

Federal Housing Finance Agency

§ 1227.2

“market value of total capital” under 12 CFR 932.5(a)(1)(ii)(A); or

(9) Other conditions as detailed by the Director in the notice provided under § 1225.3.

(b) *Standard for rescission of a temporary increase.* In making a determination to rescind a temporary increase in the minimum capital level for a regulated entity or entities, whether in full or in part, the Director will consider the consistency of such a rescission with the prudential regulation and safe and sound operations of a regulated entity. The Director will rescind, in full or in part, a temporary minimum capital increase if consideration of one or more of the following factors leads the Director to the judgment that rescission of a temporary minimum-capital increase for a regulated entity is appropriate considering the entity’s risks:

(1) Changes to the circumstances or facts that led to the imposition of a temporary increase in the minimum capital levels;

(2) The meeting of targets set for a regulated entity in advance of any capital or capital-related plan agreed to by the Director;

(3) Changed circumstances or facts based on new developments occurring since the imposition of the temporary increase in the minimum capital level, particularly where the original problems or concerns have been successfully addressed or alleviated in whole or in part; or

(4) Such other standard as the Director may consider as detailed by the Director in the notice provided under § 1225.3.

§ 1225.5 Guidances.

The Director may determine, from time to time, issue guidance to elaborate, to refine or to provide new information regarding standards or procedures contained herein.

PART 1227—SUSPENDED COUNTERPARTY PROGRAM

Subpart A—General

Sec.

1227.1 Purpose.

1227.2 Definitions.

1227.3 Scope of suspension orders.

1227.4 Regulated entity reports on covered misconduct.

1227.5 Proposed suspension order.

1227.6 Final suspension order.

1227.7 Appeal to the Director.

1227.8 Posting of final suspension orders.

1227.9 Request for reconsideration.

1227.10 Exception to final suspension order in effect.

Subpart B [Reserved]

AUTHORITY: 12 U.S.C. 4513, 4513b, 4514, 4526.

SOURCE: 78 FR 63012, Oct. 23, 2013, unless otherwise noted.

Subpart A—General

§ 1227.1 Purpose.

This part sets forth the procedures FHFA follows under its Suspended Counterparty Program, the purpose of which is to protect the safety and soundness of the regulated entities. The procedures require the regulated entities to submit reports when they become aware that a person with whom they have engaged or are engaging in a covered transaction within the past three (3) years has engaged in covered misconduct. The procedures set forth a process for FHFA to issue suspension orders directing the regulated entities to cease or refrain from engaging in covered transactions with such persons and any affiliates thereof for a specified period of time or permanently. A suspension order is not intended to be, and may not be issued as, a form of punishment for the suspended person. The procedures include options for:

(a) Appeal of a final suspension order to the Director;

(b) Request for reconsideration of a final suspension order after twelve (12) months have elapsed; and

(c) Request for an exception to a final suspension order in effect in order to engage in a particular covered transaction with the suspended person.

§ 1227.2 Definitions.

For purposes of this part:

Administrative sanction means debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation,

§ 1227.3

Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.

Affiliate means a party that either controls or is controlled by another person, whether directly or indirectly, including one or more persons that are controlled by the same third person.

Conviction means:

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea; or

(2) Any other resolution that is the functional equivalent of a judgment of guilt of a criminal offense, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Covered misconduct means:

(1) Any conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product.

(2) FHFA may impute covered misconduct among affiliates as follows:

(i) *Conduct imputed from an individual to an organization.* FHFA may impute the covered misconduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval, or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

(ii) *Conduct imputed from an organization to an individual, or between individuals.* FHFA may impute the covered misconduct of any organization to an individual, or from one individual to

12 CFR Ch. XII (1-1-14 Edition)

another individual, if the individual to whom the conduct is imputed either participated in, had knowledge of, or had reason to know of the conduct.

(iii) *Conduct imputed from one organization to another organization.* FHFA may impute the covered misconduct of one organization to another organization when the conduct occurred in connection with a partnership, joint venture, joint application, association, or similar arrangement, or when the organization to whom the conduct is imputed has the power to direct, manage, control, or influence the activities of the organization responsible for the conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence and hence is a basis for imputation of conduct.

Covered transaction means a contract, agreement, or financial or business relationship between a regulated entity and a person and any affiliates thereof.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, or other entity.

Respondent means a person and any affiliate thereof that is the subject of a proposed or final suspension order.

Suspending official means the Director, or any other FHFA official with delegated authority to sign proposed and final suspension orders and their accompanying notices.

Suspension means an action taken by a suspending official pursuant to a final suspension order that requires a regulated entity to cease or refrain from engaging in any covered transactions with a person and any affiliates thereof for a specified period of time or permanently.

§ 1227.3 Scope of suspension orders.

(a) *General.* A suspending official may issue a final suspension order to the regulated entities directing them to cease or refrain from engaging in any covered transactions with a particular person and any affiliates thereof for a specified period of time or permanently, pursuant to the requirements of this part.

Federal Housing Finance Agency

§ 1227.5

(b) *No effect on other actions by FHFA.* Nothing in this part shall limit the authority of FHFA to pursue any other regulatory or supervisory action with respect to any regulated entity or any other person and any affiliates thereof, whether instead of or in addition to any action taken under this part.

(c) *No effect on other actions by a regulated entity.* Nothing in this part shall limit the authority of any regulated entity to take any action it determines appropriate to address risks from any person and any affiliates thereof with which it engages in covered transactions.

§ 1227.4 Regulated entity reports on covered misconduct.

(a) *General.* A regulated entity shall submit a report to FHFA when the regulated entity becomes aware that a person or any affiliates thereof with which the regulated entity is engaging or has engaged in a covered transaction within the past three (3) years has engaged in covered misconduct. A regulated entity is aware of covered misconduct when the regulated entity has reliable information that such misconduct has occurred.

(b) *Content of reports.* Each report on covered misconduct shall:

(1) Include sufficient information for FHFA to identify the person or persons that are the subject of the report, as well as any affiliates thereof if such affiliates are known to the regulated entity;

(2) Describe the nature and extent of any covered transaction that the regulated entity has or had with any persons and any affiliates thereof identified in the report; and

(3) Include a description of the covered misconduct, including the date of the covered misconduct, documents evidencing the covered misconduct if in the possession of the regulated entity, and any other relevant information that the regulated entity chooses to submit.

(c) *Timing of reports.* (1) A regulated entity shall submit a report to FHFA on covered misconduct no later than ten (10) business days after the regulated entity becomes aware of such misconduct, even if the regulated enti-

ty lacks sufficient information to submit a complete report.

(2) A regulated entity may supplement the submission of any covered misconduct report by submitting additional relevant information to FHFA at any time.

§ 1227.5 Proposed suspension order.

(a) A suspending official may base a proposed suspension order upon evidence of covered misconduct from any of the following sources:

(1) A required report submitted by a regulated entity;

(2) A referral submitted by FHFA's Office of Inspector General; or

(3) Any other source of information.

(b) *Grounds for issuance.* A suspending official may issue a proposed suspension order with respect to a particular person and any affiliates thereof if the suspending official determines that there is evidence that:

(1) The regulated entity is engaging or engaged in a covered transaction with the person or any affiliates thereof within the past three (3) years and the person or any affiliates thereof has engaged in covered misconduct, which evidence may include copies of any order or other documents documenting a conviction or administrative sanction for such conduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(c) *Notice required.* If a suspending official determines that grounds exist under paragraph (b) of this section for issuance of a proposed suspension order with respect to a particular person and any affiliates thereof, the suspending official may issue a written notice of proposed suspension to the person and any affiliates thereof, and shall provide a copy of such notice to the regulated entity and to all of the other regulated entities.

(d) *Content of notice.* The notice of proposed suspension shall include:

(1) The time period during which the suspension will apply;

(2) A statement of the suspending official's proposed suspension determination and supporting grounds;

§ 1227.6

12 CFR Ch. XII (1–1–14 Edition)

- (3) The proposed suspension order;
- (4) Instructions on how to respond; and
- (5) The date by which any response must be received, which must be at least thirty (30) calendar days after the date on which the notice is sent.

(e) *Method of sending notice.* The suspending official shall send the notice of proposed suspension to the last known street address, facsimile number, or email address of the person, the person's counsel, any affiliates of the person, and the counsel for those affiliates, if known, or an agent for service of process.

(f) *Response from respondent—(1) Timing of response.* Any response from the affected person and any affiliates thereof must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or disregard such response, in the suspending official's discretion.

(2) *Content of response.* The response shall identify:

- (i) Any information and argument in opposition to the proposed suspension;
- (ii) Any specific facts that contradict the statements contained in the notice of proposed suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;
- (iii) All criminal and civil proceedings not included in the notice of proposed suspension that grew out of facts relevant to the bases for the proposed suspension stated in such notice;
- (iv) All existing, proposed, or prior exclusions under regulations implementing Executive Order 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies; and
- (v) The names and identifying information for any affiliates of the affected person.

(g) *Response from regulated entities—(1) Timing of response.* Any response from the regulated entities must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or

disregard such response, in the suspending official's discretion.

(2) *Content of response.* (i) The response shall include:

(A) Any information that would indicate that suspension of the person in question could reasonably be expected to have a negative financial impact or other significant adverse effect on the financial or operating performance of the regulated entity; and

(B) Any existing contractual relationship with the person in question for which the regulated entity might request a limitation or qualification.

(ii) The response may include any other information that the regulated entity believes would be relevant to the proposed suspension determination, including but not limited to:

(A) Any information related to the factual basis for the proposed suspension;

(B) Any information about other known affiliates of the person;

(C) Recommendations for alternatives to suspension that could mitigate the risks presented by engaging in covered transactions with the respondent; and

(D) Recommendations for limitations or qualifications on the scope of the proposed suspension.

§ 1227.6 Final suspension order.

(a) *Grounds for issuance.* A suspending official may issue a final suspension order with respect to a respondent proposed for suspension if, based solely on the written record, the suspending official determines that there is adequate evidence that:

(1) The regulated entity is engaging or has engaged in a covered transaction within the past three (3) years with the respondent, and the respondent engaged in covered misconduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(b) *Written record.* The written record shall include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in

Federal Housing Finance Agency

§ 1227.6

making the final determination, including any information related to the factors in paragraph (c) of this section. FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record.

(c) *Factors that may be considered by the suspending official.* In determining whether or not to issue a final suspension order with respect to the respondent where the grounds for suspension are satisfied, the suspending official may also consider any factors that the suspending official determines may be relevant in light of the circumstances of the particular case, including but not limited to:

(1) The actual or potential harm or impact that results or may result from the covered misconduct;

(2) The frequency of incidents or duration of the covered misconduct;

(3) Whether there is a pattern of prior covered misconduct;

(4) Whether and to what extent the respondent planned, initiated, or carried out the covered misconduct;

(5) Whether the respondent has accepted responsibility for the covered misconduct and recognizes its seriousness;

(6) Whether the respondent has paid or agreed to pay all criminal, civil and administrative penalties or liabilities for the covered misconduct, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution;

(7) Whether the covered misconduct was pervasive within the respondent's organization;

(8) The kind of positions held by the individuals involved in the covered misconduct;

(9) Whether the respondent's organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence of the covered misconduct;

(10) Whether the respondent brought the covered misconduct to the attention of the appropriate government agency in a timely manner;

(11) Whether the respondent has fully investigated the circumstances surrounding the covered misconduct and,

if so, made the result of the investigation available to the suspending official;

(12) Whether the respondent had effective standards of conduct and internal control systems in place at the time the covered misconduct occurred;

(13) Whether the respondent has taken appropriate disciplinary action against the individuals responsible for the covered misconduct; or

(14) Whether the respondent has had adequate time to eliminate the circumstances within the organization that led to the covered misconduct.

(d) *Deadline for decision.* The suspending official shall make a determination on whether to issue a final suspension order with respect to the respondent within thirty (30) calendar days of the deadline given for the respondent's response in the notice of proposed suspension, unless the suspending official notifies the respondent in writing that additional time is needed.

(e) *Determination not to issue final suspension order.* If the suspending official determines that suspension is not appropriate with respect to the respondent, the suspending official shall provide prompt written notice of that determination to the respondent, the regulated entity, and all of the other regulated entities.

(f) *Issuance of final suspension order—*

(1) *General.* If the suspending official makes a final determination to suspend the respondent, the suspending official shall issue a final suspension order to each regulated entity regarding the respondent.

(2) *Content of final suspension order.* A final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent or regulated entities;

(ii) Identification of each person and any affiliates thereof to which the suspension applies;

(iii) A description of the scope of the suspension, including the time period to which the suspension applies; and

(iv) A description of any limitations or qualifications that apply to the scope of the suspension, including modification of the conduct of covered

§ 1227.7

transactions that may be engaged in with the respondent.

(3) *Notice to respondent required.* The suspending official shall provide prompt written notice to the respondent of the final suspension order issued to the regulated entities with respect to such respondent.

(4) *Content of notice.* The notice of a final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent; and

(ii) A copy of the final suspension order.

(g) *Effective date.* A final suspension order shall take effect on the date specified in the order, which shall be at least forty-five (45) calendar days after the date on which the order is signed by the suspending official.

§ 1227.7 Appeal to the Director.

(a) *Opportunity to appeal.* A respondent may submit an appeal to the Director within thirty (30) calendar days after the date a final suspension order has been signed. If the Director signed the final suspension order as the suspension official, the respondent has no appeal right under this section. The appeal shall be accompanied by a written brief specifically identifying the respondent's objections to the final suspension order and the supporting reasons for such objections.

(b) *Decision on appeal.* The Director shall issue a written final decision on an appeal of a final suspension order based on the record submitted by the suspending official, together with any material submitted with an appeal. The Director may affirm, vacate or amend the suspension, or remand to the suspending official for further proceedings, in the discretion of the Director. If the Director does not take action on an appeal prior to the effective date of the order, the order shall take effect as if it had been affirmed by the Director, on the date specified in the order.

(c) *Final agency action.* The written final decision of the Director on an appeal of a final suspension order shall be the final agency action. If the Director does not take action on an appeal prior

12 CFR Ch. XII (1–1–14 Edition)

to the effective date of the order, the order shall be the final agency action.

(d) *Exhaustion of administrative remedies.* In order to fulfill the requirement to exhaust administrative remedies, a respondent must appeal a final suspension order to the Director as provided in this section prior to seeking judicial review of such order.

§ 1227.8 Posting of final suspension orders.

(a) *Required posting.* FHFA will publish on its Web site all final suspension orders issued by FHFA on the effective date of the order.

(b) *Content of posting.* Each posting on FHFA's Web site shall include:

(1) The full name (where available) of each suspended person and any affiliates thereof subject to the final suspension order, in alphabetical order;

(2) A description of the time period for which the suspension applies; and

(3) A copy of each final suspension order applicable to the person and any affiliates thereof.

(c) *Removal of names.* FHFA will remove from the Web site all references to the suspension of a person and any affiliates thereof at such time as the suspension expires or is otherwise vacated.

§ 1227.9 Request for reconsideration.

(a) *Time period for request.* A suspended person may submit a request to the Director for reconsideration of a final suspension order at any time after the expiration of a twelve (12)-month period from the date the order took effect, but no such request may be made within twelve (12) months of a previous request for reconsideration from such person.

(b) *Content of request.* A request for reconsideration must be submitted in writing and state the specific grounds for relief from the final suspension order, which shall be limited to any new information that may indicate that engaging in covered transactions with a regulated entity would no longer present a risk of significant financial or reputational harm or threat to the safe and sound operation of a regulated entity.

(c) *Decision on request.* The Director may approve a request for reconsideration if the Director determines that engaging in covered transactions with a regulated entity is no longer likely to result in significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. The Director will inform the requestor of the decision on the request for reconsideration in a timely manner. A decision on a request for reconsideration shall not constitute an appealable order.

§ 1227.10 Exception to final suspension order in effect.

(a) *Request for exception.* A regulated entity to which a final suspension order in effect is applicable may request an exception from such order to allow it to engage in a particular covered transaction with a suspended person and any affiliates thereof. Any such request shall clearly state any reasons supporting an exception, as well as any steps the regulated entity will take to mitigate any risks presented by the exception. An exception may not be requested by a suspended person or any affiliates thereof.

(b) *Decision on exception.* A suspending official may approve an exception from a final suspension order in effect to permit a regulated entity to engage in a particular covered transaction with a suspended person and any affiliates thereof for reasons consistent with those for which the suspending official may limit or qualify the scope or effect of a final suspension order under § 1227.6(f)(2)(iv) of this part. The decision on a request for an exception shall not constitute an appealable order.

(c) *Notice required.* FHFA shall provide written notice in a timely manner to the regulated entity, the suspended person and any affiliates thereof, and the other regulated entities of any exception approved for a particular covered transaction.

Subpart B [Reserved]

PART 1228—RESTRICTIONS ON THE ACQUISITION OF, OR TAKING SECURITY INTERESTS IN, MORTGAGES ON PROPERTIES ENCUMBERED BY CERTAIN PRIVATE TRANSFER FEE COVENANTS AND RELATED SECURITIES

Sec.

1228.1 Definitions.

1228.2 Restrictions.

1228.3 Prospective application and effective date.

1228.4 State restrictions unaffected.

AUTHORITY: 12 U.S.C. 4511, 4513, 4526, 4616, 4617, 4631.

SOURCE: 77 FR 15574, Mar. 16, 2012, unless otherwise noted.

§ 1228.1 Definitions.

For the purposes of this part, the following definitions apply:

Adjacent or contiguous property means property that borders the burdened community, *provided that* such adjacent or contiguous property may be separated from the burdened community by public right of way.

Burdened community means a community comprising all of the parcels or interests in real property encumbered by a single private transfer fee covenant or a series of separate private transfer fee covenants that require payment of private transfer fees to the same entity to be used for the same purposes.

Covered association means a nonprofit mandatory membership organization comprising owners of homes, condominiums, cooperatives, manufactured homes, or any interest in real property, created pursuant to a declaration, covenant or other applicable law; or an organization described in section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code. A covered association may include master and sub-associations, each of which is also a covered association.

Direct benefit means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association of which the owners of the burdened property are members and used primarily