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FEDERAL HOUSING FINANCE BOARD

12 CFR Part 911

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1214

RIN 2590-AA06

Availability of Non-Public Information

AGENCIES: Federal Housing Finance Board; Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) proposes to adopt a rule governing the disclosure of FHFA non-public information. The proposed rule would replace rules issued by FHFA's predecessor agencies the Federal Housing Finance Board (Finance Board) and the Office of Federal Housing Enterprise Oversight (OFHEO). The proposed rule would prohibit the unauthorized disclosure of FHFA non-public information, replace the Finance Board's rule on the Availability of Unpublished Information, and parallel those portions of OFHEO's former rule on non-public information that were not replaced by FHFA's Freedom of Information Act regulation. .

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

ADDRESSES: You may submit your comments, identified by Regulatory Information Number (RIN) 2590-AA06, by any of the following methods:

- E-mail: Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to RegComments@fhfa.gov. Please include Comments/RIN 2590-AA06 in the message's subject line.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by the Agency. Please include Comments/RIN 2590-AA06 in the subject line of the message.
- Courier/Hand Delivery: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA06, Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20024. The package should be logged in at the Guard's 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-AA06, Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: James P. Jordan, Senior Counsel, 202-649-3075 (not a toll-free number), Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule, and will revise the language of the proposed rule as appropriate after taking all comments into consideration. FHFA will accept comments on this proposed rule in writing on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Copies of all comments received will be posted without change on the FHFA web site at <http://www.fhfa.gov>, and will include any personal information you provide, such as your name, address, email address, and telephone number. Copies of all comments received will be made 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 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

Establishment of FHFA

Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (Public Law 110-289, 122 Stat. 2654) (HERA), amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act), and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) to establish FHFA as an independent regulatory agency of the Federal Government. FHFA was established with all of the authorities necessary to supervise and regulate the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Banks (collectively, regulated entities), and the Office of Finance of the Federal Home Loan Bank System (Office of Finance).

HERA transferred to FHFA the employees, functions, and regulations of OFHEO,

the Finance Board, and the Government-Sponsored Enterprise mission team within the U.S. Department of Housing and Urban Development. FHFA is responsible for ensuring that the regulated entities operate in a safe and sound manner, including maintaining adequate capital and internal controls; foster liquid, efficient, competitive, and resilient national housing finance markets; comply with the Safety and Soundness Act and their respective authorizing statutes, as well as all rules, regulations, guidelines, and orders issued under law; and carry out their missions through activities that are authorized by law and are consistent with the public interest. In addition, FHFA may prescribe regulations as determined to be appropriate regarding the conduct of conservatorships or receiverships.

III. Analysis of Proposed Rule

The Safety and Soundness Act mandates that FHFA issue regulations in connection with FHFA's supervision and regulation of the regulated entities and the Office of Finance. The proposed rule updates, clarifies, and simplifies existing regulations and eliminates redundant provisions. It reduces confusion about the applicability of predecessor agencies' rules. The proposed rule is internal and procedural rather than substantive.

FHFA has concluded that this rule would be exempt from the notice and comment requirement under the Administrative Procedure Act, 5 U.S.C. 553, because this rule falls under the agency "procedure" exemption described in 5 U.S.C. 553(b)(A). However, in recognition of the Administrative Conference of the United States Recommendation 92-1, paragraph 2, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 57 Fed. Reg. 30,102 (1992), FHFA is voluntarily

submitting this rule as a proposed rule to the public for notice and comment with a 60-day comment period following publication. The proposed rule is of a “housekeeping nature.” That is, the consolidation and migration of FHFA’s predecessor agencies’ rules on non-public information involve primarily the agency’s management of its own information and minor technical amendments.

The proposed rule would prohibit the unauthorized disclosure of FHFA non-public information, replace the Finance Board’s rule on the Availability of Unpublished Information at 12 CFR part 911, and parallel those portions of OFHEO’s former rule on non-public information that were not replaced by FHFA’s Freedom of Information Act regulation at 12 CFR part 1202. The proposed rule does not affect 12 CFR 1703 Subparts E – F. As described below, FHFA is proposing a separate rule to replace those subparts.

Proposed §§ 1214.3, 1214.4, and 1214.5 are substantively analogous to the former 12 CFR §§ 1703.6 to 1703.8 and to the existing 12 CFR 911.3, which the proposed rule would replace. The proposed FHFA rule (12 CFR part 1214), the former OFHEO rule (12 CFR Part 1703), and the existing Finance Board rule (12 CFR part 911), all generally prohibit disclosure of non-public agency information to parties that are not agency employees, and set forth the limited circumstances when disclosure is permitted. The Finance Board rule, 12 CFR part 911, also outlines how the Finance Board handled demands and requests for information in the context of legal proceedings. FHFA is separately proposing the “Production of FHFA Records, Information, and Employee Testimony in Legal Proceedings (“Touhy”) rule which would set forth FHFA’s process for handling those demands and requests.

Use of the Term “Confidential”

The proposed rule would define “confidential supervisory information,” to be included as a subset of “non-public information.” The inclusion of the term “confidential” within the definition of “confidential supervisory information” is not intended to invoke the meaning of “confidential,” as that term is used in Executive Order No. 13526, 75 FR 707 (2009) (President’s order on the classification of National Security Information). Confidential supervisory information is used in part 1214 to refer to the distinct category of information defined in proposed § 1214.1. FHFA used the word “confidential” within the label for this category of information simply to be consistent with the manner in which federal banking agencies refer to similar or identical types of information.

REGULATORY IMPACTS

Paperwork Reduction Act

The proposed rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act and Executive Order 13272—Consideration of Small Entities

FHFA has considered the proposed rule’s impact under the Regulatory Flexibility Act (5 U.S.C. 602 et seq.) and Executive Order 13272 of August 13, 2002. The proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act and Executive Order 13272, because it will not: (1) impose record-keeping requirements on them; (2) affect their competitive position in relation to large entities; and (3) affect their cash flow, liquidity or ability to remain in the market. (5 U.S.C. 605(b)).

List of Subjects in 12 CFR Part 1214

Administrative practice and procedure, Confidential commercial information, Disclosure, Exemptions, Government employees, Records.

For the reasons set forth in the **Supplementary Information**, FHFA proposes to: amend chapters IX and XII of title 12 of the Code of Federal Regulations as follows:

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

PART 911—[REMOVED]

1. Remove part 911.

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

2. Add part 1214 to read as follows:

PART 1214—AVAILABILITY OF NON-PUBLIC INFORMATION

Sec.

- 1214.1 Definitions.
- 1214.2 Purpose and scope.
- 1214.3 General rule.
- 1214.4 Exceptions.
- 1214.5 Confidential supervisory information.

Authority: 5 U.S.C. 301, 552; 12 U.S.C. 4501, 4513, 4522, 4526, 4639.

§ 1214.1 Definitions.

Confidential supervisory information means information prepared or received by FHFA that meets all of the following criteria:

- (1) The information is not a document prepared by a regulated entity or the Office of Finance for its own business purposes that is in its possession;
- (2) The information is exempt from the Freedom of Information Act, 5 U.S.C. 552 (1966); and
- (3) The information—

(i) Consists of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports, or

(ii) Is gathered by FHFA in the course of any investigation, suspicious activity report, cease-and-desist order, civil money penalty enforcement order, suspension, removal or prohibition order, or other supervisory or enforcement orders or actions taken under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Public Law 102-550 (1992).

Conservatorship or Receivership information means information in FHFA's possession strictly for the purpose of administering the conservatorship or receivership of a regulated entity.

Disclosure means release or divulgence of information by any person to a person outside of FHFA.

FHFA employee means strictly for the purpose of this regulation, any person employed by FHFA, including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA, and any person employed by the FHFA Office of the Inspector General (FHFA-OIG), including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA-OIG.

Non-public information means information that FHFA has not made public that is created by, obtained by, or communicated to an FHFA employee in connection with the performance of official duties, regardless of who is in possession of the information. This includes, but is not limited to conservatorship or receivership information and confidential supervisory information as defined above. It does not include information or

documents that FHFA has disclosed under the Freedom of Information Act (5 U.S.C. 552; 12 CFR Part 1202), or Privacy Act of 1974 (5 U.S.C. 552a; 12 CFR Part 1204). It also does not include specific information or documents that were previously disclosed to the public at large or information or documents that are customarily furnished to the public at large in the course of the performance of official FHFA duties, including but not limited to: disclosures made by the Director pursuant to the Enterprise Public Use Database Rule (currently located at 24 CFR subpart F, and any FHFA successor rule); the annual report that FHFA submits to Congress pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 et seq.), press releases, FHFA blank forms, and materials published in the Federal Register.

Person means individual or business entity.

§ 1214.2 Purpose and Scope.

(a) Purpose. The purpose of this part is to control the dissemination of non-public information and maintain its controlled, sensitive, privileged, or proprietary nature, as appropriate.

(b) Scope. This part imposes a broad-based prohibition against unauthorized disclosure of any non-public information. This part does not supersede the regulations at 12 CFR 1202 (governing disclosure under the Freedom of Information Act); 12 CFR 1204 (governing disclosure under the Privacy Act); and the sections describing permitted disclosures in any FHFA rules on Federal home Loan Bank Information Sharing or on the FHFA Public Use Database.

(c) These provisions also do not supersede or otherwise alter the rights or liabilities created by 5 U.S.C. 7211 (governing disclosures to Congress); 5 U.S.C.

2302(b)(8) (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); or 12 U.S.C. 3401 (governing disclosure of financial institution customer information).

§ 1214.3 General Rule.

(a) In general. Except as authorized in writing by the Director, no person in possession or control of non-public information may disclose or permit the use or disclosure of such information in any manner or for any purpose.

(b) Persons possessing non-public information. All non-public information, for which the Director authorizes disclosure, remains the property of FHFA and may not be used or disclosed for any purpose other than that authorized under this part without the prior written permission of the Director.

(c) No Waiver. FHFA's disclosure of non-public information to any person does not constitute a waiver by FHFA of any privilege or FHFA's right to control, supervise, or impose limitations on, the subsequent use and disclosure of the non-public information.

(d) Penalties. Any person that discloses or uses non-public information except as authorized under this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. In addition to those penalties, FHFA, regulated entity, Office of Finance, affiliate (as defined in 12 U.S.C. 4502(20)), or entity-affiliated party (as defined in 12 U.S.C. 4502(11)) employees may be subject to appropriate administrative, enforcement, or disciplinary proceedings.

§ 1214.4 Exceptions.

(a) FHFA Employees. Subject to the scope restrictions of § 1214.2, except as authorized by this part, no FHFA employee may disclose or permit the disclosure in any manner of any non-public information to anyone except another FHFA employee or regulated entity or the Office of Finance, when appropriate, for use in the performance of their official duties.

(b) Regulated Entity Agents and Consultants.—(1) When necessary and appropriate for regulated entity or Office of Finance business purposes, a regulated entity, the Office of Finance, or any director, officer, or employee thereof may disclose non-public information to any person officially connected with a regulated entity or the Office of Finance, as officer, director, employee, attorney, auditor, or independent auditor (“regulated entity agents”).

(2) A regulated entity, the Office of Finance, or a director, officer, employee, or agent thereof, also may disclose non-public information to a consultant under this paragraph if the consultant is under a written contract to provide services to the regulated entity or the Office of Finance and the consultant has agreed in writing:

(i) To abide by the prohibition on the disclosure of non-public information contained in this section; and

(ii) That it will not use the non-public information for any purposes other than those stated in its contract to provide services to the regulated entity or the Office of Finance.

(c) Law Enforcement Proceedings. Notwithstanding the general prohibition of disclosure of non-public information, to the minimum extent required by the Inspector General Act, Public Law 95–452 (1978), FHFA’s Office of Inspector General is

permitted under this section to disclose non-public FHFA information without Director approval.

(d) Privilege. FHFA retains all privilege claims for non-public information shared under § 1214.4, including, but not limited to attorney-client, attorney-work product, deliberative process, and examination privileges.

§ 1214.5 Confidential Supervisory Information.

(a) General. Confidential supervisory information may be disclosed only in accordance with this part. Confidential supervisory information is the property of FHFA and any unauthorized use or disclosure of such information may be subject to the penalties identified in § 1214.3(d).

(b) Regulated Entities and Office of Finance. The Director makes available to each regulated entity a copy of FHFA's report of examination of that regulated entity. The report of examination and all other confidential supervisory information is the property of FHFA and is provided to the regulated entity for its confidential internal use only. Under no circumstance shall a regulated entity or any director, officer, employee, regulated entity agent, or consultant, make public or disclose, in any manner, the report of examination, other confidential supervisory information, or any portion of the contents thereof to any individual or organization which is not a director, officer, employee, attorney, auditor, or independent auditor of the regulated entity; or, in the case of the Federal Home Loan Banks, the Office of Finance. Any other disclosure or use of confidential supervisory information, except as expressly permitted by the Director, may be subject to the penalties of 18 U.S.C. 641 and such administrative enforcement actions as may be appropriate.

(c) Privilege. FHFA retains all privilege claims for non-public information disclosed by FHFA under this section, including, but not limited to attorney-client, attorney-work product, deliberative process, and examination privileges.

Edward J. DeMarco,
Acting Director, Federal Housing Finance Agency.

January 17, 2013 _____
Date

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