or issue additional long-term or short-term debt to the extent that the incurrence of such additional debt would violate the specific financial covenants of such Eligible CDFI under the Bond Loan; and

(b) Not permit liens on all or any part of the Bond Loan collateral, except as permitted pursuant to the Bond Loan documents, and only then to the extent consistent with the applicable laws and regulations governing the Bond Loan and as approved by the CDFI Fund.

§ 1808.614 Covenants of Secondary Borrower with respect to Secondary Loan.

In addition to making specific representations and warranties with respect to the collateral and the project being financed by the Secondary Loan proceeds, each Secondary Borrower shall covenant in the Secondary Loan agreement that it will:

(a) Periodically, as directed by the Eligible CDFI, furnish to the Eligible CDFI certain annual and periodic financial and performance reporting;

(b) Maintain books and records related to the Secondary Loan, the collateral and the project that is to be financed by Bond Loan proceeds, and allow inspection thereof;

(c) Preserve its corporate existence, as applicable;

(d) Comply with all laws to which it is subject;

(e) Maintain insurance, as directed by the Eligible CDFI, against such risks as would customarily be maintained by commercially reasonable companies in a similar line of business;

(f) Pay and discharge all Federal, State and local taxes;

(g) Ensure proper use of proceeds of the Secondary Loan;

(h) Maintain the collateral;

(i) Periodically, as directed by the Eligible CDFI, furnish to the Eligible CDFI certain information designed to measure the impacts of the Bond Loan and the CDFI Bond Guarantee Program; and

(j) Comply with all other representations and warranties set forth in the Secondary Loan documents.

§ 1808.615 Negative covenants of Secondary Borrower.

Any additional debt of the Secondary Borrower shall be in accordance with the requirements set forth in the applicable Secondary Loan Requirements and the Secondary Loan agreement, and may include, but shall not be limited to, that:

(a) The Secondary Borrower will not incur or issue additional long-term or short-term debt payable from and having a lien on all or a portion of the Secondary Loan collateral that is

(1) Equally and ratably secured; or

(2) Superior or senior to the lien thereon of the Secondary Loan as more specifically set forth in the Secondary Loan agreement; and

(b) So long as no event of default has occurred and is continuing, the Secondary Borrower may, subject to the approval of the Eligible CDFI, incur or issue at any time additional debt payable from and having a lien on all or a portion of the Secondary Loan collateral that is subordinate or junior to the lien thereon of the Secondary Loan and enter into subordinate credit facility agreements, provided that no events of default have occurred and are continuing under the Secondary Loan documents or any parity senior loan documents and that such debt meets the requirements set forth in paragraph (a) of this section.

§ 1808.616 Events of default and remedies with respect to Bonds.

(a) *Events of default.* An event of default with respect to any Bond shall include, but not be limited to:

(1) Nonpayment of interest or the Agency Administrative Fee when due and payable;

(2) Nonpayment of principal or prepayment price when due and payable;

(3) The use of Bond Proceeds for any purpose other than an Eligible Purpose; and

(4) Any other events of default set forth in the Bond or the Bond Trust Indenture.

(b) *Default of other Bonds.* An event of default under one Bond shall not constitute an event of default under another Bond.

(c) *Remedies.* Pursuant to the Agreement to Guarantee and the Bond Trust Indenture, remedies upon an event of default shall include, but not be limited to, the following:

(1) Declaring the entire amount of unpaid principal and interest on the applicable Bond immediately due and payable; and

(2) Exercising all remedies available under the applicable Agreement to Guarantee and the Bond Trust Indenture.

(d) Notice and comment. Prior to imposing any remedies pursuant to this section or the Agreement to Guarantee, the Guarantor shall, to the maximum extent practicable, provide the Qualified Issuer with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide a Qualified Issuer the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

§ 1808.617 Events of default and remedies with respect to Bond Loans.

(a) *Events of default.* The following shall constitute an event of default with respect to each Bond Loan:

(1) Nonpayment of interest when due and payable;

(2) Nonpayment of principal or prepayment price when due and payable;

(3) Failure of the Eligible CDFI to perform any condition or covenant under any Bond Loan document;

(4) Any representation or warranty of the Eligible CDFI made in connection with the Guarantee Application or the Bond Loan is false or incorrect in any material respect;

(5) Principal or interest on any indebtedness of the Eligible CDFI or any subsidiary of the Eligible CDFI in excess of $100,000 is not paid when due (subject to a cure period);

(6) The holder of any junior or parity lien on collateral institutes a proceeding to enforce a lien on the collateral;

(7) The Eligible CDFI files bankruptcy or consents to the appointment of a receiver or trustee for itself or the collateral;

(8) Any money judgment is filed against the Eligible CDFI and remains unvacated for a period of 60 days from filing;

(9) The use of Bond Loan proceeds for any purpose other than an Eligible Purpose; or

(10) Any other events of default set forth in the Bond Loan documents.

(b) *Remedies.* Remedies of the Qualified Issuer upon an event of default include, but are not limited to, the following:

(1) Declaring the entire amount of unpaid principal and interest on the applicable Bond Loan immediately due and payable;

(2) Applying for appointment of a receiver or trustee for the collateral;

(3) At the direction of the Guarantor, terminating the Bond Loan agreement, declaring the entire amount of unpaid principal and interest on the applicable Bond Loan immediately due and payable; and

(4) Exercising all remedies available under the applicable Bond Loan agreement, including declaring the Bond Loan Payment Default Rate in effect.

(c) *Enforcement rights.* The Guarantor reserves all rights to enforce remedies upon an event of default.

§ 1808.618 Events of default and remedies with respect to Secondary Loans.

(a) *Events of default.* The following shall constitute an event of default with respect to each Secondary Loan:

(1) Nonpayment of interest when due and payable;

(2) Nonpayment of principal when due and payable;

(3) Failure of the Secondary Borrower to perform any condition or covenant under any Secondary Loan document;

(4) Any representation or warranty of the Secondary Borrower made in connection with the Secondary Loan application or the Secondary Loan documents is false or incorrect in any material respect;

(5) Principal or interest on any indebtedness of the Secondary Borrower or any subsidiary of the Secondary Borrower in excess of $100,000 is not paid when due (subject to a cure period);

(6) The holder of any junior or parity lien on collateral institutes a proceeding to enforce a lien on the collateral;

(7) The Secondary Borrower files bankruptcy or consents to the appointment of a receiver or trustee for itself or the collateral;

(8) Any money judgment is filed against the Secondary Borrower and remains unvacated for a period of 60 days from filing; or

(9) Any other events of default set forth in the Secondary Loan documents.

(b) *Remedies.* The Qualified Issuer and the Guarantor will reserve certain rights to enforce (or direct enforcement of) remedies upon an event of default under the Secondary Loan documents.

§ 1808.619 Reporting requirements.

The Bond Documents and Bond Loan documents shall specify such monitoring and financial reporting requirements as deemed appropriate by the CDFI Fund including, but not limited to the following:

(a) *Data—General.* As long as the Bonds remain outstanding, a Qualified Issuer shall provide such reports and shall maintain such records as may be

prescribed by the CDFI Fund that are necessary to:

(1) Disclose the manner in which Bond Proceeds are used, including providing documentation to demonstrate proceeds of the Bond Loans were used for Eligible Purposes;

(2) Demonstrate compliance with the requirements of this part and the Bond Documents;

(3) Evaluate the impact of the CDFI Bond Guarantee Program;

(4) Ensure the Qualified Issuer meets the performance standards over the life of the facilities; and

(5) Accomplish such other purposes that the CDFI Fund may deem appropriate.

(b) *Customer profiles.* The Qualified Issuer shall require each Eligible CDFI to compile such data on the gender, race, ethnicity, national origin, or other information on individuals and entities that utilize its products and services as the CDFI Fund shall prescribe and as is permissible under applicable law. In general, such data will be used to determine whether residents of Investment Area(s) or members of Targeted Population(s) are adequately served and to evaluate the impact of the CDFI Bond Guarantee Program.

(c) *Audits; Access to records.* (1) The CDFI Fund may, if it deems appropriate, audit Qualified Issuers, Eligible CDFIs, Program Administrators, Servicers, and/or the Master Servicer/Trustee, or provide for or require an audit, at least annually. Portfolio management and loan monitoring will also employ risk-based, on-site verification of the Eligible CDFI's lending activities to Secondary Borrowers and compliance with the terms in Secondary Lending Requirements.

(2) Qualified Issuers, Eligible CDFIs, Program Administrators, Servicers, the Master Servicer/Trustee, as applicable, must submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by the CDFI Fund to ensure compliance with the requirements of this interim rule and to evaluate the impact of the CDFI Bond Guarantee Program.

(3) The Federal Government, including the U.S. Department of the Treasury, the Comptroller General, and their duly authorized representatives, shall have full and free access to such entities' offices and facilities and all books, documents, records, and financial statements relating to the Guarantee and may copy such documents as they deem appropriate

(4) The CDFI Fund, if it deems appropriate, may prescribe audit and access to record requirements for Eligible CDFIs and Secondary Borrowers.

(d) *Retention of records.* Qualified Issuers, Eligible CDFIs, Program Administrators, the Master Servicer/Trustee, and Servicers shall comply with all record retention requirements as set forth in OMB Circular A–110 (as applicable).

(e) *Data collection and reporting.* Qualified Issuers, Eligible CDFIs, the Program Administrator, the Master Servicer/Trustee, and Servicers, as applicable, shall submit to the CDFI Fund, monthly, quarterly, and annually, as specified in the Bond Documents, and as long as the Bond shall remain outstanding, such information and documentation that will permit the CDFI Fund to review compliance with the Capital Distribution Plan and the terms and conditions of the Bond Documents, and to perform adequate portfolio management and loan monitoring. The information and documentation may include, but not be limited to, the following:

(1) Financial statements, including but not limited to:

(i) Annual financial statements for the Qualified Issuer and each Eligible CDFI that have been audited in conformity with generally accepted auditing principles; and

(ii) With respect to any nonprofit Qualified Issuer and any Eligible CDFI that is required to have its financial statements audited pursuant to OMB Circular A–133 Audits of States, Local Governments and Non-Profit Organizations, annual A–133 audited financial statements. Non-profit Qualified Issuers and Eligible CDFIs that are not required to have financial statements audited pursuant to OMB Circular A–133 must submit to the CDFI Fund a statement signed by the Qualified Issuer or Eligible CDFI's authorized

representative or certified public accountant, asserting that a single audit pursuant OMB Circular A–133 is not required;

(2) Pro forma projection of the Qualified Issuer's and Eligible CDFI's respective balance sheet, income statement, and statement of cash flows over the ensuing five years, or such other time period as specified by the CDFI Fund;

(3) Such institution-level and transaction-level reports as may be required by the CDFI Fund;

(4) Information necessary to measure the financial condition of the Eligible CDFI. This includes, but is not limited to, measuring solvency by collecting data on fixed charge coverage, capital adequacy, debt coverage, and measuring liquidity by collecting data on core financial ratios, including current ratios, quick ratios, working capital, and operating liquidity ratio. This will also include credit reporting, financial statement analysis, trend analysis of financial conditions, market valuation, loan performance (30/60/90 payment history) of Bond Loans and Secondary Loans, valuation and eligibility of Secondary Loan collateral, and management and organization changes;

(5) Information necessary to assess Program impact performance and outcome measures, including information necessary to evaluate the credit-worthiness of loan applicants; and

(6) Other such information and reports as may be requested by the CDFI Fund.

(f) *Qualified Issuer reports.* Qualified Issuers are responsible for the timely and complete submission of all required information and reports, even if all or a portion of the documents actually are completed by the Eligible CDFI. The CDFI Fund reserves the right to contact the Qualified Issuer or Eligible CDFI and require that additional information and documentation be provided.

(g) *Regulator information.* The CDFI Fund's review of a regulated Qualified Issuer's or regulated Eligible CDFI's performance or compliance with the Bond Documents may also include information provided by the Appropriate Federal Banking Agency or Appropriate State Agency, as the case may be.

(h) *Public inspection.* The CDFI Fund shall make reports described in this section available for public inspection after deleting any materials necessary to protect privacy or proprietary interests pursuant to all applicable laws and regulations.

(i) *Availability of referenced publications.* The publications referenced in this section are available as follows:

(1) OMB Circulars may be obtained from the Office of Administration, Publications Office, 725 17th Street NW., Room 2200, New Executive Office Building, Washington, DC 20503 or on the Internet (*http://www.whitehouse.gov/omb/grants_circulars/*); and

(2) Government Accountability Office materials may be obtained from GAO Distribution, 700 4th Street NW., Suite 1100, Washington, DC 20548.

§ 1808.620 Investments in Guaranteed Bonds ineligible for Community Reinvestment Act Purposes.

Notwithstanding any other provision of law, any investment by a financial institution in Bonds shall not be taken into account in assessing the record of such institution for purposes of the Community Reinvestment Act of 1977 (12 U.S.C. 2901). Other forms of participation by financial institutions in CDFI Bond Guarantee Program transactions may be eligible for inclusion in Community Reinvestment Act records to the extent permitted by the Appropriate Federal Banking Agency.

§ 1808.621 Conflict of interest requirements.

(a) *Provision of Bond Loans or Secondary Loans to Affiliates.* (1) A Qualified Issuer or Eligible CDFI that is not regulated by an Appropriate Federal Banking Agency or Appropriate State Agency may not use any Bond Proceeds or Bond Loan proceeds to make any Bond Loans or Secondary Loans available to an Affiliate unless it meets the following restrictions:

(i) The loan must be provided pursuant to standard underwriting procedures, terms and conditions;

(ii) The Affiliate receiving the loan shall not participate in any way in the decision-making regarding such loan;

(iii) The board of directors or other governing body of the lender shall approve the extension of the loan; and

(iv) The loan must be provided in accordance with a policy regarding credit to Affiliates that has been approved in advance by the CDFI Fund.

(2) A Qualified Issuer or Eligible CDFI that is an Insured CDFI, a Depository Institution Holding Company or a State-Insured Credit Union (as such terms are defined in 12 CFR 1805.104) shall comply with the restrictions on insider activities and any comparable restrictions established by its Appropriate Federal Banking Agency or Appropriate State Agency, as applicable.

(b) *Standards of conduct.* Qualified Issuers, Eligible CDFIs, Program Administrators, the Master Servicer, and Servicers shall maintain a code or standards of conduct acceptable to the CDFI Fund that govern the performance of employees engaged in the awarding and administration of any loan. No employee of a Qualified Issuer, Eligible CDFI, Program Administrators, the Master Servicer, and Servicer shall solicit or accept gratuities, favors or anything of monetary value from any actual or potential borrowers for such loans. Such policies shall provide for disciplinary actions to be applied for violation of the standards by employees.

§ 1808.622 Compliance with government requirements.

In carrying out its responsibilities pursuant to any agreements associated with the CDFI Bond Guarantee Program, all Qualified Issuers, Eligible CDFIs, Program Administrators, Servicers, and the Master Servicer/Trustee shall comply with all applicable Federal, State, and local laws, regulations, and ordinances, OMB Circulars, and Executive Orders, including restrictions on lending to entities with delinquent Federal debt.

§ 1808.623 Lobbying restrictions.

No fees or funds made available under this part may be expended by a party to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or local government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or local government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. 1352.

§ 1808.624 Criminal provisions.

The criminal provisions of 18 U.S.C. 657 regarding embezzlement or misappropriation of funds are applicable to all CDFI Bond Guarantee Program participants and insiders.

§ 1808.625 CDFI Fund deemed not to control.

The CDFI Fund shall not be deemed to control a CDFI Bond Guarantee Program participant by reason of any Guarantee provided under the Act for the purpose of any applicable law.

§ 1808.626 Limitation on liability.

The liability of the Federal Government arising out of any fees or funds obtained by a CDFI Bond Guarantee Program participant in accordance with this interim rule shall be limited to the amount of the fees or funds obtained by the CDFI Bond Guarantee Program participant. The Federal Government shall be exempt from any assessments and other liabilities that may be imposed on controlling or principal shareholders by any Federal law or the law of any State. Nothing in this section shall affect the application of any Federal tax law.

§ 1808.627 Fraud, waste and abuse.

Any person who becomes aware of the existence or apparent existence of fraud, waste or abuse of any Guarantee, Bond, Bond Loan or Secondary Loan provided under this interim rule must report such incidents to the Office of Inspector General of the U.S. Department of the Treasury.

PART 1815—ENVIRONMENTAL QUALITY

Sec.

AUTHORITY: 12 U.S.C. 4703, 4717; 42 U.S.C. 4332; Chapter X, Pub L. 104–19, 109 Stat. 237 (12 U.S.C. 4703 note).

SOURCE: 60 FR 54130, Oct. 19, 1995, unless otherwise noted.

§ 1815.100 Policy.

The Community Development Financial Institution Fund's policy is to ensure that environmental factors and concerns are given appropriate consideration in decisions and actions by the Fund and to reduce any possible adverse effects of Fund decisions and actions upon the quality of the human environment.

§ 1815.101 Purpose.

This part supplements Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended, and describe how the Community Development Financial Institutions Fund intends to consider environmental factors and concerns in the Fund's decisionmaking process. This part applies only to the Fund and not to any other bureau, office or organization within the Department of the Treasury.

§ 1815.102 Definitions.

(a) For the purpose of this part:

(1) *Act* means the Community Development Banking and Financial Institutions Act (12 U.S.C. 4701 *et seq.*);

(2) *Application* means a request for assistance from the Fund submitted pursuant to parts 1805 or 1806 of this chapter;

(3) *CEQ regulations* means the regulations for implementing the procedural provisions of the National Environmental Policy Act of 1969 as promulgated by the Council on Environmental Quality, Executive Office of the President, appearing at 40 CFR parts 1500–1508 and to which this part is a supplement;

(4) *Comprehensive Business Plan* means a document submitted as part of an Application pursuant to part 1805 of this chapter which describes an organization's proposed process for offering products or services to a particular market, including organizational requirements needed to serve that market effectively;

(5) *Consumer Loans* means loans to one or more individuals for household, family or other personal expenditures;

(6) *Decisionmaker* means the Director of the Fund, unless an appropriate delegation of authority has been made;

(7) *EIS* means an environmental impact statement as defined in 40 CFR 1508.11 of the CEQ regulations;

(8) *Fund* means the Community Development Financial Institutions Fund, established under section 104(a) of the Act (12 U.S.C. 4703(a));

(9) *NEPA* means the National Environmental Policy Act, as amended, 42 U.S.C. 4321–4335; and

(10) *Project* means all closely related actions relating to a specific site.

(b) Other terms used in this part are defined in 40 CFR part 1508 of the CEQ regulations.

§ 1815.103 Designation of responsible Fund official.

The Director of the Fund is the designated Fund official responsible for implementation and operation of the Fund's policies and procedures on environmental quality and control.

§ 1815.104 Specific responsibilities of the designated Fund official.

The designated Fund official shall:

(a) Coordinate the formulation and revision of Fund policies and procedures on matters pertaining to environmental quality and control;

(b) Establish and maintain working relationships with relevant government agencies (including Federal, state and local) concerned with environmental matters;

(c) Develop procedures within the Fund's planning and decisionmaking

processes to ensure that environmental factors are properly considered in all proposals and decisions in accordance with this part;

(d) Develop, monitor, and review the Fund's implementation of standards, procedures, and working relationships for protection and enhancement of environmental quality and compliance with applicable laws and regulations;

(e) Monitor processes to ensure that the Fund's procedures regarding consideration of environmental quality are achieving their intended purposes;

(f) Advise the officers and employees of the Fund of technical and management requirements of environmental analysis, of appropriate expertise available, and, with the assistance of the Department of the Treasury's Office of the General Counsel, of relevant legal developments;

(g) Monitor the consideration and documentation of the environmental aspects of Fund planning and decisionmaking processes by appropriate officers and employees of the Fund;

(h) Ensure that all environmental assessments and, where required, all EISs are prepared in accordance with the appropriate regulations adopted by the Council on Environmental Quality and the Fund;

(i) Ensure that, as required, a legislative EIS is submitted with all proposed legislation;

(j) Consolidate and transmit to appropriate parties the Fund's comments on EISs and other environmental reports prepared by other agencies;

(k) Acquire information and prepare appropriate reports on environmental matters required of the Fund; and

(l) Coordinate the Fund's efforts to make available to other parties information and advice on the Fund's policies for protecting and enhancing the quality of the environment.

§ 1815.105 Major decision points.

(a) The possible environmental effects of an Application, including any Comprehensive Business Plan, must be considered along with technical, economic, and other factors throughout the decisionmaking process. For most Fund actions there are two distinct stages in the decisionmaking process:

(1) Preliminary approval stage, at which point applications are selected for funding; and

(2) Final approval and funding stage.

(b) Environmental review shall be integrated into the decisionmaking process of the Fund as follows:

(1) During the preliminary approval stage, the designated Fund official shall determine whether the Application proposes actions which are categorically excluded, or normally require an environmental assessment or an EIS;

(2) If the designated Fund official determines that the Application proposes actions which normally require an environmental assessment or an EIS, the applicant shall be informed that the final approval and funding, in addition to any other conditions, is contingent upon:

(i) The applicant supplying to the Fund all information necessary for the Fund to perform or have performed any environmental review required by this part;

(ii) The applicant not using any Fund financial assistance to perform any of such proposed actions in the Application that affect the physical environment until Fund approval is received; and

(iii) The outcome of the environmental review required by this part;

(3) The Fund will perform or have performed the environmental reviews required by this part;

(4) A preliminary approval of an Application may be withdrawn or further conditions may be imposed based upon the outcome of an environmental review required by this part; and

(5) If the designated Fund official determines that the Application proposes actions that require an environmental assessment or an EIS, the environmental assessment and/or EIS must be completed and circulated prior to the use of Federal funds for any activity that triggers the need for an environmental assessment and/or EIS.

§ 1815.106 Supplemental environmental review.

(a) The designated Fund official shall determine whether the proposed actions in the Application are sufficiently definite to perform a meaningful environmental review during the preliminary approval stage.

(b) If the designated Fund official determines that the Application is sufficiently definite to perform a meaningful environmental review during the preliminary approval stage, no conditions for supplemental environmental review shall be imposed.

(c) If the designated Fund official determines that the Application, or any part of the Application, is not sufficiently definite to complete a meaningful environmental review during the preliminary approval stage, the Fund shall require a supplemental environmental review prior to the taking of any action directly using Fund financial assistance that is not categorically excluded from environmental review or for which an environmental assessment or EIS has not been approved by the Fund. The applicant shall notify the designated Fund official when proposing any action requiring a supplemental environmental review and shall supply to the Fund all information necessary for the Fund to perform the supplemental environmental review. The Fund shall perform or have performed such a supplemental environmental review. The applicant shall not use any Fund financial assistance to perform any of the proposed actions requiring a supplemental environmental review that affect the physical environment until Fund approval for such action is received.

§ 1815.107 Determination of review requirement.

In deciding whether to prepare an EIS, the designated Fund official shall determine whether the proposal is one that normally:

(a) Requires an EIS;

(b) Requires an environmental assessment, but not necessarily an EIS; or

(c) Does not require either an EIS or an environmental assessment (categorical exclusion).

§ 1815.108 Actions that normally require an EIS.

(a) If necessary, the Fund shall perform or have performed an environmental assessment to determine if an Application, or any portion of an Application, requires an EIS. However, it may be readily apparent that a proposed action in an Application will have a significant impact on the environment; in such cases, an environmental assessment is not required and the Fund shall immediately begin to prepare, or have prepared, an EIS.

(b) An EIS normally is required where an Application proposes to directly use financial assistance from the Fund for any Project that would:

(1) Remove, demolish, convert, or substantially rehabilitate 2,500 or more existing housing units, or would result in the construction or installation of 2,500 or more new housing units, or which would provide sites for 2,500 or more new housing units; or

(2) Remove, demolish, convert, or substantially rehabilitate 1,500,000 square feet or more of commercial space, or would result in the construction or installation of 1,500,000 square feet or more of new commercial space, or which would provide sites for 1,500,000 square feet or more of new commercial space.

§ 1815.109 Preparation of an EIS.

(a) If the Fund determines that an EIS should be prepared, it shall publish a notice of intent in the FEDERAL REGISTER in accordance with 40 CFR 1501.7 and 1508.22 of the CEQ regulations. After publishing the notice of intent, the Fund shall begin to prepare or have prepared the EIS. Procedures for preparing the EIS are set forth in 40 CFR part 1502 of the CEQ regulations.

(b) The Fund may supplement a draft or final EIS at any time. The Fund shall prepare or have prepared a supplement to either the draft or final EIS when:

(1) Substantial changes are proposed to an action contained in the draft or final EIS that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; or

(2) Actions are proposed which relate or are similar to other action(s) taken or proposed and that together have a cumulatively significant impact on the environment.

§ 1815.110 Categorical exclusion.

The CEQ regulations provide for the categorical exclusion of actions that do not individually or cumulatively have a significant effect on the human environment (40 CFR 1508.4). Therefore, neither an environmental assessment nor an EIS is required for such actions. An action which falls into one of the categories below may still require the preparation of an EIS or environmental assessment if the designated Fund official determines it meets the criteria stated in §1815.109 or involves extraordinary circumstances that may have a significant environmental effect. The Fund has determined the following categorical exclusions:

(a) Actions directly related to the administration or operation of the Fund (e.g. personnel actions, including, but not limited to, staff recruitment and training; purchase of goods and services for the Fund, including, but not limited to, furnishings, equipment, supplies and services; space acquisition; property management; and security);

(b) Actions directly related to and implementing proposals for which an environmental assessment or an environmental assessment and EIS have been prepared;

(c) Actions directly related to the granting or receipt of Bank Enterprise Act awards pursuant to part 1806 of this chapter;

(d) Actions directly related to training and/or technical assistance;

(e) Projects for the acquisition, disposition, rehabilitation and/or modernization of 500 existing housing units or less when all the following conditions are met:

(1) Unit density is not increased more than 20 percent;

(2) The Project does not involve changes in land use from nonresidential to residential;

(3) The estimated cost of rehabilitation is less than 75 percent of the total estimated cost of replacement after rehabilitation; and

(4) The Project does not involve the demolition of one or more buildings containing the primary use served by the project that, together, have more than 20 percent of the square footage of the Project;

(f) Projects for the construction of 200 housing units or less when all the following conditions are met:

(1) The Project does not involve changes in existing land use from nonresidential to residential; and

(2) The Project does not involve the demolition of one or more buildings containing the primary use served by the project that, together, have more than 20 percent of the square footage of the Project;

(g) Projects for the acquisition, disposition, rehabilitation and/or modernization of 200,000 square feet or less of existing commercial space when all the following conditions are met:

(1) The Project does not involve changes in existing land use from residential to nonresidential;

(2) The estimated cost of rehabilitation is less than 75 percent of the total estimated cost of replacement after rehabilitation; and

(3) The Project does not involve the demolition of more than 10,000 square feet of commercial space containing the primary use served by the Project;

(h) Projects for the construction of 100,000 square feet or less of commercial space when all the following conditions are met:

(1) The Project does not involve changes in existing land use from residential to nonresidential: and

(2) The Project does not involve the demolition of more than 10,000 square feet of commercial space containing the primary use served by the Project;

(i) Projects for the acquisition of an existing structure, provided that the property to be acquired is in place and will be retained in the same use;

(j) Projects involving Fund financial assistance of $1,000,000 or less;

(k) Actions directly related to the provision of residential tenant-based rental assistance, Consumer Loans, health care, child care, educational, cultural and/or social services;

(l) Actions involving Fund financial assistance that is used to increase the

permanent capital and/or liquidity of an applicant;

(m) Actions where no use of Federal funds is involved in the activity or Project; and

(n) Actions directly related to the provision of working capital, the acquisition of machinery and equipment or the purchase of inventory, raw materials or supplies.

§ 1815.111 Actions that require an environmental assessment.

If a Project or action is not one that normally requires an EIS and does not qualify for categorical exclusion, the Fund shall prepare, or have prepared, an environmental assessment.

§ 1815.112 Preparation of an environmental assessment.

(a) The Fund shall begin the preparation of an environmental assessment as early as possible after the designated Fund official has determined that it is required. The Fund may prepare an environmental assessment at any time to assist planning and decisionmaking.

(b) An environmental assessment is a concise public document used to determine whether to prepare an EIS. An environmental assessment aids in complying with the NEPA when no EIS is necessary, and it facilitates the preparation of an EIS, if one is necessary. The environmental assessment shall contain brief discussions of the following topics:

(1) Purpose and need for the proposed action;

(2) Description of the proposed action;

(3) Alternatives considered, including the no action alternative;

(4) Environmental effects of the proposed action and alternative actions; and

(5) Listing of agencies, organizations or persons consulted.

(c) The most important or significant environmental consequences and effects on the areas listed below should be addressed in the environmental assessment. Only those areas which are specifically relevant to the particular proposal should be addressed. Those areas should be addressed in as much detail as is necessary to allow an analysis of the alternatives and the proposal. The areas to be considered are the following:

(1) Natural/ecological features (such as floodplain, wetlands, coastal zones, wildlife refuges, and endangered species);

(2) Air quality;

(3) Sound levels;

(4) Water supply, wastewater treatment and water runoff;

(5) Energy requirements and conservation;

(6) Solid waste;

(7) Transportation;

(8) Community facilities and services;

(9) Social and economic;

(10) Historic and aesthetic; and

(11) Other relevant factors.

(d) If the Fund completes an environmental assessment and determines that an EIS is not required, then the Fund shall prepare a finding of no significant impact. The finding of no significant impact shall be made available to the public by the Fund as specified in 40 CFR 1506.6 of the CEQ regulations.

§ 1815.113 Public involvement.

All information collected by the Fund pursuant to this part shall be available to the public consistent with the CEQ regulations. Interested persons may obtain information concerning any pending EIS or any other element of the environmental review process of the Fund by contacting the Community Development Financial Institutions Fund, Department of the Treasury, 1500 Pennsylvania Avenue NW., room 5116, Washington, DC 20220, or such other contact entity designated by the Fund.

§ 1815.114 Fund decisionmaking procedures.

To ensure that at major decisionmaking points all relevant environmental concerns are considered by the Decisionmaker, the following procedures are established:

(a) An environmental document, i.e., the EIS, environmental assessment, finding of no significant impact, or notice of intent, in addition to being prepared at the earliest point in the decisionmaking process, shall accompany the relevant proposal or action through the Fund's decisionmaking process to

ensure adequate consideration of environmental factors;

(b) The Decisionmaker shall consider in its decisionmaking process only those alternatives discussed in the relevant environmental documents. Also, where an EIS has been prepared, the decisionmaker shall consider all comments received during any comment process and all alternatives described in the EIS. A written record of the consideration of alternatives during the decisionmaking process shall be maintained; and

(c) Any environmental document prepared for a proposal or action shall be made part of the record of any formal rulemaking by the Fund.

§ 1815.115 OMB control number.

The collection of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1505–0153 (expires September 30, 1998).

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FINDING AIDS

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