FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1260

RIN 2590–AA35

Information Sharing Among Federal Home Loan Banks

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: Section 1207 of the Housing and Economic Recovery Act of 2008 (HERA) amended the Federal Home Loan Bank Act (Bank Act) to require the Federal Housing Finance Agency (FHFA) to make available to each Federal Home Loan Bank (Bank) information relating to the financial condition of all other Banks. Section 1207 also requires FHFA to promulgate regulations to facilitate the sharing of such information among the Banks. FHFA published a proposed rule to implement those HERA provisions in late 2010, but, after reviewing the comments and reconsidering the proposed means of information sharing, FHFA has determined that a number of material changes to the rule are necessary. Therefore, it is publishing this second proposed rule to implement the provisions of section 1207.

DATES: Written comments must be received on or before April 1, 2013.

ADDRESSES: You may submit your comments, identified by regulatory information number (RIN) 2590–AA35, by any of the following methods:

- *Email:* Comments to Alfred M. Pollard, General Counsel may be sent by email to *RegComments@fhfa.gov.* Please include ''RIN 2590–AA35'' in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include ''RIN 2590–AA35'' in the subject line of the message.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA35, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA35, Federal Housing Finance Agency, Eighth Floor, 400 7th Street SW., Washington, DC 20024. The package should be logged at the FHFA Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Eric M. Raudenbush, Assistant General Counsel, Office of General Counsel, *Eric.Raudenbush@fhfa.gov,* (202) 649–3084 (this is not a toll-free number); or Amy Bogdon, Associate Director for Regulatory Policy and Programs, Office of Program Support, Division of Bank Regulation, *Amy.Bogdon@fhfa.gov,* (202) 649–3320 (this is not a toll-free number), Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing the final rule. All comments received will be posted without change on the FHFA web site at *http://www.fhfa.gov,* and will include any personal information provided, such as name, address (mailing and email), and telephone numbers. In addition, copies of all comments received will be available without change for public inspection on business days between the hours of 10:00 a.m. and 3:00 p.m., at the Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

II. Background

A. The Federal Home Loan Bank System

The Federal Home Loan Bank System (Bank System) consists of twelve Banks and the Office of Finance (OF). The Banks are wholesale financial institutions organized under the Bank Act.[1] The Banks are cooperatives; only members of a Bank may purchase its capital stock, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.[2] Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions.[3] Any eligible institution (generally a federally insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.[4]

B. Banks' Joint and Several Liability and Disclosure Requirements on COs

The Banks fund their operations principally through the issuance of consolidated obligations (COs), which are debt instruments issued on behalf of the Banks by the OF, a joint office of the Banks, pursuant to section 11 of the Bank Act,[5] and part 1270 of the regulations of FHFA.[6] Under these regulations, the COs may be issued only through OF as agent for the Banks, and the Banks are jointly and severally liable for the timely payment of principal and interest on all COs when due.[7] Accordingly, even when COs are issued with one Bank being the primary obligor, the ultimate liability for the timely payment of principal and interest thereon remains with all of the Banks collectively, which creates a need for each Bank to be able to assess the financial condition of the other Banks.

Although the COs themselves are not registered securities under the federal securities laws, the Federal Housing Finance Board (Finance Board)[8] adopted regulations in 2004 requiring each Bank to register a class of its common stock (which is issued only to its member institutions) with the Securities and Exchange Commission (SEC) under section 12(g) of the Securities Exchange Act of 1934 (1934 Act).[9] Each Bank subsequently registered a class of its common stock with the SEC in compliance with that regulation. Separately, HERA included a provision requiring the Banks to register their common stock under section 12(g) of the 1934 Act, and to maintain that registration.[10] Accordingly, each Bank remains subject to the periodic disclosure requirements established

[1] *See* 12 U.S.C. 1423, 1432(a).

[2] *See* 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

[3] *See* 12 U.S.C. 1427.

[4] *See* 12 U.S.C. 1424; 12 CFR part 1263.

[5] 12 U.S.C. 1431.

[6] 12 CFR part 1270.

[7] *See* 12 CFR 1270.4(a), 1270.10(a).

[8] The Federal Housing Finance Board was the regulator of the Bank System from 1989 through 2008. HERA, which abolished the Finance Board and established FHFA, provides that all regulations of the Finance Board shall remain in effect and shall be enforceable by the Director of FHFA until modified, terminated, set aside or superseded by the Director. *See* Public Law 110–289, § 1312, 122 Stat. 2798 (2008).

[9] 15 U.S.C. 78*l*(g). *See* 69 FR 38811 (June 29, 2004), *codified at* 12 CFR part 998.

[10] *See* 15 U.S.C. 78oo(b).

under the 1934 Act, as interpreted and administered by the SEC.

C. New Statutory Provision Requiring the Sharing of Bank Information

Section 1207 of HERA added a new section 20A to the Bank Act that requires FHFA to make available to each Bank such reports, records, or other information as may be available, relating to the condition of any other Bank in order to enable each Bank to evaluate the financial condition of the other Banks and the Bank System as a whole.[11] The underlying objective for that requirement is to better enable each Bank to assess the likelihood that it may be required to make payments on behalf of another Bank under its joint and several liability on the COs, as well as to comply with disclosure obligations under the 1934 Act regarding its potential joint and several liability.[12] Section 20A further requires FHFA to promulgate regulations to facilitate the sharing of such financial information among the Banks.[13] Section 20A permits a Bank to request that FHFA determine that particular information that may otherwise be made available is ''proprietary'' (a term that is not defined in the Bank Act) and that the public interest requires that such information not be shared.[14] Finally, section 20A provides that it does not affect the obligations of the Banks under the 1934 Act and related regulations of the SEC, and that the sharing of Bank information thereunder shall not cause FHFA to waive any privilege applicable to the shared information.[15]

D. The First Proposed Rule

On September 30, 2010, FHFA published in the **Federal Register** a proposed rule to implement section 20A of the Bank Act by adding to FHFA's regulations a new part 1260 to govern the sharing of information among the Banks and the OF. Under the proposed rule, FHFA also proposed to move to new part 1260, without substantive change, existing regulations of the Finance Board relating to the filing of regulatory reports by the Banks. The 60-day comment period closed on November 29, 2010.[16]

Under the first proposed rule, FHFA would have routinely distributed each Bank's report of examination (or such portions thereof deemed appropriate by FHFA), as well as any other supervisory report that FHFA presented to a Bank's board of directors, to each of the other Banks and the OF. This distribution would have occurred after affording the subject Bank a ten business day period following the presentation of the report to the Bank's board of directors within which to request that particular information contained in the report be withheld from distribution on the basis that it is proprietary and the public interest requires that it not be shared. The proposed rule would have provided that any sharing of information thereunder would not constitute a waiver by FHFA of any privileges with respect to the shared information and that, to the extent that the shared information qualified as ''unpublished information'' under part 911 of the regulations of the Finance Board, it would continue to qualify as such and would continue to be subject to the restrictions on disclosure set forth in part 911.[17]

FHFA received ten comment letters in response to the first proposed rule, all of which were sent by representatives of individual Banks—specifically, the Atlanta, Chicago, Dallas, Des Moines, Indianapolis, New York, Pittsburgh, San Francisco, Seattle, and Topeka Banks. Seven of the commenters expressed general support for the rule, although several of those expressed concerns about possible disclosure of sensitive or confidential information that may be contained in Banks' reports of examination and several provided a number of recommendations regarding other changes and clarifications to be made in the final rule. The three remaining commenters expressed general opposition to the first proposed rule as written because they believed that the types of information proposed to be distributed thereunder—*i.e.,* the Banks' reports of examination and other supervisory reports presented to a Bank's board of directors—would not serve the purposes underlying section 20A of the Bank Act. These commenters suggested alternative categories of financial information to be disseminated by FHFA (which are discussed in more detail below) that they asserted would better fulfill the intent behind section 20A, but did not otherwise comment on specific aspects of the first proposed rule.

III. The Second Proposed Rule

Following the close of the comment period on the first proposed rule, FHFA reviewed all of the comments received and also analyzed more closely a number of issues underlying the rule, including the scope of information to be shared and how that scope might evolve over time. As a result of this analysis, FHFA concluded that the scope of information to be shared under the rule should be broader than that contemplated in the first proposed rule and that, because of frequent changes in the content and format of reports, analyses and databases that FHFA might distribute or make available under the rule, the precise items to be shared should be established by order of the Director of FHFA or his designee, as opposed to being enshrined in the rule text. The agency believes that these changes represent a significant enough departure from the approach taken in the first proposed rule to warrant the publication of this second proposed rule, which supersedes the first proposed rule.

Under the new approach, the regulatory text of the proposed rule continues to address the procedures through which the information sharing is to be carried out and to set forth requirements intended to prevent or limit the disclosure of shared information to outside parties. With respect to the latter issue, FHFA has made a number of additions and changes in response to comments received. Specific comments, FHFA's responses, and differences between the first and second proposed rules are described in greater detail below in the sections describing the relevant rule provisions. In addition, the specific items that FHFA expects to distribute pursuant to the initial order issued by the Director or his designee under the rule are also discussed in detail.

In addition to a number of substantive differences, this second proposed rule is also organized somewhat differently than the first proposal. Under the first proposed rule, the material currently contained in section 914.2 of the regulations of the Finance Board (which requires each Bank to file regulatory reports as required by its regulator), as well as related definitions set forth in section 914.1, would have been transferred to new part 1260 without substantive change.[18] FHFA is no longer proposing to transfer this material to part 1260 because the agency now contemplates that it will separately adopt an equivalent regulatory provision that would be applicable to all of its regulated entities.[19] Because part 1260 (and subchapter D of chapter XII, of which it is a part) is intended to

[11] *See* 12 U.S.C. 1440a.

[12] *See* 12 U.S.C. 1440a(a).

[13] *See* 12 U.S.C. 1440a(b)(1).

[14] *See* 12 U.S.C. 1440a(b)(2).

[15] *See* 12 U.S.C. 1440a(c), (d).

[16] *See* 75 FR 60347 (Sept. 30, 2010).

[17] *See* 12 CFR part 911.

[18] *See* 12 CFR part 914.

[19] In addition to the Banks, FHFA is also the regulator of Fannie Mae and Freddie Mac. *See* 12 U.S.C. 4502(20), 4511.

apply only to the Banks, the agency determined that it is not an appropriate location for that new provision. Also, in the first proposed rule, all of the new material governing the sharing of information among Banks (other than definitions) was contained in a single CFR section. In this second proposed rule, that substantive material has been broken into four separate CFR sections in order to provide greater clarity.

A. Section 1260.1—Definitions

As in the first proposed rule, § 1260.1 of this proposed rule sets forth definitions of terms to be used in part 1260. Because the material that would have been transferred from part 914 of the Finance Board's regulations under the first proposed rule is not included in this proposed rule, the defined terms relating to that material have been removed from proposed § 1260.1. In addition, definitions of the short forms ''Bank'' (for a Federal Home Loan Bank), ''Bank Act'' (for the Federal Home Loan Bank Act), and FHFA (for the Federal Housing Finance Agency) have been removed because those terms are now defined in 12 CFR 1201.1, which sets forth definitions of basic terms that are used throughout FHFA's regulations.[20] Section 1201.1 also defines the terms ''SEC'' (meaning the United States Securities and Exchange Commission) and ''1934 Act'' (meaning the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*)), which are used in this proposed rule, but which were not used in the first proposed rule.

In this second proposed rule, FHFA has added definitions for the terms ''proprietary information'' (which is discussed below) and ''unpublished information'' (cross-referencing the definition for that term set forth in 12 CFR 911.1). None of the commenters addressed the definitions set forth in the first proposed rule.

B. Section 1260.2—Sharing of Information Among the Banks

Reasoning Behind Revised Approach

Section 1260.3(a) of the first proposed rule would have required that FHFA periodically distribute to each Bank and to the OF the final reports of examination (or such portions thereof that FHFA deemed appropriate) of all other Banks, as well as any other supervisory reports that FHFA presented to the board of directors of a Bank, subject to the requirements set forth in the remainder of the rule. In the first proposed rule, the agency also requested comments on whether the rule should allow the Director or his designee to expand the categories of information to be distributed thereunder by means of an order or other agency action without the need for subsequent amendment of the rule.

Seven commenters expressly supported the sharing of final reports of examination for each Bank, and six also expressly supported the sharing of other supervisory reports presented to a Bank's board of directors by FHFA. Five commenters expressly supported the exclusion of findings and conclusions memoranda, work programs and other supervisory materials not presented to a Bank's board of directors from the information sharing required under the rule, while no commenters favored sharing these types of materials. Several of the commenters who generally supported the sharing of final supervisory reports requested that FHFA also distribute any response from a Bank's management to a report of examination, stating that this would provide insight into how other Banks address the issues raised. All of the commenters who supported the sharing of final reports of examination also expressed concern about the possible disclosure of sensitive or confidential information that may be contained in the reports and offered a number of suggestions about how such disclosure could be prevented. As discussed further below, three of the commenters generally opposed the sharing of final reports of examination because they believed the reports would be of questionable usefulness in assessing a Bank's current and future ability to make payments on its COs.

As stated in the **SUPPLEMENTARY INFORMATION** to the first proposed rule, each Bank already has access to a significant amount of information about the financial condition of the other Banks, including reports filed with the SEC under the 1934 Act, call reports filed with FHFA, quarterly certifications filed with FHFA attesting to each Bank's ability to make full and timely payments on its current obligations during the next quarter, FHFA's Annual Report to Congress (required under 12 U.S.C. 4521(a)), and various other reports and summaries prepared by FHFA. FHFA approached the first proposed rule principally as a means of providing for the distribution of additional types of Bank information above and beyond the substantial amount of information to which the Banks already have access. As reflected in the first proposed rule, the agency believed that, given the volume of information that is already available to the Banks, the most useful source of additional information would be the Banks' reports of examination. Thus, the first proposed rule focused upon providing each Bank's full report of examination to all of the other Banks, with appropriate redactions for proprietary information meeting the criteria stated in section 20A of the Bank Act.

In the process of developing a final rule, FHFA reconsidered both the procedural and substantive aspects of the first proposed rule and, based on both comments received and on internal discussions, ultimately concluded that two major changes were warranted that would improve on the substance of the first proposed rule. First, FHFA concluded that the specific categories of information to be distributed under the regulation should not be identified in the rule itself, but by means of a Director's order. Second, FHFA concluded that such an order should address not only new categories of information to be shared, but also the many types of Bank-related financial data and reports that FHFA already distributes, or makes available, to the Banks. Accordingly, § 1260.2 of this proposed rule provides that the specific categories of information to be distributed to the Banks and the OF would be established by means of an order issued by the Director of FHFA or by a senior agency official designated by the Director pursuant to an appropriate delegation of authority. In keeping with the apparent intent behind section 20A of the Bank Act, the categories of information that could be included in such an order would be limited to financial and supervisory information regarding the Banks, either individually or collectively.

FHFA believes that, on balance, this approach will better fulfill the purposes of section 20A by allowing the scope of information shared to evolve more readily to meet the information needs of the Banks. Depending on the types of financial and supervisory issues that the Bank System may be facing at any given time, FHFA may occasionally prepare a single report on a specific topic, or may prepare a particular report for a limited period of time and then, for various reasons, either discontinue the report or combine it with another report. Even reports that are prepared regularly over an extended period of time often evolve in terms of format, content or title—again, sometimes in response to the changing issues that the Bank System may be facing, or sometimes merely to make them more useful for the purposes for which they were intended. This flexible approach to the preparation and

[20] *See* 78 Fed. Reg. 2319 (Jan. 11, 2013). New § 1201.1 and related revisions to FHFA's regulations and those of the Finance Board become effective on February 11, 2013.

distribution of Bank information has worked well to this point, and FHFA believes that it would be appropriate to incorporate that approach into this proposed information sharing regulation, rather than to continue with the original approach of specifying the items of shared information in the regulatory text. FHFA believes that to impose upon itself the obligation to undertake a full notice-and-comment rulemaking every time it seeks to alter the format or content of a report, or determine that it is appropriate to share a new category of information, would undermine its ability to provide the Banks with the type of appropriate and timely financial information that section 20A requires to be shared.

In the **SUPPLEMENTARY INFORMATION** to the first proposed rule, FHFA requested comment on whether the final rule should allow FHFA to expand the categories of information to be disseminated to the Banks without undertaking a subsequent rulemaking. Three commenters expressly supported allowing FHFA to expand the categories of information to be shared without a rulemaking, as long as the Banks are given a reasonable opportunity for informal review and comment on any changes in advance. No commenters objected to including such a provision.

FHFA recognizes that there are advantages to allowing the Banks an informal opportunity to provide input on the types of information that would be most useful to them and also on the types of information that they believe should not be disclosed to other Banks. To this end, § 1260.2 of this proposed rule would require that FHFA provide the Banks with reasonable notice and an opportunity to comment before issuing an order that would establish or amend the scope of information to be shared under the rule. The inclusion of this provision will allow FHFA, in consultation with the Banks, to make appropriate adjustments to the scope of information being shared as both gain more experience in the process, without the necessity of revising the rule. Thus, if it becomes apparent over time that it is appropriate to distribute a wider range of information, this can be accomplished by means of a written order issued under § 1260.2.

In order to provide the Banks and the OF, as well as other interested parties, the fullest opportunity to consider and comment upon the range of information that FHFA expects to include in the initial order issued under a final information sharing rule, these items are set out and discussed below. Similarly, the agency intends to publish the final rule and the initial distribution order concurrently so as to provide the greatest possible clarity regarding the scope and effect of the final rule. If the list of information to be shared under the distribution order that is published with the final rule is substantially identical to that described in this Supplementary Information, no further opportunity to comment on the contents of the order will be provided to the Banks—*i.e.,* FHFA will consider the notice and opportunity to comment provided by this proposed rule to have fulfilled the requirements of § 1260.2. However, if the list of information to be shared under that order differs materially from that described in this Supplementary Information, a further opportunity to comment will be provided to the Banks in accordance with the provisions of the rule. To be clear, proposed § 1260.2 would not require this type of formal notice-and-comment process when a distribution order is issued or amended; and if that provision is adopted substantially as proposed, the agency anticipates that it would typically use a less formal notice-and-comment process when it issues or amends a distribution order.

Anticipated Scope of Information Sharing Under Initial Distribution Order

As mentioned, FHFA already provides each Bank with a substantial amount of financial information about the other Banks—both in the form of raw data and in the form of analytical reports based on raw data. FHFA believes that, for the sake of clarity and efficiency, as well as to be consistent with the HERA mandate for information sharing, those existing distributions of information should also be governed by the procedures and requirements that would be established under a final information sharing rule. Thus, the agency expects that the initial distribution order issued under the rule would bring within the purview of the rule the following categories of information that are currently made available to the Banks: (1) Information uploaded by each Bank to FHFA's call report system (CRS) electronic database (excluding Bank membership information)[21]; (2) information about the Banks that is presented in FHFA's semi-annual ''Profile of the Federal Home Loan Bank System'' report prepared by FHFA's Division of Bank Regulation (DBR)[22]; (3) information relating to the weekly report on Bank liquidity prepared by DBR; and (4) information relating to the quarterly report on Bank membership prepared by DBR. In addition, FHFA anticipates that the initial order would also provide for the distribution of three new categories of information: (1) The ''Summary and Conclusions'' portion of each Bank's report of examination; (2) a quarterly statement, to be prepared by FHFA, indicating whether each Bank has timely filed with FHFA the quarterly liquidity certification required pursuant to 12 CFR 1270.10(b)(1); and (3) a statement, to be prepared by FHFA as circumstances warrant, identifying any Bank that has notified FHFA pursuant to 12 CFR 1270.10(b)(2) of any actual or anticipated liquidity problems and describing the nature of the liquidity problems. Each of these new categories of information is described below.

Banks' Reports of Examination

The first proposed rule contemplated that FHFA would routinely distribute each Bank's report of examination in its entirety, subject to the proviso that FHFA reserved the right to narrow the distribution to those portions of the report that FHFA deemed appropriate. FHFA carefully considered comments received, as well as the requirements of section 20A of the Bank Act, and the agency's statutory responsibilities as regulator and supervisor of the Bank System and has decided that a narrower approach to the sharing of the reports of examination would be more appropriate. The reason for this modified approach is to ensure that each Bank receives the information necessary to assess the condition of the other Banks and to make legal disclosures regarding its potential joint and several liability without damaging the integrity of the Bank examination process. Candid communication—both by Bank employees and by FHFA examiners—is a critical element of the examination process. The agency has reconsidered whether the distribution of full final reports of examination, as provided in the first proposed rule, might inhibit candid communications between Bank employees and FHFA examiners, thereby compromising the Bank examination process and

[21] Banks currently are not permitted to access detailed information about other Banks' members that is contained in the CRS database because FHFA considers this to be proprietary information. FHFA does not intend to share this information under the initial distribution order to be issued under a final rule.

[22] DBR also prepares more detailed semi-annual profiles of the individual Banks which currently are shared only with the subject Bank and not with other Banks or the OF. Because these individual Bank profiles often contain proprietary information regarding a Bank's members, as well as assessments based upon detailed information from the Bank's report of examination, FHFA does not intend to share this information under the initial distribution order to be issued under a final rule.

undermining FHFA's ability to carry out its supervisory responsibilities. These concerns regarding the examination process were reflected indirectly in § 1260.3(a) of the first proposed rule, under which FHFA would have reserved the authority to distribute only ''such portions'' of the reports of examination that the agency ''deem[ed] appropriate.'' Despite the fact that the first proposed rule would have allowed FHFA to redact certain portions of a report of examination, the agency now believes that it is preferable to take a more explicit and standardized approach to identifying the portions of the report of examination that will be provided to the other Banks and the OF.

Accordingly, FHFA expects that, under the initial distribution order, it would routinely distribute to the Banks and the OF the material that is currently contained in the ''Summary and Conclusions'' portion of each Bank's final annual report of examination. With respect to the timing of these distributions, FHFA anticipates that the initial order will reflect the approach from the first proposed rule, which is that each distribution would be made soon after FHFA has presented the final report to the subject Bank's board of directors. The Federal Home Loan Bank Examination Manual issued by FHFA requires that the Summary and Conclusions section contain an evaluation of the overall condition and practices of the Bank, as well as a table that depicts the date and examination ratings (both composite and component ratings) for the current examination and the previous examination.[23] This must be followed by a concise discussion of the composite rating which addresses any component that is a significant factor in the composite rating or has changed since the previous examination. Thus, the agency anticipates that the order would provide for the distribution of those portions of each Bank's exam report that set forth: (i) The Bank's composite rating and component ratings for the current and prior examination; (ii) a summary of the basis for the current composite rating (including any component that is a significant factor in the composite rating) and any changes to the composite or component ratings since the last examination; and (iii) the conclusion regarding the overall condition and practices of the Bank and the analysis used to reach that conclusion. FHFA would not distribute the portions of any report of examination in which the component examination ratings are discussed or analyzed in detail or in which the ''matters requiring attention'' of the Bank's board of directors are enumerated or discussed.[24]

Under the initial order, FHFA would not distribute any other supervisory reports that it may present to the board of directors of a Bank, as would have been the case under the first proposed rule. In addition, FHFA does not anticipate providing in the initial order for the sharing of Bank managements' responses to reports of examination, as suggested by one commenter. FHFA examiners discuss findings with Bank management prior to the preparation of a final report of examination, which discussions provide examiners with insights into the opinions and reactions of Bank management. FHFA believes that disclosure of such communications between management and the examination team is not essential to understanding the financial condition of the Bank, and could hamper the open and honest communication that is required to carry out the examination process effectively.

Banks' Quarterly Liquidity Certifications and Related Liquidity Notices

As mentioned above, three commenters generally opposed the sharing of final reports of examination and other supervisory reports presented by FHFA to a Bank's board of directors. All three of these viewed the purpose behind section 20A of the Bank Act as being limited strictly to providing each Bank with sufficient information to evaluate the financial condition of the other Banks in order to assess the likelihood that it may be called upon to make payments on another Bank's COs under the joint and several liability provisions of the Bank Act. None of these commenters believed that the sharing of final supervisory reports would be an effective method of achieving this goal because they argued that these reports address topics that are not necessarily related to a Bank's financial condition and are not designed to provide real-time financial information that would aid in evaluating joint and several liability. All three of these commenters advocated that FHFA include in its final rule an alternative provision requiring FHFA to confirm to all of the Banks, on a quarterly basis, that each of the other Banks has submitted a certification that it remains capable of making full and timely payment of all of its current obligations coming due during the next quarter, as required under § 1270.10(b)(1) of FHFA's regulations.[25] In response to this comment, FHFA proposes that the initial distribution order provide for the regular distribution of a statement by FHFA confirming that each Bank has filed its quarterly liquidity certification, as well as a statement by FHFA about any notices that may be submitted by a Bank about liquidity problems, as required by § 1270.10(b)(2) of the regulations.[26]

Section 1270.10(b)(1) of the regulations requires that, before the end of each calendar quarter, and before declaring or paying any dividend for that quarter, the President of each Bank certify in writing to FHFA that, based on known current facts and financial information, the Bank will remain in compliance with all statutory and regulatory liquidity requirements and will remain capable of making full and timely payment of all of its current obligations coming due during the next quarter. In addition, § 1270.10(b)(2) requires that a Bank provide immediate notice to FHFA if the Bank: (i) Is unable to provide the written certification required by paragraph (b)(1); (ii) projects at any time that it will fail to comply with statutory or regulatory liquidity requirements, or will be unable to timely and fully meet all of its current obligations due during the quarter; (iii) actually fails to comply with statutory or regulatory liquidity requirements or to timely and fully meet all of its current obligations due during the quarter; or (iv) negotiates or enters into an agreement with one or more other Banks to obtain financial assistance to meet its current obligations due during the quarter.

FHFA proposes that the initial distribution order provide that, following the end of each calendar quarter, FHFA distribute a statement indicating whether each Bank has timely filed the quarterly certification relating to the Bank's anticipated compliance with liquidity requirements and its anticipated ability to meet its obligations coming due during the following calendar quarter, as required by § 1270.10(b)(1). For example, soon after the end of the first calendar quarter of a year, FHFA would distribute a

[23] The Federal Home Loan Bank Examination Manual can be found at *http://www.fhfa.gov/webfiles/2652/FHFB%20Manual.pdf.*

[24] Component ratings are currently given for: (1) Corporate governance; (2) market risk; (3) credit risk; (4) operational risk; and (5) financial condition and performance. FHFA is adopting a new examination ratings system, effective January 1, 2013, under which component ratings will be given for: (1) Capital; (2) asset quality; (3) management; (4) earnings; (5) liquidity; (6) sensitivity to market risk; and (7) operational risk. *See* 77 FR 67644 (Nov. 13, 2012).

[25] 12 CFR 1270.10(b)(1).

[26] 12 CFR 1270.10(b)(2).

statement indicating for each Bank whether, prior to the end of the first quarter, the Bank filed the required certification regarding its ability to meet liquidity requirements and meet its obligations during the second quarter. The order would also provide that, following its receipt of any notice filed under § 1270.10(b)(2), FHFA distribute to all of the other Banks and the OF a statement identifying the Bank that filed the notice and describing the nature of the notice. In this statement, FHFA would provide whatever additional information about the notice that it deems appropriate under the circumstances. At present, certain of the Banks individually ask FHFA whether the other Banks have made their quarterly liquidity certifications, and FHFA responds to those requests individually by confirming its receipt of the certifications from the other Banks. By incorporating this information into the HERA-mandated information sharing regime, FHFA would make this information available to all of the Banks, not just those who ask for it.

Other Information Which May Be Shared in the Future

In various combinations, the three commenters who advocated the sharing of information about the liquidity filings made under § 1270.10(b) also supported the quarterly distribution of certain other financial information regarding each Bank. The suggested financial information included, for each Bank: net income projections and anticipated material losses; projected dividend rates; impairments of assets; concentrations of advances and exposures to derivatives counterparties and mortgage insurers; market risk limit measures, including key rate durations; liquidity information; member collateral shortfalls; unsecured credit exposures; and FHFA's intended actions if a Bank is expected to default on its upcoming obligations. Certain of this financial information, such as that relating to concentration of advances to members, exposures to derivatives counterparties, other unsecured credit exposures, and liquidity requirements, is already available through the Banks' federal securities filings, which may lessen the need to include it within the HERA-mandated information sharing regime. Because of that, FHFA does not currently anticipate that the initial distribution order would require the distribution of those items, but recognizes that, after FHFA and the Banks have gained further experience with the substance and mechanics of the information sharing process, it may be appropriate to include similar types of information within the information sharing regime. Accordingly, FHFA requests comments on what types of financial information, beyond those already available to the Banks through the federal securities filings and the FHFA's call report data base, might be appropriate for FHFA to include within the information sharing regime, either as part of the initial distribution order or subsequently.

FHFA also requests comments on whether it would be useful for the agency to distribute under this rule a weekly DBR report on the Banks' unsecured credit exposure. As required under § 1273.6(f) of FHFA's regulations, the OF currently collects from each Bank data relating to the Bank's unsecured credit exposure to individual counterparties and, from this data, compiles and distributes to the Banks a monthly report.[27] These reports may be of limited practical value given that the data is typically about 20 days old by the time the report is distributed and that the vast majority of the Banks' unsecured credit exposure occurs in the form of overnight transactions. In order to address these shortcomings, DBR recently has been preparing for its own internal use a weekly report that covers the Banks' credit exposures arising from repurchase transactions (which are not covered by the existing OF report, but which can constitute a significant portion of the Banks' exposure to foreign counterparties), as well as the forms of unsecured credit exposure that are addressed in the OF report. The new DBR report is typically completed within one day of FHFA's receipt of the data and assesses the Banks' exposure based upon seven-day averages, rather than as of a single point-in-time, as is the case with the OF report. Although FHFA has not yet determined whether it will continue to compile these reports or whether it will distribute them to the Banks on a regular basis, the agency seeks comment on whether regular distribution of these reports to the Banks would further the purposes of section 20A of the Bank Act.

FHFA as Information Clearinghouse

Like the first proposed rule, this proposed rule requires that FHFA act as the clearinghouse for the sharing of information under section 20A of the Bank Act, and provides no mechanism for the direct sharing of such information among Banks. Four commenters expressly supported this approach, and none objected. One commenter requested that the final rule contain an explicit statement that it governs the entirety of a Bank's right to receive shared information under section 20A of the Bank Act and that no Bank is permitted to receive such information unilaterally from FHFA or another Bank. FHFA has not included such a statement in this proposed rule. In part, this is because part 911 of the Finance Board's regulations, which continues to govern the control of unpublished information,[28] already prohibits a Bank from disclosing information created or obtained by the Finance Board or FHFA in connection with the performance of official duties, including reports of examination and supervisory correspondence, without prior written authorization from FHFA.[29] The first proposed rule would not have authorized any direct sharing of unpublished information among the Banks and no such authorization has been included in this proposed rule. In order to preserve its ability to provide written authorization for the disclosure of unpublished information as circumstances warrant, FHFA has declined to include in this proposed rule a blanket prohibition on the direct sharing of such materials. In addition, there is no basis upon which FHFA may prohibit a Bank from sharing financial information that does not qualify as unpublished information under part 911, even if it is shared with one or several Banks to the exclusion of others. Moreover, the Banks currently share certain non-confidential information among themselves on an informal basis—a practice that FHFA does not want to discourage, as could be the case if the proposed rule were to include a

[27] *See* 12 CFR 1273.6(f).

[28] In this issue of the **Federal Register**, FHFA is also publishing a proposed rule which would replace part 911 with new regulations governing the control of unpublished information (which is referred to as ''non-public information'' in that proposed rule). If adopted in final form as proposed, those new regulations would be identical in effect to the provisions of part 911 that are referenced in the regulatory text of this proposed rule and that are discussed in this Supplementary Information. Should FHFA's final rule on non-public information differ materially from the proposed rule with respect to those provisions, these changes will be addressed and appropriately accounted for in the final version of this rule.

[29] *See* 12 CFR 911.3(c)(1). In 2006, the Finance Board issued an Advisory Bulletin that permitted a Bank to disclose the factual content of information contained in its report of examination, if necessary in the preparation of its SEC disclosures, but continued to prohibit the Banks from releasing the report of examination itself, or any portion of the report. *See* Federal Housing Finance Board Advisory Bulletin 2006–AB–03 (July 18, 2006) (available online at *http://www.fhfa.gov/webfiles/13094/2006–AB–03.pdf*). The Advisory Bulletin also specifically prohibited the sharing of reports of examination among the Banks, and nothing in the second proposed rule is intended to override this restriction.

prohibition such as that raised by the commenters.

The centralized distribution process reflected in this proposed rule represents the agency's best initial judgment as to the appropriate way to implement section 20A. FHFA intends to undertake the distribution of Bank information within the parameters of part 1260, but will assess the process on an ongoing basis and make such adjustments within those parameters, or take such other steps (including amending the rule if appropriate), as it determines are necessary to most effectively fulfill the statutory information sharing mandate.

For similar reasons, FHFA has declined a request made by three commenters that the final rule specify that FHFA is to distribute information directly to the chief executive officer of each Bank and of the OF. Although the agency intends to provide guidance as to the specifics of the distribution process (probably as part of the distribution orders), FHFA believes that these specifics should not be enshrined in the regulation. FHFA already communicates with the Banks through various secure means, and other such approaches may be developed over time. To require FHFA to undertake a new rulemaking to make the necessary adjustments would hinder the ability of the agency to carry out the distribution process in the most effective manner. FHFA believes that the restrictions on disclosure of information by Banks and their directors, officers and employees set forth in § 1260.5 of this proposed rule (discussed in detail below) and elsewhere are sufficient to protect confidential information. Within those parameters, each Bank must establish its own policies and procedures to govern access to the shared information.

C. Section 1260.3—Requests To Withhold Proprietary Information

As required under section 20A of the Bank Act, § 1260.3(b)(1) of the first proposed rule would have permitted a Bank to request in writing that FHFA withhold from distribution particular information contained in a report of examination, so long as the Bank could demonstrate that the information is proprietary and the public interest requires that it not be shared. The first proposed rule would have given a Bank ten business days following the presentation of a report to its board of directors within which to make such a request. Section 1260.3(b)(2) of the first proposed rule would have required the Director of FHFA or his designee to make a prompt, non-appealable determination as to whether to redact the subject information from the report to be distributed and to notify the affected Bank of its decision.

In this proposed rule, FHFA has restructured the provisions regarding the withholding of proprietary information, primarily to correspond to the changes that are proposed to be made to the scope of information to be shared under the rule, but also to provide greater clarity and in response to some of the comments received on the first proposed rule. Those provisions are located in § 1260.3 of this proposed rule. It has also added a definition of the term ''proprietary information'' to § 1260.1 in order to clarify the standards to be applied in making proprietary determinations under the rule and to ensure that those standards are consistent with standards that FHFA applies when it makes proprietary determinations in other contexts.

Section 1260.3(a) provides that a Bank may request in writing that FHFA withhold from distribution particular information relating to the Bank on the grounds that it is proprietary information and the public interest requires that it not be shared. Section 1260.3(a) would also require that, in order for a request to be considered by FHFA, the request must identify the particular information the Bank believes should be withheld and provide support for the assertions that it is proprietary information and that withholding such information from the other Banks and the OF is necessary to protect the public interest. The primary purpose of this provision is to make clear that, in preparing a request to withhold particular information, a Bank must be able to demonstrate that it meets both the ''public interest'' and the ''proprietary information'' elements of the statutory test. An assertion that a piece of information is ''proprietary information,'' without more, is not sufficient under the statute to justify withholding the information.

Proposed § 1260.1 defines the term ''proprietary information'' to mean ''information that contains trade secrets, or privileged or confidential commercial or financial information that, if shared among the Banks and the Office of Finance as provided under this part, would likely cause substantial competitive harm to the Bank to which the information pertains.'' Because neither section 20A nor any other provision of the Bank Act defines the term ''proprietary,'' FHFA looked to the Freedom of Information Act (FOIA) and related case law in formulating the proposed definition. Specifically, the definition is based largely upon the language of section 552(b)(4) of FOIA (Exemption 4), which exempts from FOIA's public disclosure requirements ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' [30] The definition also incorporates language from a line of judicial interpretations of Exemption 4 requiring that disclosure of the information in question be ''likely * * * to cause substantial harm to the competitive position of the person from whom the information was obtained'' in order for that information to qualify for exemption from FOIA disclosure pursuant to that provision.[31]

Although the term ''proprietary'' does not actually appear in the statutory text of FOIA, courts interpreting FOIA Exemption 4 generally have treated that provision as referring to proprietary information.[32] FHFA has chosen to take this approach in part because it will allow the agency to draw upon the substantial body of case law interpreting Exemption 4 if called upon to make a proprietary determination under section 20A (although in doing so FHFA will not be bound by FOIA, its legislative history, or Exemption 4 case law). In addition, the proposed definition parallels the regulatory definition that FHFA applies when determining whether particular data constitutes ''proprietary information'' that must be excluded from the electronic ''Public Use Database'' of information on mortgages purchased by Fannie Mae and Freddie Mac that the agency is required by statute to maintain and make available to the public.[33] However, unlike determinations made

[30] *See* 5 U.S.C. 552(b)(4).

[31] *See, e.g., National Parks & Conservation Ass'n* v. *Morton,* 498 F.2d 765, 770 (DC Cir. 1974).

[32] *See, e.g., Public Citizen Health Research Group* v. *FDA,* 704 F.2d 1280 (DC Cir. 1983). In *Public Citizen,* the U.S. Court of Appeals for the District of Columbia Circuit clarified that, in order to meet the ''competitive harm'' requirement imposed by *National Parks* and its progeny, the harm arising from disclosure of the information at issue must ''flow[] from the affirmative use of proprietary information by competitors.'' *See id.* at 1291 n.30.

[33] *See* 12 U.S.C. 4543. The definition of ''proprietary information'' that FHFA uses in such cases is actually contained in the regulations of the Department of Housing and Urban Development (HUD), *see* 24 CFR 81.2, which was responsible for maintaining the Public Use Database (PUDB) until Congress transferred responsibility for that function to FHFA in 2008. In developing its definition of ''proprietary information,'' HUD drew from FOIA Exemption 4 and related case law in part so that it would be able to draw upon the body of FOIA law when making proprietary determinations under its PUDB regulations. *See* 60 Fed. Reg. 61846, 61877 (Dec. 1, 1995). FHFA expects to propose new PUDB regulations in the near future and anticipates that those regulations will contain a definition of ''proprietary information'' that is substantially similar to the one contained in the current HUD-promulgated PUDB regulations.

under the Public Use Database regulations, in order for information to be withheld from distribution under section 20A and this rule, a Bank must establish not only that the information is proprietary, but also that the public interest requires that it not be distributed. Accordingly, it is possible that, under this rule, FHFA may find it necessary to distribute information that qualifies as ''proprietary'' where the distribution of that information is necessary or appropriate to fulfill the purposes of section 20A.

Section 1260.3(b) of this proposed rule addresses the required timing of requests from the Banks to withhold proprietary information. Paragraph (b)(1) establishes general rules for requests relating to information submitted by the Banks, as well as for requests relating to information created by FHFA, such as reports of examination. Paragraph (b)(2) provides an exception to the general rules, which would allow the Director to establish different timeframes for particular categories of information that may be distributed pursuant to a distribution order issued under § 1260.2. For information that a Bank submits to FHFA, subparagraph (b)(1)(i) provides that the agency would consider only those requests that were received prior to, or simultaneously with, the Bank's submission of the information to FHFA. For example, if a Bank were to believe that elements of the data that it uploads into FHFA's CRS database met the statutory standards for being withheld from distribution, it would be required to submit its request to FHFA no later than the time at which it uploads the data. Otherwise, it would forgo the right to object at a later time to FHFA's distribution of that data—whether the data was made available in raw form (for example, as data accessible to other Banks in the CRS) or in modified form (for example, as part of comparisons with the data of other Banks, as presented in the Bank System Profile Book or other reports on the Banks or Bank System).

The reasoning behind this approach for Bank-submitted information is three-fold. First, this type of information is likely to serve the purposes underlying section 20A of the Bank Act only if other Banks are able to access it in a timely fashion. To allow a Bank a multi-day period within which to ask that portions of the information be withheld would introduce an unnecessary delay in the process and could lead to the risk that the information will be stale by the time it is received by other Banks, thus undermining the purpose of the information sharing scheme. For example, FHFA currently distributes to the Banks a weekly liquidity report, which it could not continue to do with the same timeliness if Banks had an opportunity to object to the distribution of portions of each week's data. Second, because the Banks themselves prepare the information and would be aware of its probable distribution, the marginal utility of providing them with an additional period of time in which to review the information for proprietary material would not outweigh the need to distribute the information in a timely manner. Finally, the vast majority of the data that Banks submit to FHFA through the CRS and in response to special data requests is in the form of numbers reflecting past financial performance, which data is unlikely to contain anything that could be considered proprietary in nature.

For information to be distributed other than that which is submitted to FHFA by the Banks themselves, subparagraph (b)(1)(ii) would permit each Bank ten business days after being provided a copy of the information within which to review that information for proprietary material and to deliver to FHFA a request to withhold. This is substantially identical to the approach reflected in the first proposed rule with respect to Banks' reports of examination and, in fact, would apply in the same way to that information under this proposed rule.

As mentioned, paragraph (b)(2) of § 1260.3 would allow FHFA, as part of an order issued by the Director or his designee under § 1260.2, to establish requirements for the timing of requests to withhold for any category of information to be distributed under such an order. Paragraph (b)(2) requires that, in establishing any such requirements, the Director or his designee must consider the volume and complexity of the information to be reviewed, the Bank's existing familiarity with the information, the frequency of submission or distribution of the information, the likelihood that the information will contain proprietary information, and the effect that any delay in the distribution of the information would have on the fulfillment of the purposes of section 20A(a) of the Bank Act.

FHFA anticipates that, for the sake of clarity, when it issues the initial distribution order identifying the particular categories of information to be disclosed, it also would specify which information is subject to the ''time of submission'' provision and which is subject to the ''10 business day'' provision, described above. For example, FHFA anticipates that the initial order would specify that a Bank will have ten business days following the date on which FHFA presents a report of examination to the Bank's board of directors within which to request that FHFA redact particular proprietary information before distributing it to the other Banks—*i.e.,* the request would need to be filed before the close of business on the tenth business day following the presentation of the report to the Bank's board. Similarly, the initial distribution order would likely reiterate that the Banks will be required to file requests to withhold data uploaded to the CRS, information submitted in response to a special data request or liquidity certifications and notices at or before the time that such information is submitted to FHFA.

Section 1260.3(c) of this proposed rule provides that, after receiving a written request that meets the form and timing requirements of paragraphs (a) and (b) of § 1260.3, the Director or his designee shall promptly determine whether to withhold any information from distribution, which determination is final. Paragraph (c) would also require that FHFA notify the affected Bank of its determination and prohibit FHFA from distributing the information that is the subject of the request until it has provided the required notice to the Bank.

Three commenters supported the first proposed rule's provision for the withholding of proprietary information when doing so is found to be in the public interest, while no commenters objected to the withholding of such information, or to the finality of FHFA's determination regarding the information requested to be withheld. A number of commenters requested that the final rule provide a mechanism for the withholding of categories of information in addition to that which FHFA deems to be proprietary and in the public interest to withhold. Seven commenters expressed concern over the possible disclosure of information that is subject to confidentiality agreements with third parties, or confidentiality provisions of license agreements. Five commenters stated that because each Bank is a separate legal entity, providing a Bank with access to sensitive or confidential strategic, operational, regulatory and business information may not be appropriate. Six commenters stated that sensitive information, such as that identifying personnel, or describing personnel matters, should not be distributed.

FHFA has declined to include in this proposed rule additional bases upon which the Banks may request the

withholding of information beyond that which is mandated by section 20A of the Bank Act. While section 20A does not expressly limit the bases upon which a Bank may request that FHFA withhold information, the fact that the statute expressly permits Banks to request the withholding only of proprietary information and requires a conclusion that any withholding of such information be in the public interest is a strong indication that the intent of Congress was to limit the types of information which the Banks could request to be withheld. FHFA believes that the concerns raised by the commenters will be mitigated by the fact that only the summary portions of the Banks' reports of examination would be distributed under the anticipated initial distribution order. In addition, FHFA is cognizant of the concerns expressed by the commenters and will prepare reports of examination with those concerns in mind.

Seven commenters expressly supported the ten business day period in which a Bank would be permitted to request the withholding of proprietary information from distribution. However, all of these commenters also asked that the final rule require FHFA to notify the subject Bank prior to distribution if the request is fully or partially denied, and to identify the information that will not be withheld, in order to allow the Bank to make timely and appropriate securities law or contractual disclosures. Section 1260.3(b)(2) of the first proposed rule would have required FHFA to provide notice of any determination regarding a request to withhold information, and this provision appears in revised form in § 1260.3(c) of this proposed rule, which specifies that FHFA must provide such notice to the requesting Bank and may not distribute any of the information in question until it has provided that notice.

D. Section 1260.4—Timing and Form of Information Distribution

Section 1260.3(c) of the first proposed rule would have required FHFA to distribute a Bank's report of examination after the ten-business-day period had expired without a request to withhold proprietary information or, if a Bank had made such a request, after the Director or his designee had acted on the request. If the Director or his designee were to determine that the report of examination included proprietary information that should not be shared, that proposed rule would have required FHFA to distribute an appropriately redacted version of the report. The first proposed rule also would have allowed FHFA to distribute the reports in either tangible or electronic form, as deemed appropriate on either an ongoing or case-by-case basis. FHFA received no comments on this provision of the rule.

Section 1260.4 of this proposed rule is substantially similar to § 1260.3(c) of the first proposal, although the wording has been altered slightly to reflect the more generic approach to the scope of information to be distributed. Section 1260.4(a) provides that FHFA may distribute information to the other Banks and the OF after the expiration of the applicable time period for asking that FHFA withhold proprietary information, unless the affected Bank has asked that particular information be withheld from distribution. Section 1260.4(a) further provides that when a Bank has filed a request to withhold information, FHFA may not distribute the information that is the subject of the request until after the Director or his designee has acted on the request and has provided the affected Bank with notice of the decision. Under this provision, the Director or his designee would be free to reach any appropriate decision regarding the distribution of the information in question—*i.e.,* to withhold all of the information, to distribute all of the information or to withhold part and distribute part of the information in question. Subsequently, FHFA would distribute the subject information in conformity with that decision. Under § 1260.4(b), as under the first proposed rule, FHFA would be permitted to distribute the information in either tangible or electronic form, as it deems appropriate.

E. Section 1260.5—Control of Shared Information

Section 1260.3(d) of the first proposed rule provided that the sharing of information under the rule did not constitute a waiver by FHFA of any privilege, or its right to control, supervise, or impose limitations on, the subsequent use and disclosure of any information concerning a Bank. The first proposed rule also provided that, to the extent that any reports of examination or other materials provided to a Bank or the OF under the rule otherwise qualify as ''unpublished information'' under 12 CFR part 911 (or any future regulatory provisions dealing with the same subject matter that may be promulgated by FHFA), those materials would continue to qualify as such and would continue to be subject to the restrictions on disclosure of such information set forth therein.[34] Two commenters expressly supported this provision and none opposed it. In this proposed rule, FHFA has carried over that provision from the first proposed rule (with additions described below), and has redesignated that provision as § 1260.5(a). This proposed rule also adds three new provisions, contained in paragraphs (b), (c), and (d) of § 1260.5, to address more comprehensively the protection of unpublished information.

Section 20A of the Bank Act makes clear that a primary reason for requiring the sharing of information among the Banks is to enable each Bank to better assess the likelihood that it will need to make payments pursuant to its joint and several liability on Bank System COs and to enable it to better fulfill its duty to disclose material information regarding the likelihood of such payments as required by applicable provisions of the federal securities laws or regulations issued thereunder by the SEC. Citing the restrictions on the disclosure of unpublished information set forth in 12 CFR part 911, several commenters requested that FHFA provide in the final rule, or in other guidance, authorization for each Bank to disclose in its SEC disclosure documents material information derived from the reports of examination of other Banks received under the rule after giving prior notice to the Bank to which the information pertains.

In 2006, the Finance Board issued written guidance authorizing each Bank to use and disclose in its SEC disclosure documents information contained in its own report of examination, provided that the disclosure is limited to a recital of the factual content of the report and does not involve the release of the report of examination itself, or any portion of it.[35] FHFA has added to § 1260.5(a) of this proposed rule language to extend this treatment to unpublished information regarding other Banks received pursuant to an order issued under § 1260.2, provided that the Bank meets the requirements regarding disclosure of this information that are set out in § 1260.5(b) of the rule. In this proposed rule, FHFA has added

[34] Under 12 CFR part 911 ''unpublished information'' refers to any information or document created or obtained by FHFA in connection with the performance of official duties, regardless of who possesses it, except for information or documents that the agency is required by statute or its own regulations to disclose or that were previously published or disclosed or are customarily furnished to the public in the course of the performance of official duties. *See* 12 CFR 911.1 (definition refers to the former Federal Housing Finance Board as regulator, but now applies to FHFA).

[35] *See* Federal Housing Finance Board Advisory Bulletin 2006–AB–03 (July 18, 2006).

§ 1260.5(b) to permit a Bank to disclose unpublished information received under § 1260.2 in its SEC disclosure documents provided that its determination that such disclosure is required under applicable provisions of the federal securities laws has been made in good faith, and that the Bank provides to FHFA and to the Bank to which the information pertains prior notice of the content and the anticipated timing of the disclosure. FHFA believes it is unlikely that information received regarding one Bank would prompt an SEC disclosure obligation by another Bank if the subject Bank has not determined that the information was material to the first Bank and thus warranted disclosure under the federal securities laws.[36] Nonetheless, because each Bank makes its own determination as to materiality and the content of its own disclosures under the federal securities laws, such a result is at least possible and, for that reason, FHFA has decided to address the matter in this proposed rule.

While the first proposed rule would have addressed the maintenance of the privileged status of reports of examination from the perspective of FHFA, it would not have addressed the confidentiality of shared information from the perspective of the Banks. Two commenters requested that the final rule clarify that the release of information under the rule will not be deemed a waiver by the subject Bank of any privilege or right to control the underlying information. In addition, four commenters advocated including a requirement in the final rule that would require each Bank to take measures to ensure that the confidentiality of other Banks' supervisory information is maintained by those that will have access to it. One commenter stated that the final rule should require that all Banks use reasonable means, but not less than that used to protect their own proprietary information, to safeguard the information contained in another Bank's report of examination and avoid unauthorized disclosure, dissemination or use.

In response to these concerns, FHFA has included in this proposed rule a new § 1260.5(c), which expressly states that a Bank may use unpublished information received under the rule only for the purposes described in section 20A(a) of the Bank Act (*i.e.,* to evaluate the financial condition of one or more other Banks and to comply with its obligations under the 1934 Act), and prohibits the disclosure of any unpublished information received under § 1260.2, except as otherwise provided in the rule (*e.g.,* in the case of a disclosure made under the federal securities laws pursuant to § 1260.5(a) and (b)). Proposed § 1260.5(c) would further require that each Bank and the OF implement policies and procedures to prevent the improper disclosure of such information and to limit the access of its personnel to such information. Under this proposed rule, these policies and procedures must be no less stringent than those that apply to the entity's own confidential and supervisory information. As with other internal controls, these procedures and their implementation will be subject to FHFA scrutiny as part of the Bank examination process.

Finally, like the first proposed rule, this proposed rule does not provide for any formal sharing of information pertaining to the OF because all twelve Bank presidents are members of the OF's board of directors and, therefore, already have access to its report of examination and other financial information. Three commenters expressly agreed that, for the reason stated, reports of examination for the OF do not need to be formally distributed to the Banks, while no commenters advocated the formal distribution of the OF reports or other information. However, all three supported inclusion of a specific provision stating that Bank presidents be permitted to share information regarding the OF with the boards of directors and appropriate staff of his or her Bank, subject to the restrictions on disclosure and adoption of policies and procedures required under the rule. FHFA has included such a provision in § 1260.5(d) of this proposed rule.

IV. Consideration of Differences Between the Banks and the Enterprises

Section 1201 of HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 to add a new section 1313(f), which requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to: the Banks' cooperative ownership structure; the mission of providing liquidity to members; the affordable housing and community development mission; their capital structure; and their joint and several liability on consolidated obligations.[37] The Director also may consider any other differences that are deemed appropriate. In preparing this second proposed rule, FHFA considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate. No commenters raised any issues relating to this statutory requirement, as it applied to the first proposed rule.

V. Paperwork Reduction Act

This proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

VI. Regulatory Flexibility Act

This proposed rule applies only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, FHFA certifies that this proposed rule will not have significant economic impact on a substantial number of small entities.

List of Subjects

12 CFR Part 1260

Confidential business information, Federal home loan banks, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the **SUPPLEMENTARY INFORMATION** and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency proposes to amend subchapter D of chapter XII of title 12 of the Code of Federal Regulations as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Subchapter D—Federal Home Loan Banks

■ 1. Add part 1260 to read as follows:

PART 1260—SHARING OF INFORMATION AMONG FEDERAL HOME LOAN BANKS

Sec.

Authority: 12 U.S.C. 1440a, 4511 and 4513.

[36] Each Bank is subject to the periodic reporting requirements of section 13(a) of the 1934 Act, 15 U.S.C. 78m(a), and, therefore, upon the occurrence of a material corporate event, is required to file with the SEC (in most cases within four business days of the material event) a current report on Form 8–K. *See* 17 CFR 240.13a–11; 17 CFR 249.308.

[37] *See* 12 U.S.C. 4513(f).

§ 1260.1 Definitions.

As used in this part:

Proprietary information means information that contains trade secrets, or privileged or confidential commercial or financial information that, if shared among the Banks and the Office of Finance as provided under this part, would likely cause substantial competitive harm to the Bank to which the information pertains.

Unpublished information has the meaning set forth in § 911.1 of this title.

§ 1260.2 Bank information to be shared.

In order to enable each Bank to evaluate the financial condition of any one or more of the other Banks and the Bank System, FHFA shall distribute to each Bank and to the Office of Finance such categories of financial and supervisory information regarding each Bank and the Bank system as the Director or his designee may specify from time to time by written order, subject to the requirements of this part. Prior to issuing or amending such an order, FHFA shall notify each Bank and the Office of Finance of the proposed contents of the order and allow them a reasonable period within which to comment.

§ 1260.3 Requests to withhold proprietary information.

(a) *General.* A Bank may request in writing that FHFA withhold from distribution particular information relating to the Bank that may otherwise be subject to distribution under § 1260.2 on the basis that it is proprietary information and the public interest requires that it not be shared. Any such request shall identify the particular information the Bank believes should be withheld and provide support for the assertions that it is proprietary information and that withholding it from the other Banks and the Office of Finance is necessary to protect the public interest.

(b) *Timing of requests.*—(1) *General.* Unless otherwise specified by written order as described in paragraph (b)(2) of this section, the period within which a Bank may make a request to withhold proprietary information under paragraph (a) of this section shall be as follows:

(i) For information that a Bank submits to FHFA, the request shall be delivered to FHFA no later than the time at which the Bank submits the subject information to FHFA.

(ii) For information that FHFA creates (not including compilations of data submitted by the Banks), prior to distributing any information relating to a particular Bank, FHFA shall provide that Bank with a copy of the information to be distributed, after which the Bank shall have ten (10) business days within which to deliver the request to FHFA.

(2) *As specified by written order.* Any order issued by the Director or his designee under § 1260.2 may establish requirements for the timing of requests to withhold proprietary information that are different from those specified under paragraph (b)(1) of this section for any category of information to be distributed thereunder. In establishing such requirements, the Director or his designee shall give due regard to the volume and complexity of the information to be reviewed, the Bank's existing familiarity with the information, the frequency of submission or distribution of the information, the likelihood that the information will contain proprietary information, and the effect that any delay in the distribution of the information would have on the fulfillment of the purposes of section 20A(a) of the Bank Act.

(c) *Determination and notice by FHFA.* After receiving a written request that meets the requirements of paragraphs (a) and (b) of this section, the Director or his designee shall promptly determine whether to withhold any information from distribution pursuant to the request, which determination shall be final. FHFA shall promptly notify the affected Bank of that determination and shall not distribute any information that is the subject of the request until it has provided the required notice to the Bank.

§ 1260.4 Distribution of Bank information by FHFA.

(a) *Timing.* FHFA may distribute information authorized to be distributed pursuant to § 1260.2 after the expiration of the applicable time period specified in § 1260.3(b) unless, within that time period, the affected Bank has filed with FHFA a written request to withhold particular proprietary information that meets the requirements of § 1260.3(a). When a Bank has filed such a request, FHFA shall not distribute the information that is the subject of the request until the Director or his designee has made the determination and provided the notice required by § 1260.3(c) and shall distribute or withhold the subject information in conformity with that determination.

(b) *Form.* FHFA may distribute information under this part in either tangible or electronic form, as it deems appropriate.

§ 1260.5 Disclosure of shared Bank information.

(a) *No waiver of privilege.* The release of information under this part does not constitute a waiver by FHFA of any privilege, or of its right to control, supervise or impose limitations on the subsequent use and disclosure of any information concerning a Bank. To the extent that any information provided to a Bank or the Office of Finance pursuant to this part qualifies as unpublished information under part 911 of this title or any successor provision, that information shall continue to qualify as such and shall continue to be subject to the restrictions on disclosure set forth in those provisions, provided that a Bank shall not be deemed to have violated § 911.3(c) of this title or any successor provision by disclosing in filings with the SEC unpublished information about another Bank that was obtained pursuant to this part if the disclosure is limited to a recital of the relevant factual content of the underlying information and the Bank has provided the notice required by paragraph (b) of this section.

(b) *Disclosures under the Federal securities laws.* If a Bank determines in good faith that it is required by any applicable provisions of the 1934 Act or of the regulations issued by the SEC thereunder to disclose unpublished information relating to another Bank that it has received pursuant to this part, it shall provide to FHFA and to the Bank to which the information pertains prior written notice of such determination and of the content and anticipated timing of the disclosure, which notice shall be provided as far in advance of the anticipated disclosure as is feasible under the circumstances.

(c) *Safeguarding of information.* A Bank may use unpublished information distributed pursuant to this part only for the purposes described in section 20A(a) of the Bank Act. Except as otherwise provided in this part, neither the Office of Finance, nor any Bank, nor any officer, director or employee thereof, may disclose or permit the use or disclosure of any unpublished information regarding another Bank or the Office of Finance, received pursuant to this part, in any manner or for any purpose. Each Bank and the Office of Finance shall implement policies and procedures to prevent the improper disclosure of such information and to limit the access of its personnel to such information, which policies and procedures shall be no less stringent than those that apply to the entity's own confidential and supervisory information.

(d) *Information regarding the Office of Finance.* A Bank president that receives any information regarding the Office of Finance in his or her capacity as a member of the board of directors of the Office of Finance may share the information with the board of directors of the Bank at which he or she is employed, as well as with the appropriate officers and employees of the Bank, subject to the limitations of this part.

Dated: January 17, 2013.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2013–01428 Filed 1–28–13; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1142

[Docket No. FDA–2012–N–1032]

Smokeless Tobacco Product Warning Statements; Request for Comments and Scientific Evidence

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is establishing a public docket to obtain comments, supported by scientific evidence, regarding what changes to the smokeless tobacco product warnings, if any, would promote greater public understanding of the risks associated with the use of smokeless tobacco products.

DATES: Submit electronic or written comments by April 1, 2013.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Gail Schmerfeld, Center for Tobacco Products, 9200 Corporate Blvd., Rockville, MD 20850–3229, 1–877–287–1373, *gail.schmerfeld@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 22, 2009, the President signed the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31) (Tobacco Control Act) into law. The Tobacco Control Act grants FDA authority to regulate the manufacture, marketing, and distribution of tobacco products to protect public health generally and to reduce tobacco use by minors.

Section 204 of the Tobacco Control Act amended section 3 of the Comprehensive Smokeless Tobacco Health Education Act (Smokeless Tobacco Act) (15 U.S.C. 4402) to prescribe new requirements for health warnings that must appear on smokeless tobacco product packages and advertising. The Smokeless Tobacco Act (15 U.S.C. 4402(a)(1) and (b)(1)), requires that smokeless tobacco product packages and advertising must bear one of four required warning statements. The four required warning statements are:

''WARNING: This product can cause mouth cancer.''

''WARNING: This product can cause gum disease and tooth loss.''

''WARNING: This product is not a safe alternative to cigarettes.''

''WARNING: Smokeless tobacco is addictive.'' (15 U.S.C. 4402(a)(1))

One of the four required warning statements must be located on each of the two principal display panels of the package and comprise at least 30 percent of each such display panel (15 U.S.C. 4402(a)(2)(A)). The Smokeless Tobacco Act (15 U.S.C. 4402(a)(2) and (b)(2)), also sets forth requirements for the placement, type, size, and color of warnings on packaging and advertisements, respectively.

Section 205(a) of the Tobacco Control Act further amended section 3 of the Smokeless Tobacco Act to give FDA the authority to ''adjust the format, type size and text of any of the label requirements, require color graphics to accompany the text, increase the required label area from 30 up to 50 percent of the front and rear panels of the package, or establish the format, type size, and text of any other disclosures required under the Federal Food, Drug, and Cosmetic Act'' through rulemaking conducted under the Administrative Procedures Act (5 U.S.C. 552, *et seq.*) if FDA ''finds that such a change would promote greater public understanding of the risks associated with the use of smokeless tobacco products'' (15 U.S.C. 4402(d)).

II. Request for Scientific Evidence and Information

We are interested in comments, supported by scientific evidence, regarding what changes, if any, to the smokeless tobacco product warnings would promote greater public understanding of the risks associated with the use of smokeless tobacco products. The ''public'' includes both tobacco users and nonusers (i.e., never users and former users). Comments and supporting evidence should address how any changes in the warnings would affect both users' and nonusers' understanding of the risks associated with the use of smokeless tobacco products.

III. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov*. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov*.

Dated: January 18, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–01626 Filed 1–28–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–102966–10]

RIN 1545–BJ31

Designation of Payor as Agent To Perform Acts Required of an Employer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 3504 of the Internal Revenue Code (Code) providing circumstances under which a person (payor) is designated as an agent to perform the acts required of an employer and is liable for employment taxes with respect to wages or compensation paid by the payor to individuals performing services for the payor's client pursuant to a service agreement between the payor and the client.

DATES: Written or electronic comments must be received by April 29, 2013.