

Proposed Rules

Federal Register

Vol. 74, No. 115

Wednesday, June 17, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1233

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR 1731

RIN 2590-AA11

Reporting of Fraudulent Financial Instruments

AGENCY: Federal Housing Finance Agency; Office of Federal Housing Enterprise Oversight.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a proposed regulation that would require the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Banks (regulated entities) to report to FHFA any fraudulent financial instruments that they purchased or sold. The proposed regulation would also require the regulated entities to establish and maintain internal controls, procedures, and training programs to ensure that any such fraudulent instruments are detected and reported.

DATES: Written comments on the proposed regulation must be received on or before August 17, 2009. For additional information, *see*

SUPPLEMENTARY INFORMATION.

ADDRESSES: You may submit your comments on the proposed regulation, identified by regulatory information number (RIN) 2590-AA11, by any of the following methods:

- *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-AA11, Federal Housing Finance Agency,

Fourth Floor, 1700 G Street, NW., Washington, DC 20552.

- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA11, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to RegComments@fhfa.gov. Please include "RIN 2590-AA11" 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 e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by the agency. Please include "RIN 2590-AA11" in the subject line of the message.

FOR FURTHER INFORMATION CONTACT:

Andra Grossman, Counsel, telephone (202) 343-1313 (not a toll-free number), Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed regulation and will take all comments into consideration before issuing the final regulation. Copies of all comments will be posted without change, including any personal information you provide, such as your name and address, on the FHFA Web site at <http://www.fhfa.gov>. 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, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414-6924.

II. Background

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110-289, 122 Stat. 2654 (2008), amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12

U.S.C. 4501 *et seq.*) (Safety and Soundness Act) to establish FHFA as an independent agency of the Federal Government.¹ FHFA was established to oversee the prudential operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), the Federal Home Loan Banks (Banks) (collectively, regulated entities) and to ensure that they operate in a safe and sound manner; remain adequately capitalized; foster liquid, efficient, competitive and resilient national housing finance markets; comply with the Safety and Soundness Act and their respective authorizing statutes, as well as all rules, regulations, guidelines, and orders, issued thereunder; and carry out their missions through activities that are authorized by the above-cited statutes and are consistent with the public interest.

The Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) will be abolished one year after enactment of HERA. However, the regulated entities continue to operate under regulations promulgated by OFHEO and FHFB until such regulations are supplanted by regulations promulgated by FHFA.

In 2005, OFHEO issued a regulation requiring the Enterprises to report mortgage fraud and to establish internal controls, procedures, and training programs to ensure that mortgage fraud is detected and prevented. As part of this rulemaking, that regulation, 12 CFR part 1731, "Mortgage Fraud Reporting," would be removed when this regulation becomes effective.

III. Proposed Regulation

Section 1379E of the Safety and Soundness Act (12 U.S.C. 4642(a)), subjects the regulated entities to both a reporting and an internal controls requirement. Under this statutory provision, the Director must require a regulated entity to submit a timely report upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. In addition, the Director must require each regulated entity to

¹ See Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, Section 1101 of HERA.

establish and maintain procedures designed to discover any such transactions.

Section 1379E of the Safety and Soundness Act (12 U.S.C. 4642(b)) also provides each regulated entity, and any entity-affiliated party, protection from liability in making a report, or requiring another to make any report, if it acts in good faith. This protection extends to any liability arising under any provision of law or regulation, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement) for the submission of any report or for any failure to notify persons who are the subject of, or who are identified in, the report.

In addition, Congress has continued to emphasize combating mortgage fraud as a key element in stabilizing mortgage markets and protecting homeowners and investors. The recently enacted Fraud Enforcement and Recovery Act of 2009, Public Law 111–21 (2009), provides new funding for anti-fraud efforts, enhances federal penalties and includes a review of the current financial and economic crisis.

Section 1313(f) of the Safety and Soundness Act (12 U.S.C. 4513(f)), 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, liquidity mission, affordable housing and community development mission, capital structure, and joint and several liability. The Director may also consider any other differences that are deemed appropriate. The purpose of this proposed rule is to implement statutory provisions that address possible risks to the regulated entities associated with fraudulent loans or other instruments. Although the respective businesses in which the Banks and the Enterprises are engaged differ, all of them are involved to some degree in providing financing to the residential mortgage market and thus may be exposed to the risk of fraud, particularly when investing in whole mortgage loans. In preparing the proposed regulation, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors. The Director believes that none of the unique factors relating to the Banks warrants establishing different treatment under the proposed regulation. However, detailed guidance may be issued that would address specific business or operational differences with respect to

the regulated entities. Nonetheless, the Director requests comments about whether it would be appropriate to include in a final rule any provisions relating to the differences between the Banks and the Enterprises.

IV. Section-by-Section Analysis

Section 1233.1 Purpose

This section as proposed would require each regulated entity to report to FHFA the discovery of fraud or possible fraud, in connection with a loan or other financial instrument that it has purchased or sold, and to establish internal controls, procedures, and training programs to detect and report such fraud.

Section 1233.2 Definitions

This section provides definitions for the terms contained in the proposed regulation.

Bank or Federal Home Loan Bank would be defined as a Bank established under the Federal Home Loan Bank Act; the term “Federal Home Loan Banks” means, collectively, all the Federal Home Loan Banks.

Director would be defined as the Director of FHFA or his or her designee.

Enterprise would be defined as the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and any affiliate thereof.

Entity-affiliated party would be defined as—

- Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;
- Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;
- Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant), if:
 - The independent contractor knowingly or recklessly participates in—
 - Any violation of any law or regulation;
 - Any breach of fiduciary duty; or
 - Any unsafe or unsound practice; and
 - Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a

significant adverse effect on, the regulated entity;

- Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and

- The Office of Finance.

Fraud would be defined as a material misstatement, misrepresentation, or omission relied upon by a regulated entity.

Possible fraud would be defined as a situation that a regulated entity has a reasonable belief, based upon a review of information available to the regulated entity, that fraud may be occurring or has occurred.

Regulated entity would be defined as the Federal National Mortgage Association and any affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, and any Federal Home Loan Bank; the term “regulated entities” means, collectively, the Federal National Mortgage Association and any affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, and the Federal Home Loan Banks.

Safety and Soundness Act would be defined as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Federal Housing Finance Regulatory Reform Act of 2008, Division A of the Housing and Economic Recovery Act of 2008, Public Law 110–289, 122 Stat. 2654 (2008).

Section 1233.3 Reporting

This section as proposed sets forth the procedures for reporting fraud and possible fraud to FHFA, and requires a regulated entity to report promptly any fraud or possible fraud in writing to the Director. This section also provides that if the situation requires the immediate attention of FHFA, a regulated entity must report the matter to FHFA immediately by telephone or electronic communication. FHFA expects that it would issue guidance and instructions with respect to the format and content of fraud reports. This proposed section would allow the regulated entities to use fraud-reporting formats used by other agencies with jurisdiction over such fraud, but only upon receipt of written notice from the Director. For instance, under the Bank Secrecy Act of 1970, banking regulatory agencies require the completion and submission of Suspicious Activity Reports to the United States Department of the Treasury Financial Crimes Enforcement Network. The section as proposed would further provide for retention of records by a regulated entity and would

prohibit the disclosure of reporting fraud or possible fraud to the parties connected with such fraud without the prior written approval of the Director. This requirement would not prevent a regulated entity from disclosing or reporting such fraud pursuant to legal requirements, including disclosure to appropriate law enforcement authorities. Finally, this section reiterates a statutory provision that makes clear that a regulated entity does not waive any privilege it may otherwise possess as a result of reporting fraud or possible fraud to FHFA under these provisions.

Section 1233.4 Internal Controls, Procedures and Training

This section as proposed would require each regulated entity to establish adequate and efficient internal controls and procedures, as well as an operational training program, to assure that it has in place an effective system to detect and report any fraud.

Section 1233.5 Protection From Liability for Reports

This section as proposed would provide that a regulated entity and any entity-affiliated party that submits a report pursuant to this part, in good faith (or requires another person to submit such a report), cannot be held liable either for submitting the report, or for failing to notify any person who is the subject of such report, or is identified in the report.

Section 1233.6 Supervisory Action

This section as proposed would address that failure to comply with the requirements of the final regulation may subject a regulated entity or its board members, officers, or employees to supervisory action by FHFA under the Safety and Soundness Act, including but not limited to, cease-and-desist proceedings and civil money penalties.

Regulatory Impact

Paperwork Reduction Act

As the proposed regulation pertains to the regulated entities, it 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.*).

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). In this case, the proposed regulation would apply only to the regulated entities, none of which are small entities for purposes of this requirement. Accordingly, FHFA hereby certifies that the proposed regulation is not likely to have a significant economic impact on a substantial number of small business entities for purposes of the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 1233

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

12 CFR Part 1731

Administrative practice and procedure, Government-sponsored enterprises.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4514, 4526, and 4642, the Federal Housing Finance Agency proposes to amend chapters XII and XVII of Title 12, Code of Federal Regulations, as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Subchapter B—Entity Regulations

1. Add part 1233 to subchapter B to read as follows:

PART 1233—REPORTING OF FRAUDULENT FINANCIAL INSTRUMENTS

Subpart A—General

Sec.

1233.1 Purpose.

1233.2 Definitions.

1233.3 Reporting.

1233.4 Internal controls, procedures, and training.

1233.5 Protection from liability for reports.

1233.6 Supervisory action.

Authority: 12 U.S.C. 4514, 4526, 4642.

Subpart A—General

§ 1233.1 Purpose.

The purpose of this part is to implement section 1379E of the Safety and Soundness Act (12 U.S.C. 4642) by requiring each regulated entity to report to FHFA any known or possible fraud in connection with a loan or other financial instrument that it has purchased or sold, and by requiring

each regulated entity to establish internal controls, procedures, and training programs designed to detect and report such fraud.

§ 1233.2 Definitions.

The following definitions apply to the terms used in this part:

Bank or Federal Home Loan Bank means a Bank established under the Federal Home Loan Bank Act; the term “Federal Home Loan Banks” means, collectively, all the Federal Home Loan Banks.

Director means the Director of FHFA or his or her designee.

Enterprise means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and any affiliate thereof.

Entity-affiliated party means—

(1) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(2) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

(3) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant), if:

(i) The independent contractor knowingly or recklessly participates in—

(A) Any violation of any law or regulation;

(B) Any breach of fiduciary duty; or

(C) Any unsafe or unsound practice; and

(ii) Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a significant adverse effect on, the regulated entity;

(4) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and

(5) The Office of Finance.

Fraud means a material misstatement, misrepresentation, or omission relied upon by a regulated entity.

Possible fraud means that a regulated entity has a reasonable belief, based upon a review of information available to the regulated entity, that fraud may be occurring or has occurred.

Regulated entity means the Federal National Mortgage Association and any

affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, any Federal Home Loan Bank; the term “regulated entities” means, collectively, the Federal National Mortgage Association and any affiliate thereof, the Federal Home Loan Mortgage Corporation and any affiliate thereof, and the Federal Home Loan Banks.

Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Federal Housing Finance Regulatory Reform Act of 2008, Division A of the Housing and Economic Recovery Act of 2008, Public Law 110–289, 122 Stat. 2654 (2008).

§ 1233.3 Reporting.

(a) *Timeframe for reporting.* (1) A regulated entity shall submit to the Director a written report relating to any fraud or possible fraud occurring in connection with a loan, a series of loans or other financial instruments that the regulated entity has purchased or sold, and shall do so promptly after identifying such fraud or possible fraud or is notified about such fraud or possible fraud by law enforcement or other government authority.

(2) In addition to submitting a report in accordance with paragraph (a)(1) of this section, in any situation that would have a significant impact on the regulated entity, the regulated entity shall immediately report any fraud or possible fraud to the Director by telephone or electronic communication.

(b) *Format for reporting.* (1) The report shall be in such format and shall be filed in accordance with such procedures that the Director may prescribe.

(2) The Director may require a regulated entity to provide such additional or continuing information relating to such fraud or possible fraud as the Director deems appropriate.

(3) A regulated entity may satisfy the reporting requirements of this section by submitting the required information on a form or in another format used by any other regulatory agency, provided it has first obtained the prior written approval of the Director.

(c) *Retention of records.* A regulated entity shall maintain a copy of any report submitted to the Director and the original or business record equivalent of any supporting documentation for a period of five years from the date of submission.

(d) *Nondisclosure.* (1) A regulated entity may not disclose to any person that it has submitted a report to the Director pursuant to this section, unless

it has first obtained the prior written approval of the Director.

(2) The restriction in paragraph (d)(1) of this section does not prohibit a regulated entity from—

(i) Disclosing or reporting such fraud or possible fraud pursuant to legal requirements, including reporting to appropriate law enforcement or other governmental authorities; or

(ii) Taking any legal or business action it may deem appropriate, including any action involving the party or parties connected with the fraud or possible fraud.

(e) *No waiver of privilege.* A regulated entity does not waive any privilege it may possess under any applicable law as a consequence of reporting fraud or possible fraud under this part.

§ 1233.4 Internal controls, procedures, and training.

(a) *In General.* Each regulated entity shall establish and maintain adequate and efficient internal controls and procedures and an operational training program to assure an effective system to detect and report fraud in connection with the purchase or sale of a loan or other financial instrument.

(b) *Examination.* The examination by FHFA of fraud reporting programs of each regulated entity must include an evaluation of the extent to which internal policies, procedures, and training programs of the regulated entity minimize risks from fraud and to the extent that fraud or possible fraud is consistently reported to FHFA.

§ 1233.5 Protection from liability for reports.

As provided by section 1379E of the Safety and Soundness Act (12 U.S.C. 4642(b)), a regulated entity that, in good faith, submits a report pursuant to this part, and any entity-affiliated party, that, in good faith, submits or requires a person to submit a report pursuant to this part, shall not be liable to any person under any provision of law or regulation, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement) for such report, or for any failure to provide notice of such report to the person who is the subject of such report, or any other persons identified in the report.

§ 1233.6 Supervisory action.

Failure by a regulated entity to comply with this part may subject the regulated entity or the board members, officers, or employees thereof to supervisory action by FHFA, including

but not limited to, cease-and-desist proceedings and civil money penalties.

CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PART 1731—[REMOVED]

2. Remove part 1731.

Dated: June 4, 2009.

James B. Lockhart III,

Director, Federal Housing Finance Agency.

[FR Doc. E9–14189 Filed 6–16–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

RIN 1010–AD15

[Docket ID MMS–2008–OMM–0003]

Safety and Environmental Management Systems for Outer Continental Shelf Oil and Gas Operations

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Proposed rule.

SUMMARY: The MMS proposes to require operators to develop and implement a Safety and Environmental Management System to address oil and gas operations in the Outer Continental Shelf. The Safety and Environmental Management System would consist of four elements—Hazards Analysis, Management of Change, Operating Procedures, and Mechanical Integrity—that, until now, have not been covered in our regulations. The MMS analyzed accident panel investigation reports, incident reports, and incidents of noncompliance and determined that the root cause of most safety and environmental accidents and incidents is one or more of these four elements. The MMS believes that requiring operators to implement a Safety and Environmental Management System will reduce the risk and number of accidents, injuries, and spills during Outer Continental Shelf activities.

DATES: Submit comments by September 15, 2009. The MMS may not fully consider comments received after this date. Submit comments to the Office of Management and Budget on the information collection burden in this proposed rule by July 17, 2009. This does not affect the deadline for the public to comment to MMS on the proposed regulations.