

represented by two grower members and two handler members. District 2, the State of Oregon, shall be represented by one grower member and one handler member. Processor members may be from District 1, District 2, or from both.

Dated: November 29, 2012.

David R. Shipman,
Administrator, Agricultural Marketing Service.

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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1209

RIN 2590-AA57

Rules of Practice and Procedure: Enterprise and Federal Home Loan Bank Housing Goals Related Enforcement Amendment

AGENCY: Federal Housing Finance Agency.

ACTION: Proposed rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is proposing to amend its Rules of Practice and Procedure (RPP) to specify that the rules of practice and procedure for hearings on the record in Subpart C therein shall apply to any cease and desist or civil money penalty proceedings brought against the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), or the Federal Home Loan Banks (Banks) for failure to submit or follow a housing plan or failure of an Enterprise to submit information on its housing activities, except where such rules are inconsistent with related statutory provisions, in which case the statutory provisions shall apply.

DATES: Written comments must be received on or before January 22, 2013.

ADDRESSES: You may submit your comments, identified by Regulatory Information Number (RIN) 2590-AA57, 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-AA57" 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 the Agency. Please

include "RIN 2590-AA57" in the subject line of the message.

- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA57, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged in at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- *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-AA57, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Lyn Abrams, Assistant General Counsel, (202) 649-3059; or Sharon Like, Managing Associate General Counsel, (202) 649-3057, Office of General Counsel. These are not toll-free numbers. The mailing address for each contact is: Office of General Counsel, Federal Housing Finance Agency, Eighth Floor, 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 revise the language of the proposed rule as appropriate after taking all comments into consideration. Copies of all comments will be posted without change on the FHFA Web site at <http://www.fhfa.gov>, and will include any personal information you provide, such as your name, address, email address and telephone number. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Eighth Floor, 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. Statutory and Regulatory Background

1. Enterprise Enforcement for Housing Plan and Failure To Submit Housing Activities Information

Prior to the enactment of the Housing and Economic Recovery Act of 2008 (HERA), the Federal Housing Enterprises Financial Safety and

Soundness Act of 1992 (Safety and Soundness Act) provided the Secretary of the U.S. Department of Housing and Urban Development (HUD) with specific authority to establish, monitor and enforce housing goals for mortgages purchased by Fannie Mae and Freddie Mac (collectively, the Enterprises). In addition, section 309(m) and (n) of the Federal National Mortgage Association Charter Act and section 307(e) and (f) of the Federal Home Loan Mortgage Corporation Act (collectively, Charter Acts) required that each Enterprise submit information on its housing activities to the Secretary of HUD, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing and Urban Affairs of the Senate.¹ See 12 U.S.C. 1723a(m) and (n); 12 U.S.C. 1456(e) and (f).

The Safety and Soundness Act, prior to the HERA amendments, authorized HUD to initiate cease and desist proceedings and impose civil money penalties against an Enterprise for failure to submit or comply with a housing plan or failure to submit information on its housing activities. HUD issued regulations implementing its enforcement authority against the Enterprises for these violations. See 24 CFR part 81, Subpart G.

HERA amended the Safety and Soundness Act in 2008 to create FHFA as an independent agency of the federal government and, among other things, transferred the responsibility to establish, monitor and enforce the housing goals for the Enterprises from HUD to FHFA, and required that each Enterprise submit information on its housing activities to the Director of FHFA instead of to the Secretary of HUD. See Public Law 110-289, 122 Stat. 2654 (2008), codified at 12 U.S.C. 4501 *et seq.* The Safety and Soundness Act, as amended, requires the Director of FHFA to establish new annual housing goals for mortgages purchased by the Enterprises, effective for 2010 and beyond. FHFA reviews mortgage purchase data provided by each Enterprise in its Annual Housing Activities Report and other mortgage reports, as well as other available data, and determines whether the Enterprise has met the housing goals.

Enterprise compliance with the housing goals is enforced under section 1336 of the Safety and Soundness Act,

¹ The Charter Acts require that the Enterprises submit information on their housing activities to the Committee on Banking, Finance and Urban Affairs of the House of Representatives. The Enterprises submit this information to that Committee's successor, the Committee on Financial Services of the House of Representatives.

which provides that if an Enterprise fails to meet a housing goal determined by the Director to be feasible, the Director may, in his or her discretion, require the Enterprise to submit a housing plan describing the specific actions the Enterprise will take to achieve the goal. *See* 12 U.S.C. 4566.

Section 1336 further provides that if an Enterprise fails to submit an acceptable housing plan or fails to comply with the plan, the Director may initiate cease and desist proceedings or impose civil money penalties against the Enterprise in accordance with sections 1341 and 1345, respectively, of the Safety and Soundness Act, exercise other appropriate enforcement authority, or seek other appropriate actions. *See* 12 U.S.C. 4566(c)(1) and (c)(7), 4581, 4585. In addition, sections 1341 and 1345 provide that the Director may initiate cease and desist proceedings or impose civil money penalties, respectively, if an Enterprise fails to submit information on its housing activities. *Id.* FHFA's regulations do not currently address enforcement proceedings for these violations. Accordingly, as further discussed below, FHFA is proposing to amend its RPP to implement the hearing procedures for enforcement actions under sections 1341 to 1348 of the Safety and Soundness Act. *See* 12 U.S.C. 4581–4588.

2. Bank Housing Plan Enforcement

Section 10C(a) of the Federal Home Loan Bank Act (Bank Act), as amended by HERA (12 U.S.C. 1430c(a)), requires the Director of FHFA to establish housing goals with respect to the purchase of mortgages, if any, by the Banks. Section 10C(a) further states that the goals shall be consistent with the goals established for the Enterprises under sections 1331 through 1334 of the Safety and Soundness Act, taking into consideration the unique mission and ownership structure of the Banks. Section 10C(d) provides that the monitoring and enforcement requirements of section 1336 of the Safety and Soundness Act shall apply to the Banks in the same manner and to the same extent as they apply to the Enterprises. Thus, in accordance with section 1336, if a Bank fails to submit or follow an acceptable housing plan, the Director may initiate cease and desist proceedings or impose civil money penalties against the Bank.

FHFA's Bank housing goals regulation, which implements the statutory housing goals requirements, includes housing plan provisions similar to those in FHFA's Enterprise housing goals regulation, but like the

Enterprise housing goals regulation, does not specifically address enforcement actions for failure to submit or follow a housing plan. *See* 12 CFR Part 1281.

3. Applicable Enforcement Provisions

Sections 1341 to 1348 of the Safety and Soundness Act set forth the grounds and procedures for the enforcement actions that are the subject of this proposed rule. Following is a summary of these provisions.

a. Cease and Desist Proceedings

Section 1341 of the Safety and Soundness Act sets forth the grounds for initiating cease and desist proceedings and the procedures FHFA must follow when filing a notice of charges against an Enterprise and issuing an order in such proceedings. *See* 12 U.S.C. 4581. The grounds for issuing a notice of charges are:

(1) Failure to submit housing activity information required under section 309(m) or (n) of Fannie Mae's Charter Act or section 307(e) or (f) of Freddie Mac's Charter Act;

(2) Failure to submit an acceptable housing plan with respect to the housing goals; or

(3) Failure to comply with a housing plan.²

b. Civil Money Penalties

Section 1345 sets forth the grounds for imposing civil money penalties under this section, which are identical to the grounds for initiating cease and desist proceedings under section 1341. *See* 12 U.S.C. 4585. This section also sets forth the procedures governing imposition of civil money penalties, the factors the Director shall consider in determining the amount of a penalty, the maximum amount of penalty the Director may impose, and authorizes the Director to bring an action in federal court to collect a penalty.

c. Hearings, Judicial Review and Enforcement

Section 1342 sets forth the hearing requirements for hearings under sections 1341 and 1345. *See* 12 U.S.C. 4582. Section 1342 specifies that hearings shall be held on the record and in accordance with the Administrative Procedures Act (APA). This section also governs the issuance of the order from the Director after the hearing. Section 1343 sets forth the procedures for

² Sections 1341 and 1345 also include Enterprise failure to submit a report under section 1327 as grounds for enforcement actions. However, section 1327 does not exist in the Safety and Soundness Act, as amended by HERA, its subject having been subsumed in section 1314.

judicial review of a final order pursuant to a proceeding under sections 1341 and 1345. *See* 12 U.S.C. 4583. Section 1344 authorizes the Director to bring a civil action in federal court to enforce a notice or order under sections 1341 and 1345.

d. Public Disclosure and Notice of Service

Section 1346 governs disclosure of the Director's enforcement actions under sections 1342 and 1343, public hearings, and retention of documents. *See* 12 U.S.C. 4586. Section 1347 gives the Director authority to determine, by regulation or otherwise, the manner of notice of service. *See* 12 U.S.C. 4587.

e. Subpoena Authority

Section 1348 sets forth the Director's subpoena authority for administrative proceedings under sections 1341 to 1348. *See* 12 U.S.C. 4588.

4. General Enforcement Under FHFA's RPP

Sections 1371 through 1379D of the Safety and Soundness Act authorize the Director to initiate civil administrative enforcement actions against the Enterprises, the Banks, and their entity-affiliated parties to enforce, as needed, applicable law, rules, orders and agreements pertaining to the safe and sound operation of the Enterprises and Banks. *See* 12 U.S.C. 4631–4641. FHFA's RPP implements these provisions by setting forth the authority, grounds and procedures for cease and desist proceedings, temporary cease and desist orders, civil money penalty proceedings, and removal and prohibition proceedings. Subpart C of the RPP sets forth the specific rules of practice and procedure for hearings on the record and hearings in accordance with the APA in connection with these enforcement proceedings.

However, the RPP does not implement provisions governing enforcement proceedings for failure to submit or comply with a housing plan or failure to submit information on housing activities. The hearing procedures set forth in the Safety and Soundness Act for adjudicating these actions are almost indistinguishable from the statutory procedures for adjudicating enforcement actions under sections 1371 to 1379D. Accordingly, the formal hearing procedures set forth in Subpart C of the RPP are well suited to govern enforcement proceedings under sections 1341 to 1348. FHFA stated this in the **SUPPLEMENTARY INFORMATION** published with the RPP and noted that promoting use of the Subpart C procedures for housing-goals-

related enforcement proceedings both supports an economies of scale approach to regulation, and provides certainty with respect to the process. See 76 FR 53596, 53601–53602 (Aug. 26, 2011).

B. Conservatorship

On September 6, 2008, the Director of FHFA appointed FHFA as conservator of the Enterprises to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. The Enterprises remain under conservatorship at this time.

III. Analysis of Proposed Rule

As successor to HUD in establishing, monitoring and enforcing the housing goals, FHFA is responsible for initiating and adjudicating enforcement actions for failure to submit or comply with a housing plan. FHFA is also responsible for ensuring that an Enterprise submits information on its housing activities to Congress and the Director, and FHFA has the authority to enforce this requirement.³

None of the Banks was subject to housing goals in 2011. Under FHFA's Bank housing goals regulation, to be subject to housing goals, the total unpaid principal balance of loans purchased through the Acquired Member Assets programs held by a Bank must exceed \$2.5 billion in a given year. See 12 CFR Part 1281. Mortgage purchase volumes did not individually exceed \$2.5 billion at any of the Banks in 2011.

To provide clarity on the rules of practice and procedure that would apply should FHFA initiate enforcement actions under sections 1341 to 1348 of the Safety and Soundness Act, the proposed rule would amend § 1209.1(c) of the RPP to specify that the rules of practice and procedure for hearings on the record in Subpart C therein shall apply to enforcement proceedings under sections 1341 to 1348, except where such rules are inconsistent with sections 1341 to 1348 or section 10C of the Bank Act, in which case those statutory provisions shall apply. The amendment would codify FHFA's intent as expressed in the **SUPPLEMENTARY INFORMATION** published with the RPP. FHFA is proposing to amend § 1209.1(c) as a simpler and more efficient approach than making conforming

amendments to each of the affected sections of the RPP.

IV. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act, as amended by HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks': cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; joint and several liability; and any other differences the Director considers appropriate. See 12 U.S.C. 4513(f). In preparing this proposed rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the Banks should not be treated differently from the Enterprises for purposes of the proposed rule, particularly as section 10C(d) of the Bank Act provides that the monitoring and enforcement requirements of section 1336 of the Safety and Soundness Act shall apply to the Banks in the same manner and to the same extent as they apply to the Enterprises. Nonetheless, FHFA requests comments on whether these factors should result in a revision of the proposed amendment as it relates to the Banks.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act.

The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities

because the regulation is applicable only to the Enterprises and the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1209

Administrative practice and procedure, Federal home loan banks, Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, FHFA proposes to amend part 1209, Subchapter A, Chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1209—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 1209 is revised to read as follows:

Authority: 5 U.S.C. 554, 556, 557, and 701 *et seq.*; 12 U.S.C. 1430c(d); 12 U.S.C. 4501, 4502, 4503, 4511, 4513, 4513b, 4517, 4526, 4566(c)(1) and (c)(7), 4581–4588, 4631–4641; and 28 U.S.C. 2461 note.

2. Amend § 1209.1 by:

a. In paragraph (c)(2), remove the word “and”;

b. In paragraph (c)(3), remove “.” at the end of the paragraph and add in its place “; and”; and

c. Add new paragraph (c)(4) to read as follows:

§ 1209.1 Scope.

* * * * *

(c) * * *

(4) Enforcement proceedings under sections 1341 through 1348 of the Safety and Soundness Act, as amended (12 U.S.C. 4581 through 4588), and section 10C of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1430c), except where the Rules of Practice and Procedure in Subpart C are inconsistent with such statutory provisions, in which case the statutory provisions shall apply.

Dated: November 29, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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³ The Banks are subject to similar reporting requirements under 12 CFR Part 1281. Because the reporting requirements for the Banks are already subject to enforcement under sections 1371 through 1379D of the Safety and Soundness Act, they are not addressed in this rulemaking.