Conversion of UF4 to UF6 is performed by exothermic reaction with fluorine in a tower reactor. UF6 is condensed from the hot effluent gases by passing the effluent stream through a cold trap cooled to -10°C. The process requires a source of fluorine gas.

(6) Especially Designed or Prepared Systems for the conversion of UF4 to U metal.

Conversion of UF4 to U metal is performed by reduction with magnesium (large batches) or calcium (small batches). The reaction is carried out at temperatures above the melting point of uranium (1130°C).

(7) Especially designed or prepared systems for the conversion of UF6 to UO2.

Conversion of UF6 to UO2 can be performed by one of three processes. In the first, UF6 is reduced and hydrolyzed to UO2 using hydrogen and steam. In the second, UF6 is hydrolyzed by solution in water, ammonia is added to precipitate ammonium diuranate, and the diuranate is reduced to UO2 with hydrogen at 820°C. In the third process, gaseous UF6, CO2, and NH3 are combined in water, precipitating ammonium uranyl carbonate. The ammonium uranyl carbonate is combined with steam and hydrogen at 500–600°C to yield UO2. UF6 to UO2 conversion is often performed as the first stage of a fuel fabrication plant.

(8) Especially Designed or Prepared Systems for the conversion of UF6 to UF4. Conversion of UF6 to UF4 is performed by reduction with hydrogen.

Appendix L to Part 110 [Amended]

23. In newly redesignated Appendix L to Part 110, the entry ''Tungsten 185 (W 85)'' is revised to read ''Tungsten 185 (W 185).''

Dated in Rockville, MD, this 28th day of June 1996.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 96–17236 Filed 7–5–96; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

12 CFR Part 1750

RIN 2550–AA03

Office of Federal Housing Enterprise Oversight; Minimum Capital

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final regulation.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a final regulation that sets forth the methodology for computing the minimum capital requirement for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises). The final regulation also establishes procedures for the filing of quarterly minimum capital reports by each Enterprise. In addition, the final regulation establishes procedures under which OFHEO will determine the capital classification of each Enterprise on a quarterly basis.

EFFECTIVE DATE: August 7, 1996.

FOR FURTHER INFORMATION CONTACT: Gary L. Norton, Deputy General Counsel (202/414–3800); Isabella W. Sammons, Associate General Counsel (202/414–3800); Michael P. Scott, Assistant Director, Office of Research, Analysis and Capital Standards (202/414–3800), 1700 G Street, N.W., 4th Floor, Washington, D.C. 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act), established OFHEO as an independent office within the Department of Housing and Urban Development. OFHEO is responsible for ensuring that the Enterprises are adequately capitalized and operating in a safe and sound manner. Included among the express statutory authorities of the Director of OFHEO is the authority to issue regulations establishing minimum and risk-based capital standards.[1]

As a separate rulemaking procedure, OFHEO published an Advance Notice of Proposed Rulemaking (ANPR)[2] as the first step toward developing the risk-based capital regulation required by section 1361 of the 1992 Act.[3] The risk-based capital regulation will specify a stress test that will determine the amount of capital that an Enterprise must hold to maintain positive capital throughout a 10-year period of economic stress. That amount, plus an additional 30 percent to cover management and operations risk, will constitute the risk-based capital requirement of the Enterprise.

The ANPR solicited public comment on a variety of issues concerning the development of the risk-based capital regulation. In light of the complex issues, OFHEO decided to issue the proposed risk-based capital regulation in two Notices of Proposed Rulemaking (NPRs).

The first NPR addresses two key components of the stress test—the ''benchmark loss experience'' (the basis for determining the extent of Enterprise credit losses during the stress test) and the use of the OFHEO House Price Index (HPI) in the stress test to estimate changes over time in the values of single-family properties securing Enterprise mortgages.[4] A second NPR, currently being developed, will address the remaining aspects of the risk-based capital stress test and how the stress test will be used to determine the Enterprises' risk-based capital requirements.

In addition to the risk-based capital standard, the 1992 Act prescribes a minimum capital standard for the Enterprises.[5] This final regulation implements the minimum capital standard of the 1992 Act. Unlike the risk-based capital requirement that is computed by applying the stress test, the minimum capital requirement is computed on the basis of capital ratios that are applied to certain defined on-balance sheet assets and off-balance sheet obligations of the Enterprises.

OFHEO issued a proposed Minimum Capital regulation on June 8, 1995.[6] As discussed in the preamble to the proposed regulation, the proposed regulation contained the interim administrative procedures with respect to the methodology for computing the minimum capital requirement for on- and off-balance sheet items, except for interest rate and foreign exchange rate contracts for which the methodology was modified. The proposed regulation also established procedures for the filing of minimum capital reports by the Enterprises each quarter, or at other times as required by the Director. The proposed regulation further required OFHEO to provide each Enterprise with notice and opportunity to comment on its proposed capital classification.

OFHEO received five comments in response to the proposed regulation. Comments were received from a federal government agency (Office of Thrift Supervision), both Enterprises, and two trade associations (America's Community Bankers and Mortgage Bankers Association of America). OFHEO has carefully considered the comments in developing the final regulation. A discussion of the comments received follows.

II. Comments on the Proposed Minimum Capital Regulation

General Comments

Freddie Mac commented generally on OFHEO's role with respect to the

[1] 1992 Act, section 1313(b)(1) (12 U.S.C. 4513(b)(1)).

[2] 60 FR 7468, Feb. 8, 1995.

[3] 12 U.S.C. 4611.

[4] 61 FR 29592, Jun. 11, 1996.

[5] Section 1362 (12 U.S.C. 4612).

[6] 60 FR 30201.

minimum capital standard of the 1992 Act. First, Freddie Mac noted that the 1992 Act details what the capital standard is, unlike the statutes governing the capital standards for banks and thrifts. Therefore, Freddie Mac concluded that the Minimum Capital regulation should reflect Congress' intent that OFHEO act as the implementor, rather than the creator, of the minimum capital standard.

OFHEO agrees that its role is to implement the minimum capital standard set forth in the 1992 Act. Nevertheless, Congress specifically authorized OFHEO to adjust the capital ratios that are applied to certain off-balance sheet obligations, the credit risk of which differs from that of mortgage-backed securities (MBS). Additionally, in implementing the 1992 Act, OFHEO must define those terms not defined therein. OFHEO believes that the final regulation effectively implements the minimum capital standard in a manner completely consistent with the specific provisions and overall intent of the 1992 Act.

Secondly, Freddie Mac stated that Congress recognized that the minimum capital standard would create marginal capital requirements and that marginal capital requirements tend to induce changes in the Enterprises' behavior.[7] Therefore, Freddie Mac explained, Congress cautioned OFHEO against creating ''perverse incentives'' that may induce Freddie Mac to make inappropriate changes in the conduct of its businesses.[8] Freddie Mac further noted that, in the context of OFHEO's risk-based capital standard, ''OFHEO has expressed a policy of designing the [risk-based] capital regulation to reflect closely the relative risks inherent in the Enterprises' different activities, rather than setting out to encourage or discourage particular activities by means of a [risk-based] capital regulation that rewards or punishes an Enterprise that engages in such activities.' Freddie Mac urged OFHEO to apply this policy to its design of the Minimum Capital regulation.

As recognized by Freddie Mac, congressional concern regarding the creation of perverse incentives was expressed in the context of the discussion of risk-based capital and the appropriate level of detail of the stress test.[9] OFHEO has stated that, where feasible, it will endeavor to avoid the creation of perverse incentives in its risk-based capital regulation for the Enterprises. However, this concept has little relevance to the minimum capital standard. The minimum capital requirement is computed on the basis of simple leverage ratios.

The proposed regulation deviates from the specific statutory ratios in only one area—by adjusting the statutory ratio of 0.45 percent for certain off-balance sheet obligations relative to the credit risk of MBS. The proposed regulation establishes different minimum capital ratios for collateralized and uncollateralized exposure for interest rate and foreign exchange rate contracts. Although OFHEO considered using a single capital ratio applied to all interest rate and foreign exchange rate contracts, thus treating contracts as one broad risk category, OFHEO believes that making a distinction between collateralized and uncollateralized exposure provides the Enterprises with better risk management incentives.

Section 1750.1 General

Section 1750.1 of the proposed Minimum Capital regulation provides in part that:

> The board of directors of each Enterprise is responsible for ensuring that the Enterprise maintains capital at a level that is sufficient to ensure the continued financial viability of the Enterprise and in excess of the minimum capital level contained in this Subpart A.

Freddie Mac recommended that the phrase ''is sufficient to ensure the continued financial viability of the Enterprise'' be deleted from section 1750.1 because it appears to establish a new or additional capital standard not provided for in the 1992 Act. Freddie Mac stated that, in light of the comprehensive guidance in the 1992 Act as to how to determine the levels of capital that the Enterprises are required to hold, it would be inappropriate for OFHEO, by regulation, to amend the minimum capital standard of the 1992 Act by adding a financial viability standard.

OFHEO disagrees with Freddie Mac's view because OFHEO has the duty and authority to ensure the safe and sound financial operation of the Enterprises, and none of the capital levels specified in the 1992 Act represent the amount needed by an Enterprise to operate safely and soundly under all circumstances. The language in proposed section 1750.1 is consistent with OFHEO's authority under section 1313(a) of the 1992 Act,[10] which provides that the duty of the Director is to ensure that the Enterprises are adequately capitalized and operating safely. OFHEO's specific authority to issue the Minimum Capital regulation is derived from section 1313(b) of the 1992 Act,[11] which provides the Director with the authority to issue regulations to carry out (a) part 1 of subtitle A of the 1992 Act (which establishes OFHEO and sets forth OFHEO's authorities), (b) subtitle B (which sets forth the required capital levels for the Enterprises and OFHEO's special enforcement powers with respect to capital levels), (c) subtitle C (which sets forth OFHEO's enforcement provisions), and (d) ''other matters relating to safety and soundness.'' As explained in section 1302 of the 1992 Act,[12] Congress finds that—

> * * * an entity regulating such enterprises should have the authority to establish capital standards, require financial disclosure, prescribe adequate standards for books and records and other internal controls, conduct examinations when necessary, and enforce compliance with the standards and rules that it establishes * * *.

Section 1750.1 is also consistent with the manner in which the capitalization provisions of the 1992 Act are designed to operate. The capitalization provisions in the 1992 Act are structured in the following way. The 1992 Act provides for both ''mandatory'' and ''discretionary'' capital classifications.[13] The 1992 Act also sets forth certain supervisory actions that are specific to each capital classification.[14]

Under the discretionary capital classification criteria, the Director may reclassify an Enterprise at a lower capital level than it would be classified under the mandatory classification criteria. The Director may do so if the Enterprise is engaging in conduct that could result in a rapid depletion of core capital or the value of the property subject to mortgages held or securitized by the Enterprise has decreased significantly.[15]

When the Enterprise is placed in a lower capital classification as a result of either a mandatory or discretionary classification, it is required to increase its capital pursuant to a mandatory capital restoration plan.[16] The Director's discretionary classification authority thus could have the effect of requiring

[7] Marginal capital requirements are incremental capital requirements for each additional dollar of business.

[8] Freddie Mac cites S. Rep. No. 282, 102d Cong., 2d Sess. 24 (1992).

[9] The Senate report accompanying the legislation states: ''A more detailed [stress test] model will be more likely to create the right incentives and less likely to create perverse incentives.'' S. Rep. No. 282, 102d Cong., 2d Sess. 24 (1992).

[10] 12 U.S.C. 4513(a).

[11] 12 U.S.C. 4513(b).

[12] 12 U.S.C. 4501.

[13] Section 1364 (12 U.S.C. 4614).

[14] Sections 1365–1367 (12 U.S.C. 4615–4617).

[15] Section 1364(b) (12 U.S.C. 4614(b)).

[16] Sections 1365(a)(1) and 1369C (12 U.S.C. 4615(a)(1) and 4622).

an Enterprise that is engaging in certain types of risky activities to increase the amount of capital it holds, pursuant to a mandatory capital restoration plan, even though it meets or exceeds the minimum capital or risk-based capital requirement.[17]

The discretionary classification authority reflects the statutory scheme that the minimum capital ratios in the 1992 Act establishes a ''floor'' on capital, not a ''ceiling.'' The legislative history of the 1992 Act indicates that there was some confusion regarding this issue that was resolved in favor of the ''floor'' approach. For example, during Senate consideration of the bill, Senator Metzenbaum stated to the Chairman of the Committee:

> [You] said on this floor that the Director [of OFHEO] did indeed have the authority to set the required ratios above the minimum levels * * * if necessary to protect the health and security of an enterprise and that it is important that the Director act in those circumstances. Since that time, I have learned that some Senators may have a different view about the Director's authority. I would like to be assured by the chairman of the committee and the manager of this bill that the director has authority to raise capital standards, if necessary.

Senator Riegle, in replying, explained that:

> [T]he Director is given the duty to ensure that the enterprises are adequately capitalized and operating safely in accordance with this act and the Charter Acts. Under section 103(a)(1) of the bill, the Director is authorized to issue regulations concerning the financial health and security of the enterprises, including the establishment of capital standards. There is no way the Director can discharge these responsibilities unless he or she has the authority to prescribe capital standards to be met by the enterprises.
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> * * * * *
>
> Unless the legislation specifically and affirmatively prohibits the Director from establishing required capital ratios, it must be assumed that the Director has that authority in order to discharge his or her duties assigned under section 102 * * *. The only constraint on the Director's authority is that the required capital ratios cannot be set below the minimum levels contained in section 202.
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> * * * * *
>
> If the Director believed that the minimum statutory ratios * * * should be raised, he or she would obviously have to seek a change in the law. A Director might believe an increase in the statutory minimum ratios * * * to be necessary if he or she concluded that they were clearly inadequate under all foreseeable circumstances. If the Congress were to so raise the statutory minimum ratios * * * it would establish a new and higher floor applicable to the Director's discretionary authority to prescribe capital ratios. However, there is nothing in the legislation that would preclude the Director from setting the required rated * * * without further legislation. If the circumstances that gave rise to the need for higher ratios changed, the Director could then reduce the required capital ratios, but not lower than the minimum ratios * * *.[18]

In the House of Representatives, the issue of whether the minimum capital ratios constituted a floor or a ceiling was raised during the consideration of the conference report. In a discussion between the Chairman and Ranking Member of the Committee, the two members agreed that the duty of the Director to ensure that the Enterprises are adequately capitalized and operating safely in accordance with the 1992 Act authorizes the Director to require a higher ratio than the minimum ratio specified in the statute.[19]

Freddie Mac further questioned why the board of directors of each Enterprise is held responsible for maintaining capital at a level that is sufficient to ensure the continued viability of the Enterprise. Freddie Mac stated that the board of directors has a fiduciary duty to protect the interests of the Enterprise's shareholders, and that maintaining an adequate level of capital under varying circumstances would be one aspect of the overall set of responsibilities represented within that duty. Furthermore, Freddie Mac stated that the fiduciary duties of corporate directors are derived principally from state common law, so the adoption of a viability standard and corresponding responsibility could interfere with the subtleties and complexities of that law.

OFHEO believes that to the extent there is any conflict between state law and the 1992 Act, the conflict would be resolved in favor of the 1992 Act and implementing regulations. The Enterprises are federally-chartered entities subject to federal statutory and regulatory requirements. The 1992 Act imposes capital requirements on the Enterprises and makes clear that the board of directors of each Enterprise is responsible for the financial safety and soundness of the Enterprise. Specifically, the Director is authorized to take enforcement actions, *e.g.,* cease and desist orders and civil money penalties, against directors of an Enterprise for actions that deplete the core capital of the Enterprise, cause a loss to the Enterprise, or violate an order or regulation of OFHEO.[20] In exercising its enforcement powers, OFHEO will be cognizant of all of the relevant federal and, if applicable, state requirements. However, to the extent there are any applicable state law requirements relating to the fiduciary responsibilities of the directors, they would not override the obligations created by the 1992 Act or the Minimum Capital regulation.

Freddie Mac also recommended that the phrase ''in excess of the minimum capital level'' be replaced by ''is equal to or exceeds the minimum capital level'' in order to reflect accurately the minimum capital standard set forth in the 1992 Act. OFHEO agrees and has revised section 1750.1 accordingly. OFHEO has also substituted, where appropriate, the word ''requirement'' for ''level'' to ensure consistency of terms throughout the Minimum Capital regulation.

Section 1750.1 of the proposed regulation also contains a sentence that reads: ''The regulation contained in this Subpart A establishes the minimum capital requirements for each Enterprise.'' Freddie Mac recommended an editorial change that would clarify that the regulation sets forth the ''methodology'' for computing the minimum capital requirement for each Enterprise. OFHEO agrees with the need for this change and the final regulation has been revised accordingly.

Section 1750.2 Definitions

Proposed Section 1750.2 defines various terms used in the Minimum Capital regulation. OFHEO received comments on the definitions of the following terms: commitment, core capital, foreign exchange rate contract, interest rate contract, multifamily credit enhancement, off-balance sheet obligation, other off-balance sheet obligations, and qualifying collateral. The comments are discussed below.

Commitment

Freddie Mac recommended that, for the purpose of the minimum capital requirement computation, the term ''commitment'' should be defined as a legally binding agreement that obligates an Enterprise to purchase mortgages that

[17] Section 1365 (12 U.S.C. 4615).

[18] 138 Cong. Rec. S9353–54 (July 1, 1992). This colloquy was with respect to section 202, Minimum Capital Levels, of S. 2733. Although the 1992 Act was a compromise between S. 2733 and H.R. 2900, section 202 of S. 2733 is substantially similar to section 1362 of the 1992 Act. Therefore, the colloquy with respect to section 202, cited above, is relevant to the discussion of section 1362 of the 1992 Act.

[19] 138 Cong. Rec. H11,102 (Oct. 3, 1992) (discussion by Mr. Gonzalez, Mr. Frank, and Mr. Leach). In response to Mr. Gonzalez' explanation, Mr. Leach stated that ''I fully share with you the interpretation that would imply that the Director could go above the 2.5-percent requirement that is currently in statute [sic] * * *.'' *Id.*

[20] See sections 1371, 1372, and 1376 (12 U.S.C. 4631, 4632, and 4636).

specify all the terms of the transaction, including price, volume, and fees.

Freddie Mac referenced its comments to OFHEO's ANPR on risk-based capital.[21] In those comments, Freddie Mac stated that, as a matter of general contract law, an agreement is legally binding only if all of its key terms are included and agreed upon. Therefore, any definition of a contractual commitment should include a requirement that it be a binding contractual obligation of the Enterprise to purchase mortgages and specify price, volume, and fees.

OFHEO agrees that for purposes of the Minimum Capital regulation the term ''commitment'' should mean any legally binding agreement that obligates an Enterprise to purchase or securitize mortgages, and has defined the term as such. However, OFHEO does not believe it necessary or appropriate to restrict the definition of the term ''commitment'' by reference to price, volume, and fees because agreements may be legally binding even when there is a lack of specificity on all terms.[22] It would not be possible for OFHEO to reflect the complexities of this area of contract law in a regulatory definition. Moreover, to do so would be inadvisable in light of Congress' specific concerns regarding the need for capital to support commitments and other off-balance sheet obligations.

For example, in discussing the need for the capital requirements of the 1992 Act, Congress expressed the concern that off-balance sheet obligations had not been previously captured under prior capital standards:

> The capital provisions of the GSEs' charter Acts limit their debt to 15 times their capital unless HUD sets a higher ratio * * * This is unsatisfactory because no capital need be held against the GSEs' $750 billion of off balance sheet guarantees * * *.[23]

Recognizing this concern, it would be inappropriate for OFHEO to promulgate a narrow definition that could exempt certain legally binding commitments from the minimum capital calculation.

OFHEO has made editorial revisions to the definition of the term ''commitment'' by substituting the word ''agreement'' for ''arrangement'' and by deleting the phrase ''for portfolio.''

Core Capital

In drafting the definition of core capital in the proposed regulation, OFHEO made minor changes to the statutory language that were intended to improve the clarity of the provision. Freddie Mac commented that since Congress expressly defined core capital in section 1303(4) of the 1992 Act,[24] the regulation should use the same statutory language to avoid confusion. In light of the comment received, OFHEO wants to ensure that the regulation does not create any confusion and has revised the definition of core capital in the final regulation to mirror the statutory definition.

Foreign Exchange Rate Contracts and Interest Rate Contracts

OFHEO received a comment from Freddie Mac on the definitions of the terms ''foreign exchange rate contracts'' and ''interest rate contracts.'' Freddie Mac stated that the definitions of these terms as they appear in section 1750.2 and Appendix A of the proposed regulation are not identical. To avoid any implication that the differences are intentional, Freddie Mac recommended that OFHEO define the terms only in one location, or that OFHEO conform the language of the two sets of definitions.

The different ways these terms are used in the regulation and Appendix A make it is necessary to include a definition in the main body of the regulation as well as a separate discussion in Appendix A. However, in light of the comment, OFHEO has made editorial changes to conform the definitions of the terms ''foreign exchange rate contracts'' and ''interest rate contracts'' in section 1750.2 to the discussion of such terms in Appendix A.

Multifamily Credit Enhancement

Section 1750.2 of the proposed regulation defines the term multifamily credit enhancement to mean ''a guarantee by an Enterprise of the payments on a multifamily mortgage revenue bond issued by a state or local housing finance agency.''

Fannie Mae recommended that OFHEO revise the definition to describe more fully the routine types of transactions in which an Enterprise engages ''to support multifamily bond issues.'' Fannie Mae stated that it normally provides credit enhancement through a collateral pledge, purchase agreement, or other contractual obligation by which the mortgage loan risk is borne by the Enterprise during a period in which the bonds are credit enhanced by a letter of credit or surety obligation of another party.

Fannie Mae also commented that under many state laws, other state and local governmental units or instrumentalities may issue mortgage revenue bonds, not only state and local housing finance agencies. Therefore, Fannie Mae recommended that the definition should be expanded to include any state and local governmental issuers authorized to issue such revenue bonds secured by mortgages.

OFHEO agrees with the comment and has revised the definition of the term ''multifamily credit enhancement'' to describe more fully the routine types of transactions in which an Enterprise engages to support multifamily bond issues.

Off-balance Sheet Obligation and Other Off-Balance Sheet Obligations

OFHEO received comments from Freddie Mac on the definitions of the terms ''off-balance sheet obligation'' and ''other off-balance sheet obligations.'' The term ''off-balance sheet obligation'' is defined in proposed section 1750.2 to mean—

> * * * a binding agreement, contract, or similar arrangement that requires or may require future payment(s) in money or kind by another party to an Enterprise or that effectively guarantees all or part of such payment(s) to third parties, where such agreement or contract is a source of credit risk that is not included on its balance sheet.

The term ''other off-balance sheet obligations'' is defined in proposed section 1750.2 to mean—

> * * * all off-balance sheet obligations of an Enterprise that are not mortgage-backed securities or substantially equivalent instruments.

Freddie Mac noted that section 1362(a)(3) of the 1992 Act[25] requires the Enterprises to hold 0.45 percent core capital against other off-balance sheet obligations (excluding commitments in excess of 50 percent of the average dollar amount of commitments outstanding each quarter over the preceding four quarters), except as the Director adjusts the 0.45 percent ratio to reflect differences between the credit risk of such obligations and MBS. Freddie Mac stated that an obligation of an Enterprise does not subject the Enterprise directly to credit risk: ''it is the party holding the obligation that bears the credit risk of an Enterprise obligation.'' However, while the obligations of an Enterprise create no

[21] ''Comments of the Federal Home Loan Mortgage Corporation on the Advance Notice of Proposed Rulemaking on Risk-Based Capital of the Office of Federal Housing Enterprise Oversight,'' 139–146 (May 9, 1995) (available at OFHEO).

[22] See Restatement (Second) of Contracts section 204 (1981).

[23] S. Rep. No. 282, 102d Cong., 2d Sess. 11 (1992).

[24] 12 U.S.C. 4502(4).

[25] 12 U.S.C. 4612(a)(3).

direct credit risk for the Enterprise, certain obligations, such as MBS or commitments to purchase mortgages, involve identifiable credit risk that is related in one way or another to those obligations (the risk of the default on the associated mortgages). Freddie Mac believes that this related credit risk is what Congress intended to capture when it enacted the minimum capital requirement applicable to other off-balance sheet obligations. Therefore, Freddie Mac believes that a definition of ''other off-balance sheet obligations'' will not capture the related credit risk that is apparently the focus of the 1992 Act.

To resolve this concern, Freddie Mac recommended that OFHEO delete the definition of the term ''off-balance sheet obligation'' and take a targeted approach in the definition of the term ''other off-balance sheet obligations'' by identifying only those items that OFHEO intends to include within the scope of the term, *i.e.,* commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate and foreign exchange rate contracts. Freddie Mac believes that because OFHEO has considered no other items to be other off-balance sheet obligations, such a definition would fully implement section 1362(a)(3) of the 1992 Act.[26] Freddie Mac stated that, to the extent that the Director determines in the future that other items should be considered to be other off-balance sheet obligations, the Director should address such items in a future rulemaking proceeding to amend the Minimum Capital regulation. In connection with this recommendation, Freddie Mac also recommended that section 1750.4(a)(7) be deleted. That section provides for other off-balance sheet obligations to be included in the computation of the minimum capital requirement.

After considering Freddie Mac's comments, OFHEO has determined not to adopt the recommendations with respect to the definition of the terms ''off-balance sheet obligation'' and ''other off-balance sheet obligations.'' The capital provisions of the 1992 Act require the Enterprises to hold sufficient capital to ensure against risks of both on- and off-balance sheet items. For off-balance sheet obligations, the 1992 Act specifies the ratio of 0.45 percent of the unpaid principal balance of MBS and substantially equivalent instruments issued or guaranteed by the Enterprise. The Act also specifies a ratio of 0.45 percent of other off-balance sheet obligations (excluding commitments in excess of 50 percent of the average dollar amount of the commitments outstanding each quarter over the preceding four quarters), except that the Director must adjust the 0.45 percent ratio to reflect differences between the credit risk of such obligations and MBS.

OFHEO believes that it is appropriate to provide for a definition of other off-balance sheet obligations, which ensures that capital will be held against all off-balance sheet obligations whether or not they are now used by the Enterprises or at any time in the future. The 1992 Act requires that OFHEO apply a ratio of 0.45 percent to other off-balance sheet obligations until OFHEO determines whether an adjustment is necessary. OFHEO has determined the appropriate ratios for commitments, multifamily credit enhancements, sold portfolio remittances pending, interest rate contracts, and foreign exchange rate contracts. When an Enterprise begins to use a new type of obligation, OFHEO will apply the statutory ratio of 0.45 percent. OFHEO will then analyze the obligation to determine whether an adjustment to the 0.45 percent ratio is necessary, and will amend the Minimum Capital regulation, as appropriate.

Freddie Mac believes that the proposed definitions could create confusion because they appear to conflict with how the term ''obligation'' is used elsewhere in the 1992 Act and in the Enterprises' Charter Acts. The proposed regulation defines the term ''off-balance sheet obligation'' as a binding agreement or contract that requires another party to make future payments in money or in kind to an Enterprise (or guarantees of such payments to a third party). In contrast, Freddie Mac stated that the term ''obligation'' used elsewhere in the 1992 Act and the Enterprises' Charter Acts applies only to future payments from an Enterprise to a third party—and not to future payments from another party to the Enterprise (or guarantees of such payments to a third party).

Freddie Mac also stated that the proposed definition of the term ''other off-balance sheet obligations'' could create confusion as to whether resecuritizations of MBS, such as real estate mortgage investment conduits and other multi-class MBS, are included in that definition. Freddie Mac believes that it was the intent of Congress that such resecuritizations should not be included and that OFHEO's interim procedures do not include resecuritizations. Also, Freddie Mac believes that the definition of the term ''other off-balance sheet obligations'' is too narrow because commitments, which Congress expressly considered to be other off-balance sheet obligations, would not fall within the proposed definition of that term.

OFHEO believes that because the term ''obligation'' may be used differently in the 1992 Act and the Enterprises' Charter Acts, it more important to include a definition of the terms ''off-balance sheet obligation'' and ''other off-balance sheet obligations'' for purposes of the computation of the minimum capital requirement. However, to eliminate any confusion regarding the treatment of commitments, the definition of the term ''off-balance sheet obligation'' has been revised to include an express reference to commitments. Also, the definition of the term ''other off-balance sheet obligations'' has been revised to clarify that resecuritizations of MBS are not included in the definition.

Qualifying Collateral

Freddie Mac noted that the definition of the term ''qualifying collateral'' in section 1750.2 differs from the discussion of what constitutes qualifying collateral in paragraph 5 of Appendix A. Consistent with this comment, OFHEO has made conforming editorial changes to both the definition in section 1750.2 and the discussion in Appendix A.

OFHEO has also revised the footnote in connection with the definition of the term ''qualifying collateral'' by defining the term ''OECD-based group of counties'' to conform with the Joint Final Rule published by the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.[27] This final rule was promulgated after the publication of the proposed Minimum Capital regulation.

Section 1750.4 Minimum Capital Requirement Computation

Section 1750.4(a) of the proposed regulation provides that the minimum capital requirement for each Enterprise is the sum of the following amounts—

—2.50 percent times the aggregate on-balance sheet assets of the Enterprise;
—0.45 percent times the unpaid principal balance of mortgage-backed securities and substantially equivalent instruments that were issued or guaranteed by the Enterprise;
—0.45 percent of 50 percent of the average dollar amount of commitments outstanding each quarter over the preceding four quarters;

[26] Id.

[27] 60 FR 66042, Dec. 20, 1995.

—0.45 percent of the outstanding principal amount of bonds with multifamily credit enhancements;
—0.45 percent of the dollar amount of sold portfolio remittances pending;
—3.00 percent of the credit equivalent amount of interest rate and foreign exchange rate contracts except to the extent of the current market value of posted qualifying collateral;
—1.50 percent of the credit equivalent amount of interest rate and foreign exchange rate contracts equal to the market value of posted qualifying collateral; and
—0.45 percent of the outstanding amount of other off-balance sheet obligations, excluding commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate and foreign exchange rate contracts, except as adjusted by the Director to reflect differences in the credit risk of such obligations in relation to MBS.

Section 1750.4(b) provides that any asset or financial obligation that can be properly classified in more than one of the enumerated categories shall be classified in the category that yields the highest minimum capital amount.

OFHEO received comments with respect to section 1750.4, as explained below.

Section 1750.4(a)(6) Ratios With Respect to Interest Rate and Foreign Exchange Rate Contracts

Notice of Adjustment

Freddie Mac asserted that OFHEO has not provided adequate notice to the Enterprises of the basis, in quantifiable terms, for the proposed upward adjustment it makes to the 0.45 percent ratio with respect to interest rate and foreign exchange rate contracts.

OFHEO believes that it provided adequate notice of the basis of the proposed adjustment in the preamble of the proposed Minimum Capital regulation. The preamble explained how OFHEO analyzed the relative credit risk of interest rate and foreign exchange rate contracts as compared with the credit risk of MBS. However, in light of this comment, OFHEO believes it appropriate to summarize its reasons for adjusting the 0.45 percent ratio.

The source of credit risk of MBS to the Enterprises is the risk of defaults and losses on the mortgages underlying the MBS. The aggregate credit risk associated with the underlying mortgages is low because the Enterprises require very broad geographic diversification; strict and consistent mortgage underwriting standards; minimum initial collateralization of 125 percent (*i.e.,* maximum 80 percent loan-to-value ratio) or supplemental mortgage insurance; and increasing levels of collateralization as loans amortize and property values increase. Moreover, the credit risk of MBS is offset by the continuing source of income provided by guarantee fees.

Neither Enterprise has experienced a net credit loss on its MBS. Annual losses to date have ranged from two basis points to ten basis points (expressed as a percentage of the outstanding portfolio), and have been easily covered by guarantee fee income, which has ranged from 20 to 25 basis points.

The source of credit risk of interest rate and foreign exchange rate contracts is the risk of counterparty default. The credit risk of interest rate and foreign exchange rate contracts is greater than that of MBS, even though the Enterprises attempt to limit the credit risk of the contracts by restricting their business to high quality counterparties and adjusting collateral requirements on the basis of the counterparty credit quality and the current replacement cost of the contracts. The credit risk associated with interest rate and foreign exchange rate contracts is a result of the following characteristics:

- Large swings in market rates, on which interest rate and foreign exchange rate contracts are based, may simultaneously increase exposure to and risk of default by one or more counterparties, which are typically financial firms.
- While losses may be infrequent, the high level of interdependence of the world's major financial institutions, many of which are important interest rate and foreign exchange rate contract counterparties, could cause disproportionately high losses when they do occur. This phenomenon is often referred to as ''systemic risk.''
- Counterparty risk is concentrated. The loss resulting from the default of a single counterparty could be many times larger than the amount of capital that would be associated with the application of a 0.45 percent capital ratio.
- Interest rate and foreign exchange rate contract exposures are not as fully collateralized as are the mortgages underlying the Enterprises' MBS.
- The interest rate and foreign exchange rate contracts markets are comparatively new; therefore, the functioning of these markets is less predictable in terms of operational and legal risk.
- There is no current stream of fee income to offset losses on interest rate and foreign exchange rate contracts associated with counterparty failures.

OFHEO recognizes that, although the credit risk characteristics of interest rate and foreign exchange rate contracts can be identified, they are difficult to quantify. However, the 1992 Act does not require such quantification. Rather, it requires a reasonable analysis, based on available information, of the credit risk of interest rate and foreign exchange rate contracts relative to that of MBS.

The fact that the Enterprises have not experienced a net credit loss on their MBS does not mean that there are no risks associated with these instruments. Similarly, the fact that the Enterprises have not experienced losses associated with interest rate and foreign exchange rate contracts does not mean that there are no risks associated with these contracts. In these circumstances, it is appropriate for OFHEO to analyze the relative risks of these instruments by comparing their respective credit risk characteristics. Based on an analysis of these relative credit risk characteristics, OFHEO adjusted the 0.45 percent ratio applicable to MBS upward to reflect the greater risk of interest rate and foreign exchange rate contracts. As OFHEO and the Enterprises accumulate data on the risk of, and gain experience with the application of the ratios for, interest rate and foreign exchange rate contracts, OFHEO may make adjustments to the ratios, as appropriate.

Freddie Mac also commented on the upward adjustment of ratios for interest rate and foreign exchange rate contracts in light of OFHEO's statement in the Annual Report to Congress that the credit risk of the Enterprises' derivatives (interest rate and foreign exchange rate) contracts ''is very small relative to the credit risk the Enterprises face with regard to mortgages they hold or guarantee.'' [28] This statement was in the context of the notional values of the contracts. As the Annual Report to Congress notes two sentences later, the replacement cost (current credit exposure) of the contracts is relatively small. In other words, the replacement cost, which together with an amount for potential future credit exposure constitutes the credit equivalent amount, is very small in comparison with the notional amount. We note that the credit equivalent amount represents the overall credit risk of interest rate and foreign exchange rate contracts.

Lowering the Proposed Ratios

Fannie Mae recommended lowering the proposed ratios from 3.0 percent of

[28] OFHEO, Annual Report to Congress, 9 (June 15, 1995).

the credit equivalent amount of uncollateralized interest rate and foreign exchange rate contracts and 1.5 percent of the credit equivalent amount of collateralized contracts to 2.0 percent and 0.5 percent respectively. Fannie Mae believes that the proposed ratios are unreasonably high in relation to the historical loss experience for similar obligations.

Fannie Mae stated that the factors that determine an adequate amount of required capital for interest rate and foreign exchange rate contracts include the probability of default and the severity of possible loss. To determine the probability of default of collateralized interest rate and foreign exchange rate contracts, Fannie Mae analyzed historical default statistics from Moody's Investors Service over the past 25 years for unsecured, 5- to 9-year term senior debt of corporations with debt ratings from Aaa to Baa. Fannie Mae stated that it uses historical data for unsecured senior debt because data on interest rate and foreign exchange rate contracts is limited due to the relative newness of the market in such contracts. Fannie Mae believes that their default rates are functionally equivalent because interest rate and foreign exchange rate contracts and unsecured senior debt represent general corporate obligations.

Fannie Mae stated that the average rating of its interest rate and foreign exchange rate counterparties is Aa or A. Using the Moody's Investors Service historical data, the default rates for unsecured senior debt in those categories ranges from 0.3 percent to 1.5 percent. Thus, Fannie Mae suggested that an appropriate estimate of default incidence for its interest rate and foreign exchange rate contracts is between 0.3 and 1.5 percent.

Fannie Mae then stated that the historical data demonstrates that the average loss severity from 1974 through 1994 is 51.1 percent for all corporate unsecured senior debt, and 28.4 percent for Baa or better corporate unsecured senior debt. Multiplying the default incidence by the loss severity yields a ''capital ratio.'' Thus, according to Fannie Mae, a default incidence in the range of 0.3 to 1.5 percent and a severity level in the range of 28.4 to 51.1 percent produces a ''capital ratio'' for uncollateralized interest rate and foreign exchange rate contracts in the range of 0.1 to 0.75 percent. The ratio that Fannie Mae recommended—2.0 percent for uncollateralized interest rate and foreign exchange rate contracts—is 2⅔ times its estimated ''worst case'' ratio of 0.75 percent. Consequently, Fannie Mae believes the recommended ratio to be an adequate and suitable minimum capital ratio for uncollateralized interest rate and foreign exchange rate contracts.

Fannie Mae further believes that the use of collateral significantly reduces the severity of loss associated with interest rate and foreign exchange rate contracts. Fannie Mae asserted that 10 percent is a reasonable estimate of expected loss severity for collateralized interest rate and foreign exchange rate contracts, because Fannie Mae evaluates the market value of collateral and exposures at least monthly, Fannie Mae requires over-collateralization if credit quality deteriorates below a specific level, and the loss severity of uncollateralized exposures is best represented by the 28.4 percent historical loss severity experience for unsecured senior debt. By multiplying the 10 percent loss severity by the 0.3 to 1.5 percent historical average default rates, Fannie Mae estimated a ''capital ratio range'' of 0.03 percent to 0.15 percent. Thus, Fannie Mae's recommendation of a 0.5 percent ratio for collateralized interest rate and foreign exchange rate contracts is 3⅓ times its estimated ''worst case.''

After carefully considering Fannie Mae's arguments, OFHEO has decided not to reduce the proposed ratio for interest rate and foreign exchange rate contracts. Fannie Mae's analysis assumes that the default rate for interest rate and foreign exchange rate contracts will conform with the historical default rates for corporate unsecured senior debt. As Fannie Mae noted, interest rate and foreign exchange rate contracts are relatively new instruments and historical default rates are lacking. Therefore, OFHEO cannot assume that the default rates of unsecured senior debt and interest rate and foreign exchange rate contracts will prove to be comparable.

Even assuming the default rates would be comparable, Fannie Mae's proposal does not provide an adequate capital cushion. Fannie Mae derives what it calls ''capital ratios'' based on more than twenty years' experience of a national sample of corporate credits. These ''capital ratios'' are in fact average national loss rates for a period not marked by extreme economic stress. For minimum capital purposes, Fannie Mae proposes to apply rates to both uncollateralized and collateralized counterparty exposure that are roughly three times as high as these capital ratios. The 1992 Act requires that any adjustment to the 0.45 percent ratio reflect the credit risk relative to MBS. Fannie Mae's proposed multiples are not consistent with this requirement. As the above discussion notes, neither Enterprise has experienced any net credit loss on its MBS. However, ignoring guarantee fee income, annual losses to date have ranged from two basis points to ten basis points. Thus the 0.45 percent statutory capital ratio for MBS ranges from 4.5 to 22.5 times the historical loss experience for MBS—higher than the 2⅔ and 3⅓ times the estimated ''worst case'' loss proposed by Fannie Mae.

Fannie Mae's analysis also ignores a number of factors which increase the potential loss associated with the credit exposure of interest rate and foreign exchange rate contracts that are not present with MBS. The credit exposures of interest rate and foreign exchange rate contracts are highly concentrated, large swings of interest rates may simultaneously increase both the credit exposure and the default risk, and systemic problems could cause disproportionately high losses when they do occur.

Furthermore, Fannie Mae predicates its proposal on its current risk management practices, with respect to counterparty creditworthiness and collateral requirements and their enforcement. OFHEO believes that a minimum capital requirement establishes an essential amount of capital that an Enterprise with given levels of business must hold to address broad categories of risk, not specific exposures. Accordingly, it should not attempt to reflect the quality of current risk management practices. For example, Fannie Mae's analysis assumes that it will continue to manage credit risk by doing business with counterparties with Aa and A ratings and that such counterparties are not subject to sudden declines in ratings. Fannie Mae also assumes that, if ratings decline, it will require and be able to obtain more collateral.

Even if these assumptions were valid, OFHEO believes that they cannot be the basis of a minimum capital requirement. The minimum capital requirement is not intended to be a risk-based capital requirement. The 1992 Act separately provides for a risk-based capital requirement in which credit, interest, and operational and management risk are calculated using a stress test. The 1992 Act requires that the 0.45 percent ratio for other off-balance sheet obligations be adjusted to reflect differences in the credit risk of the obligation and MBS. OFHEO believes that the adjustment should be for differences in risk associated with the inherent risk characteristics of different instruments, not the risk characteristics of counterparties to these obligations or

current risk management practices for these obligations.

Right to Raise the Ratio

America's Community Bankers recommended that OFHEO explicitly reserve the right to raise the ratio for uncollateralized interest rate and foreign exchange rate contracts to 4.0 percent depending on the specific counterparty risks involved. As discussed above, OFHEO believes that counterparty credit ratings are not the appropriate focus of minimum capital ratios and that it has required an adequate amount of capital for uncollateralized interest rate and foreign exchange rate contracts. If OFHEO's experience with the application of the ratio for interest rate and foreign exchange rate contracts proves otherwise, OFHEO will raise the ratio. In addition, as discussed in connection with the comments on section 1750.1, if the business practices of an Enterprise were to endanger the capital adequacy of the Enterprise, OFHEO would take any actions necessary to ensure the financial safety and soundness of the Enterprise's operations.

Avoid Changing the Capital Calculation

Mortgage Bankers Association of America (MBA) stated that the proposed change from the interim guidelines in the calculation of the capital ratio for interest rate and foreign exchange rate contracts does not appear to be so significant as to cause the Enterprises to increase current guarantee fees, which would ultimately harm consumers in the form of higher interest rates or fees. MBA understands that the Enterprises currently have sufficient capital to meet the higher capital ratios that would result from the proposal. Nevertheless, MBA urged OFHEO to remain cautious and avoid changing the capital calculation of interest rate and foreign exchange rate contracts if the calculation influences the Enterprises' selection of funding and hedging instruments in a way that affects their ability to manage risks, is detrimental to their housing mission, or increases the cost of credit to consumers.

MBA recognizes that OFHEO does not wish to jeopardize the Enterprises' ability to meet their housing mission and goals, but must ensure the safety and soundness of the Enterprises. MBA believes that OFHEO should strive to strike a balance and avoid imposing inefficient capital requirements that inhibit the management of risk.

OFHEO agrees that the capital requirements should ensure the safety and soundness of the Enterprises while not jeopardizing the Enterprises' ability to meet their housing mission and goals. Consistent with that approach, OFHEO does not believe that the change in the calculation of the capital ratio for interest rate and foreign exchange rate contracts will adversely affect the Enterprises' ability to manage risk or increase the cost of mortgage credit to consumers. Furthermore, mindful of the need to strike a balance among competing interests, OFHEO believes that it is in the best long-term interests of consumers and the Enterprises that the Enterprises have an adequate cushion of minimum capital to ensure against loss. While a decrease in capital requirements could result in a reduction in mortgage credit costs for consumers in the short-term, the decrease would not be beneficial in the long-term if it jeopardized the financial viability of the Enterprises.

This view is consistent with the congressional findings set forth in the 1992 Act that recognize the Enterprises' important housing mission and the need to provide long-term safeguards in the form of capital requirements to reduce the risk of failure.[29] The congressional findings also recognize the Enterprises' obligation to facilitate the financing of affordable housing while maintaining a strong financial condition and a reasonable economic return.[30]

''Pro Rata'' Capital Charge

The Office of Thrift Supervision asked whether the proposed regulation would provide a reduced ''pro rata'' capital charge for partially collateralized interest rate and foreign exchange rate contracts. In response to this comment, OFHEO notes that section 1750.4(a)(6) provides a ratio of 3.00 percent of the credit equivalent amount of interest rate and foreign exchange rate contracts, except to the extent of the current market value of posted qualifying collateral; and 1.50 percent of the market value of qualifying collateral posted to secure interest rate and foreign exchange rate contracts, not to exceed the credit equivalent amount of such contracts. Thus, an interest rate or foreign exchange rate contract partially collateralized with qualifying collateral will have a reduced capital charge to the extent of the qualifying collateral.

Enterprises' Right to Require Collateral

Fannie Mae and Freddie Mac both stated that the market widely perceives an agreement with a Aaa rated counterparty that agrees to post collateral if it is downgraded to be as safe as, or safer than, a comparable agreement with a lesser-rated counterparty that posts collateral. They claimed that the proposed regulation would run counter to well-established market practices by rewarding an Enterprise with a lower capital requirement if its Aaa rated counterparties are downgraded and post collateral under their collateral agreements, or if the Enterprise avoids Aaa rated counterparties in favor of lesser-rated counterparties.

Freddie Mac recommended the following standard: The same minimum capital ratio would apply for collateralized agreements and for uncollateralized agreements where the counterparty holds the highest credit rating of any entity effectively recognized by the Division of Market Regulation of the Securities and Exchange Commission as a nationally recognized statistical rating organization for the purposes of capital rules for broker-dealers, and has entered into a binding agreement to post qualifying collateral if and when the counterparty no longer holds the highest rating of such an entity. As an alternative, Freddie Mac recommended treating the contract as fully collateralized for purposes of computing the minimum capital requirement where a Aaa rated counterparty has agreed to post collateral when it is downgraded.

OFHEO has considered Fannie Mae's and Freddie Mac's recommendations, but has decided not to adopt them. The Enterprises' recommendations rely heavily on the credit ratings of counterparties and current Enterprise practice. In fact, Freddie Mac has noted elsewhere that credit enhancements in which the counterparty is required to post collateral only when its credit rating or capital begins to deteriorate ''present some management-and-operations risk because the arrangements need to be monitored and the collateral needs to be posted in a timely fashion.''[31]

OFHEO believes that reliance on the credit ratings of counterparties and current Enterprise practice should not be the basis for establishing minimum capital ratios. Even though the 1992 Act requires that credit risk be taken into account when adjusting the ratio for certain off-balance sheet obligations, the minimum capital requirement essentially is computed on the basis of simple leverage ratios. Categories of obligations that are assigned a specific ratio include obligations with a mixture

[29] See section 1302 (12 U.S.C. 4501).

[30] Section 1302(7) (12 U.S.C. 4501(7)).

[31] ''Comments of the Federal Home Loan Mortgage Corporation on the Advance Notice of Proposed Rulemaking on Risk-Based Capital of the Office of Federal Housing Enterprise Oversight,'' 72 (May 9, 1995)(available at OFHEO).

of greater and lesser risk, depending on borrower or counterparty characteristics.

Consistent with the concepts underlying ''minimum'' as opposed to ''risk-based'' capital, when developing the proposed regulation, OFHEO considered whether the minimum capital ratio should be the same for interest rate and foreign exchange rate contracts regardless of whether collateral was posted. In adopting the proposed regulation, OFHEO determined that a lower minimum capital ratio for the collateralized portion of an obligation was appropriate. This determination was made based on the recognition that a collateralized position affords the Enterprises greater certainty of collection than an uncollateralized position in the event of a decline in the financial condition of a counterparty. In contrast, the value of a promise by a counterparty to post collateral in the event that it is downgraded is subject to the diminished capacity of a counterparty during times of financial stress to identify and pledge adequate liquid assets to secure its contractual obligations.

OFHEO also recognizes that the value of a promise by a counterparty to post collateral when it is downgraded is influenced by the speed of the rating agency's ability to recognize changes in credit conditions. Recent incidents, such as the default of Barings from trading losses, illustrate how rapidly the financial health of a well-respected entity can deteriorate. When a decline occurs very rapidly, a promise to post collateral to secure counterparty obligations may be of little value. Finally, as a point of comparison, OFHEO notes that the risk-based capital standards for banks and thrifts do not treat agreements to post collateral as the equivalent of collateral and do not incorporate counterparty credit ratings into the determination of risk weights assigned to different counterparties.

Section 1750.4(a)(7) Ratio With Respect to Other Off-Balance Sheet Obligations

Section 1750.4(a)(7) of the proposed regulation provides the amount of other off-balance sheet obligations that is to be included in the computation of the minimum capital requirement. The amount is—

0.45 percent of the outstanding amount of other off-balance sheet obligations, excluding commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate contracts and foreign exchange rate contracts except as adjusted by the Director to reflect differences in the credit risk of such obligations in relation to mortgage-backed securities.

Freddie Mac recommended that proposed section 1750.4(a)(7) be deleted in connection with its comments that (1) the definition of the term ''off-balance sheet obligation'' be deleted and (2) the definition of the term ''other off-balance sheet obligations'' be defined in terms of commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate and foreign exchange rate contracts. (See the full discussion under section 1750.2, above.) If section 1750.4(a)(7) is retained, Freddie Mac recommended that OFHEO delete the phrase ''the outstanding amount.'' Freddie Mac believes that the phrase could create confusion if, in the future, OFHEO determines that an item should be treated as an ''other off-balance sheet obligation,'' and OFHEO also determines that the appropriate measure of credit risk should be something other than an ''outstanding amount.''

OFHEO agrees with Freddie Mac; however, rather than deleting the phrase ''outstanding amount,'' OFHEO has substituted the phrase ''credit equivalent amount, or other appropriate measure, as determined by the Director.'' This revision will clarify that, depending on the specific characteristics of the obligation, the computation of the minimum capital requirement may be based on the credit equivalent amount or other measures that the Director determines are appropriate.

OFHEO also has made a clarifying editorial revision to proposed section 1750.4(a)(6)(ii) with respect to the computation of the minimum capital amount for interest rate and exchange rate contracts.

Section 1750.4(b) Capital Treatment of On-Balance Sheet and Off-Balance Sheet Items

Section 1750.4(b) of the proposed regulation provides that, for purposes of the minimum capital requirement computation, any asset or financial obligation that is properly classifiable in more than one category of items must be classified in the category that yields the highest requirement.

Freddie Mac expressed the concern that the proposed regulation would require capital charges for foreign exchange rate contracts to be computed as if such contracts were reflected on the balance sheet, even if they are not. Freddie Mac also recommended that OFHEO clarify that the regulation will not require an Enterprise to make adjustments to a balance sheet that has been prepared in accordance with generally accepted accounting principles (GAAP).

As noted by Freddie Mac, the Enterprises are required to prepare their balance sheets in accordance with GAAP. Consistent with that requirement, the Minimum Capital regulation does not require an Enterprise to adjust its balance sheet prepared in accordance with GAAP. The requirements of the Minimum Capital regulation relate only to the computation of the minimum capital requirement.

Under GAAP, it is possible that some assets or obligations may properly be reflected either on or off the balance sheet. OFHEO believes that, for minimum capital purposes, it is appropriate to classify any asset or obligation that may be properly reflected either on or off the balance sheet in the category that yields the highest minimum capital requirement. The purpose of capital is to serve as a cushion to absorb losses and thereby reduce the risk of failure of the Enterprise. The minimum capital requirement represents a level of capital for an Enterprise which, if not met, will result in the institution being classified as 'significantly undercapitalized.'' Consequently, it would be inappropriate for the Minimum Capital regulation to permit an Enterprise to determine its minimum capital requirement by favoring one accounting treatment over another. The purpose of section 1750.4(b) is to avoid such a circumstance.

In addition, Freddie Mac commented on the relationship between section 1750.4(b) and paragraph 4 of Appendix A, suggesting that they articulated inconsistent requirements with respect to interest rate and foreign exchange rate contracts. In that regard, Freddie Mac recommended that OFHEO treat all foreign exchange rate contracts as other off-balance sheet obligations, and then subtract from the computed minimum capital requirement the amount, if any, that is attributable to the contracts as on-balance sheet assets.

OFHEO does not believe there is any inconsistency between section 1750.4(b) and paragraph 4 of Appendix A. The scope of the two provisions is different and, to the extent they deal with the same issue, they address different aspects of the issue. As explained above, section 1750.4(b) provides that an Enterprise's assets or obligations that may be properly classified in more than one of the on- or off-balance sheet categories will be classified according to the category that yields the highest

minimum capital requirement. The scope of section 1750.4(b) encompasses not only interest rate and foreign exchange rate contracts, but also any other assets or obligations that could be classified in more than one category.

In contrast, paragraph 4 of Appendix A, Avoidance of Double Counting, is restricted in scope to interest rate and foreign exchange rate contracts and only addresses the issue of double counting. The purpose of paragraph 4 is to ensure that the capital amount for such contracts is not double counted if the proper accounting treatment results in a portion of the credit exposure of the contract(s) being reflected on and off the balance sheet. To that end, paragraph 4 provides that the amount of credit exposure arising from interest rate and foreign exchange rate contracts may need to be excluded from on-balance sheet assets in calculating the minimum capital requirement.

Section 1750.5 Notice of Capital Classification

Section 1750.5 outlines the procedures that OFHEO will follow when notifying each Enterprise of its capital classification.

Freddie Mac noted that while the proposed regulation sets forth a process that could result in a final capital classification not being issued until a full 150 days after the end of a quarter, it hopes that a process of less than 90 days would continue to be the norm.

Section 1750.3 provides that an Enterprise has 30 days after the end of each quarter to file a minimum capital report. Section 1750.5 provides that within 60 days of receiving the minimum capital report, OFHEO will provide each Enterprise with a notice of proposed capital classification. The Enterprise has 30 days in which to respond to the proposed capital classification. The Enterprise's response period may be extended up to 30 additional calendar days, or shortened, at the sole discretion of the Director. The Director, after taking into consideration the Enterprise's response, has up to 30 calendar days following the end of the response period in which to issue a final notice of capital classification.

The time periods specified in the regulation are designed to establish the longest possible timeframes for actions by the Enterprises and OFHEO in the capital classification process. OFHEO would expect that under most circumstances the total elapsed time for a capital classification will be substantially less than the maximum period contemplated in the regulation. In that regard, the timing of the submission of the Enterprise's minimum capital report and its response to the proposed classification will have a significant impact on the time period for receipt of the final capital classification.

Appendix A

Appendix A provides the methodology for computing the minimum capital component for interest rate and foreign exchange rate contracts.

The Office of Thrift Supervision questioned whether OFHEO had considered whether the proposed treatment of interest rate and foreign exchange rate contracts, including the bilateral netting provisions, adds unnecessary complexity to the minimum capital standard in light of the sophisticated risk-based capital regulation that OFHEO is developing.

Although the minimum capital standard is a minimum leverage ratio standard, Congress has required that OFHEO consider the credit risk of off-balance sheet obligations and adjust the 0.45 percent ratio to reflect the difference between the credit risk of interest rate and foreign exchange rate contracts and MBS. Thus, OFHEO believes that the adjusted ratios should be applied to the credit equivalent amount of interest rate and foreign exchange rate contracts because the credit equivalent amount best represents the dollar amount at risk. OFHEO also believes that bilateral netting, that is, the offsetting of positive and negative mark-to-market values in the determination of a current credit exposure used in the calculation of a credit equivalent amount, provides a more accurate representation of the dollar amount at risk. Consequently, OFHEO believes that the more complex treatment with respect to interest rate and foreign exchange rate contracts is appropriate.

Paragraph 5. Collateral

Freddie Mac noted that the definition of the term ''qualifying collateral'' in section 1750.2 differs from the discussion of what constitutes qualifying collateral in paragraph 5 of Appendix A. OFHEO does not intend that there be any difference and has revised the discussion in Appendix A to conform with the definition set forth in section 1750.2. (See the full discussion of this comment under section 1750.2, Qualifying collateral, above.)

Additionally, OFHEO has renumbered paragraphs 1 and 2 of Appendix A of the proposed regulation to ensure ease of reading and reference.

IV. Section-by-Section Analysis

Section 1750.1 General

This section states that the regulation sets forth the methodology for computing the minimum capital requirement for each Enterprise. It further states that the board of directors of each Enterprise is responsible for ensuring that the Enterprise maintains capital at a level that is sufficient to ensure the continued financial viability of the Enterprise and that equals or exceeds the minimum capital requirement.

Section 1750.2 Definitions

Section 1750.2 provides definitions for the terms used in the regulation.

The term ''affiliate'' is defined as to mean any entity that controls, is controlled by, or is under common control with, an Enterprise, except as otherwise provided by the Director.

The term ''commitment'' is defined to mean any contractual, legally binding agreement that obligates an Enterprise to purchase or to securitize mortgages.

The term ''core capital'' is defined to mean the sum of (as determined in accordance with generally accepted accounting principles) the par or stated value of outstanding common stock; the par or stated value of outstanding perpetual, noncumulative preferred stock; paid-in capital; and retained earnings. This definition does not include debt instruments or any amounts an Enterprise could be required to pay at the option of an investor to retire capital instruments. The amount of retained earnings includable in the calculation of core capital is the net of the carrying value of Treasury stock. Treasury stock is stock that an Enterprise has issued and subsequently acquired, but has not retired or resold. Carrying value is typically the amount the Enterprise paid for the Treasury stock.

The term ''Director'' is defined to mean the Director of OFHEO.

The term ''Enterprise'' is defined to mean the Federal National Mortgage Association and any affiliate thereof or the Federal Home Loan Mortgage Corporation and any affiliate thereof.

The term ''foreign exchange rate contracts'' is defined to mean cross-currency interest rate swaps, forward foreign exchange contracts, currency options purchased (including currency options purchased over-the-counter), and any other instrument that gives rise to similar credit risks. The definition clarifies that the term ''foreign exchange rate contracts'' does not mean foreign exchange rate contracts with an original maturity of 14 calendar days or less and

foreign exchange rate contracts traded on exchanges that require daily payment of variation margins.

The term ''interest rate contracts'' is defined to mean single currency interest rate swaps, basis swaps, forward rate agreements, interest rate options purchased (including caps, collars, and floors purchased), over-the-counter options purchased, and any other instrument that gives rise to similar credit risks (including when-issued securities and forward deposits accepted). The definition of the term ''interest rate contracts'' does not include instruments traded on exchanges that require daily payment of variation margins.

The term ''mortgage-backed security'' is defined to mean a security, investment, or substantially equivalent instrument that represents an interest in a pool of loans secured by mortgages or deeds of trust where the principal or interest payments to the investor in the security or substantially equivalent instrument are guaranteed or effectively guaranteed by an Enterprise.

The term ''multifamily credit enhancement'' is defined to mean any guarantee, pledge, purchase arrangement, or other obligation or commitment provided or entered into by an Enterprise with respect to multifamily mortgages to provide credit enhancement, liquidity, interest rate support, and other guarantees and enhancements for revenue bonds issued by a state or local governmental unit (including a housing finance agency) or other bond issuer.

The term ''1992 Act'' is defined to mean the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, found at Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550.

The term ''notional amount'' is defined to mean the face value of the underlying financial instrument(s) on which an interest rate or foreign exchange rate contract is based.

The term ''off-balance sheet obligation'' is defined to mean a binding agreement, contract, or similar arrangement that requires or may require future payment(s) in money or kind by another party to an Enterprise, or that effectively guarantees all or part of such payment(s) to third parties (including commitments), where such agreement or contract is a source of credit risk that is not included on its balance sheet.

The term ''OFHEO'' is defined to mean the Office of Federal Housing Enterprise Oversight.

The term ''other off-balance sheet obligations'' is defined to mean all off-balance sheet obligations of an Enterprise that are not mortgage-backed securities or substantially equivalent instruments and that are not resecuritized MBS such as real estate mortgage investment conduits or similar resecuritized instruments.

The term ''perpetual, noncumulative preferred stock'' is defined to mean preferred stock that does not have a maturity date, provides the issuer the ability and the legal right to eliminate dividends and does not permit the accruing or payment of impaired dividends, and that cannot be redeemed at the option of the holder. It is further defined as preferred stock that has no other provisions that will require future redemption of the issue, in whole or in part, or that will reset the dividend periodically based, in whole or in part, on the Enterprise's current credit standing, such as auction rate, money market, or remarketable preferred stock, or that may cause the dividend to increase to a level that could create an incentive for the issuer to redeem the instrument, such as exploding rate stock. For purposes of minimum capital, perpetual, noncumulative preferred stock must provide capital that is available to absorb losses of the Enterprise from any source.

The term ''qualifying collateral'' is defined to mean cash on deposit; securities issued or guaranteed by the central governments of the OECD-based group of countries,[32] United States Government agencies, or United States Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks.

[32] The OECD-based group of countries comprises full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow, but excludes any country that has rescheduled its external sovereign debt within the previous 5 years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's mobility or unwillingness to meet its external debt service obligations, but generally not include any renegotiation to allow the borrower to take advantage of a decline in interest rate or other change in market conditions.

As of November 1995, the OECD countries included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; and Saudi Arabia has concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow.

Section 1750.3 Procedures and Timing

Section 1750.3 provides that each Enterprise must file with the Director a minimum capital report each quarter, or at such other times as the Director requires, in his or her sole discretion. The report must contain the information that responds to all of the items required by OFHEO in written instructions to the Enterprise, including, but not limited to an estimate of the minimum capital requirement; an estimate of core capital overage or shortfall relative to the estimated minimum capital requirement; and such other information as may be required by the Director.

This section further provides that the report must be submitted not later than April 30, July 30, October 30, and January 30 of each year, and that it must be in writing and in such other format as may be required by the Director.

In the event an Enterprise makes an adjustment to its financial statements for a quarter or a date for which the information was requested which would cause an adjustment to a minimum capital report, section 1750.3 requires that the Enterprise file an amended minimum capital report not later than 3 business days after the date of such adjustment.

Finally, section 1750.3 provides that each minimum capital report or any amended minimum capital report must contain a declaration by an officer authorized by the board of directors of the Enterprise to make such a declaration, including, but not limited to, a president, vice president, or treasurer, that the report is true and correct to the best of such officer's knowledge and belief.

Section 1750.4 Minimum Capital Requirement Computation

Section 1750.4 sets forth the methodology for computing the minimum capital requirement. The minimum capital requirement is the sum of the following amounts:

—2.50 percent times the aggregate on-balance sheet assets of the Enterprise;
—0.45 percent times the unpaid principal balance of mortgage-backed securities and substantially equivalent instruments that were issued or guaranteed by the Enterprise;
—0.45 percent of 50 percent of the average dollar amount of commitments outstanding each quarter over the preceding four quarters;
—0.45 percent of the outstanding principal amount of bonds with multifamily credit enhancements;
—0.45 percent of the dollar amount of sold portfolio remittances pending;

—3.00 percent of the credit equivalent amount of interest rate contracts and foreign exchange rate contracts, except to the extent of the current market value of posted qualifying collateral, computed in accordance with Appendix A; 1.50 percent of the market value of qualifying collateral posted to secure interest rate and foreign exchange rate contracts, not to exceed the credit equivalent amount of such contracts, computed in accordance with Appendix A; and

—0.45 percent of the outstanding amount, credit equivalent amount, or other measure determined appropriate by the Director, of other off-balance sheet obligations (excluding commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate contracts and foreign exchange rate contracts), except as adjusted by the Director to reflect differences in the credit risk of such obligations in relation to mortgage-backed securities.

In the event that any asset or financial obligation is properly classifiable in more than one of the above categories, section 1750.4 provides that, for minimum capital purposes, the asset or financial obligation must be classified in the category that yields the highest minimum capital requirement.

The section further explains that the term ''preceding four quarters'' means the last day of the quarter just ended (or the date for which the minimum capital report is filed, if different), and the three preceding quarter-ends.

Section 1750.5 Notice of Capital Classification

Section 1750.5 states that not later than 60 calendar days after the date for which the minimum capital report is filed, OFHEO will provide each Enterprise with a notice of proposed capital classification in accordance with section 1368 of the 1992 Act.[33] The notice of proposed capital classification includes the proposed minimum capital requirement and the summary computation of the proposed minimum capital requirement.

Each Enterprise has a period of 30 calendar days following receipt of a notice of proposed capital classification to submit a response. The response period may be extended for up to 30 additional calendar days at the sole discretion of the Director. The Director may shorten the response period with the consent of the Enterprise or without such consent if the Director determines that the condition of the Enterprise requires a shorter response period.

[33] 12 U.S.C. 4618.

Section 1750.5 further provides that the Director must take into consideration any response to the notice of proposed capital classification received from the Enterprise and must issue a notice of final capital classification for each Enterprise not later than 30 calendar days following the end of the response period.

Appendix A to Subpart A of Part 1750—Minimum Capital Components for Interest Rate and Foreign Exchange Rate Contracts

Calculation of Credit Equivalent Amounts

Appendix A provides that the minimum capital components for interest rate and foreign exchange rate contracts are computed on the basis of the credit equivalent amounts of such contracts. The credit equivalent amount of an off-balance sheet interest rate or foreign exchange rate contract that is not subject to a qualifying bilateral netting contract in accordance with Appendix A is equal to the sum of the current exposure (sometimes referred to as the replacement cost) of the contract and an estimate of the potential future credit exposure over the remaining life of the contract.

The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is the mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. Mark-to-market values are measured in United States dollars, regardless of the currency or currencies specified in the contract, and should reflect changes in the relevant rates as well as counterparty credit quality.

The potential future credit exposure of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal amount of the contract by a credit conversion factor. The effective rather than the apparent or stated notional amount must be used in this calculation. The credit conversion factors for interest rate contracts are 0.0 percent for interest rate contracts with a remaining maturity of 1 year or less; 0.5 percent for interest rate contracts with a remaining maturity of over 1 year; 1.0 percent for foreign exchange rate contracts with a remaining maturity of 1 year or less; and 5.0 percent for foreign exchange rate contracts with a remaining maturity of over 1 year.

Because foreign exchange rate contracts involve an exchange of principal upon maturity, and foreign exchange rates are generally more volatile than interest rates, higher conversion factors have been established for foreign exchange rate contracts than for interest rate contracts.

No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indexes, so-called floating/floating or basis swaps. The credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

Avoidance of Double Counting

Appendix A provides that, in certain cases, credit exposures arising from the interest rate and foreign exchange rate contracts covered by this Appendix A may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy, counterparty credit exposures arising from the types of instruments covered by this Appendix A may need to be excluded from balance sheet assets in calculating the minimum capital requirement.

Collateral

Appendix A provides that the sufficiency of collateral for off-balance sheet items is determined by the market value of the collateral in relation to the credit equivalent amount. Collateral held against a netting contract is not recognized for minimum capital standard purposes unless it is legally available to support the single legal obligation created by the netting contract. Excess collateral held against one contract or a group of contracts for which a recognized netting agreement exists may not be considered.

The only forms of collateral that are formally recognized by the minimum capital standard framework are cash on deposit; securities issued or guaranteed by the central governments of the OECD-based group of countries, United States Government agencies, or United States Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks.

Netting

For purposes of Appendix A, netting refers to the offsetting of positive and negative mark-to-market values in the determination of a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting (that is, netting with a single counterparty) of interest rate and foreign exchange rate contracts is recognized for purposes of calculating the credit equivalent amount if it meets the following requirements. Netting is

accomplished under a written netting contract that creates a single legal obligation, covering all included individual contracts, with the effect that the Enterprise would have a claim to receive, or obligation to pay, only the net amount of the sum of the positive and negative mark-to-market values on included individual contracts in the event that a counterparty, or a counterparty to whom the contract has been validly assigned, fails to perform due to default, insolvency, liquidation, or similar circumstances.

The Enterprise must obtain a written and reasoned legal opinion(s) representing that in the event of a legal challenge—including one resulting from default, insolvency, liquidation, or similar circumstances—the relevant court and administrative authorities would find the Enterprise's exposure to be such a net amount under—

—the law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;
—the law that governs the individual contracts covered by the netting contract; and
—the law that governs the netting contract.

The Enterprise must establish and maintain procedures to ensure that the legal characteristics of netting contracts are kept under review in the event of possible changes in relevant law. Furthermore, the Enterprise must maintain in its files documentation adequate to support the netting of rate contracts, including a copy of the bilateral netting contract and necessary legal opinions.

A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount. A walkaway clause is a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payment at all, to a defaulter or to the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the contract.

By netting individual contracts for the purpose of calculating its credit equivalent amount, the Enterprise represents that it has met the requirements of Appendix A, and that all the appropriate documents are in the Enterprise's files and available for inspection by OFHEO. OFHEO may determine that an Enterprise's files are inadequate or that a netting contract, or any of its underlying individual contracts, may not be legally enforceable under any one of the bodies of law described in Appendix A. If such a determination is made, the netting contract may be disqualified from recognition for minimum capital standard purposes or underlying individual contracts may be treated as though they are not subject to the netting contract.

The credit equivalent amount of interest rate and foreign exchange rate contracts that are subject to a qualifying bilateral netting contract is calculated by adding the current exposure of the netting contract and the sum of the estimates of the potential future credit exposures on all individual contracts subject to the netting contract, estimated in accordance with Appendix A. Offsetting contracts in the same currency maturing on the same date will have lower potential future exposure as well as lower current exposure. Therefore, for purposes of calculating potential future credit exposure to a netting counterparty for foreign exchange rate contracts, and other similar contracts in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts falling due on each value date in each currency.

The current exposure of the netting contract is determined by summing all positive and negative mark-to-market values of the individual contracts included in the netting contract. If the net sum of the mark-to-market values is positive, then the current exposure of the netting contract is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the current exposure of the netting contract is zero. OFHEO may determine that a netting contract qualifies for netting treatment even though certain individual contracts may not qualify. In such instances, the nonqualifying contracts should be treated as individual contracts that are not subject to the netting contract.

In the event a netting contract covers contracts that are normally excluded from the minimum capital requirement computation—for example, foreign exchange rate contracts with an original maturity of 14 calendar days or less, or instruments traded on exchanges that require daily payment of variation margin—an Enterprise may elect consistently either to include or exclude all mark-to-market values of such contracts when determining net current exposure.

As stated in the preamble to the proposed regulation, in developing Appendix A, OFHEO considered provisions of the regulations of the federal banking agencies with respect to the calculation of the credit equivalent amount for interest rate and foreign exchange rate contracts. Subsequent to the publication of the proposed Minimum Capital regulation, the federal banking agencies amended their regulations with respect to interest rate and foreign exchange rate contracts.[34] The amendments increase the number of credit conversion factors that are used to measure the potential future credit exposure of interest rate and foreign exchange rate contracts. They also change the way the potential future credit exposure is calculated when the interest rate and foreign exchange rate contracts are subject to a qualifying bilateral netting agreement, resulting in a reduction in the amount of capital required for the netted interest rate and foreign exchange rate contracts.

OFHEO is analyzing those amendments and considering whether to conform Appendix A to the final regulations of the federal banking agencies. Based on the results of that analysis, OFHEO will publish a proposal, as appropriate.

Regulatory Impact

Executive Order 12606, The Family

This regulation does not have potential for significant impact on family formulation, maintenance, and general well-being, and thus is not subject to review under Executive Order 12606.

Executive Order 12612, Federalism

This regulation has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 12612.

Executive Order 12866, Regulatory Planning and Review

This regulation has been reviewed by the Office of Management and Budget pursuant to Executive Order 12866.

Executive Order 12988, Civil Justice Reform

This proposed regulation meets the applicable standards of sections 3(a) and (b) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

The regulation does not require the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995. Assessment statements are not required for regulations that incorporate requirements specifically set forth in

[34] 60 FR 46170 (Sept. 5, 1995).

law. As explained in the preamble, this regulation implements the minimum capital standard contained in the 1992 Act. In addition, this regulation does not include a federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year.

Regulatory Flexibility Act

This regulation is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act, and does not have a significant effect on a substantial number of small entities. Therefore, the General Counsel of OFHEO has certified that the final regulation will not have significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This regulation contains no information collection requirements that require the approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 12 CFR Part 1750

Banks, banking, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Mortgages, Securities.

Accordingly, for the reasons set forth in the preamble, OFHEO amends Chapter XVII of Title 12 of the Code of Federal Regulations by adding Part 1750 to read as follows:

PART 1750—CAPITAL

Subpart A—Minimum Capital

Sec.
1750.1 General.
1750.2 Definitions.
1750.3 Procedure and timing.
1750.4 Minimum capital requirement computation.
1750.5 Notice of capital classification.

Appendix A to Subpart A of Part 1750—Minimum Capital Components for Interest Rate and Foreign Exchange Rate Contracts

Subpart B—[Reserved]

Authority: 12 U.S.C. 4513, 4514, 4612, 4614, 4618.

Subpart A—Minimum Capital

§ 1750.1 General.

The regulation contained in this subpart A sets forth the methodology for computing the minimum capital requirement for each Enterprise. The board of directors of each Enterprise is responsible for ensuring that the Enterprise maintains capital at a level that is sufficient to ensure the continued financial viability of the Enterprise and that equals or exceeds the minimum capital requirement contained in this subpart A.

§ 1750.2 Definitions.

For purposes of this subpart A, the following definitions shall apply:

Affiliate means any entity that controls, is controlled by, or is under common control with, an Enterprise, except as otherwise provided by the Director.

Commitment means any contractual, legally binding agreement that obligates an Enterprise to purchase or to securitize mortgages.

Core Capital—(1) Means the sum of (as determined in accordance with generally accepted accounting principles)—

(i) The par or stated value of outstanding common stock;

(ii) The par or stated value of outstanding perpetual, noncumulative preferred stock;

(iii) Paid-in capital; and

(iv) Retained earnings; and

(2) Does not include debt instruments or any amounts the Enterprise could be required to pay at the option of an investor to retire capital instruments.

Director means the Director of OFHEO.

Enterprise means the Federal National Mortgage Association and any affiliate thereof or the Federal Home Loan Mortgage Corporation and any affiliate thereof.

Foreign exchange rate contracts—

(1) Means cross-currency interest rate swaps, forward foreign exchange contracts, currency options purchased (including currency options purchased over-the-counter), and any other instrument that gives rise to similar credit risks; and

(2) Does not mean foreign exchange rate contracts with an original maturity of 14 calendar days or less and foreign exchange rate contracts traded on exchanges that require daily payment of variation margins.

Interest rate contracts—

(1) Means single currency interest rate swaps, basis swaps, forward rate agreements, interest rate options purchased (including caps, collars, and floors purchased), over-the-counter options purchased, and any other instrument that gives rise to similar credit risks (including when-issued securities and forward deposits accepted); and

(2) Does not mean such instruments traded on exchanges that require daily payment of variation margins.

Mortgage-backed security means a security, investment, or substantially equivalent instrument that represents an interest in a pool of loans secured by mortgages or deeds of trust where the principal or interest payments to the investor in the security or substantially equivalent instrument are guaranteed or effectively guaranteed by an Enterprise.

Multifamily credit enhancement means any guarantee, pledge, purchase arrangement, or other obligation or commitment provided or entered into by an Enterprise with respect to multifamily mortgages to provide credit enhancement, liquidity, interest rate support, and other guarantees and enhancements for revenue bonds issued by a state or local governmental unit (including a housing finance agency) or other bond issuer.

1992 Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, found at Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102–550, 12 U.S.C. 4501 *et seq.*

Notional amount means the face value of the underlying financial instrument(s) on which an interest rate or foreign exchange rate contract is based.

Off-balance sheet obligation means a binding agreement, contract, or similar arrangement that requires or may require future payment(s) in money or kind by another party to an Enterprise, or that effectively guarantees all or part of such payment(s) to third parties (including commitments), where such agreement or contract is a source of credit risk that is not included on its balance sheet.

OFHEO means the Office of Federal Housing Enterprise Oversight.

Other off-balance sheet obligations means all off-balance sheet obligations of an Enterprise that are not mortgage-backed securities or substantially equivalent instruments and that are not resecuritized mortgage-backed securities, such as real estate mortgage investment conduits or similar resecuritized instruments.

Perpetual, noncumulative preferred stock means preferred stock that—

(1) Does not have a maturity date;

(2) Provides the issuer the ability and the legal right to eliminate dividends and does not permit the accruing or payment of impaired dividends;

(3) Cannot be redeemed at the option of the holder; and

(4) Has no other provisions that will require future redemption of the issue, in whole or in part, or that will reset the dividend periodically based, in whole or in part, on the Enterprise's current credit standing, such as auction rate,

money market, or remarketable preferred stock, or that may cause the dividend to increase to a level that could create an incentive for the issuer to redeem the instrument, such as exploding rate stock.

Qualifying collateral means cash on deposit; securities issued or guaranteed by the central governments of the OECD-based group of countries,[1] United States Government agencies, or United States Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks.

§ 1750.3 Procedure and timing.

(a) Each Enterprise shall file with the Director a minimum capital report each quarter or at such other times as the Director requires, in his or her sole discretion. The report shall contain the information that responds to all of the items required by OFHEO in written instructions to the Enterprise, including, but not limited to:

(1) Estimate of the minimum capital requirement;

(2) Estimate of core capital overage or shortfall relative to the estimated minimum capital requirement;

(3) Such other information as may be required by the Director.

(b) The quarterly minimum capital report shall be submitted not later than April 30, July 30, October 30, and January 30 of each year.

(c) Each minimum capital report shall be submitted in writing and in such other format as may be required by the Director.

(d) In the event an Enterprise makes an adjustment to its financial statements for a quarter or a date for which the information was requested, which would cause an adjustment to a minimum capital report, the Enterprise shall file with the Director an amended minimum capital report not later than 3 business days after the date of such adjustment.

(e) Each minimum capital report or any amended minimum capital report shall contain a declaration by an officer authorized by the board of directors of the Enterprise to make such a declaration, including, but not limited to a president, vice president, or treasurer, that the report is true and correct to the best of such officer's knowledge and belief.

§ 1750.4 Minimum capital requirement computation.

(a) The minimum capital requirement for each Enterprise shall be computed by adding the following amounts:

(1) 2.50 percent times the aggregate on-balance sheet assets of the Enterprise;

(2) 0.45 percent times the unpaid principal balance of mortgage-backed securities and substantially equivalent instruments that were issued or guaranteed by the Enterprise;

(3) 0.45 percent of 50 percent of the average dollar amount of commitments outstanding each quarter over the preceding four quarters;

(4) 0.45 percent of the outstanding principal amount of bonds with multifamily credit enhancements;

(5) 0.45 percent of the dollar amount of sold portfolio remittances pending;

(6)(i) 3.00 percent of the credit equivalent amount of interest rate contracts and foreign exchange rate contracts, except to the extent of the current market value of posted qualifying collateral, computed in accordance with appendix A to this subpart;

(ii) 1.50 percent of the market value of qualifying collateral posted to secure interest rate and foreign exchange rate contracts, not to exceed the credit equivalent amount of such contracts, computed in accordance with appendix A to this subpart; and

(7) 0.45 percent of the outstanding amount, credit equivalent amount, or other measure determined appropriate by the Director, of other off-balance sheet obligations (excluding commitments, multifamily credit enhancements, sold portfolio remittances pending, and interest rate contracts and foreign exchange rate contracts), except as adjusted by the Director to reflect differences in the credit risk of such obligations in relation to mortgage-backed securities.

(b) Any asset or financial obligation that is properly classifiable in more than one of the categories enumerated in paragraphs (a) (1) through (7) of this section shall be classified in the category that yields the highest minimum capital requirement.

(c) As used in this section, the term ''preceding four quarters'' means the last day of the quarter just ended (or the date for which the minimum capital report is filed, if different), and the three preceding quarter-ends.

§ 1750.5 Notice of capital classification.

(a) Pursuant to section 1364 of the 1992 Act (12 U.S.C. 4614), OFHEO is required to determine the capital classification of each Enterprise on a not less than quarterly basis.

(b) The determination of the capital classification shall be made following a notice to, and opportunity to respond by, the Enterprise.

(1) Not later than 60 calendar days after the date for which the minimum capital report is filed, OFHEO will provide each Enterprise with a notice of proposed capital classification in accordance with section 1368 of the 1992 Act (12 U.S.C. 4618). The notice shall contain the following information—

(i) The proposed capital classification;

(ii) The proposed minimum capital requirement; and

(iii) The summary computation of the proposed minimum capital requirement.

(2) Each Enterprise shall have a period of 30 calendar days following receipt of a notice of proposed capital classification to submit a response regarding the proposed capital classification. The response period may be extended for up to 30 additional calendar days at the sole discretion of the Director. The Director may shorten the response period with the consent of the Enterprise, or without such consent if the Director determines that the condition of the Enterprise requires a shorter period.

(3) The Director shall take into consideration any response to the notice of proposed capital classification received from the Enterprise and shall issue a notice of final capital classification for each Enterprise not later than 30 calendar days following the end of the response period in accordance with section 1368 of the 1992 Act (12 U.S.C. 4618).

Appendix A to Subpart A of Part 1750—Minimum Capital Components for Interest Rate and Foreign Exchange Rate Contracts

1. The minimum capital components for interest rate and foreign exchange rate contracts are computed on the basis of the credit equivalent amounts of such contracts. Credit equivalent amounts are computed for each of the following off-balance sheet

[1] The OECD-based group of countries comprises full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow, but excludes any country that has rescheduled its external sovereign debt within the previous 5 years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's mobility or unwillingness to meet its external debt service obligations, but generally not include any renegotiation to allow the borrower to take advantage of a decline in interest rate or other change in market conditions. As of November 1995, the OECD countries included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; and Saudi Arabia has concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow.

interest rate and foreign exchange rate contracts:

a. Interest Rate Contracts

i. Single currency interest rate swaps.
ii. Basis swaps.
iii. Forward rate agreements.
iv. Interest rate options purchased (including caps, collars, and floors purchased).
v. Any other instrument that gives rise to similar credit risks (including when-issued securities and forward deposits accepted).

b. Foreign Exchange Rate Contracts

i. Cross-currency interest rate swaps.
ii. Forward foreign exchange rate contracts.
iii. Currency options purchased.
iv. Any other instrument that gives rise to similar credit risks.

2. Foreign exchange rate contracts with an original maturity of 14 calendar days or less and foreign exchange rate contracts traded on exchanges that require daily payment of variation margins are excluded from the minimum capital requirement computation. Over-the-counter options purchased, however, are included and treated in the same way as the other interest rate and foreign exchange rate contracts.

3. Calculation of Credit Equivalent Amounts

a. The minimum capital components for interest rate and foreign exchange rate contracts are computed on the basis of the credit equivalent amounts of such contracts. The credit equivalent amount of an off-balance sheet interest rate and foreign exchange rate contract that is not subject to a qualifying bilateral netting contract in accordance with this appendix A is equal to the sum of the current exposure (sometimes referred to as the replacement cost) of the contract and an estimate of the potential future credit exposure over the remaining life of the contract.

b. The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is the mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. Mark-to-market values are measured in United States dollars, regardless of the currency or currencies specified in the contract, and should reflect changes in the relevant rates, as well as counterparty credit quality.

c. The potential future credit exposure of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal amount of the contract by a credit conversion factor. The effective rather than the apparent or stated notional amount must be used in this calculation. The credit conversion factors are:

Remaining maturity	Interest rate contracts (percent)	Foreign exchange rate contracts (percent)
1 year or less	0.0	1.0
Over 1 year	0.5	5.0

d. Because foreign exchange rate contracts involve an exchange of principal upon maturity, and foreign exchange rates are generally more volatile than interest rates, higher conversion factors have been established for foreign exchange rate contracts than for interest rate contracts.

e. No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indexes, so-called floating/floating or basis swaps. The credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

4. Avoidance of Double Counting

In certain cases, credit exposures arising from the interest rate and foreign exchange instruments covered by this appendix A may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy, counterparty credit exposures arising from the types of instruments covered by this appendix A may need to be excluded from balance sheet assets in calculating the minimum capital requirement.

5. Collateral

a. The sufficiency of collateral for off-balance sheet items is determined by the market value of the collateral in relation to the credit equivalent amount. Collateral held against a netting contract is not recognized for minimum capital standard purposes unless it is legally available to support the single legal obligation created by the netting contract. Excess collateral held against one contract or a group of contracts for which a recognized netting agreement exists may not be considered.

b. The only forms of collateral that are formally recognized by the minimum capital standard framework are cash on deposit; securities issued or guaranteed by the central governments of the OECD-based group of countries, United States Government agencies, or United States Government-sponsored agencies; and securities issued by multilateral lending institutions or regional development banks.

6. Netting

a. For purposes of this appendix A, netting refers to the offsetting of positive and negative mark-to-market values in the determination of a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting (that is, netting with a single counterparty) of interest rate and foreign exchange rate contracts is recognized for purposes of calculating the credit equivalent amount provided that the following criteria are met:

i. Netting must be accomplished under a written netting contract that creates a single legal obligation, covering all included individual contracts, with the effect that the Enterprise would have a claim to receive, or obligation to pay, only the net amount of the sum of the positive and negative mark-to-market values on included individual contracts in the event that a counterparty, or a counterparty to whom the contract has been validly assigned, fails to perform due to default, insolvency, liquidation, or similar circumstances.

ii. The Enterprise must obtain a written and reasoned legal opinion(s) representing that in the event of a legal challenge—including one resulting from default, insolvency, liquidation, or similar circumstances—the relevant court and administrative authorities would find the Enterprise's exposure to be such a net amount under—

A. The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

B. The law that governs the individual contracts covered by the netting contract; and

C. The law that governs the netting contract.

iii. The Enterprise must establish and maintain procedures to ensure that the legal characteristics of netting contracts are kept under review in the event of possible changes in relevant law.

iv. The Enterprise must maintain in its files documentation adequate to support the netting of rate contracts, including a copy of the bilateral netting contract and necessary legal opinions.

b. A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount.[1]

c. By netting individual contracts for the purpose of calculating its credit equivalent amount, the Enterprise represents that it has met the requirements of this appendix A and all the appropriate documents are in the Enterprise's files and available for inspection by OFHEO. OFHEO may determine that an Enterprise's files are inadequate or that a netting contract, or any of its underlying individual contracts, may not be legally enforceable under any one of the bodies of law described in this appendix A. If such a determination is made, the netting contract may be disqualified from recognition for minimum capital standard purposes or underlying individual contracts may be treated as though they are not subject to the netting contract.

d. The credit equivalent amount of interest rate and foreign exchange rate contracts that are subject to a qualifying bilateral netting contract is calculated by adding the current exposure of the netting contract and the sum of the estimates of the potential future credit exposures on all individual contracts subject to the netting contract, estimated in accordance with paragraph 3 of this appendix A. Offsetting contracts in the same currency maturing on the same date will have lower potential future exposure as well as lower current exposure. Therefore, for purposes of calculating potential future credit exposure to a netting counterparty for foreign exchange rate contracts and other similar contracts in which notional principal

[1] A walkaway clause is a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payment at all, to a defaulter or to the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the contract.

is equivalent to cash flows, total notional principal is defined as the net receipts falling due on each value date in each currency.

e. The current exposure of the netting contract is determined by summing all positive and negative mark-to-market values of the individual contracts included in the netting contract. If the net sum of the mark-to-market values is positive, then the current exposure of the netting contract is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the current exposure of the netting contract is zero. OFHEO may determine that a netting contract qualifies for minimum capital standard netting treatment even though certain individual contracts may not qualify. In such instances, the nonqualifying contracts should be treated as individual contracts that are not subject to the netting contract.

f. In the event a netting contract covers contracts that are normally excluded from the minimum capital requirement computation—for example, foreign exchange rate contracts with an original maturity of 14 calendar days or less, or instruments traded on exchanges that require daily payment of variation margin—an Enterprise may elect consistently either to include or exclude all mark-to-market values of such contracts when determining net current exposure.

Subpart B—[Reserved]

Aida Alvarez,

Director, Office of Federal Housing Enterprise Oversight.

[FR Doc. 96–17120 Filed 7–5–96; 8:45 am]

BILLING CODE 4220–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Airspace Docket No. 96–AWP–12]

Change Time of Designation for Restricted Area R–3107, Kaula Rock; HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action reduces the time of designation for Restricted Area 3107 (R–3107), Kaula Rock, HI, to accurately reflect actual times of use. This administrative change, initiated by the U.S. Navy, will not affect the boundaries, designated altitudes, or activities conducted within the restricted area.

EFFECTIVE DATE: 0901 UTC, October 10, 1996.

FOR FURTHER INFORMATION CONTACT: Steve Brown, Airspace and Rules Division, ATA–400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations reduces the time of designation for R–3107, Kaula Rock, HI, to accurately reflect actual times of use. This administrative change, initiated by the U.S. Navy, will not affect the boundaries, designated altitudes, or activities conducted within the restricted area. Therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor technical amendment in which the public would not be particularly interested. Section 73.31 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8C dated June 29, 1995.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This action reduces the restricted area's time of designation. In accordance with FAA Order 1050.1D, ''Policies and Procedures for Considering Environmental Impacts,'' this action is not subject to environmental assessments and procedures and the National Environmental Policy Act.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 73.31 [Amended]

2. Section 73.31 is amended as follows:

R–3107 Kaula Rock, HI. [Amended]

By removing the current time of designation and substituting the following:

Time of designation. 0700–2200 local time Monday-Friday; 0800–1600 local time Saturday-Sunday; other times by NOTAM issued at least 24 hours in advance.

Issued in Washington, DC, on June 28, 1996.

Nancy B. Kalinowski,

Acting Program Director for Air Traffic Airspace Management.

[FR Doc. 96–17231 Filed 7–5–96; 8:45 am]

BILLING CODE 4910–13–P

14 CFR Part 97

[Docket No. 28615; Amdt. No. 1739]

RIN 2120–AA65

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference-approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:.

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800