

**FEDERAL HOUSING FINANCE
AGENCY**

12 CFR Part 1230

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

**Office of Federal Housing Enterprise
Oversight**

12 CFR Part 1770

RIN 2590-AA12

Executive Compensation

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

ACTION: Interim final rule; request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing an interim final rule with request for comments that sets forth requirements and processes with respect to compensation provided to executive officers by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Banks, and the Federal Home Loan Bank System's Office of Finance, consistent with the safety and soundness responsibilities of FHFA under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008.

DATES: The interim final rule is effective on June 13, 2013. FHFA will accept written comments on this interim final rule on or before July 15, 2013. For additional information see

SUPPLEMENTARY INFORMATION.

ADDRESSES: You may submit your comments on this interim final rule, identified by regulatory identifier number "RIN 2590-AA12," by any one of the following methods:

- **Email:** Comments to Alfred M. Pollard, General Counsel, may be sent by email at RegComments@fhfa.gov. Please include "RIN 2590-AA12" in the subject line of the message.

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal*, please also send it by email to FHFA at RegComments@fhfa.gov to ensure timely receipt by the agency. Please include "RIN 2590-AA12" in the subject line of the message.

- **Hand Delivered/Courier:** The hand delivery address is: Alfred M. Pollard, General Counsel; Attention: Comments/

RIN 2590-AA12, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel; Attention: Comments/RIN 2590-AA12, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Alfred M. Pollard, General Counsel, (202) 649-3050, Alfred.Pollard@fhfa.gov, or Lindsay Simmons, Assistant General Counsel, (202) 649-3066, Lindsay.Simmons@fhfa.gov, (not toll-free numbers), Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. 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 interim final rule 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, address, email address, and telephone number, 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, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

II. Background

FHFA published a proposed rulemaking with request for comments on Executive Compensation on June 5, 2009 (74 FR 26989). The public notice and comment period closed on August 4, 2009. This interim final rule, when effective, will supersede the Office of Federal Housing Enterprise Oversight (OFHEO) Executive Compensation rule, (12 CFR part 1770).¹

¹ FHFA is continuing its work to merge existing regulations of its predecessor agencies (OFHEO and the Federal Housing Finance Board), and will consider the appropriate disposition of an OFHEO corporate governance provision related to compensation of directors, executive officers and employees (at 12 CFR 1710.13), and the relationship

FHFA issued the proposed rule to implement sections 1113 and 1117 of the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110-289, 122 Stat. 2654. Section 1113, which amended section 1318 of the Federal Housing Enterprises Financial Safety and Soundness Act (Safety and Soundness Act) (12 U.S.C. 4518), provides authority to the Director to prohibit and withhold compensation of executive officers of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, the Enterprises), and the Federal Home Loan Banks (Banks) (collectively, the regulated entities). Section 1117, which amended the Enterprises' charter acts and the Federal Home Loan Bank Act, provided the Director with temporary authority to approve, disapprove, or modify the executive compensation of the regulated entities.² This temporary authority expired on December 31, 2009.

The proposed rule also was issued to continue the requirement under the charter acts of the Enterprises that the Director approve any agreements or contracts of executive officers that provide compensation in connection with termination of employment.³ As was noted in the Supplementary Information to the proposed rule, no similar prior approval authority for the Director of termination benefits of executive officers of the Banks is contained in the Federal Home Loan Bank Act or HERA, but the total payment or value derived from termination benefits is included in FHFA's review of compensation provided by the Banks to their executive officers to determine whether the overall compensation is reasonable and comparable. This is because FHFA considers the term "compensation" to include benefits to an executive officer that are derived from post-employment benefit plans or programs and other compensatory benefit arrangements containing termination benefits, which affect the executive officer individually or as part of a group. As a result, FHFA reviews the value of benefits provided under such plans, programs, and

of that provision to this interim final rule, in conjunction with that project.

² Section 1117 of HERA amended section 304 of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719), section 306 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1455), and section 11 of the Federal Home Loan Bank Act (12 U.S.C. 1431).

³ See section 309(d)(3)(B) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1723a(d)(3)(B)) and section 303(h)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1452(h)(2)).

arrangements on an ongoing basis in exercising its compensation review authority. FHFA aggregates the benefits provided under such plans, programs, and arrangements with all other payments of money or any other thing of current or potential value to determine whether an officer's overall compensation is reasonable and comparable.⁴

Additionally, the proposed rule was issued to ensure that the regulated entities and the Office of Finance (OF) comply with processes used by FHFA in its oversight of executive compensation. The processes require the submission of relevant information by the regulated entities and OF on a timely basis, in a format deemed appropriate by FHFA, to enable FHFA to efficiently carry out its executive compensation functions. For reasons noted above, as with the Enterprises, information required to be submitted to FHFA for its review and consideration by the Banks includes information relating to compensation for services during employment and to termination benefits for their executive officers.

FHFA has determined to issue this rule as an interim final rule with request for comments for a number of reasons. This approach will allow provisions upon which FHFA has received and considered comments to become effective, while also providing an opportunity for additional comment in view of certain revisions to the proposed rule which, although they are a logical outgrowth of the proposed rule and are aligned with existing agency practice which the regulated entities are familiar with, may be of interest to potential commenters. Given the passage of time since the comment period closed (August 4, 2009), and the executive compensation review processes currently in place, FHFA also believes that publishing this interim final rule will promote clarity and transparency. Further details of the revisions in response to comments and other changes, can be found below.

In addition to the Director's authority under section 1113 of HERA to prohibit and withhold compensation of executive officers of the regulated entities (as implemented in this interim final rule), section 1114 of HERA further amended section 1318 of the Safety and Soundness Act (12 U.S.C. 4518) to authorize the Director to prohibit or limit golden parachute payments and indemnification payments by the Enterprises and the Banks to entity-affiliated parties. FHFA issued an

interim final rule⁵ and a final rule⁶ on Golden Parachute Payments setting forth factors to be considered by the Director of FHFA in acting upon the Director's authority to limit golden parachute payments to entity-affiliated parties of a regulated entity or OF. Subsequently, FHFA issued a proposed amendment to the final Golden Parachute Payments rule to address in more detail prohibited and permissible golden parachute payments. FHFA believed it was useful to provide an opportunity to the public to read and comment on both the proposed golden parachute payments and indemnification payments amendments in context. Therefore, the proposed amendment re-proposed the indemnification payments amendment.⁷ Today, FHFA also published in this issue of the **Federal Register** a proposed rule (Re-proposal) that addresses content set forth in the proposed amendment, both in the Supplementary Information and the regulatory section, which relates to prohibited and permissible golden parachute payments. The Re-proposal solicits comments on the appropriate treatment of golden parachute arrangements entered into before the effective date of the rule. Additionally, the Re-proposal responds to public comments received to date by FHFA on the golden parachute provisions, and provides clarification regarding coverage of retirement plans.

III. Comments on and Changes to the Proposed Rule

A. Changes in Response to Comments Received

FHFA received comments from a few individuals (consumers), private businesses, the 12 Banks, the Chairs of the 12 Banks, OF, a retirement service, a number of state bankers associations and state community bankers associations, several banks that are Bank members and stockholders, and the American Bankers Association.

FHFA considered all of the comments submitted. Some of them, as described below, requested changes in the proposed rule that would conflict with the agency's statute. In response to the

other comments, FHFA either made the requested or a similar change, or explains below why it is not doing so.

In general, the consumers commented that executive compensation is too high. FHFA acknowledges widespread public concern that executive compensation is unreasonably high. Concerns about amounts and composition of executive compensation and their effect on safety and soundness underlie many recent legislative and regulatory initiatives. This regulation is a means for addressing that concern, as prescribed by Congress. Section 1318 of the Safety and Soundness Act, as amended by section 1113 of HERA, and this interim final rule prohibit executive compensation that is excessive, in that it is higher than is reasonable, or than is comparable to that paid by similar companies.

One consumer stated that the proposed rule provides too much discretion on the part of the Director regarding oversight of an executive officer's compensation. He referred to language in regulatory provisions, e.g., the Director "may review," and "may take into consideration," and requested that the rule be revised to use language that imposes an affirmative duty, i.e., "must" instead of "may." On these points, the language in the proposed rule is the same as the statutory authorizing language. It ensures that the Director, on a case-by-case basis, has the ability to take appropriate action with respect to an executive officer's compensation. Therefore, FHFA has determined to retain the language in the interim final rule.

The same commenter stated that the proposed rule provides too little discretion to the Director with respect to setting compensation for an executive officer. He requested modifying the prohibition set forth in § 1230.3(d) to provide the Director with the authority to prescribe or set a specific level or range of compensation. However, such a modification would be contrary to the statutory prohibition against setting of compensation by the Director (12 U.S.C. 4518(d)). A final comment by the consumer was that affirmative, not discretionary, language should be added to § 1230.7 "Compliance" of the proposed rule in order to provide adequate consequences for failure to comply with the rule. For the reasons described below in response to other comments, FHFA has determined to remove that section of the proposed rule and therefore is not making the requested change.

Except for the consumers, all commenters identified above requested that FHFA provide full consideration to

⁵ Golden Parachute Payments and Indemnification Payments—Interim Final Rule with Request for Comments, 73 FR 53356 (September 16, 2008), with Correcting Amendments at 73 FR 54309 (September 19, 2008) and 73 FR 54673 (September 23, 2008), codified at 12 CFR part 1231. *See also*, Proposed Amendment for Golden Parachute and Indemnification Payments, 73 FR 67424 (November 14, 2008).

⁶ Golden Parachute Payments, 74 FR 5101 (January 29, 2009), codified at 12 CFR part 1231.

⁷ Golden Parachute and Indemnification Payments Proposed Rule, 74 FR 30975 (June 29, 2009).

⁴ See 74 FR at 26990 (June 5, 2009).

the Banks' member-controlled, cooperative structure and financial performance as bases on which FHFA should provide a less prescriptive approach in its review of the executive compensation at the Banks than what they stated may be justified for FHFA review of executive compensation at the Enterprises, in view of their conservatorship status.

Those commenters uniformly stated their belief that FHFA review, as proposed, would be unduly prescriptive for two reasons. First, they claimed that the proposed rule usurps to FHFA the authority and responsibilities for establishing Bank executive compensation from each Bank's compensation committee or board of directors. Second, they claimed that the proposal violates the statutory prohibition on FHFA setting Bank compensation noted above (12 U.S.C. 4518(d)).

As bases for these concerns, the commenters noted that the Supplementary Information to the proposed rule contained a statement that "FHFA may consider the Federal Reserve Banks and the Farm Credit Banks as examples of appropriate comparators to assess the reasonableness and comparability of executive compensation provided by the Banks."⁸ They also noted that proposed § 1230.2, in defining the term "reasonable and comparable," includes language under the definition of the term "comparable," with regard to benefit levels, that states "FHFA generally considers comparable to be at or below the median compensation for a given position at similar institutions."⁹

The commenters argued that the effect of FHFA's identifying particular comparator institutions is to impose a presumptive cap on compensation by reference to those institutions, which would prescribe or set a specific level or range of compensation. While HERA imposes certain limitations on compensation (e.g., that it be reasonable), they argued that HERA did not alter the fundamental authority of the board of directors of each Bank to set executive compensation. They claim that FHFA's proposed approach would impose uniform FHFA-mandated compensation outcomes on a widely divergent set of Banks, which, although they share the same mission, operate in different circumstances, under different strategies, and in different markets. By

doing so, they argued, FHFA effectively would be dictating an outcome to the Banks' boards of directors, thereby assigning to FHFA the role that is properly assigned to the Banks' boards of directors.

The commenters stated that the existing Executive Compensation rule does not include a specific presumptive percentage cap relative to comparator institution compensation that would apply to the Enterprises' executive compensation determinations. Nor does the existing rule, or the **Federal Register** notice accompanying its promulgation, specify particular comparator institutions for the Enterprises. They further argued that their comparator institutions should not include Federal Reserve Banks or Farm Credit Banks. They enumerated a number of reasons why those institutions should not be included in the Banks' comparator groups.

The commenters argued that, under 12 U.S.C. 4518, FHFA may not mandate a specified benchmarking level for compensation by establishing a presumption that Banks must pay compensation at or below the median compensation. They also pointed out that, as reflected in the Form 10-Ks filed by the Banks, although many of the Banks' boards of directors have chosen to utilize the median level, others look to the 65th percentile or the 75th percentile. They argued that the proposed rule ignores the reality of the benchmarking process and requested that FHFA delete the language under the definition of the term "comparable," stating that "comparable" benefits are those at or below the median for similar institutions.

FHFA agrees with the commenters that the board of directors has the responsibility to set compensation for an executive officer, which the Director will review for reasonableness and comparability, including whether the structure of such compensation encourages excessive risk-taking or aligns management's incentives with those of safety and soundness.

As is required by HERA,¹⁰ the Director, when promulgating regulations relating to the Banks, considers the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. The Director also considers any

other differences that are deemed appropriate. In preparing the proposed rule and this interim final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors.

FHFA does not agree that calling attention to certain classes of institutions—the Farm Credit Banks and the Federal Reserve Banks—as relevant to assessing Federal Home Loan Bank compensation constitutes "set[ting] a specific level or range of compensation" under the Safety and Soundness Act. FHFA continues to believe that those institutions are relevant points of reference in assessing the reasonableness and comparability of Federal Home Loan Bank compensation, because they have certain points in common with the Federal Home Loan Banks: They are government-sponsored financial institutions; they have some measure of government backing and therefore a potentially different risk profile than non-government-sponsored institutions;¹¹ and they do not issue publicly traded stock that can be used as an element of long-term compensation and therefore must structure their compensation differently from publicly traded companies. For these reasons it would be wrong to ignore the Farm Credit Banks and the Federal Reserve Banks.¹² While the Banks' comment letters correctly point out differences between them and the Farm Credit Banks and the Federal Reserve Banks, there are also key differences between the Federal Home Loan Banks and the commercial banks and similar institutions that the Banks have identified as their comparators. The fact is that there are no institutions that are exactly comparable to the Federal Home Loan Banks. FHFA concludes that the Farm Credit Banks and Federal Reserve Banks should be included as points of reference in assessing the reasonableness and

¹¹ For example, the financial crisis of 2008 caused Congress to enact, in HERA, a temporary liquidity facility for the Federal Home Loan Banks, 12 U.S.C. 1431(*l*). (That facility was never drawn upon.) Similarly, a crisis in the Farm Credit System in the 1980s caused Congress to intervene, see Agricultural Credit Act of 1987, 101 Stat. 1568 (Jan. 6, 1988).

¹² While the statute refers to "similar businesses (including other publicly held financial institutions or major financial services companies)," that language was originally included in the Safety and Soundness Act when the only regulated entities were the Enterprises, major publicly held financial institutions. The inclusion of the Federal Home Loan Banks as regulated entities occurred subsequently, in the amendments made by HERA in 2008. They are not publicly held institutions, and supervisory judgments made with respect to them must reflect their unusual status as cooperatives. In fact, the statute requires FHFA to do so, 12 U.S.C. 4513(f).

⁸ 74 FR at 26990 (June 5, 2009).

⁹ Section 1230.2, definition of the term "reasonable and comparable" (2)(i). 74 FR at 26993 (June 5, 2009).

¹⁰ Section 1313(f) of the Safety and Soundness Act (12 U.S.C. 4513(f)), as amended by section 1201 of HERA.

comparability of compensation at the Federal Home Loan Banks, and that doing so does not result in dictating any particular level or range of compensation.

In order to address the commenters' expressed concerns that the language in the proposed rule results in a presumptive cap with respect to benefit levels, and after further consideration of the need to describe comparable "benefit levels" and "similar institutions," FHFA has determined to delete paragraphs (i) and (ii) under the definition of "comparable," which were the paragraphs addressing the relationship between "comparable" benefits and median levels at other institutions, and providing that FHFA may communicate particular comparable institutions or types of institutions to the regulated entities from time to time. Instead, FHFA is replacing the term "similar institutions" in the first paragraph of the definition of "comparable" with "institutions of similar size and function."

Second, in response to concerns regarding FHFA oversight of Banks' executive compensation, as was noted in the proposed rule, FHFA will address differences in aspects of executive compensation between the Enterprises and the Banks by establishing policies for appropriate compensation packages and termination benefits, and will provide routine guidance to the regulated entities.¹³ FHFA recognizes that executive compensation oversight mandated by HERA has resulted in a new area of regulatory compliance for the Banks. For that reason, in addition to guidance, FHFA staff will continue to work directly with the relevant staff, committees, and boards of the Banks to ensure a structured, well-understood review process. FHFA guidance and dialogue between staffs will, among other things, address concerns raised by the Banks regarding how the provisions of the rule will operate under specific circumstances.

FHFA has considered, and will continue to consider, by guidance and discussion with the Banks, the differences related to the factors set forth in 12 U.S.C. 4513(f). However, both the Enterprises and the Banks, as "regulated entities," are subject to the same statutory requirements with respect to oversight of their executive compensation by the Director, and FHFA believes that that mandate is fairly and reasonably implemented by establishing an equivalent process and the same high-level concept of

reasonableness and comparability for the Banks as for the Enterprises.

FHFA received additional comment from the Banks expressing concern that the definition of "reasonable and comparable" in the proposed rule refers to compensation taken "in whole or in part." The Banks stated their belief that if an executive's compensation package taken as a whole is reasonable and comparable to compensation at similar institutions for similar duties, FHFA should not be permitted to reject a discrete element of an executive's compensation as excessive. They requested that the wording "in whole or in part" be replaced with "taken as a whole" in the interim final rule.

In its ongoing oversight of an executive's overall compensation, FHFA reviews all components that compose the broadly defined term "compensation." If any component's value is determined to be an outlier, it may still be acceptable given the compensation taken as a whole. On the other hand, it may also be deemed excessive by itself if it creates questionable incentives. FHFA will advise the entity if it finds the aggregate compensation package to be excessive. FHFA may specifically note that a particular component appears to be the source of the problem and should be reassessed by the entity in order to align the total package with the reasonable and comparable standard. For these reasons, FHFA has determined to retain the language in the interim final rule.

The Banks requested that FHFA revise paragraph (1)(iv) of the definition of "reasonable" compensation to clarify that the factors being reviewed by FHFA include not only corporate and individual performance, but also the performance of a division, department, or unit of a regulated entity. FHFA considers this request to be well founded, and has determined to revise the paragraph to add the language "or one of the entity's significant components."

The Banks also requested that FHFA revise paragraph (1)(iv) noted above to delete the reference to "guidance." They stated that, while compliance with FHFA regulations and orders, and written agreements is mandatory and subject to enforcement action by FHFA, "guidelines" issued by FHFA do not constitute the basis for an FHFA enforcement action. They also stated that the advisory status of "guidance" or "guidelines" should not form the basis for an evaluation of executive compensation.

The Banks are correct that guidance, because it is often not adopted through notice-and-comment rulemaking,

occupies a lesser status than regulations as a supervisory tool. Failure to follow guidance cannot *per se* be grounds for an enforcement action. Therefore, FHFA has revised the paragraph (1)(iv) to reference the "performance of the regulated entity, the specific employee, or one of the entity's significant components with respect to achievement of goals, consistency with guidance and internal rules of the entity, and compliance with applicable law and regulation." Guidance does represent the agency's considered view on the subjects that it addresses, and failure to follow it may be taken as evidence that an entity is not engaging in best practices or is not managing itself safely and soundly in all respects. Failure to follow guidance may expose an entity to unnecessary risk and is likely to subject an entity to criticism when discovered in an examination. For these reasons, FHFA believes that consistency with agency guidance is an expected element of executive performance and, therefore, consistency with guidance is an appropriate element in assessing compensation.

FHFA has also determined that the substance of paragraphs (1)(i) and (1)(ii) of the definition of "reasonable" in the proposed rule can be combined into one paragraph. In addition, FHFA has removed references to comparability from the definition of "reasonable," leaving these concepts to be covered by the definition of "comparable." As a result of these amendments, paragraph (1)(iii) of the proposed rule's definition of "reasonable" now appears as paragraph (1)(ii); and the preceding changes discussed with regard to paragraph (1)(iv) of that definition are set forth in paragraph (1)(iii) of the interim final rule.

The Banks expressed concerns that the proposal would put a Bank executive officer at risk with respect to all compensation the officer may have received or earned, thereby making it difficult for the Banks to attract or retain highly qualified executive officers. As the bases for these concerns, they cited proposed § 1230.3, "Prohibition and withholding of executive compensation," and proposed § 1230.7, "Compliance." Specifically, they referred to the Director's authority to withhold compensation of an executive officer during the Director's review of its reasonableness and comparability under § 1230.3, and the possibility that FHFA could take corrective or remedial action, including an enforcement action, to require a Bank executive officer to make restitution or reimbursement of "excessive compensation" under § 1230.7. Under these provisions, the

¹³ See 74 FR at 26990 (June 5, 2009).

Banks stated that FHFA appears to suggest that it can not only prohibit earned compensation from being paid to a Bank executive officer, but also can require a Bank executive officer to repay compensation the officer has already received under the claim that such compensation was “excessive compensation.” They requested that FHFA modify the rule to provide reasonable and appropriate limitations on FHFA’s exercise of any authority under proposed §§ 1230.3 and 1230.7.

FHFA’s authority to withhold compensation to an executive officer, or to place such compensation in an escrow account during its review under the reasonable and comparable standard under § 1230.3, was mandated by Congress in section 1113 of HERA. A description of how that authority would be exercised is provided below. With respect to FHFA’s compliance authority under § 1230.7, FHFA has considered the merits of the commenters’ arguments and has removed proposed § 1230.7 from the interim final rule. Proposed § 1230.7 was derived from statutory enforcement provisions not specific to executive compensation. Those enforcement provisions authorize FHFA to obtain restitution or reimbursement from entity-affiliated parties who have been unjustly enriched by a regulatory violation,¹⁴ and those provisions are available, with or without § 1230.7 of the proposed rule, as a remedy for violations of § 1230.3(a) of the rule prohibiting regulated entities from paying compensation that is not reasonable or comparable. FHFA will use that authority where it determines that a case requires it. At the same time, however, FHFA is aware of the potential impact that uncertainty about the finality of compensation may have on recruitment and retention. Therefore, as a next step, FHFA plans to publish for comment a proposal to require the regulated entities to develop and adopt policies to provide for recapture of improvidently or improperly paid compensation in appropriate circumstances.

The Banks commented extensively on proposed § 1230.3(c) “Withholding of compensation” and § 1230.3(e) “Prohibition of payment or agreement by regulated entity.” They sought clarification as to the relationship between the two paragraphs and the circumstances in which they would apply. They also questioned the relationship between subsections of paragraph (e). The Banks recommended that paragraphs (c) and (e) be combined

to eliminate any potential conflict or ambiguity.

After considering the comments received, and further reflecting on the appropriate interaction between FHFA and the regulated entities and OF with respect to review of executive compensation actions, FHFA has reorganized paragraphs (c) and (e) which appear as paragraphs (d) and (e) of the interim final rule, and has revised their substantive content. Rather than identify a set of compensation actions that cannot be taken while under FHFA review, regardless of how long that review takes, FHFA has identified sets of compensation actions that require prescribed advance notice to FHFA, and which cannot be executed until that review period, or any extension thereof, has passed, unless the regulated entity or OF receives notice of approval or non-objection by the Director earlier.

Specifically, paragraph (d) of § 1230.3 of the interim final rule requires 60 days’ advance notice of incentive compensation plans; 30 days’ advance notice of term employment agreements, termination arrangements (except that, because of a pre-existing statutory requirement, termination arrangements of the Enterprises must be approved in advance), and changes to annual compensation, payments under pay for performance or other incentive plan, or any other element of compensation; and five business days’ advance notice of compensation commitments being made to executive officers who are being newly hired. In the interim final rule, FHFA reserves the right to extend the review period as necessary, in its discretion, which it may exercise if, for example, it has questions about a proposed compensation arrangement or proposed incentive plan goals. The Director may also require that the compensation be withheld or paid into escrow pending further review, with respect to the types of actions specifically identified in this section of the rule or any other executive compensation actions.

FHFA has adopted this regime as balancing the importance of appropriate review for important executive compensation actions, while recognizing the need of business organizations to be able to move forward with compensation decisions without being restrained by a review period that could be indefinite. At the same time, in situations where more review is required, the Director retains the ability to extend the review period and, if necessary, under paragraph (e) to require that compensation be withheld or paid into escrow even beyond the periods prescribed, as well as with

respect to compensation actions other than those specified in paragraph (d).

The Banks requested that FHFA modify the definition of the term “executive officer” with respect to a Bank to correspond more closely to the definition of “executive officer” as defined in Exchange Act Rule 3b-7 (17 CFR 240.3b-7), which covers the president, any vice president in charge of a principal business unit, division or function, any other officer who performs a policy-making function or any other person who performs similar policy-making functions. They noted that the definition seems to provide the basis for the definition of an “executive officer” for the Enterprises under the section. Because the Banks are SEC registrants, they stated their belief that a similar definition would be appropriate. They further stated that, given the nature of Bank boards of directors, the positions of chairman and vice chairman should not be included in the definition of executive officer for the Banks. Also, they commented that the definition of “executive officer” should not be based solely on an officer’s reporting relationship, such as a senior vice president that reports to the president or chief operating officer, but instead, should be based only on whether such officer is in charge of a principal business unit, division or function. Moreover, the Banks stated that the Director should be required to inform the Banks of those officers covered by the definition of executive officer as he is required to notify the Enterprises under the proposal.

As noted earlier, the Director recognizes that there are differences between the Enterprises and the Banks in size, complexity, and function. Therefore, as was stated in the proposed rule, the approach by FHFA to oversight of executive compensation may differ in certain aspects between the Enterprises and the Banks. For example, it was noted that “in consideration of the Banks’ size and structure, the Director’s oversight of compensation may cover a smaller number of positions in comparison to covered executive officer positions for the Enterprises.”¹⁵

Based on comments received and after further consideration, FHFA has determined to revise the definition of the term “executive officer” for the Enterprises, Banks, and OF in the interim final rule. FHFA believes that the revised definition is more appropriate to their organizational structure, position responsibilities, and other relevant factors. An “executive officer” of an Enterprise continues to

¹⁴ Safety and Soundness Act section 1371(d), 12 U.S.C. 4631(d).

¹⁵ 74 FR at 26990 (June 5, 2009).

follow the definition set forth in the Safety and Soundness Act. The definition tracks the current concept of SEC “Section 16 Officers” plus any position designated by the Director. FHFA has determined to delete the reporting function from the definition. With respect to the Banks, the definition of “executive officer” adopts the language of the SEC’s Regulation S-K, 17 CFR 229.402(a)(3), and therefore covers a Bank’s most highly compensated officers (generally referred to as the “Top 5”) who are designated under SEC disclosure requirements as “Named Executive Officers” (NEOs). An executive officer for purposes of this regulation would cover officers who were NEOs at the Bank’s last filing, who would be NEOs if filing occurred today, and those expected to be NEOs in the future based on current title, duties, or pay. (Consequently, the total number of NEOs at any time may be more than five.) In addition to the NEOs, an “executive officer” of a Bank would include any officer designated by the Director. With respect to OF, an “executive officer” is defined to cover the chief executive officer, chief financial officer, chief operating officer, and any other officer designated by the Director.

Because the Banks are much smaller than the Enterprises, and because the rule states clearly who is an executive officer, it is not necessary for the Director to tell the Banks who their NEOs are, although the Director retains the ability to identify additional executive officers.

The Banks observed that proposed § 1230.3(b) provides that, in determining whether compensation provided by a Bank to an executive officer is not reasonable and comparable, the Director may take into consideration any factors that the FHFA Director considers relevant, but that the section specifies only one factor that the FHFA Director might consider relevant to such a determination: “any wrongdoing on the part of the executive officer, such as any fraudulent act or omission, breach of trust or fiduciary duty, violation of law, rule, regulation, order, or written agreement, and insider abuse with respect to the regulated entity or the Office of Finance.” The Banks requested that FHFA modify the rule to provide more specificity as to the types of factors that would be deemed relevant in supporting a determination by the FHFA Director that an executive officer’s compensation is not reasonable and comparable.

In response, FHFA notes that HERA amended the Director’s authorities under section 1318 of the Safety and

Soundness Act to prohibit and withhold executive compensation by adding paragraph (b) of that section, and the language of the regulation is taken directly from that statutory language. Congress recognized the need to provide the Director with the broad ability to consider *any* factor relevant to the position under review, based on the case-specific facts and circumstances, to determine whether the prohibition or withholding of the executive officer’s compensation is warranted. FHFA believes that the Director may need sufficient flexibility in consideration of factors and that it would be unwise to establish a specific list in this regulation. In determining whether compensation is excessive, the Director may consider a number of factors, such as the appropriateness of comparator groups, geography, level of complexity of the institution and its business model as well as of the executive’s own responsibilities, the level and types of risk that must be managed, the appropriate balance between short- and long-term risks and rewards, the executive’s years of experience and tenure at the entity (including past performance), and other customary factors used to determine compensation.

The Banks commented that proposed § 1230.3(b) would not offer an executive officer who is the subject of a compensation review based on, among other things, a potential claim of wrongdoing, any notice and opportunity to present his or her views or defenses with respect to either the factors that the Director is considering or the amount and form of compensation that may be potentially withheld. They further stated that § 1230.3(b) does not provide any standard as to the degree of proof of a claim of wrongdoing or other conduct that would be required to support a decision by the Director to order a Bank to permanently withhold compensation that had been earned by an executive officer. The Banks argued that § 1230.3(b), as proposed, raises significant due process concerns.

The Banks argued that the importance of protecting due process rights was recognized by the Federal Housing Finance Board (Finance Board) when it issued an order that established a process for the suspension or removal of a Bank director or officer.¹⁶ They requested that FHFA incorporate the notice, hearing, and decision principles that the Finance Board included in the Order into any final rule.

The Director’s authorities with respect to oversight of executive compensation

resulted from Congressional concern, both at the time of original enactment of the Safety and Soundness Act and at the time of HERA, that compensation provided by the regulated entities to an executive officer be reasonable and comparable. To that end, Congress mandated that the Director review the compensation arrangements for any executive officer and prohibit the entity from providing compensation to any such executive that is excessive, based on the factors deemed relevant by the Director. Under the statutory mandate, the process is between the Director and the entity, not between the Director and the executive officer, because it is the entity’s decisions with respect to compensation that are being reviewed. FHFA anticipates that, under that process, decisions that compensation is excessive will be communicated in writing, with an opportunity for the entity to respond by letter or to request a meeting.

FHFA appreciates that its directive to a regulated entity prohibiting or to withhold compensation of an executive officer impacts the executive financially. For that reason, any such decision is made only after thorough review and full understanding of the facts on a case-by-case basis, and the application to the facts of its authorities mandated by Congress. FHFA’s decision regarding compensation does not result in either the suspension or removal of the executive officer, unlike the Finance Board Order referenced by the Banks, and therefore does not implicate the due process considerations that the Finance Board addressed in that Order. FHFA believes implementing a process incorporating notice and a hearing is unnecessary in light of the extent of communication that will occur before making a decision that executive compensation is excessive, and would unduly delay corrective action. Accordingly, FHFA has determined to retain proposed § 1230.3(b) in the interim final rule.

FHFA received a number of comments on the information-submission requirements of proposed § 1230.5(b). After considering that subject, FHFA has determined that the level of detail appropriate to it, combined with the possible need for flexibility with respect to changing compensation practices, makes the subject of information-submission requirements more appropriate to a data collection order under section 1314 of the Safety and Soundness Act than to a regulation, which can be modified only through notice-and-comment rulemaking. Consequently, FHFA is not including proposed § 1230.5 in the

¹⁶ See Finance Board Order No. 2005–12 (June 16, 2005).

interim final rule and is instead replacing it with the Director's authority to issue notices, orders, and guidance on the subject of information submissions. FHFA plans to publish such an order shortly after the publication of this interim final rule.

FHFA here responds to comments it received on proposed § 1230.5, and gives an indication of how the issues presented would be expected to be addressed in the anticipated order on the same subject.

First, the Banks commented that the one-week timeframe for submissions set forth in proposed § 1230.5(b) is inadequate. They stated that, as a matter of corporate practice, board minutes and resolutions often are not officially approved until the next board or committee meeting, which typically does not occur until well after one week following a board or committee meeting. They requested that the proposed rule should be revised to recognize this factor.

Proposed § 1230.5(b) provided for submission of materials after they have received final, official approval. The intent of the section was to ensure that the materials were received promptly after official action, which normally means within five business days. In its forthcoming order, FHFA plans to direct that materials be submitted promptly after official action. With respect to submission of any proposed compensation action that is subject to FHFA review, all compensation-related information should be submitted to FHFA well in advance of any planned board decision on it.¹⁷

The Banks objected to the requirement in proposed § 1230.5(b) that there be no redactions in materials that are submitted to FHFA for the Director's review of executive compensation for reasonableness and comparability. They requested that the requirement should be deleted, as they asserted there would be *bona fide* reasons for redactions. For example, they stated that redactions may relate to information that is subject to the attorney-client privilege.

To be fully informative and useful to FHFA, and to ensure that key information is not omitted, these materials need to be complete. The anticipated order will likely require that

resolutions and minutes and all supporting materials relating to executive compensation be submitted to FHFA without redactions or omissions, except as necessary to preserve particularized claims of attorney-client communication privilege. FHFA expects that each particularized redaction or omission and the assertion of privilege supporting it will be identified on a privilege log submitted simultaneously with the non-privileged material. FHFA believes that these requirements strike the proper balance between preserving the regulated entities' legal privileges and FHFA's need for complete and reliable information in performing its responsibilities to supervise and regulate the regulated entities. This approach leaves open the possibility FHFA may require the production of particularized information that is asserted to be privileged, should a need arise or the assertion of privilege be found lacking. Consequently any such privilege log should describe each separate redaction and omission and assertion of privilege in sufficient detail to allow FHFA to determine whether a further need for the information justifies demanding its production and whether the assertion of privilege is well founded.

The Banks observed that proposed § 1230.5(b)(4) required the submission of general benefit plans applicable to executive officers to FHFA. They sought clarification as to whether "general benefit plans applicable to executive officers" included all benefits applicable to all employees (including executive officers) or only those benefit plans meant to apply primarily to executive officers. FHFA intends that any plan that provides compensation to an executive officer should be submitted, as it is not possible to evaluate whether compensation is excessive without understanding all of its components. This would include general benefit plans applicable to all employees, as well as so-called "top hat" plans that provide special benefits to executive officers.

The Banks observed that proposed § 1230.5(b)(5) required submission to FHFA of any study conducted by or on behalf of a Bank with respect to compensation of executive officers, when delivered. They stated that this requirement could result in a Bank having to submit such studies to FHFA before the board of directors has had an opportunity to review or approve the study. They requested that the board of directors have the opportunity to review and comment on such a study prior to submission to FHFA. FHFA's expectation is that submission would

apply at the time the study has been finalized. If the Bank (such as its compensation committee or board of directors) plans to review and comment on the study, submission would be required subsequent thereto.¹⁸

The Banks argued that compensation arrangements with their executive officers that are in effect prior to the effective date of the final rule should not be subject to action by FHFA under 12 U.S.C. 4518 or under the final rule; that existing arrangements should be grandfathered. In this regard, they noted that Congress, in amending the charter acts of the Enterprises to include certain restrictions on the payment of termination benefits by the Enterprises to their executive officers, provided that such restrictions should be applied prospectively only to agreements entered into after the date of the enactment of the Safety and Soundness Act. The Banks requested that FHFA not apply its oversight of executive compensation to compensation arrangements with Bank executive officers that were entered into prior to the date that the final rule becomes effective. They argued that such an approach would help avoid possible legal issues or challenges that might arise if the rule were applied to pre-existing compensation arrangements.

The grandfathering requested by the Banks is much broader than that ever provided by Congress. Section 1318 of the Safety and Soundness Act, as originally enacted by Congress in 1992, did not contain any language imposing a grandfathering restriction on agency oversight of the reasonableness and comparability of executive compensation provided by the Enterprises to their executive officers. If Congress had intended to limit oversight under section 1318 to compensation arrangements entered into after the effective date of the legislation, it would have included such language in the statute. This is confirmed by the fact that, with respect to agency authority over termination benefits, Congress expressly stated in the statutory amendments to the Enterprises' charter acts that such benefits entered into before enactment of the Safety and Soundness Act are not retroactively subject to approval or disapproval by the Director. When amending the Safety and Soundness Act in HERA, Congress expanded agency oversight authority over executive compensation under section 1318, but, for the second time,

¹⁷ The memorandum to the Banks from Acting Deputy Director Ronald A. Rosenfeld of October 1, 2008, (the Rosenfeld memo) requested that compensation matters be submitted for review four weeks in advance of board decision. That period remains a useful rule of thumb. As described above, § 1230.3(d) prescribes specific advance notice periods for particular types of compensation actions.

¹⁸ In appropriate circumstances, FHFA might also request any of the prior drafts, and might also request to speak directly with the consultants who prepared the study.

chose not to impose any grandfather restriction on such oversight. Congress did determine to continue the grandfather restriction with respect to Enterprise executive officers' termination benefits.

Nevertheless, FHFA recognizes that compensation agreements in place prior to HERA's enactment deserve consideration, and it is FHFA's intention to consider all the facts and circumstances in reviewing existing agreements.

Proposed § 1230.6, which addressed certain powers provided by section 1117 of HERA to the Director in connection with executive compensation, has been deleted from the interim final rule. The powers were temporary in nature and are no longer effective.

The OF argued that the final rule should not apply to it, asserting that Congress intended that the executive compensation provisions in section 1318 (12 U.S.C. 4518) of the Safety and Soundness Act, as amended by section 1113 of HERA, apply only to a "regulated entity" or "regulated entities" and not to OF. The OF asserted that the clear intent of Congress was to exclude OF from the reach of these provisions.

FHFA acknowledges, as it did when proposing this rule, that OF is not directly covered by section 1318 of the Safety and Soundness Act. However, OF is subject to the Director's "general regulatory authority" under section 1311(b)(2) of the Safety and Soundness Act (12 U.S.C. 4511(b)(2)), as amended by HERA. Excessive compensation is a threat to safety and soundness and is appropriately within the agency's general regulatory authority. Therefore, in order to ensure safety and soundness, the Director's authority to prohibit excessive compensation continues to apply to OF in the interim final rule.

B. Other Changes

Subsequent to FHFA's issuance of its proposed rule on Executive Compensation, the Stop Trading on Congressional Knowledge Act (the "STOCK Act") was enacted. See Public Law No. 112-105, 126 Stat. 291 (April 4, 2012) (codified at 12 U.S.C. 4518a). Section 16 of the STOCK Act prohibits senior executives of any Enterprise in conservatorship from receiving bonuses during any period of conservatorship on or after the date of enactment. Section 1230.3(a) of the interim final rule has been amended to include this statutory prohibition.

On March 9, 2012, FHFA announced new executive compensation programs for the Enterprises, in its capacity as conservator. See News Release dated

March 9, 2012, at <http://www.fhfa.gov/webfiles/23438/ExecComp3912F.pdf>. These programs eliminate bonuses for Enterprise senior executives (and other executives) and thus comply with Section 16 of the STOCK Act. FHFA developed the new compensation programs as "reasonable and comparable" (though there are no companies truly comparable to the Enterprises in their current situation) in light of the Enterprises' status in conservatorship; their continuing support from the U.S. Treasury through the Senior Preferred Stock Purchase Agreements; and related objectives that the Enterprises reduce their portfolios, shrink their dominant position in the U.S. mortgage finance market, focus on their core mission activities, and avoid "new products" as contemplated by the Safety and Soundness Act.¹⁹

FHFA made additional changes to the proposed rule based on findings from current practice. Section 1230.3(e)(2) of the proposed rule required prior review and non-objection for certain types of compensation for the president at the Banks, and the chief executive officer at each of the Enterprises. The correlated provision of this interim final rule expands this requirement of prior review both in scope of compensation and in the number of executives to which it applies. Specifically, § 1230.3(d)(3) of the interim final rule states that a regulated entity or OF shall not, without providing the Director at least 30 days' advance written notice, pay, disburse, or transfer to any executive officer, annual compensation (where the annual amount has changed), pay for performance or other incentive pay, or any other element of compensation.

FHFA has concluded that it is beneficial to provide prior review of all compensation arrangements for all executive officers for several reasons. First, prior approval promotes clarity in pay practices for the regulated entities and OF. In view of FHFA's statutory obligation to prohibit compensation to any executive officer that is not

reasonable and comparable, prior review and non-objection rather than review after-the-fact can help set expectations and avoid the need for later remedial action. Prior review provides the regulated entities and OF before-the-fact notice of any objections and an opportunity to address FHFA's concerns and obtain its non-objection. Additionally, prior approval for all executive officers of each Bank was the original design for incentive compensation review by FHFA, and is a practice FHFA has consistently followed since 2008.²⁰

Given that prior review of all compensation actions for all executive officers has been FHFA's consistent practice, FHFA also believes that this change from the language of the proposed rule will not impose any new or additional burden on the regulated entities or their executive officers. Nonetheless, FHFA is specifically requesting comment on these changes to the scope of the advance notice requirement.

Regulatory Impact

Paperwork Reduction Act

The interim final 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.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a rule 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 rule's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the rule 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 interim final rule under the Regulatory Flexibility Act. FHFA certifies that the interim final rule is not likely to have a significant economic impact on a substantial number of small business entities because the rule is applicable only to the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

²⁰ The Rosenfeld memo notified the Banks that FHFA would provide prior review of all compensation actions relating to the five most highly compensated officers at each of the Banks. The Rosenfeld memo's approach to the scope and application of prior review is reflected in this regulation.

¹⁹ See 12 U.S.C. 4541; see also Letter from Edward J. DeMarco, Acting Director, FHFA, to the Honorable Christopher Dodd, Chairman, and the Honorable Richard C. Shelby, Ranking Minority Member, Committee on Banking, Housing and Urban Affairs, United States Senate; and the Honorable Barney Frank, Chairman, and the Honorable Spencer Bachus, Ranking Minority Member, Committee on Financial Services, United States House of Representatives (February 2, 2010), pp. 6-7, at http://www.fhfa.gov/webfiles/15393/Conservatorship_Letter_2_2_10%5b1%5d.pdf; and FHFA Strategic Plan for Enterprise Conservatorships: The Next Chapter in a Story That Needs an Ending (February 21, 2012), at <http://www.fhfa.gov/webfiles/23344/StrategicPlanConservatorshipsFINAL.pdf>.

List of Subjects

12 CFR Part 1230

Administrative practice and procedure, Compensation, Confidential business information, Government-sponsored enterprises, Reporting and recordkeeping requirements.

12 CFR Part 1770

Administrative practice and procedure, Confidential business information, Reporting and recordkeeping requirements.

Authority and Issuance

Accordingly, for the reasons stated in the **SUPPLEMENTARY INFORMATION**, under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency amends Chapters XII and XVII of Title 12 of the Code of Federal Regulations, as follows:

Chapter XII—Federal Housing Finance Agency

Subchapter B—Entity Regulations

■ 1. Add part 1230 to Subchapter B to read as follows:

PART 1230—EXECUTIVE COMPENSATION

Sec.

1230.1 Purpose.

1230.2 Definitions.

1230.3 Prohibition and withholding of executive compensation.

1230.4 Prior approval of termination agreements of Enterprises.

1230.5 Submission of supporting information.

Authority: 12 U.S.C. 1427, 1431(l)(5), 1452(h), 1455(l)(5), 4502(6), 4502(12), 4513, 4514, 4517, 4518, 4518a, 4526, 4631, 4632, 4636, 1719(g)(5), and 1723a(d).

§ 1230.1 Purpose.

The purpose of this part is to implement requirements relating to the supervisory authority of FHFA under the Safety and Soundness Act with respect to compensation provided by the regulated entities and the Office of Finance to their executive officers. This part also establishes a structured process for submission of relevant information by the regulated entities and the Office of Finance, in order to facilitate and enhance the efficiency of FHFA's oversight of executive compensation.

§ 1230.2 Definitions.

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

Charter acts mean the Federal National Mortgage Association Charter Act and the Federal Home Loan Mortgage Corporation Act, which are codified at 12 U.S.C. 1716 through 1723i

and 12 U.S.C. 1451 through 1459, respectively.

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with employment. Compensation includes all direct and indirect payments of benefits, both cash and non-cash, granted to or for the benefit of any executive officer, including, but not limited to, payments and benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, post-employment benefit or other compensatory arrangement.

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

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

Executive officer means:

(1) With respect to an Enterprise:

(i) The chairman of the board of directors, chief executive officer, chief financial officer, chief operating officer, president, vice chairman, any executive vice president, any senior vice president, any individual in charge of a principal business unit, division, or function, and any individual who performs functions similar to such positions whether or not the individual has an official title; and

(ii) Any other officer as identified by the Director;

(2) With respect to a Bank:

(i) The president, the chief financial officer, and the three other most highly compensated officers; and

(ii) Any other officer as identified by the Director.

(3) With respect to the Office of Finance:

(i) The chief executive officer, chief financial officer, and chief operating officer; and

(ii) Any other officer identified by the Director.

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

FHFA means the Federal Housing Finance Agency.

Office of Finance means the Office of Finance of the Federal Home Loan Bank System (or any successor thereto).

Reasonable and comparable means compensation that is:

(1) *Reasonable*—compensation, taken in whole or in part, that would be appropriate for the position and based

on a review of relevant factors including, but not limited to:

(i) The duties and responsibilities of the position;

(ii) Compensation factors that indicate added or diminished risks, constraints, or aids in carrying out the responsibilities of the position; and

(iii) Performance of the regulated entity, the specific employee, or one of the entity's significant components with respect to achievement of goals, consistency with guidance and internal rules of the entity, and compliance with applicable law and regulation.

(2) *Comparable*—compensation that, taken in whole or in part, does not materially exceed compensation paid at institutions of similar size and function for similar duties and responsibilities.

Regulated entity means the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or 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 any Federal Home Loan Bank.

Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, (12 U.S.C. 4501 *et seq.*), as amended by the Housing and Economic Recovery Act of 2008 (HERA), Public Law No. 110–289, 122 Stat. 2654 (2008).

§ 1230.3 Prohibition and withholding of executive compensation.

(a) *In general.* The Director may review the compensation arrangements for any executive officer of a regulated entity or the Office of Finance at any time, and shall prohibit the regulated entity or the Office of Finance from providing compensation to any such executive officer that the Director determines is not reasonable and comparable with compensation for employment in other similar businesses involving similar duties and responsibilities. No regulated entity or the Office of Finance shall pay compensation to an executive officer that is not reasonable and comparable with compensation paid by such similar businesses involving similar duties and responsibilities. No Enterprise in conservatorship shall pay a bonus to any senior executive during the period of that conservatorship.

(b) *Factors to be taken into account.* In determining whether compensation provided by a regulated entity or the Office of Finance to an executive officer is not reasonable and comparable, the

Director may take into consideration any factors the Director considers relevant, including any wrongdoing on the part of the executive officer, such as any fraudulent act or omission, breach of trust or fiduciary duty, violation of law, rule, regulation, order, or written agreement, and insider abuse with respect to the regulated entity or the Office of Finance.

(c) *Prohibition on setting compensation by Director.* In carrying out paragraph (a) of this section, the Director may not prescribe or set a specific level or range of compensation.

(d) *Advance notice to Director of certain compensation actions.* (1) A regulated entity or the Office of Finance shall not, without providing the Director at least 60 days' advance written notice, enter into any written arrangement that provides incentive awards to any executive officer or officers.

(2) A regulated entity or the Office of Finance shall not, without providing the Director at least 30 days' advance written notice, enter into any written arrangement that:

(i) Provides an executive officer a term of employment for a term of six months or more; or

(ii) In the case of a Bank or the Office of Finance, provides compensation to any executive officer in connection with the termination of employment, or establishes a policy of compensation in connection with the termination of employment.

(3) A regulated entity or the Office of Finance shall not, without providing the Director at least 30 days' advance written notice, pay, disburse, or transfer to any executive officer, annual compensation (where the annual amount has changed), pay for performance or other incentive pay, or any other element of compensation.

(4) Notwithstanding the foregoing review periods, a regulated entity or the Office of Finance shall provide five business days' advance written notice to the Director before committing to pay compensation of any amount or type to an executive officer who is being newly hired.

(5) The Director reserves the right to extend any of the foregoing review periods, and may do so in the Director's discretion, upon notice to the regulated entity or the Office of Finance. Any

such notice shall set forth the number of business or calendar days by which the review period is being extended.

(e) *Withholding, escrow, prohibition.* During the review period required by paragraph (d) of this section, or any extension thereof, a regulated entity or the Office of Finance shall not execute the compensation action that is under review unless the Director provides written notice of approval or non-objection. During a review under paragraph (a) or (d) of this section, or at any time before an executive compensation action has been taken, the Director may, by written notice, require a regulated entity or the Office of Finance to withhold any payment, transfer, or disbursement of compensation to an executive officer, or to place such compensation in an escrow account; or may prohibit the action.

§ 1230.4 Prior approval of termination agreements of Enterprises.

(a) *In general.* An Enterprise may not enter into any agreement or contract to provide any payment of money or other thing of current or potential value in connection with the termination of employment of an executive officer unless the agreement or contract is approved in advance by the Director.

(b) *Covered agreements or contracts.* An agreement or contract that provides for termination payments to an executive officer of an Enterprise that was entered into before October 28, 1992, is not retroactively subject to approval or disapproval by the Director. However, any renegotiation, amendment, or change to such an agreement or contract shall be considered as entering into an agreement or contract that is subject to approval by the Director.

(c) *Factors to be taken into account.* In making the determination whether to approve or disapprove termination benefits, the Director may consider:

(1) Whether the benefits provided under the agreement or contract are comparable to benefits provided under such agreements or contracts for officers of other public or private entities involved in financial services and housing interests who have comparable duties and responsibilities;

(2) The factors set forth in § 1230.3(b); and

(3) Such other information as deemed appropriate by the Director.

(d) *Exception to prior approval.* An employment agreement or contract subject to prior approval of the Director under this section may be entered into prior to that approval, provided that such agreement or contract specifically provides notice that termination benefits under the agreement or contract shall not be effective and no payments shall be made under such agreement or contract unless and until approved by the Director. Such notice should make clear that alteration of benefit plans subsequent to FHFA approval under this section, which affect final termination benefits of an executive officer, requires review at the time of the individual's termination from the Enterprise and prior to the payment of any benefits.

(e) *Effect of prior approval of an agreement or contract.* The Director's approval of an executive officer's termination of employment benefits shall not preclude the Director from making any subsequent determination under this section to prohibit and withhold executive compensation.

(f) *Form of approval.* The Director's approval pursuant to this section may occur in such form and manner as the Director shall provide through written notice to the regulated entities or the Office of Finance.

§ 1230.5 Submission of supporting information.

In support of the reviews and decisions provided for in this part, the Director may issue guidance, orders, or notices on the subject of information submissions by the regulated entities and the Office of Finance.

Chapter XVII—Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development

PART 1770—[REMOVED]

■ 2. Remove part 1770.

Dated: May 6, 2013.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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