available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2009–10 fiscal period begins on August 1, 2009, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable onions handled during such fiscal period; (2) this action decreases the assessment rate for assessable onions beginning with the 2009–10 fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 959

Marketing agreements, Onions, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 959 is amended as follows:

PART 959—ONIONS GROWN IN SOUTH TEXAS

■ 1. The authority citation for 7 CFR part 959 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 959.237 is revised to read as follows:

§ 959.237 Assessment rate.

On and after August 1, 2009, an assessment rate of $0.025 per 50-pound equivalent is established for South Texas onions.

Dated: July 29, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–18540 Filed 8–3–09; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1229

RIN 2590–AA21

Capital Classifications and Critical Capital Levels for the Federal Home Loan Banks

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Regulatory Reform Act, Division A of the Housing and Economic Recovery Act of 2008 (HERA), requires the Director of the Federal Housing Finance Agency (FHFA) to establish criteria based on the amount and type of capital held by a Federal Home Loan Bank (Bank) for each of the following capital classifications: Adequately capitalized; Undercapitalized; Significantly undercapitalized; and Critically undercapitalized. In addition, HERA provides that the critical capital level for each Bank shall be the amount of capital that the Director by regulation shall require. HERA also sets forth prompt corrective action (PCA) authority that the Director has for the Banks. To implement these new provisions, FHFA published in the **Federal Register** on January 30, 2009 an interim final rule to define critical capital for the Banks, establish the criteria for each of the capital classifications identified in HERA and delineate its PCA authority over the Banks. FHFA requested comments on all aspects of the regulation. It also sought comment on whether it should establish a ''well-capitalized'' classification and on what criteria may be appropriate to define such a new category. After considering the comments received on the interim final rule, FHFA is adopting the interim final rule as a final regulation, subject to amendments meant to clarify certain provisions.

DATES: The final regulation is effective August 4, 2009.

FOR FURTHER INFORMATION CONTACT: Julie Paller, Senior Financial Analyst, (202) 408–2842, and Anthony G. Cornyn, Senior Associate Director, (202) 408–2522, Division of Federal Home Loan Bank Regulation, Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006; or Thomas E. Joseph, Senior Attorney-Advisor, (202) 414–3095, Office of General Counsel, Federal Housing Finance Agency, 1700 G St., NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Federal Housing Finance Agency and Recent Legislation

Effective July 30, 2008, HERA, Public Law 110–289, 122 Stat. 2654 (2008), transferred the supervisory and oversight responsibilities of the Office of Federal Housing Enterprise Oversight (OFHEO) over the Federal National Mortgage Association (Fannie Mae), and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) and the oversight responsibilities of the Federal Housing Finance Board (Finance Board) over the Banks and the Office of Finance (which acts as the Banks' fiscal agent) to a new independent executive branch agency, FHFA. FHFA is responsible for ensuring that the Enterprises and the Banks operate in a safe and sound manner, including that they maintain adequate capital and internal controls, that their activities foster liquid, efficient, competitive and resilient national housing finance markets, and that they carry out their public policy missions through authorized activities. *See id.* at § 1102, 122 Stat. 2663–64.

Section 1141 of HERA states that the Director shall adopt regulations specifying the critical capital level for each Bank no later than the expiration of the 180 day period from the date that HERA was enacted. *See id.* at § 1141, 122 Stat. 2730 (adopting 12 U.S.C. 4613(b)). In establishing this requirement, HERA provides that the Director shall take due consideration of the critical capital levels established for the Enterprises, with such modifications as the Director determines to be appropriate to reflect the difference in operations between the Banks and the Enterprises.

In addition, section 1142 of HERA requires that the Director, no later than 180 days from its enactment, establish for the Banks criteria for each of the four following capital classifications: Adequately capitalized; Undercapitalized; Significantly undercapitalized; and Critically undercapitalized. *See id.* at § 1142, 122 Stat. 2730–32. HERA specifies that the criteria should be based on the amount and types of capital held by a Bank and the risk-based, minimum and critical capital levels for the Banks, taking due consideration of the capital classifications established for the Enterprises, with such modifications as the Director determines to be appropriate to reflect the difference in

operations between the Banks and the Enterprises. HERA also provides FHFA prompt corrective action (PCA) authority over the Banks and amends the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) so that specific mandatory or discretionary supervisory actions and restrictions under that statute would apply to any Bank determined to be undercapitalized, significantly undercapitalized or critically undercapitalized. *See id.* at §§ 1143–1145, 122 Stat. 2732–34. The general purpose for the PCA framework is to supplement the FHFA's other regulatory and supervisory authority and provide for timely and, in some situations, mandatory intervention by the regulator.

B. The Bank System Generally

The twelve Banks are instrumentalities of the United States organized under the Federal Home Loan Bank Act (Bank Act).[1] *See* 12 U.S.C. 1423, 1432(a). The Banks are cooperatives. Only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances or other products provided by a Bank. *See* 12 U.S.C. 1426(a)(4), 1430(a), 1430b. Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions. *See* 12 U.S.C. 1427. Any eligible institution (generally a federally-insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock. *See* 12 U.S.C. 1424; 12 CFR part 925. The Banks also require members to purchase certain amounts of stock to become a member of the Bank and to undertake specific activities and transactions with the Bank. These stock purchase requirements are set forth in a Bank's capital structure plan as required by amendments to the Bank Act made by the Gramm Leach Bliley Act (GLB Act) in 1999.[2]

C. Interim Final Rule

On January 30, 2009, the FHFA published in the **Federal Register** an interim final rule with requests for comments, which added new subpart A of part 1229 to 12 CFR chapter XII, subchapter B. *See* 74 FR 5595. The comment period for the interim final rule originally was scheduled to close on April 30, 2009, but on March 26, 2009, the FHFA published a notice extending the comment period for an additional 15 days. *See* 74 FR 13083. FHFA received 14 comments on the interim final rule, including comments from all twelve of the Banks. Two industry associations that represent many Bank members also commented. Comments are available at the FHFA Web site, *http://www.fhfa.gov*.

The interim final rule implemented the PCA provisions set forth in sections 1363 through 1369D of the Safety and Soundness Act, as these provisions had been amended and made applicable to the Banks by HERA. The interim final rule also incorporated certain restrictions on capital distributions that are imposed on the Banks by the Bank Act and it's implementing regulations, and made clear that those restrictions will continue to apply to any Banks that do not meet their capital requirements or that incur charges against their capital, and that they will apply, in addition to the new PCA restrictions made applicable to the Banks by the Safety and Soundness Act. *See e.g.,* 12 U.S.C. 1426(f) and (h)(3); 12 CFR 917.9(b).

As required by HERA, the interim final rule established the critical capital level for the Banks. The interim final rule also defined the criteria for the four capital classification categories that HERA applied to the Banks. It set forth the process that govern the Director's required quarterly determination of each Bank's capital classification as well as the mandatory and discretionary restrictions and requirements that must or can be imposed on a Bank that the Director determines is less than adequately capitalized.

FHFA asked for comments on all aspects of the interim final rule. It specifically requested comments on whether consideration of the differences between the Enterprises and the Banks with regard to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability should result in revision to the interim final rule.

FHFA also sought comment on whether it should adopt a fifth capital classification of ''well-capitalized'' as part of the regulation, although the interim final rule did not adopt such a category. Among the questions posed by FHFA with regard to a potential well-capitalized classification were:

(1) What criteria would be appropriate to define a ''well-capitalized'' category?

(2) Whether a retained earnings or a market value of equity to par value of capital stock (MVE/PVCS) target would be useful or appropriate for defining a well-capitalized category? and

(3) What restrictions on an adequately capitalized Bank would be appropriate to create an incentive for a Bank to achieve a well-capitalized rating?

The FHFA also asked whether it should adopt a retained earnings or MVE/PVCS target as part of the Banks' risk-based capital regulations or as a requirement that would be separate and distinct from the risk-based capital regulations.

II. Discussion of Comments and Changes to the Interim Final Rule

A. Overview of Comments

Most commenters provided suggestions for changes to the published text of the interim final rule or asked that clarifications be made to certain provisions. Specifically, the comment letters urged FHFA to exempt advances from limits on asset growth applicable to Banks that are not adequately capitalized, alter the definition of executive officer to narrow the scope of persons covered, extend the time period for submission of a capital restoration plan, and clarify the scope of certain mandatory restrictions on Bank acquisitions and on payment of executive compensation or bonuses that become applicable once a Bank is deemed to be undercapitalized or significantly undercapitalized. Each of the suggested changes is addressed more fully below.

Commenters also responded to FHFA questions about different aspects of instituting a fifth capital classification of well-capitalized. Nine of the comment letters expressed at least mild support or did not affirmatively oppose adopting the fifth capital classification, although most of these commenters did not support any approach that would effectively raise current minimum capital standards. Five commenters stated that such a classification was unnecessary or inappropriate. To the extent that they specifically addressed the issue, commenters also believed that

[1] Each Bank is generally referred to by the name of the city in which it is located. The twelve Banks are located in: Boston, New York, Pittsburgh, Atlanta, Cincinnati, Indianapolis, Chicago, Des Moines, Dallas, Topeka, San Francisco, and Seattle.

[2] All the Banks but the Chicago Bank operate pursuant to a capital structure plan required under the GLB Act. The Chicago Bank, which has not yet implemented its capital structure plan, still operates in accordance with stock purchase requirements set forth in the Bank Act prior to its amendment by the GLB Act. *See* 12 U.S.C. 1426(a)(6).

FHFA should not impose restrictions on an adequately capitalized Bank if a well-capitalized category were adopted. A number of commenters suggested specific positive regulatory incentives that FHFA could adopt to encourage Banks to achieve a well-capitalized rating.

Generally, commenters believed that if a well-capitalized category were adopted, the defining criteria should focus on the composition of Bank capital (*i.e.,* retained earnings) rather than the level of capital. All but one of the commenters specifically opposed using an MVE/PVCS measure as part of the defining criteria or as a separate capital requirement. The one commenter that did not specifically oppose the MVE criteria, however, thought that an MVE/PVCS requirement should be adopted only after a separate rulemaking in which FHFA provided a more thorough analysis of the matter.

FHFA has determined that it will not adopt the well-capitalized category as part of this final regulation. Instead, it will consider the comments and suggestions in developing any proposed future amendments to the PCA regulation concerning a well-capitalized category, including any proposals related to the criteria for defining, and for creating an incentive structure for the Banks to achieve, a well-capitalized rating. In developing any amendments, FHFA also would consider any changes that it may propose to the Banks' risk-based capital requirements. FHFA also will continue to weigh whether it would be appropriate to propose a separate target for retained earnings and/or MVE/PVCS, either as a stand-alone regulation or as part of any risk-based capital proposal.

B. Specific Suggestions for Changing the Interim Final Rule

Commenters addressed a number of different provisions and suggested a number of changes to the interim final rule. FHFA has carefully considered these comments. As is discussed below, while FHFA has adopted some changes to the interim final rule in response to the comments, it did not feel that all the suggested amendments were appropriate in light of statutory requirements and policy considerations.

Definition of Executive Officer (§ 1229.1). A number of commenters asked for specific changes to the definition of ''Executive Officer'' set forth in the regulation. This definition is needed to implement the provision limiting bonuses and compensation paid to executive officers of significantly undercapitalized Banks under § 1229.8(f) of the regulation. Commenters requested three principal changes be made to the definition in § 1229.1 to provide more clarity as to which employees were executive officers and establish a more appropriate scope for the definition.

First, they asked that the regulation require FHFA to inform the Banks, in advance, which persons in charge of a principal business unit, division or function would be considered an executive officer. This approach, the commenters argued, would be consistent with the treatment provided the Enterprises. Second, they asked, without providing further explanation, that the reference to chief operating officer in the regulation be changed to chief executive officer. Finally, commenters asked that the regulation clarify that administrative or support staff that answer directly to the president or chief operating officer of the Bank or the chairman or vice-chairman of the Bank's board of directors not be considered executive officers. One commenter further stated that the regulation should specify that positions or persons identified by functional area would be within the scope of the definition only if they truly performed the duties of an executive officer.

The Safety and Soundness Act, as amended by HERA, refers to executive officers of a regulated entity in various provisions including the PCA provision and a provision providing the Director with oversight and approval authority for compensation paid to executive officers. It does not, however, specifically define the term. Given that the statute does not differentiate between the term ''executive officer'' as used in the PCA provision and as used in the provision addressing executive compensation and the two provisions deal with the question of limiting compensation or bonus to certain Bank employees, FHFA believes the definition used in the two regulations ultimately should be the same.

The definition of executive officer in § 1229.1 is similar to the definition of executive officer with respect to a Bank that was proposed for comment as part of the executive compensation regulation on June 5, 2009. *See* Proposed Rule: Executive Compensation, 74 FR 26989. While there are some wording differences between the definition adopted in the PCA regulation and that being proposed in the executive compensation regulation (and the proposed definition in the executive compensation regulation may provide the Director with less discretion to remove persons from coverage than does the definition in § 1229.1), the definitions remain substantively the same. FHFA also expects that the definition in the PCA regulation will be amended in the future to conform to what is ultimately adopted in the executive compensation regulation. In the meantime, FHFA believes that the current definition of executive officer in § 1229.1 sufficiently identifies the persons that are subject to the PCA regulation restrictions and provides the Director with sufficient flexibility to add or remove specific persons from the list of Bank executive officers so that the concerns raised in the comments can be addressed on a case-by-case basis, if needed. Therefore, FHFA is not revising the definition of executive officer in the PCA regulation at this time.

Advances and Limitations on Asset Growth (§ 1229.6(a)(4)). Most of the commenters requested that the mandatory limitation on asset growth applicable to an undercapitalized Bank and set forth in § 1229.6(a)(4) of the interim final rule be modified to exclude advances from its coverage. This provision prevents the average total assets of a Bank, that was less than adequately capitalized, from exceeding its average total assets of the previous quarter, unless the Director determines the increase is consistent with an approved capital restoration plan and meets other requirements. The commenters argued that in light of the safety and low-risk profile of advances, the self-capitalizing nature of the product and the centrality of advances to the Bank's mission, limits should not be put on advance growth even if the Bank were less than adequately capitalized.

The regulatory language in the interim final rule, however, closely follows the statutory provision that was added to section 1365(a)(4) of the Safety and Soundness Act by section 1143 of HERA. The statutory language appears straightforward and contains no exception for advances or other mission assets of either the Banks or the Enterprises. Instead, the statute allows the Director to waive the limit on asset growth when certain conditions are met. These conditions are carried over to the regulation and include that the growth be consistent with the capital restoration plan and that the ratio of the Bank's tangible equity to total assets is increasing at a rate that will allow the Bank to become adequately capitalized in a reasonable period of time. Thus, it is not clear that the language of the statute provides flexibility to implement this suggested change.

Moreover, § 1229.6(a)(4) imposes a limit on total assets and not on

advances, specifically, so that an undercapitalized Bank would not face a barrier to continued advances growth as long as it reduces its investment portfolio or other asset holdings. In addition, despite commenters' claims, nothing assures that new advances will be self- capitalizing, since a number of the Banks' capital structure plans provide them discretion to set the advances stock purchase requirement below the level of their minimum capital requirements. Further, Bank members often do not have to buy additional stock to take down new advances, as they may have excess stock that can be applied to meeting the stock purchase requirement, or otherwise may not have to buy additional stock, to cover the new advances.[3] Thus, a Bank that did not meet its capital requirements, unless it took some other action (*e.g.,* reduce other assets), could become more highly leveraged if it were allowed unconditionally to expand advances. Arguably, the restrictions in the PCA provisions are designed to make sure the Bank has a plan of action that has been reviewed by FHFA to prevent this outcome from occurring.

Given these considerations FHFA has decided not to adopt the changes to § 1229.6(a)(4) suggested by commenters.

Clarify Prohibition on Acquisition of Assets (§ 1229.6(a)(5)). A number of commenters asked that FHFA clarify the scope of the restriction in § 1229.6(a)(5) that prohibits a Bank that is not adequately capitalized from acquiring directly or indirectly, any interest in any entity. They asked especially for FHFA to confirm that this restriction would not prevent the Banks from undertaking authorized activities in the ordinary course of business, such as making otherwise authorized investments in financial instruments. One commenter also noted that existing regulations would likely already require a Bank to receive FHFA approval before making an acquisition in another entity. After considering these comments, FHFA agrees that the language used in the provision is vague, especially in light of other restrictions placed on Bank activities, and that some clarification would be useful.

The regulatory language that is the subject to these comments closely follows the language that was added to section 1365(a)(5) of the Safety and Soundness Act by section 1143 of HERA. The restriction on the acquisition of an interest in an entity is one of a series of restrictions imposed on regulated entities that are not adequately capitalized, which includes limits on asset growth, new business activities and capital distributions. The Director is allowed under the statute and the regulation to waive this restriction if the Bank has an approved capital restoration plan, the Bank is implementing that plan, the acquisition of the interest is consistent with the plan and with the Bank's safe and sound operations, and will further its compliance with its capital requirements.

There appears to be little or no legislative history as to what Congress intended by this restriction. Given that the statute separately limits the ability of a Bank that is less than adequately capitalized to expand its activity through asset growth or undertaking new business activities, it would be reasonable that this particular restriction is meant to limit a Bank's expansion through acquisition of other operating businesses or lines of business in which the Bank already may be involved. FHFA therefore has decided to clarify the meaning of § 1229.6(a)(5) by revising the restriction to apply to the acquisition of any equity interest in another operating entity.[4] The revised language also makes clear that the restriction is not meant to prevent a Bank from enforcing any security interest granted to it or otherwise taking possession of collateral in the normal course of business.

FHFA recognizes that under current regulations the Banks would have few if any opportunities to take equity positions in other operating entities without first receiving FHFA's approval. Nevertheless, it is important to carry over into the regulation all the statutory restrictions even if such restrictions may have limited practical effect at this time. The revised language should clarify, however, FHFA's intent that the restriction on the acquisition of interests in any entity was not meant to restrict a Bank's investment in authorized investments such as mortgage backed securities or acquired member assets or otherwise restrict the Bank's ability to accept pledges of security as part of its business.

Submission of Capital Restoration Plan (§ 1229.11(b)). Most of the commenters supported extending the period in which a Bank has to submit a capital restoration plan from the 10 calendar-days required under § 1229.11(b) of the interim final rule. The commenters recognized that the 10 day period was based on requirements currently applicable to the Enterprises but believed the difference in capital structures between the Banks and the Enterprises justified a longer period for the Banks to prepare and submit their capital restoration plans. In this respect, a number of the commenters stated that the Banks would need to amend their GLB Act capital structure plans and take other actions that would not be applicable to the Enterprises to implement the capital restoration plan.[5] After consideration of these comments, FHFA has decided there is merit to the suggestions and is extending the period of time for submitting a capital restoration plan by a Bank to 15 business-days after a Bank receives written notification that such a plan is required.

The Safety and Soundness Act, as amended by HERA, allows up to 45 days after the date of notification for a regulated entity to submit a capital restoration plan. While the majority of the commenters suggested a 30 calendar-day period for submission of the plan, FHFA believes that 30 calendar-days is too long a period given that a Bank needs to begin taking action immediately to restore capital when a capital deficiency is identified. Moreover, having an approved capital restoration plan in place is a necessary pre-condition imposed by the statute for the Director's granting an exception to many of the restrictions that are imposed on the activities of an undercapitalized or a significantly undercapitalized Bank. Given that the Banks, in their comments, to other regulation provisions have suggested that some of these restrictions may be problematic, FHFA does not want to draw out the period for submission and approval of a capital restoration plan more than necessary. Moreover, Banks will be aware of the likelihood that they will be classified as less than adequately capitalized before the Director issues a

[3] All of the stock outstanding, including excess stock, however, would already have been counted as part of the Bank's capital. Thus, in these cases the new advances would increase the Bank's assets without necessarily increasing its capital from the level which was already determined to be insufficient to meet regulatory requirements.

[4] Such an interpretation also would appear to bring the meaning of this provision close to that of a similar PCA restriction imposed on insured depository institutions by § 38(e)(4) of the Federal Deposit Insurance Act (FDI Act)(12 U.S.C. § 1831o(e)(4)). The FDI Act provision restricts an undercapitalized institution's acquisition of any interest in any company or in another insured depository institution and limits the right to establish or acquire any additional branch offices.

[5] This comment suggests that some Banks may believe that they have to complete any contemplated amendments to their GLB Act capital structure plan prior to the submission of the capital restoration plan. This is not the case, however. Under § 1229.11 of the final rule, a Bank would need to identify in its capital restoration plan any changes to its stock purchase requirements that it intends to make but it does not necessarily need to have those changes in place at the time it submits its capital restoration plan for approval.

final notification, so a Bank could begin work on its capital restoration plan prior to receiving the final notification.[6] Thus, FHFA believes that 15 business-days should generally be sufficient for a Bank to prepare its capital restoration plan.

Executive Officers Bonuses and Compensation (§§ 1229.8(e) and (f)). A number of the commenters asked FHA to clarify ''whether, in light of contractual and constitutional concerns,'' employment agreements entered into prior to the effective date of the regulation are subject to the mandatory limits in §§ 1229.8(e) and (f) on bonuses and compensation paid to an executive officer of a significantly undercapitalized Bank. The comments do not further describe what these concerns are or provide any arguments addressing the constitutional issues. The cited provisions prohibit a Bank that is significantly undercapitalized either from paying a bonus to any executive officer without the prior written approval of the Director or from compensating an executive officer at a rate exceeding the average rate of compensation of that officer during the 12 months preceding the calendar month in which the Bank became significantly undercapitalized, without the prior written approval of the Director.

The regulatory language in §§ 1229.8(e) and (f) closely corresponds to the language in section 1366(c) the Safety and Soundness Act as the provision was amended by section 1144 of HERA. The statute does not provide an exception for employment agreements entered into before a certain date or outstanding as of HERA's effective date. More importantly, this restriction is triggered only if a Bank becomes significantly undercapitalized—a future event that is unrelated to the date in which an executive officer signed his or her employment agreement. As a general matter, the point of the provision seems to be to preserve resources expended on compensation and prevent executives from benefiting from increased compensation when their behavior, decisions or leadership resulted in (or failed to prevent) a Bank's becoming significantly undercapitalized. Thus, looking to the date of when employment began seems irrelevant to the purpose of the provision, which appears to be to address a future capital deficiency and discourage behavior that may cause such capital problems.[7]

The regulation also allows the Director to authorize a Bank to pay compensation and/or bonuses in excess of the limits established by the provisions. This means that under the regulation, a Bank has the right to make a case once its receives notice of its preliminary classification, or thereafter, that the Director should approve higher compensation or bonuses for executive officers, and allows a Bank to present all relevant information as to why the compensation and bonus restrictions are not appropriate in a particular case.[8] Thus, FHFA sees no reason to provide a blanket exemption from this restriction in the regulation itself, and believes that such a revision would contradict both the plain language of the statute and would undermine the policy concerns that this provision addresses.

Other comments. One commenter asked FHFA to incorporate into its regulations previous Finance Board guidance that Other Comprehensive Income (OCI) is not included in calculations of permanent and total capital. The referenced guidance was provided by the Finance Board when it was proposing amendments to its capital regulation based on an Advanced Notice of Proposed Rulemaking (ANPR), as well as responding to some of the comments received as part of that ANPR. *See* Proposed Rules: Capital Requirements for the Federal Home Loan Banks, 66 FR 41462, 41471–72 (Aug. 8, 2001). Specifically, the Finance Board's guidance responded to comments that the definitions of permanent and total capital be clarified to exclude certain elements of OCI. The Finance Board noted, however, that there was no need to change the definitions and clarified that OCI was not included in retained earnings as used in the calculation of total and permanent capital. *Id.* Given that this guidance was provided as part of the rulemaking for the capital regulation and addressed definitions in that provision, FHFA is not going to alter those regulations at this time as part of its adoption of the final PCA regulation. It will, however, affirm the Finance Board's prior interpretation that OCI is not an element of the Bank's regulatory capital.

C. Other Changes in the Final Regulation

In addition to making the changes described above in response to the comments submitted on the interim final rule, FHFA is also making certain clarifying changes to the regulation. First, FHFA is adding new paragraphs (g) and (h) to § 1229.8 to clarify its view as to what mandatory or discretionary restrictions or obligations that apply to an undercapitalized Bank continue to apply to a Bank found to be significantly undercapitalized.

FHFA is also revising § 1229.10(d) to make clear that restrictions and obligations previously imposed on a significantly undercapitalized Bank continue to apply to a critically undercapitalized Bank for which FHFA has not yet been named conservator or receiver. As originally adopted, this provision only referred to ''restrictions'' on a significantly undercapitalized Bank but FHFA recognizes that a Bank may also be obligated to take positive actions under the PCA provisions.

Finally, FHFA modified § 1229.11(a) to clarify the type of information it intends a Bank to submit in its capital restoration plan. These changes make clear that the Bank should describe, if appropriate, any actions that it would take to address any long term or structural problems that led to its becoming less than adequately capitalized and that the Bank should provide in it's capital restoration plan

[6] For example, under the regulations, Banks first will receive a preliminary notification that the Director proposes to classify them at a level other than adequately capitalized, prior to the final classification. In addition, Banks are required to notify the Director if their capital decreases to the extent that they would expect to be reclassified at a level lower than their previous preliminary or final classification, so that Banks should monitor and be aware of negative changes in their capital levels at all times.

[7] The provision related to executive officer compensation and bonuses is similar to restrictions on compensation in the FDI Act which become applicable to senior executive officers of an insured financial institution that becomes significantly undercapitalized. *See* 12 U.S.C. 1831o(f)(4). When federal banking regulators adopted rules implementing this provision of the FDI Act, those rules did not provide an exception for employment agreements entered into prior to its effective date. *See* 57 FR 44866 (Sept. 29, 1992).

[8] The issue of whether the statutory language is itself constitutionally flawed, as suggested by the commenters, is difficult to address since the comments fail to provide any specific arguments or theory on this point. The constitutional argument that usually arises in these types of cases is that the parties have some fundamental right or protected interest recognized by law so that the loss of that right is subject to due process protection under the Fifth Amendment. In this respect, the Supreme Court has noted that the ''fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted). The Court has identified three factors that should be balanced in deciding the dictates of due process generally. *See id.* at 335. These are: (i) The private interest that will be affected by the official action; (ii) The risk of an erroneous deprivation of such interest through the procedures used and the value, if any, of additional or substitute procedure; and (iii) The government's interests, including the function at issue and the fiscal and administrative burdens of additional or substitute procedures. *See id.* (citations omitted). The fact that the Banks can seek the Director's review of the restriction and provide information as to why the restrictions should not be applied in a particular instance provides an opportunity to be heard that should address the commenters concerns.

projections indicating how each component of total and permanent capital (including retained earnings) and the major components of income, assets and liabilities are expected to change over the term of the plan. FHFA believes that this information is the type of information it would generally request under § 1229.11(a)(5) and is necessary for it to judge the adequacy of the plan and to monitor the plan effectively over time. Thus, § 1229.11(a) is being updated to make clear that this information should be submitted as part of a capital restoration plan.

III. Paperwork Reduction Act

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

IV. Regulatory Flexibility Act

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

V. Effective Date

The Administrative Procedure Act provides that the required publication of a substantive regulation shall be made not less than 30 days before its effective date except for: A substantive regulation that grants or recognizes an exemption or relieves a restriction; An interpretative regulation or statement of policy; or As otherwise provided by the agency for good cause found and published with the regulation. *See* 5 U.S.C. 553(d). In publishing the interim final rule, FHFA found that it had good cause for the regulation to become effective immediately. *See* 74 FR at 5604. These reasons are still true with regard to the final rule and the changes made to it. In addition, the changes made to the interim final rule clarify the scope of the provisions of the regulation or ease requirements that had been established in the interim final rule, as in the case of the longer period for submitting a capital restoration plan, rather than add new requirements. Thus, FHFA finds that there is good cause for the regulation to become effective on August 4, 2009.

List of Subjects in 12 CFR Part 1229

Capital, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Interim Final Rule at subpart A of part 1229 of Title 12 CFR chapter XII, subchapter B, which was published at 74 FR 5595 on January 30, 2009, is being adopted by FHFA as a final regulation with the following changes:

PART 1229—CAPITAL CLASSIFICATIONS AND PROMPT CORRECTIVE ACTION

■ 1. The authority citation for subpart A continues to read as follows:

Authority: 12 U.S.C. 1426, 4513, 4526, 4613–4618, 4622, 4623.

■ 2. Amend § 1229.6 by revising paragraph (a)(5) to read as follows:

§ 1229.6 Mandatory actions applicable to undercapitalized Banks.

(a) * * *

(5) Not acquire, directly or indirectly, an equity interest in any operating entity (other than as necessary to enforce a security interest granted to the Bank) nor engage in any new business activity unless:

(i) The Director has approved the Bank's capital restoration plan, the Bank is implementing the capital restoration plan and the Director determines that proposed acquisition or activity will further achievement of the goals set forth in that plan; or

(ii) The Director determines that the proposed acquisition or activity will be consistent with the safe and sound operation of the Bank and will further the Bank's compliance with its risk-based and minimum capital requirements in a reasonable period of time.

* * * * *

■ 3. Amend § 1229.8 by removing the word ''and'' at the end of paragraph (e), removing the period at the end of paragraph (f) and adding a semi-colon in its place, and adding new paragraphs (g) and (h) to read as follows:

§ 1229.8 Mandatory actions applicable to significantly undercapitalized Banks.

* * * * *

(g) Comply with § 1229.6(a)(4) and (a)(5) of this subpart; and

(h) Comply with any on-going restrictions or obligations that were imposed on the Bank by the Director under § 1229.7 of this subpart.

■ 4. Amend § 1229.10 by revising paragraph (d) to read as follows:

§ 1229.10 Actions applicable to critically undercapitalized Banks.

* * * * *

(d) *Other applicable actions.* Until such time as FHFA is appointed as conservator or receiver for a critically undercapitalized Bank, a critically undercapitalized Bank shall be subject to all mandatory restrictions or obligations applicable to a significantly undercapitalized Bank under § 1229.8 of this subpart and will remain subject to any on-going restrictions or obligations that the Director imposed on the Bank under § 1229.7 or § 1229.9 of this subpart, or any restrictions or obligations that are applicable to the Bank under the terms of an approved capital restoration plan.

■ 5. Amend § 1229.11 by revising paragraphs (a) and (b) to read as follows:

§ 1229.11 Capital restoration plans.

(a) *Contents.* Each capital restoration plan submitted by a Bank shall set forth a plan to restore its permanent and total capital to levels sufficient to fulfill its risk-based and minimum capital requirements within a reasonable period of time. Such plan must be feasible given general market conditions and the conditions of the Bank and, at a minimum, shall:

(1) Describe the actions the Bank will take, including any changes that the Bank will make to member stock purchase requirements, to assure that it will become adequately capitalized within the meaning of § 1229.3(a) of this subpart and, if appropriate, to resolve any structural or long term causes for the capital deficiency;

(2) Specify the level of permanent and total capital the Bank will achieve and maintain and provide quarterly projections indicating how each component of total and permanent capital and the major components of income, assets and liabilities are expected to change over the term of the plan;

(3) Specify the types and levels of activities in which the Bank will engage during the term of the plan, including any new business activities that it intends to begin during such term;

(4) Describe any other actions the Bank intends to take to comply with any other requirements imposed on it under this subpart A of part 1229;

(5) Provide a schedule which sets forth dates for meeting specific goals and benchmarks and taking other actions described in the proposed capital restoration plan, including setting forth a schedule for it to restore its permanent and total capital to levels necessary for meeting its risk-based and minimum capital requirements; and

(6) Address such other items that the Director shall provide in writing in advance of such submission.

(b) *Deadline for submission.* A Bank must submit a proposed capital restoration plan no later than 15 business-days after it receives written notification that such a plan is required either because the notice specifically states that the Director has required the submission of a plan or the notice indicates that the Bank's capital classification or reclassification is to a category for which a capital restoration plan is a mandatory action required of the Bank. The Director may extend this deadline if the Director determines that such extension is necessary. Any such extension shall be in writing and provide a specific date by which the Bank must submit its proposed capital restoration plan.

* * * * *

Dated: July 29, 2009.

James B. Lockhart, III,

Director, Federal Housing Finance Agency.

[FR Doc. E9–18581 Filed 8–3–09; 8:45 am]

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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1291

RIN 2590–AA04

Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority

AGENCY: Federal Housing Finance Agency.

ACTION: Interim final rule with request for comments.

SUMMARY: Section 1218 of the Housing and Economic Recovery Act of 2008 (HERA) requires the Federal Housing Finance Agency (FHFA) to permit the Federal Home Loan Banks (Banks) until July 30, 2010, to use Affordable Housing Program (AHP) homeownership set-aside funds to refinance low- or moderate-income households' mortgage loans. On October 17, 2008, FHFA amended its AHP regulation to authorize the Banks to provide AHP direct subsidies under their homeownership set-aside programs to low- or moderate-income households who qualify for refinancing assistance under the Hope for Homeowners Program established by the Federal Housing Administration (FHA) under Title IV of HERA. Based on the comments received on the amendments and continuing adverse conditions of the mortgage market, FHFA has determined that in order for the AHP set-aside refinancing program to be implemented successfully for the benefit of the intended households, the scope of the program authority should be broadened and the Banks should have greater flexibility in implementing the program. Accordingly, FHFA is issuing and seeking comment on an interim final rule that authorizes the Banks to provide AHP subsidy through their members to assist in the refinancing of eligible households' mortgages under eligible Federal, State and local programs for targeted refinancing in addition to the Hope for Homeowners Program. These programs would include the Administration's Making Home Affordable Refinancing program. The interim final rule permits the Banks to provide AHP direct subsidy to members and to use the subsidy for principal reduction and for loan closing costs, and requires that households obtain counseling for qualification for refinancing and foreclosure mitigation.

In addition, the interim final rule enhances the ability of the Banks to respond to the mortgage crisis by providing greater flexibility to accelerate their future annual statutory AHP contributions for use in their AHP homeownership set-aside programs in the current year. The interim final rule also permits the Banks to adopt multiple housing needs under their Second District Priority scoring criterion under the AHP competitive application program.

DATES: The interim final rule is effective on August 4, 2009. FHFA will accept written comments on the interim final rule on or before October 5, 2009.

ADDRESSES: Submit comments, identified by regulatory information number (RIN) 2590–AA04, by any of the following methods:

- *Mail/Hand Delivery:* Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552, Attention: Public Comments/RIN 2590–AA04.
- *E-mail: regcomments@fhfa.gov.* Please include ''RIN 2590–AA04'' 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. Include the following information in the subject line of your submission ''Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority; RIN 2590–AA04.''

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, on the FHFA Web site at *http://www.fhfa.gov.*

FOR FURTHER INFORMATION CONTACT: Nelson Hernandez, Senior Associate Director, Housing Mission and Goals, 202–408–2819, *Nelson.Hernandez@fhfa.gov*; Charles E. McLean, Jr., Acting Manager, Housing Mission and Goals, 202–408–2537, *Charles.McLean@fhfa.gov*; or Melissa L. Allen, Senior Policy Analyst, 202–408–2524, *Melissa.Allen@fhfa.gov*, Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006; or Sharon B. Like, Associate General Counsel, 202–414–8950, *Sharon.Like@fhfa.gov*, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Hearing Impaired is 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the interim final rule, and will revise the rule as appropriate after taking all comments into consideration. Copies of all comments will be posted on the FHFA Internet 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

A. HERA

Effective July 30, 2008, Division A of HERA, Public Law 110–289, 122 Stat. 2654 (2008), created FHFA as an independent agency of the Federal Government. HERA transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), the Banks, and the Bank System's Office of Finance, from the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) to FHFA. HERA provides for the abolishment of OFHEO and FHFB one year after the date of enactment. FHFA is responsible for ensuring that the