

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1227**

**RIN 2590-AB23**

**Suspended Counterparty Program**

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** The Federal Housing Finance Agency (FHFA) is proposing to amend the existing Suspended Counterparty Program (SCP) regulation. FHFA proposes to expand the categories of covered misconduct on which a suspension could be based to include sanctions arising from certain forms of civil enforcement. The proposed rule would also eliminate the requirement that any final suspension order be preceded by a proposed suspension order, but only when the suspension is based on an administrative sanction.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590-AB23, by any one of the following methods:

- *Agency website:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590-AB23.

• *Hand Delivered/Courier*: The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590-AB23, Federal Housing Finance Agency, 400 Seventh Street, SW., Washington, DC 20219. Deliver the package 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: Clinton Jones, General Counsel, Attention: Comments/RIN 2590-AB23, Federal Housing Finance Agency, 400 Seventh Street, SW., Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Marshall Adam Pecsek, Assistant General Counsel, at (202) 649-3380 (not a toll-free number), [marshall.pecsek@fhfa.gov](mailto:marshall.pecsek@fhfa.gov). For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The SCP requires a regulated entity – the Federal Home Loan Mortgage Corporation and any affiliate thereof, the Federal National Mortgage Association and any affiliate thereof (individually, an Enterprise and together, the Enterprises), and any Federal Home Loan Bank (Bank) – to submit a report to FHFA if it becomes aware that an individual or institution with which it does business has been found within the past three years to have committed certain forms of misconduct. FHFA may issue proposed and final suspension orders based on the reports it has received from the regulated entities

or based on other information. FHFA offers the affected individual or institution and the regulated entities an opportunity to respond to any proposed suspension order. FHFA may issue a final suspension order if FHFA determines that the underlying misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity. Final suspension orders direct the regulated entities to cease or refrain from doing business with the suspended counterparties, subject to terms as provided in the orders.

The reporting that is required under the SCP is authorized by sections 1313 and 1314 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (Safety and Soundness Act). Section 1314(a) of the Safety and Soundness Act authorizes FHFA to require the regulated entities to submit regular reports on their activities and operations, as the Director considers appropriate. *See* 12 U.S.C. § 4514(a).

The orders issued under the SCP fall within FHFA's general supervisory authority over the regulated entities, and specifically its authority under sections 1313, 1313B, and 1319G of the Safety and Soundness Act. Section 1313B of the Safety and Soundness Act authorizes FHFA to establish standards, by regulation or guideline, for each regulated entity regarding prudential management of risks. *See* 12 U.S.C. § 4513b. The Director may also require by order that the regulated entities take any action that will best carry out the purposes of that section. *See* 12 U.S.C. § 4513(b)(2)(B)(iii). Section 1319G(a) of the Safety and Soundness Act authorizes FHFA to issue any regulations, guidelines, or orders necessary to ensure that the purposes of the Safety and Soundness Act and the Enterprise charter acts are accomplished. *See* 12 U.S.C. § 4526(a). Finally, section 1313(a)(2) of the Safety and Soundness Act authorizes FHFA to exercise such incidental

powers as may be necessary in the supervision and regulation of each regulated entity.  
*See* 12 U.S.C. § 4513(a)(2).

FHFA established the SCP in June 2012 by letter to the regulated entities. The requirements and procedures for the SCP were generally codified at 12 CFR part 1227 by the interim final rule published on October 23, 2013. 78 FR 63007. FHFA amended the SCP regulation via final rule published on December 23, 2015. 80 FR 79675.

## **II. Analysis of Proposed Rule**

### *A. Civil Enforcement*

The SCP regulation authorizes suspension only if the applicable counterparty has committed covered misconduct, as that term is defined at 12 CFR 1227.2.<sup>1</sup> “Covered misconduct” is defined to include “administrative sanctions” and “convictions,” each of which is also defined at 12 CFR 1227.2.<sup>2</sup> The definition of “conviction” is limited solely to judgments of guilt of criminal offense, or certain other dispositions that are the functional equivalent of such judgments. The standards reflected in these definitions have allowed FHFA to significantly reduce the risks to which the regulated entities are

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<sup>1</sup> “Covered misconduct” is defined, in relevant part, to mean “[a]ny 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.” 12 CFR 1227.2 (definition of “covered misconduct”).

<sup>2</sup> “Administrative sanction” is defined to mean “debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.” *Id.* (definition of “administrative sanction”). “Conviction” is defined as follows: “(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) [a]ny 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.” *Id.* (definition of “conviction”).

exposed, by prohibiting them from doing business with counterparties that have committed various offenses, including but not limited to mortgage fraud. However, in FHFA's experience of administering the SCP, it has determined that this standard is too narrow; specifically, it does not authorize suspension of counterparties that have been found to have committed various forms of misconduct in the context of civil enforcement actions. Counterparties determined to have committed certain forms of misconduct in the context of civil enforcement actions may pose a significant risk to the regulated entities, even though their conduct might not rise to the level of criminal sanction, or might rise to this level, but the relevant criminal enforcement authority has declined to prosecute or has yet to prosecute.

To address this limitation in the SCP regulation, the proposed rule would amend the definition of "conviction" at § 1227.2 to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the person committed one of the offenses enumerated in the definition of "covered misconduct" – *e.g.*, fraud, embezzlement, etc. FHFA intends the expansion of the SCP suspension authority to cover civil enforcement actions to be applied broadly, to all manner of civil enforcement proceedings, including civil enforcement actions before a court in the relevant judicial branch – *e.g.*, a court organized under Article III of the United States Constitution in the Federal system or state equivalent – those before an administrative body convened by the issuing agency (*e.g.*, agency enforcement action presided over by an administrative law judge), as well as

actions properly undertaken by a private citizen on behalf of the Federal or a state government (*e.g.*, *qui tam* actions under the False Claims Act).

In addition, the proposed amendments would also include findings that a counterparty knowingly committed a material breach of contract. Certain, although possibly not all, of the enumerated offenses in the definition of “covered misconduct” have analogs in a non-criminal context (*e.g.*, fraud); hence, the proposed amendment to the definition of “conviction” would simply incorporate, via reference, those enumerated offences. However, a counterparty’s breach of contract, which generally would not be criminally actionable, may pose a significant risk to the regulated entities, particularly knowing, material breaches. These two qualifiers – “knowing” and “material,” which generally relate to intent and significance, respectively – are appropriate insofar as FHFA’s authority should be limited to those types of breaches that are likely to evince a risk of significant financial or reputation harm to the regulated entities, or otherwise threaten their safe and sound operation. Selection of this standard is prompted by the authority provided at 42 U.S.C. § 1437z-1, under which the United States Department of Housing and Urban Development (HUD) may impose monetary penalties under the Section 8 program for certain knowing, material contractual violations, including the failure under a Section 8 contract “to provide decent, safe, and sanitary housing.” 42 U.S.C. § 1437z-1(b)(2)(A). However, the proposed rule would not merely authorize FHFA to suspend business where the counterparty has been found by HUD or, pursuant to judicial review of HUD final agency action, a federal court, to have knowingly committed a material breach under a Section 8 contract, but any finding by relevant authority in the context of civil enforcement actions where a counterparty has been found

to have committed such a breach under any contract. Given the otherwise applicable restrictions under the SCP – most notably the requirement that covered misconduct occur in connection with a mortgage, mortgage business, *etc.* or in connection with the management or ownership of real property (a proposed revision separately addressed in section II C 1 below) – the risk of any such breach to the regulated entities is apparent and it would be appropriate to authorize suspension in event of such a breach, not only those for which penalties are authorized under 42 U.S.C. § 1437z-1.

This amendment would also include resolutions that are the equivalent of the above-referenced judgments or orders – *e.g.*, consent orders – regardless of whether the resolution includes an admission of misconduct by the subject counterparty. The current SCP regulation authorizes suspension where the covered misconduct is the disposition of a criminal offense that is the functional equivalent of a judgment of guilt (*e.g.*, deferred prosecution agreement). However, it also provides that “[a] disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.” 12 CFR 1227.2 (par. (2) of definition of “covered misconduct”). The proposed rule would not establish such a restriction with respect to civil enforcement. In FHFA’s experience, admissions of misconduct in the context of civil enforcement are uncommon. Imposing such a restriction on suspensions based on settled civil enforcement actions would significantly hinder the SCP’s purpose. FHFA is not proposing to eliminate the corresponding restriction in the context of criminal enforcement, because FHFA does not wish the SCP to have chilling effect on such dispositions. However, in the civil context, where the stakes for the applicable counterparties may be lower and where the costs of any such chilling effects would

therefore be more limited, FHFA has determined that it is appropriate to permit suspension where enforcement claims are resolved without admission of misconduct.

Accordingly, for the aforementioned reasons, the proposed rule would amend the definition of “conviction” in § 1227.2 to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of “covered misconduct” or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

*B. Administrative Sanctions*

*1. Immediate suspension orders.*

The SCP regulation establishes a series of procedures governing the issuance of a final order of suspension. FHFA must first issue a proposed order of suspension and provide the relevant counterparty and each regulated entity an opportunity to respond. Only then does the regulation authorize issuance of a final suspension order, and any such suspension order may not be effective sooner than 45 days after signature by the suspending official. Although these procedures are appropriate under most circumstances, ensuring that affected counterparties and the regulated entities are given the opportunity to provide FHFA with relevant information prior to issuance of a final suspension order, and that the regulated entities are provided adequate time to cease



transactions with the relevant counterparties, there are circumstances under which these procedures excessively constrain FHFA.

Specifically, FHFA has determined that these procedures should be modified where the covered misconduct is an administrative sanction, which is defined to mean “debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.” 12 CFR 1227.2 (definition of “administrative sanction”). Accordingly, where the covered misconduct is an administrative sanction, the proposed rule would add new § 1227.11 allowing FHFA to issue a suspension order – designated as an “immediate suspension order” – that is effective as early as the date signed by the suspending official and without first issuing a proposed suspension order.

Because FHFA does not conduct independent fact-finding investigations or adjudications in response to discovery of covered misconduct, it must defer to the judgment of third-party authorities (*e.g.*, a criminal court). A proposed suspension order provides an important opportunity for subject counterparties and regulated entities to provide information that FHFA might find relevant in determining whether to issue a final suspension order, including but not limited to information that the subject counterparty believes would undermine one or more of the factual determinations on which the order is based. FHFA believes, however, that where another Federal agency has concluded that a counterparty’s right to do business with the government should be

limited, particular deference to that conclusion is warranted. In addition, whereas a conviction represents a judgment by a court of competent jurisdiction that a counterparty has engaged in certain forms of misconduct – or the functional equivalent of such a judgment – an administrative sanction reflects a specific determination by a Federal agency that the subject counterparty’s right to do business with the Federal government should be limited or prohibited. Given FHFA’s obligation to protect the safe and sound operation of the regulated entities and the authority under the SCP to restrict the entities’ rights to conduct business with third parties, such determinations by Federal agencies are of unique significance. Accordingly, FHFA has determined that where the covered misconduct is based on an administrative sanction, it should be authorized to restrict the relevant counterparty’s business with the regulated entities without excessive delay.

This amendment would, of course, not preclude FHFA from adhering to the current procedures and issuing a proposed suspension order where an immediate suspension order is authorized, but would merely provide the Agency with additional flexibility to timely respond to the discovery of covered misconduct as appropriate. Similarly, the amendments would not require that immediate suspension orders be effective upon signature by the suspending official. FHFA expects that there would be circumstances under which such an effective date would be unduly disruptive to the regulated entities, who may require additional time to wind down business with the relevant counterparties. The proposed amendment would simply permit FHFA to issue an immediate suspension order that is effective upon signature by the suspending official where necessary and appropriate to protect the safe and sound operation of the regulated entities, without the burden of the 45-day requirement, but would also permit issuance of

an immediate suspension order effective at some future date specified in the order. In addition, subject counterparties and the regulated entities would have the opportunity to provide a response for FHFA's consideration. However, whereas this response period precedes the effective date of a final suspension order under the current procedures, the proposed rule would allow for issuance of an immediate suspension order with an effective date preceding the deadline by which a response must be provided. The procedures governing issuance of an immediate suspension order, including but not limited to those governing the content of the order and notice, are described in more detail in section II C below.

2. *Request to vacate.*

The proposed rule would add new § 1227.12 establishing procedures allowing for the vacation of a final suspension order where the administrative sanction was imposed under authority that does not guarantee advance notice or an opportunity to present an opposition before the sanction is imposed. As noted above, FHFA does not conduct investigations or adjudicate facts regarding subject counterparties' conduct. Rather, FHFA relies on findings made by other authorities. Accordingly, FHFA's suspension authority is generally limited to judgments by authorities issued with certain procedural protections in place – *e.g.*, notice and hearing opportunity in criminal proceedings. Under certain circumstances, however, a Federal agency may issue an administrative sanction without such protections. Specifically, the Office of Management and Budget (OMB) Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, Subpart G provides agencies with the authority, pursuant to implementing regulations promulgated by those agencies, to issue

immediately effective orders of suspension without advance notice or an opportunity for hearing, pending resolution of a related proceeding (*e.g.*, debarment proceeding). This suspension is generally meant to be temporary, pending outcome of the related proceeding, although it may be superseded by a more permanent sanction (*e.g.*, debarment). *See* 2 CFR 180.760.

Due to the comparatively limited procedural protections afforded to counterparties subject to such suspensions, FHFA has determined that it would be appropriate to vacate suspension orders based on an administrative sanction imposed without prior notice and opportunity to present an opposition, once those orders are no longer in effect. The proposed rule would allow for a request to vacate, which FHFA would grant upon a finding that these conditions have been satisfied. The rule would require that the request be initiated by the subject counterparty and include such information as is necessary for FHFA to determine that the conditions are satisfied. The procedures governing vacation of such suspension orders are described in more detail in the section-by-section passage immediately below.

### *C. Section-by-Section Analysis*

#### *1. § 1227.2 Definitions.*

As discussed above in section II A, the proposed rule would amend the definition of “conviction” to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of “covered misconduct” or knowingly committed a material breach of contract, or any other

resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

In addition, the proposed rule would amend the definition of “covered misconduct” to include misconduct in connection with the management or ownership of real property. Real property management is a significant function performed by certain regulated entity counterparties, particularly participants in Enterprise multifamily loan transactions. Misconduct in connection with real property management or ownership – *e.g.*, submission of fraudulent reports in connection with real property management service contracts, failure to maintain safe housing in accordance with assisted housing contracts, etc. – demonstrates a potential risk to the regulated entities, even in the absence of a close nexus between the misconduct and financing (*e.g.*, mortgage origination fraud).

Accordingly, the proposed rule would amend paragraph (1) of the definition of “covered misconduct” to read “[a]ny 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, or in connection with the management or ownership of real property.”

2. *§ 1227.11 Immediate suspension order.*

For the reasons provided above in section II B, the proposed rule would establish a new § 1227.11 governing the issuance of immediate suspension orders. Paragraph (a) would establish the grounds under which such an order could be issued; specifically, such an order would be issued where the subject counterparty committed covered misconduct,

the basis of which is an administrative sanction, and where 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. This second requirement mirrors the corresponding standard, found in §§ 1227.5(b)(2) and 1227.6(a)(2), authorizing issuance of proposed and final suspension orders, respectively.

Paragraph (b) would establish the factors that FHFA may consider when determining whether to issue an immediate suspension order. It incorporates, by reference, the factors that FHFA may consider when determining whether to issue a final suspension order enumerated at § 1227.6(c).

Paragraph (c) would establish procedures governing issuance of an immediate suspension order, which generally correspond to those currently governing issuance of proposed and final suspension orders. It would provide that, where the suspending official makes a determination to suspend a person under § 1227.11, the suspending official must issue an immediate suspension order to each regulated entity, mirroring similar requirements provided with respect to final suspension orders at § 1227.6(f)(1). It would establish requirements for the content of the required order, incorporating by reference the content requirements for a final suspension order at § 1227.6(f)(2); however, whereas a final suspension order must include a discussion of any relevant information submitted by the respondent or regulated entities, because an immediate suspension order is not preceded by a notice of proposed suspension that would provide the respondent or regulated entities with the opportunity to provide such information prior to issuance, reference to this information would be omitted in § 1227.11(c).

Paragraph (c) would also require that FHFA provide each respondent and regulated entity with a notice of the immediate suspension order and establish requirements for the content of the notice, incorporating by reference analogous requirements governing issuance of proposed suspension orders at § 1227.5(d) and (e). These elements include, but are not limited to, information instructing the subject counterparty on how to provide a response.

Paragraph (d) would provide that the effective date of the immediate suspension order be included in the order, as is the case with respect to final suspension orders. However, whereas final suspension orders may be effective no sooner than 45 days after signature by the suspending official, immediate suspension orders may be effective immediately upon signature.

Paragraph (e) would establish requirements for the written record and would provide for FHFA's evaluation of information provided by respondents and regulated entities following issuance of an immediate suspension order. The proposed rule would require that the written record include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the determination, including any information related to the factors in paragraph (b) of this section. It would specify that FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record.

As discussed above in section II B, in contrast to a proposed suspension order, which is issued in anticipation of the issuance of a final suspension order and which will not be effective until after the deadline for response has passed, an immediate suspension

order may be effective before such a deadline, and is not issued in anticipation of a subsequent order. Nevertheless, FHFA welcomes input from respondent and regulated entities in response to an immediate suspension order. Accordingly, paragraph (e) would provide that FHFA will consider any material submitted by the respondent and regulated entities by the deadline provided in the notice and document its determination whether or not to vacate or modify the terms of the immediate suspension order. The rule would provide that if FHFA elects to vacate or modify the terms of an immediate suspension order, notice will be provided to the respondent and regulated entities, and a modified order, as applicable, will replace the immediate suspension order on FHFA's website. However, if FHFA declines to vacate or modify the terms of the immediate suspension order, no notice of this determination would be provided, and the immediate suspension order would persist until it is later modified or vacated, or expires per the terms of the order.

Finally, paragraph (f) would specify, as is noted above, that an immediate suspension order has the full force and effect of a final suspension order. FHFA acknowledges that the addition of a new category of order might create confusion among certain members of the public, but expects that this can be addressed through the text of the immediate suspension order itself and accompanying notice – *e.g.*, in contrast to a notice of proposed suspension, which by historical practice notes that the referenced proposed order is only proposed and will not go into effect unless finalized, a notice of immediate suspension would read that the referenced order will go into effect on the identified effective date. Nevertheless, to more explicitly clarify what might otherwise be



unclear, paragraph (f) distinguishes immediate from proposed suspension orders, providing that the former has the full force and effect of a final suspension order.

3. *§ 1227.12 Request to vacate.*

The proposed rule would add new § 1227.12 to provide respondents subject to an immediate suspension order with the opportunity to request that FHFA vacate the order under certain circumstances. Paragraph (a) would provide the general grounds that must be satisfied in order for FHFA to grant the request. These include that: i) the covered misconduct on which the suspension order was based does not include a conviction; ii) each administrative sanction on which the order was based was imposed pursuant to authority that does not guarantee prior notice and a prior opportunity to present an opposition; and iii) each administrative sanction on which the order was based is no longer in effect.

Paragraph (b) would establish requirements for the content of a request to vacate. A request must include: i) a copy of the final order of suspension for which the request to vacate applies; ii) documentation from the agency imposing the administrative sanction citing the authority under which the sanction was imposed; iii) documentation from the agency imposing the administrative sanction demonstrating that the sanction is no longer in effect; and 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. This information would allow FHFA to determine whether the preconditions that would be established in paragraph (a) are satisfied.

Paragraph (c) would establish requirements for FHFA's review of the request and any response. It would provide that FHFA must approve a request to vacate if it has been presented with evidence sufficient to demonstrate that the preconditions in paragraph (a) have been satisfied, unless FHFA discovers covered misconduct that has not formed the basis for a previously issued order of suspension, provided that 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. Discovery of this additional covered misconduct may justify denial of the request, and any denial of a request to vacate would be regarded as final agency action and would not be appealable to the Director. Under these circumstances – *i.e.*, where the administrative sanction initially justifying the suspension is no longer in effect but where continuation of the suspension is justified by discovery of additional covered misconduct – the public suspension order would not reflect all of the grounds on which the suspension's continuation is based. FHFA regards this as a negligible concern, however. By necessity, the immediate suspension order would have satisfied the appropriate regulatory requirements upon issuance, and both the respondent and regulated entities would have had an opportunity to respond to the order. In addition, the proposed rule would require that FHFA timely notify the respondent of its decision and that a denial of the vacation request specify the reasons for the denial, which would include identification of the additional covered misconduct.

Paragraph (d) would specify that a request to vacate under § 1227.12 is distinct from a request for reconsideration under § 1227.9. A respondent may, for example, submit a request to vacate an immediate suspension order concurrently with a request for

consideration, in which case FHFA would evaluate each independently. If FHFA were to determine that the request to vacate should be granted, then the request for reconsideration would be rendered moot. If, however, FHFA were to determine that the request to vacate should be denied, because the necessary preconditions have not been satisfied, it may still grant a request for reconsideration based on the standard provided in § 1227.9(c). The time constraints governing requests for reconsideration would not apply to requests to vacate.

#### 4. *Miscellaneous provisions*

The proposed rule would amend § 1227.6(a) to specify that a final suspension order may be issued only if preceded by a proposed suspension order, pursuant to the requirements of § 1227.5. Although this is implicitly apparent under the current regulation, it would be appropriate, in light of the proposed addition of immediate suspension order authority, to explicitly provide the circumstances under which a final suspension order may be issued. Finally, the proposed rule would make a series of conforming revisions throughout part 1227 to include a reference to immediate suspension orders, where the SCP regulation currently only references final suspension orders – *e.g.*, the requirement, found at § 1227.8(a), that FHFA publish final suspension orders on its website. These amended provisions are: §§ 1227.1(c); 1227.2 (definitions of “respondent,” “suspending official” and “suspension”); 1227.3(a); and 1227.8 section heading, paragraphs (a) and (b)(3).

#### *D. Solicitation of comments*

FHFA solicits comments on every aspect of this proposed rule. However, FHFA solicits input in particular with respect to the following questions:

1. Should the scope of misconduct included in the definition of “covered misconduct” be expanded beyond what is being proposed? If so, what additional forms of misconduct should be included?
2. Should the illustrative list of forms of misconduct – *e.g.*, fraud, embezzlement, etc. – provided in the definition of “covered misconduct” be otherwise changed? If so, what should be added or removed?
3. Should the regulation be amended to allow for suspension based on specific additional sanctions imposed by other Federal agencies, including but not limited to sanctions that restrict a counterparty’s rights to participate in federally insured mortgage programs – *e.g.*, the Federal Housing Administration’s revocation of a mortgagee’s right to participate in mortgage insurance programs under Title I or Title II of the National Housing Act – regardless of whether the underlying misconduct was related to fraud, embezzlement, etc.?
4. Should FHFA be authorized to issue immediate suspension orders only with a prospective effective date (*e.g.*, ten days after signature by the suspending official)? If so, how long after signature by the suspending official?

### **III. Consideration of Differences Between the Banks and the Enterprises**

Section 1313(f) of the Safety and Soundness Act requires FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Enterprises and the Banks 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 FHFA considers appropriate. *See* 12 U.S.C. 4513(f). In preparing this

proposed rule, FHFA 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.

#### **IV. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to OMB for review.

#### **V. 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. FHFA need not undertake such an analysis 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. FHFA certifies that the proposed rule, if adopted as a final rule, would not have a significant economic impact on a substantial number of small entities because the proposed rule is applicable only to the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

#### **List of Subjects in 12 CFR Part 1227**

Administrative practice and procedure, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the Preamble, FHFA proposes to amend

part 1227 of chapter XII of title 12 of the Code of Federal Regulations as follows:

**PART 1227—SUSPENDED COUNTERPARTY PROGRAM**

1. The authority citation for part 1227 continues to read as follows:

**Authority:** 12 U.S.C. 4513, 4513b, 4514, 4526.

2. Amend § 1227.1(c) by adding the words “or immediate” after “Request for an exception to a final”.

3. Amend § 1227.2 as follows:

a. In the definition of “Conviction”:

i. In paragraph (1), removing the word “or” after the “;”;

ii. In paragraph (2), removing the “.” and adding the word “; or” after the words “admission of guilt”; and

iii. Adding new paragraph (3).

b. In the definition of “Covered misconduct” revising paragraph (1).

c. In the definition of “Respondent” adding the word “; immediate,” after the words “subject of a proposed”;

d. In the definition of “Suspending official” adding the word “; immediate” after the words “sign proposed”;

e. In the definition of “Suspension” removing the word “a” after the term “pursuant to” and adding, in its place, the words “an immediate or”.

The addition reads as follows:

**§ 1227.2 Definitions.**

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*Conviction* \*\*\*

(3) An order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of “covered misconduct” or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

*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, or in connection with the management or ownership of real property.

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3. Amend § 1227.3(a) by removing the word “a” after the word “issue” and adding, in its place, the words “an immediate or”.

4. Amend § 1227.6(a) by adding a new sentence in the beginning of the introductory text to read as follows:

**§ 1227.6 Final suspension order.**

(a) *Grounds for issuance.* A final suspension order may be issued only if preceded by a proposed suspension order, pursuant to the requirements of § 1227.5. \* \* \*

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5. Amend § 1227.8 by:
  - a. Revising the section heading by adding the words “and immediate” after the word “final”;
  - b. Revising paragraph (a) by adding the words “and immediate” after the word “final”; and
  - c. Revising paragraph (b)(3) by adding the words “or immediate” after the word “final”.
6. Add new § 1227.11 to read as follows:

**§ 1227.11 Immediate suspension order.**

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

(1) The person engaged in covered misconduct, the basis for which is an administrative sanction; 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) *Factors that may be considered by the suspending official.* In determining whether or not to issue an immediate suspension order with respect to a person 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 any of the applicable factors enumerated in § 1227.6(c).



(c) *Issuance of an immediate suspension order*—(1) *General*. If the suspending official makes a determination to suspend a person under this section, the suspending official shall issue an immediate suspension order to each regulated entity regarding the respondent.

(2) *Content of immediate suspension order*. The immediate suspension order must include a statement of the suspension determination and supporting grounds and each of the elements described in § 1227.6(f)(2)(ii) through (iv).

(3) *Notice to respondent required*. The suspending official shall provide prompt written notice to the respondent of the immediate suspension order issued to the regulated entities with respect to such respondent. It must be delivered pursuant to the requirements provided in § 1227.5(e).

(4) *Content of notice*. The notice of an immediate suspension order shall include the elements prescribed for notice of a proposed suspension order established in § 1227.5(d), except that wherever the term “proposed” appears in § 1227.5(d), it shall be construed to mean “immediate.”

(d) *Effective date*. An immediate suspension order shall take effect on the date specified in the order, which may be as early as the date that the order is signed.

(e) *Written record and post-issuance evaluation*. The written record shall include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the determination, including any information related to the factors in paragraph (b) of this section. FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record. FHFA will consider any

material submitted by the respondent and regulated entities by the deadline provided in the notice and document its determination whether or not to vacate or modify the terms of the immediate suspension order. If FHFA elects to vacate or modify the terms of an immediate suspension order, notice will be provided to the respondent and regulated entities, and a modified order, as applicable, will replace the immediate suspension order on FHFA's website. If FHFA declines to vacate or modify the terms of the immediate suspension order, no notice of this determination will be provided, and the immediate suspension order will persist until it is later modified or vacated, or expires per the terms of the order.

(f) *Relationship to final suspension order.* An immediate suspension order has the same force and effect of a final suspension order, subject to the terms and conditions presented in the order.

7. Add new § 1227.12 to read as follows:

**§ 1227.12 Request to vacate.**

(a) *Grounds.* A respondent subject to an immediate suspension order may petition FHFA for a request to vacate the order if each of the following conditions is met:

(1) The covered misconduct on which the order was based does not include a conviction;

(2) Each administrative sanction on which the order was based was imposed pursuant to authority that does not guarantee prior notice and a prior opportunity to present an opposition; and

(3) Each administrative sanction on which the order was based is no longer in effect.

(b) *Content of request.* A request to vacate a final suspension order that satisfies each of the conditions provided in this paragraph (b) does not preclude FHFA from requesting additional information from the respondent. The request must include:

(1) A copy of the final order of suspension for which the request to vacate applies;

(2) Documentation from the agency imposing the administrative sanction citing the authority under which the sanction was imposed;

(3) Documentation from the agency imposing the administrative sanction demonstrating that the sanction is no longer in effect; and

(4) 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.

(c) *Decision and response.* FHFA will vacate the final order of suspension if it has been presented with documentation demonstrating that each of the conditions in paragraph (a) of this section has been satisfied, unless FHFA is aware of any other covered misconduct that has not formed the basis for a previously issued order of suspension, which may justify denying the request to vacate if 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. FHFA will notify the respondent of its decision in a timely manner. If FHFA denies the request, its response will specify the reasons for the denial. Any such rejection shall not be appealable to the Director and shall constitute final agency action.

