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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1701

RIN 2550-AA15

Assessments

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final regulation.

SUMMARY: The Office of Federal Housing Enterprise Oversight is issuing a final regulation setting forth its policy and procedures with respect to the annual assessment of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation as provided by statute.

EFFECTIVE DATE: The effective date of this regulation is May 7, 2001.

FOR FURTHER INFORMATION CONTACT: David W. Roderer, Deputy General Counsel, telephone (202) 414-3804; or Isabella W. Sammons, Associate General Counsel, telephone (202) 414-3790, (not a toll-free number); Office of Federal Housing Enterprise Oversight, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102-550, entitled the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Act), established OFHEO as an independent office within the Department of Housing and Urban Development to ensure that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage

Corporation (Freddie Mac) (collectively, the Enterprises) are capitalized adequately and operate safely and in compliance with applicable laws, rules and regulations.

Section 1316 of the Act (12 U.S.C. 4516) provides that OFHEO may establish and collect annual assessments from the Enterprises. OFHEO has been assessing the Enterprises pursuant to procedures developed under section 1316. OFHEO recently published a proposed regulation for comment to spell out and clarify its policies and procedures with respect to such assessments at 65 FR 81768 (December 27, 2000).

Comments

In response to the proposed regulation, OFHEO received comments from Freddie Mac and Fannie Mae, as follows:

Adequately Capitalized (§ 1701.2(b))

One Enterprise suggested a technical change to the proposed definition of the term "adequately capitalized." OFHEO agrees that such change will clarify the definition and accordingly modifies § 1701.2(b) to read:

Adequately capitalized means the adequately capitalized capital classification under section 1364 of the Act (12 U.S.C. 4614).

Enterprise (§ 1701.2(d))

One Enterprise suggested a revision to the definition of the term "Enterprise" to include also a definition of the term "Enterprises." OFHEO agrees that such a technical change would be appropriate and has modified § 1701.2(d) of the proposed regulation to read:

(d) *Enterprise* means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and the term "Enterprises" means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Surplus Funds (§ 1701.2(e))

In connection with a comment on "Increase in Semiannual Payments," § 1701.4, discussed below, one Enterprise suggested that the regulation clarify that in calculating the following year's assessment, OFHEO will credit any surplus funds that were previously collected pursuant to § 1701.4 in addition to those surplus funds collected pursuant to § 1701.3. OFHEO agrees that this clarification is best accomplished by a technical

modification of the definition of the term "surplus funds," as follows:

(e) *Surplus funds* means funds that are not obligated as of September 30 of each fiscal year that were collected from any Enterprise pursuant to § 1701.3 or § 1701.4.

Total Assets (§ 1701.2(f))

Section 1701.2(f) of the proposed regulation defines the term "total assets." Both Enterprises suggested that the definition incorporate by reference the methodology applied under the OFHEO minimum capital regulation at 12 CFR part 1750, rather than describe such methodology in detail. OFHEO agrees with the comment to incorporate 12 CFR part 1750 by reference and accordingly modifies § 1701.2(f) to read:

(f) *Total assets* means the sum, as of the most recent June quarterly minimum capital report of the Enterprise, of the amounts of the following assets that are used to calculate the quarterly minimum capital requirement of the Enterprise under 12 CFR part 1750:

- (1) On-balance sheet assets;
- (2) Off-balance sheet mortgage-backed securities; and
- (3) Other off-balance sheet obligations.

One Enterprise suggested that OFHEO calculate the allocation of the annual assessment semiannually rather than annually. If this suggestion were accepted, the definition of the term "total assets" would require additional modification. As discussed more fully below under "Allocation and Proportional Share," § 1701.3(b), OFHEO has rejected the recommendation and determined not to calculate the annual assessment semiannually; therefore, additional modification of the definition of the term "total assets" is not required.

Establishment of Assessment (§ 1701.3(a))

Section 1701.3(a) of the proposed regulation recites the statutory bases of the authority of the Director to collect the annual assessment from the Enterprises. One Enterprise recommended that OFHEO reference the narrow statutory language of 12 U.S.C. 4516(a) (section 4516(a)), rather than the amplifying statutory language of 12 U.S.C. 4516(f) (section 4516(f)), in determining the amount of the assessment that may be collected.

Section 4516(a) provides that the Director may collect an annual assessment "in an amount not exceeding the amount sufficient to

provide for reasonable costs and expenses of [OFHEO], including the expenses of any examinations under [12 U.S.C. 4517].” In further delineating the authority of OFHEO, section 4516(f) provides more broadly that the amount of the assessment collected may be used for “carrying out the responsibilities of the Director relating to the enterprises” and “necessary administrative and nonadministrative expenses of [OFHEO] to carry out the purposes of [the Act].” The narrow language of section 4516(a) is not reasonably to be read to restrict the amount of funds that may be collected to an amount arguably less than contemplated under section 4516(f). It would be inconsistent with a reading of the Act, as a whole, to set forth in the regulation restrictions on the collection of funds that are greater than the restrictions on the use of such funds after they are collected. OFHEO, therefore, has determined to reject and not to make the recommended modification. While referring only to examination expenses, the non-exclusive language of the law presumably contemplates the use of the authorized assessment to meet all costs and expenses of the agency.

Allocation and Proportional Share (§ 1701.3(b))

One Enterprise suggested that OFHEO calculate the proportional share of the annual assessment for each Enterprise semiannually rather than annually. The Enterprise suggested that it would be more equitable to the Enterprise to have a subsequent recalculation of its proportional share because the total assets of the Enterprises may vary during any year.

There is, however, no overriding reason to depart from the statutory scheme that clearly contemplates that the proportional share to be paid by each Enterprise is to be calculated on an annual basis. Therefore, OFHEO has determined to reject and not to make the suggested modification to calculate the proportional share semiannually.

Timing of Payment (§ 1701.3(c))

One Enterprise pointed out that proposed § 1701.3(c) mistakenly contains inapplicable references to other sections of the proposed regulation. Section 1701.3(c)(1) is accordingly revised to correct and clarify which references are applicable.

Surplus Funds (§ 1701.3(d))

One Enterprise suggested that proposed § 1701.3(d) be modified to clarify that surplus funds be credited fully to the first semiannual assessment payment. Section 1316(d) of the Act (12

U.S.C. 4516(d)) requires that surplus funds “be credited to the assessment to be collected from the enterprise for the following year,” without specifying to which semiannual payment such surplus funds must be credited. OFHEO cannot determine the amount, if any, of surplus funds until about mid-October; therefore, OFHEO cannot credit the surplus funds to the first semiannual payment due on or before October 1, but rather credits the surplus funds to the second semiannual payment due on or before April 1. Consequently, OFHEO cannot adopt the suggestion that would require it to credit surplus funds to the first semiannual payment. Where OFHEO is operating under one or more continuing resolutions and does not receive its full appropriation until later in the fiscal year, OFHEO may be able to determine the amount of surplus funds before the first full semiannual payment is made. In such a case, OFHEO has and will continue to credit the surplus funds to the first full semiannual payment.

The Enterprise also suggested that, in any instance when OFHEO determines that there was a surplus for the prior year after the first semiannual payment has been made, OFHEO immediately return such surplus to the Enterprises, *i.e.*, refund the overpayment of the first semiannual payment. OFHEO has determined not to adopt this suggestion because section 1316(d) of the Act (12 U.S.C. 4516(d)) requires that surplus funds be credited to the next annual assessment, not refunded as an overpayment.

Increase in semiannual payments (§ 1701.4)

Section 1701.4 of the proposed regulation sets forth the statutory authority of OFHEO to increase the semiannual payment of an Enterprise that is not classified as adequately capitalized. Both Enterprises suggested that this section include the regulatory purposes for which such an increase may be used, as provided in 12 U.S.C. 4516(c). OFHEO agrees and modifies § 1701.4 to read:

The Director, in his or her discretion, may increase any semiannual payment to be collected under § 1701.3 from an Enterprise that is not classified as adequately capitalized as necessary to pay additional estimated costs of regulation of the Enterprise.

Notice and Review (§ 1701.5)

Section 1701.5 of the proposed regulation requires that the Director provide written notice of the annual assessment, the semiannual payments, and any partial payments to be collected

from each Enterprise. It also provides that the Enterprises receive notice of any changes to the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

One Enterprise requested that actual notice of any semiannual payment be made at least five business days prior to the due date. A minimum five-day-notice, the Enterprise asserted, is needed for the Enterprise to review the calculation, process the notice of payment, and make the payment in a timely manner. OFHEO is not required by statute to provide a minimum notice period for any semiannual payment and believes that it would be inappropriate to bind itself to a specific notice period. OFHEO, nevertheless, will continue to provide the Enterprises with ample notice of the actual semiannual payment.

The Enterprise also suggested that any change to current assessment procedures would require notice and comment rulemaking under the Administrative Procedure Act (APA). To the extent, however, that a particular change is not subject to the APA notice and comment procedures, the Enterprise further suggested that notice of such change should be given at least 30 days in advance of the implementation of the change in order for the Enterprises to review, understand, prepare for, and respond to the change.

OFHEO does not agree that every change to the assessment procedures would require notice and comment rulemaking under the APA. Furthermore, OFHEO has determined not to adopt the 30-days advance notice suggested by the Enterprise because to do so would unnecessarily restrict the statutory authority of OFHEO to assess and carry out its statutory duties and responsibilities with regard to the Enterprises and the mortgage market.

Delinquent Payment (§ 1701.6)

Section 1701.6(a) of the proposed regulation provides that the Director may assess interest and penalties on any delinquent payment of any assessment under this part in accordance with 31 U.S.C. 3717 (interest and penalties on claims) and 12 CFR part 1704 (debt collection).

One Enterprise suggested that § 1701.6(a) be modified to provide details as to how the interest on delinquent payments is to be calculated pursuant guidance published by the Department of the Treasury (Treasury guidance) as required by 31 U.S.C. 3717 and 12 CFR part 1704. OFHEO does not agree that providing such detail in § 1701.6(a) is necessary or appropriate.

OFHEO is required to follow the Treasury guidance regardless whether the details of such guidance are spelled out in the regulation. By not spelling out the details, OFHEO avoids the need to revise the regulation if the Treasury guidance were to be revised.

In addition to the modifications discussed above, which OFHEO considers to be nonsubstantive, OFHEO makes minor editorial modifications to the proposed regulation. Accordingly, OFHEO has determined to issue the proposed regulation, as modified, as a final regulation.

Regulatory Impact

Executive Order 12866, Regulatory Planning and Review

The final regulation is not classified as a significant rule under Executive Order 12866 because it will not result in an annual effect on the economy of \$100 million or more or a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. Accordingly, no regulatory impact assessment is required and this final regulation has not been submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). OFHEO has considered the impact of the final regulation under the Regulatory Flexibility Act. The General Counsel of OFHEO certifies that the regulation, as herein adopted, is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1701

Government Sponsored Enterprises, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, OFHEO adds 12 CFR part 1701 as follows:

PART 1701—ASSESSMENTS

Sec.

- 1701.1 Purpose.
- 1701.2 Definitions.
- 1701.3 Annual assessment.
- 1701.4 Increase in semiannual payment.
- 1701.5 Notice and review.
- 1701.6 Delinquent payment.
- 1701.7 Enforcement of payment.
- 1701.8 Deposit in fund.

Authority: 12 U.S.C. 4513(b)(1) and 12 U.S.C. 4516.

§ 1701.1 Purpose.

This part sets forth the policy and procedures of OFHEO with respect to the establishment and collection of the annual assessments of the Enterprises under section 1316 of the Act (12 U.S.C. 4516).

§ 1701.2 Definitions.

For purposes of this part, the term—

(a) *Act* means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102–550, section 1301, Oct. 28, 1992, 106 Stat. 3672, 3941–4012 (1993) (12 U.S.C. 4501 *et seq.*).

(b) *Adequately capitalized* means the adequately capitalized capital classification under section 1364 of the Act (12 U.S.C. 4614).

(c) *Director* means the Director of the Office of Federal Housing Enterprise Oversight or his or her designee.

(d) *Enterprise* means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and the term “Enterprises” means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

(e) *Surplus funds* means funds that are not obligated as of September 30 of each fiscal year that were collected from any Enterprise pursuant to § 1701.3 or § 1701.4.

(f) *Total assets* means the sum, as of the most recent June quarterly minimum capital report of the Enterprise, of the amounts of the following assets that are used to calculate the quarterly minimum capital requirement of the Enterprise under 12 CFR part 1750:

- (1) On-balance sheet assets;
- (2) Off-balance sheet mortgage-backed securities; and

(3) Other off-balance sheet obligations.

(g) *OFHEO* means the Office of Federal Housing Enterprise Oversight.

§ 1701.3 Annual assessment.

(a) *Establishment of assessment.* The Director may, to the extent provided in appropriation acts, establish and collect from the Enterprises an annual assessment for each fiscal year, as allocated under paragraph (b) of this section. The amount of the annual assessment shall not exceed the estimated amount to be sufficient to provide for the necessary administrative and non-administrative expenses to carry out the responsibilities of the Director relating to the Enterprises and to carry out the purposes of the Act.

(b) *Allocation and proportional share.* The annual assessment established under paragraph (a) of this section shall be allocated between the Enterprises. Each Enterprise shall pay a proportional share of the annual assessment that bears the same ratio to the total annual assessment as the total assets of each Enterprise bears to the total assets of both Enterprises.

(c) *Timing and amount of semiannual payment.* (1) Each Enterprise shall pay on or before October 1 and April 1 of each fiscal year an amount of one-half of its proportional share of the annual assessment, except:

(i) As provided in paragraph (c)(2) of this section;

(ii) To the extent surplus funds are credited under paragraph (d) of this section; and

(iii) To the extent a semiannual payment is increased under § 1701.4.

(2) If OFHEO is operating under a continuing appropriation as of October 1 of any year, each Enterprise shall pay, on such date as determined by the Director, an amount calculated by applying the annual assessment proportion calculated under paragraph (b) of this section to the amount authorized for expenditure. When OFHEO receives a regular appropriation, the amount of the allocation share of the annual assessment collected from each Enterprise shall be reduced by any partial payments made by each Enterprise in connection with any continuing appropriations.

(d) *Surplus funds.* Surplus funds shall be credited to the annual assessment by reducing the amount collected by the amount of the surplus funds. Surplus funds shall be allocated in the same proportion in which they were collected, except as determined by the Director.

§ 1701.4 Increase in semiannual payment.

The Director, in his or her discretion, may increase any semiannual payment to be collected under § 1701.3 from an Enterprise that is not classified as adequately capitalized as necessary to pay additional estimated costs of regulation of the Enterprise.

§ 1701.5 Notice and review.

(a) *Written notice.* The Director shall provide each Enterprise with written notice of the annual assessment, the semiannual payments and any partial payments to be collected under this part. In addition, the Director shall provide each Enterprise with written notice of any changes in the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

(b) *Request for review.* At the written request of an Enterprise, the Director, in his or her discretion, may review the calculation of the proportional share of the annual assessment, the semiannual payments, and any partial payments to be collected under this part. The determination of the Director is final. Except as provided by the Director, review by the Director does not suspend the requirement that the Enterprise make the semiannual payment or partial payment on or before the date it is due.

§ 1701.6 Delinquent payment.

(a) *Interest and penalties.* The Director may assess interest and penalties on any delinquent semiannual payment or partial payment collected under this part in accordance with 31 U.S.C. 3717 (interest and penalty on claims) and 12 CFR part 1704 (debt collection). The Director may waive interest and penalties in his or her discretion.

(b) *Transfer to general fund.* Any interest and penalties collected under this section shall be transferred to the general fund of the Treasury of the United States.

§ 1701.7 Enforcement of payment.

Notwithstanding § 1701.6, the Director may enforce the payment of any assessment under this part pursuant to the authorities of sections 1371 (12 U.S.C. 4631) (cease-and-desist proceedings), 1372 (12 U.S.C. 4632) (temporary cease-and-desist orders), and 1376 (12 U.S.C. 4636) (civil money penalties) of the Act.

§ 1701.8 Deposit in fund.

OFHEO shall deposit any annual assessment collected under this part in the Federal Housing Enterprise Oversight Fund established in the Treasury of the United States.

Dated: April 2, 2001.

Armando Falcon, Jr.,

Director, Office of Federal Housing Enterprise Oversight.

[FR Doc. 01-8424 Filed 4-4-01; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1780

RIN 2550-AA16

Rules of Practice and Procedure

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final rule.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a final rule amending OFHEO's rules governing administrative enforcement proceedings. The amendments summarize OFHEO's statutory authority to issue cease and desist orders and to impose various corrective and remedial sanctions, including, among other things, civil money penalties, against the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), as well as their respective executive officers and directors, in appropriate cases. By describing the grounds on which such actions might be instituted, and providing examples of the terms and conditions the agency might impose, OFHEO seeks to ensure greater transparency to and public awareness of the agency's supervisory regime and the safeguards affecting Freddie Mac and Fannie Mae.

EFFECTIVE DATE: May 7, 2001.

FOR FURTHER INFORMATION CONTACT:

David W. Roderer, Deputy General Counsel, (202) 414-6924, Jamey Basham, Counsel (202) 414-8906 (not toll-free numbers), 1700 G Street NW, Fourth Floor, Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is: (800) 877-8339 (TDD only).

SUPPLEMENTARY INFORMATION:

Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, entitled the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (the Act), established OFHEO. OFHEO is an independent office within the

Department of Housing and Urban Development (HUD) with responsibility for ensuring that Fannie Mae and Freddie Mac (collectively, the Enterprises) are adequately capitalized and operate safely and in conformity to the requirements of applicable statutes, rules and regulations, including their respective charter acts. The Enterprises are Federal instrumentalities established under Federal law to effect various broad public policy purposes.¹ These include providing liquidity to the residential mortgage market and promoting the availability of mortgage credit benefiting low- and moderate-income families and areas that are underserved by lending institutions.

The enumerated statutory authorities of the Director explicitly include the authority to issue rules to carry out the duties of the Director,² as well as other broad supervisory powers similar to those of the Federal bank regulatory agencies. OFHEO is empowered, among other things, to conduct examinations of the Enterprises; to require the Enterprises to provide reports;³ to establish capital standards for the Enterprises;⁴ and, in appropriate circumstances, to take prompt corrective action against an Enterprise that fails to remain adequately capitalized, including but not limited to possible imposition of a conservatorship.⁵

In addition, the Act grants OFHEO administrative enforcement authority similar to that granted by Congress to the Federal bank regulatory agencies, including the power to issue temporary and permanent cease and desist orders to an Enterprise or its executive officers or directors, and to impose sanctions, including civil money penalties when appropriate.⁶ Prior to issuing a cease and desist order, OFHEO is to conduct a hearing on the record and provide the subject of an order with notice and the opportunity to participate in such hearings.⁷ Prior to imposing civil money penalties, OFHEO is to provide notice and the opportunity for a hearing to the persons subject to the penalties.⁸ Part 1780 of OFHEO's rules and regulations currently sets out the procedural rules under which such notices are provided and hearings conducted.

¹ See Federal Home Loan Mortgage Corporation Act, 12 U.S.C. 1451 *et seq.*; Federal National Mortgage Association Charter Act, 12 U.S.C. 1716 *et seq.*; Act at 12 U.S.C. 4561-67, 4562 note.

² 12 U.S.C. 4513(b)(1).

³ 12 U.S.C. 4514, 4517, 1456(c), 1723a(k).

⁴ 12 U.S.C. 4611-4614.

⁵ 12 U.S.C. 4615-4623.

⁶ 12 U.S.C. 4631-4641.

⁷ 12 U.S.C. 4631(c), 4633.

⁸ 12 U.S.C. 4636(c), 4633.