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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1217

RIN 2590-AA76

Implementation of the Program Fraud Civil Remedies Act of 1986

AGENCY: Federal Housing Finance Agency.

ACTION: Proposed rule; request for comment.

SUMMARY: The Federal Housing Finance Agency (FHFA) proposes this rule to implement the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*), by establishing administrative procedures for imposing civil penalties and assessments against persons who make false, fictitious, or fraudulent claims or written statements to FHFA in the context of its contracting or employment activities, where the amount of money or the value of property or services involved or requested from FHFA is \$150,000 or less.

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

ADDRESSES: You may submit your comments, identified by regulatory information number (RIN) 2590-AA76, by any of the following methods:

- Agency Web site: www.fhfa.gov/open-for-comment-or-input.
- Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments. If you submit your comments 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-AA76” in the subject line of the message.

- Hand Delivery/Courier: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA76, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. The package should be delivered to the Seventh Street entrance 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-AA76, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 Seventh Street SW, Washington, DC 20219.

FOR FURTHER INFORMATION CONTACT: Laura Ayoud, Assistant General Counsel, Office of the General Counsel, (202) 649-3069, Laura.Ayoud@fhfa.gov, or Ellen Bailey, Managing Associate General Counsel, (202) 649-3056, Ellen.Bailey@fhfa.gov, 400 Seventh Street SW, Eighth Floor, Washington, DC 20219 (not toll free numbers). The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. General Information

A. 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. Copies of all comments will be posted without change, including any personal

information you provide, such as your name, address, or phone 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 20219. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

B. Background

The Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*) (PFCRA) requires FHFA, as an “authority,” to establish by rule procedures for imposing civil penalties and assessments on any person who makes a false claim for property, services, or money from FHFA, or makes a false material statement to FHFA in connection with a claim, where the amount involved does not exceed \$150,000.¹ A “claim” as defined in the Act includes a request, demand, or submission for property, services, or money from FHFA or a party to a contract with FHFA, including money representing benefits.² A “statement” is any representation, certification, affirmation, document, record, or accounting or bookkeeping entry with respect to a claim, a contract or a bid or proposal for a contract with FHFA, or a benefit from FHFA.³ For covered claims and statements, PFCRA provides an administrative remedy as an alternative to judicial action, where the Department of Justice (DOJ) has declined to prosecute under the civil False Claims Act, 31 U.S.C. 3729.⁴

¹ See 31 U.S.C. 3801(a)(1)(C) and 3803(g); see also 5 U.S.C., App. 3, 11(2).

² *Id.*, section 3801(a)(3).

³ *Id.*, section 3801(a)(9).

⁴ See S.Rep. No. 99-212, 99th Cong., 1st Sess. 6 (1985) (“[E]xisting remedies are not adequate to cope with the problem of fraud in Federal programs. The Committee [of Governmental Affairs of the Senate],

PFCRA establishes a process of (a) investigation by the “investigating official,” who, by statute, is the Inspector General (IG) of the agency or a designee of the IG; (b) review by the agency’s “reviewing official,” designated by the agency head,⁵ to determine if adequate evidence of liability exists; and (c) review by DOJ. If the Attorney General approves use of the PFCRA process, PFCRA authorizes the reviewing official to initiate an action by providing notice to the person alleged to be liable; if a hearing on the record is requested, it is before a “presiding official,” which by statute is an Administrative Law Judge (ALJ) appointed or detailed for such purpose.⁶ PFCRA also establishes appeal rights to the agency head by any person determined by an ALJ to be liable; further review is available by the U.S. District Court.⁷

A civil penalty may be imposed for making a false claim or statement to an agency even if the agency did not provide any money, property, services or benefits to any person as a result. Where money, property, services or benefits were provided as a result of the person’s false claim or statement, an assessment may also be imposed as the administrative equivalent of “damages.” The maximum amount of any civil penalty is established by PFCRA, subject to periodic adjustments for inflation, and PFCRA also caps any assessment at an amount equal to twice the value of the money, property, services or benefits provided.⁸

Following PFCRA’s enactment in 1986, an interagency task force was established under the leadership of the Department of Health and Human Services to develop model

therefore, believes that an alternative administrative remedy is needed to adjudicate small-dollar false claim and statement cases that otherwise would not be initiated civilly.”).

⁵ 31 U.S.C. 3801(a)(8)(A) and 3803. With publication of this proposed rule, the Director of FHFA designates the General Counsel of FHFA as FHFA’s reviewing official.

⁶ *Id.* section 3803.

⁷ *Id.*, *see also* section 3805.

⁸ *Id.* section 3802(a)(1) and (3).

implementing regulations by all affected agencies and departments. This action was consistent with the expectation that “regulations would be substantively uniform throughout the government, except as necessary to meet the specific needs of a particular agency or program.”⁹ For that reason, FHFA reviewed the PFCRA rules of other departments and agencies and has modeled its proposed rule on final rules of the Federal Deposit Insurance Corporation (FDIC) and Department of Housing and Urban Development (HUD).¹⁰ The FDIC rule was employed because, like FHFA, FDIC is a federal financial safety and soundness regulator. FHFA’s supervisory, regulatory, enforcement and resolution powers are similar to FDIC’s, and both FDIC and FHFA have express independent litigating authority and authority to bring administrative actions for civil money penalties for false claims or statements made to them by their regulated institutions or entities and affiliated parties apart from authority provided by PFCRA. The HUD rule provided a structural model and an established operational approach.

II. Analysis of Proposed Rule

Scope. As does the FDIC’s PFCRA rule, FHFA’s proposed rule states that it applies to FHFA’s employment and contracting activities and does not apply to FHFA’s supervisory, regulatory, enforcement, conservatorship, or receivership activities because other civil and administrative remedies available to FHFA are adequate to redress fraud in the areas not covered. FHFA intends that the PFCRA administrative process not be confused with ordinary Agency procedures available in regulatory or conservatorship situations. There FHFA exercises its broad and comprehensive supervisory, regulatory, enforcement, conservatorship, or receivership authorities, as appropriate, with regard to

⁹ See S. Rep. No. 99-212 at 12; see also 52 FR 27423 (July 21, 1987).

¹⁰ See 12 CFR Part 308, Subpart T (FDIC) and 24 CFR Part 28 (HUD) (2015).

its regulated entities (Fannie Mae, Freddie Mac (collectively, the “Enterprises”), any affiliate of an Enterprise and the Federal Home Loan Bank System and the Office of Finance of the Federal Home Loan Bank System (OF), or any other entity-affiliated party. This statement of scope is almost identical to limitations imposed by the FDIC in its PFCRA rule, at 12 CFR 308.500(c), and reflects the broad enforcement authorities provided to FHFA in the Federal Housing Enterprise Financial Safety and Soundness Act, 12 U.S.C. 4501 *et seq.* (Safety and Soundness Act).

FHFA has determined this approach is appropriate for several reasons. Through the Safety and Soundness Act, FHFA has other available administrative remedies and independent litigating authority that it could use in the event a regulated entity, any affiliate of an Enterprise, the OF, or any other entity-affiliated party made a false claim on or provided false information to FHFA in its supervisory, regulatory, enforcement, conservatorship, or receivership activities. *See generally* 12 U.S.C. 4513, 4514, 4585, and 4636. As a result, even without PFCRA, FHFA could pursue administrative or judicial remedies for these false claims or statements on its own behalf with similar or greater effect. The statement of scope also recognizes that PFCRA provides the reviewing official discretion to pursue a false claim or statement through the PFCRA process and acknowledges that where FHFA has determined that another available action or remedy would be more appropriate, an administrative action will not be brought under PFCRA. Finally, the statement of scope serves congressional intent that the FHFA Office of the Inspector General be independent and objective in its oversight of FHFA, which could be compromised if the IG were able to initiate administrative actions against a regulated entity, including any affiliate of an Enterprise, or the OF or any other entity-

affiliated party based on false claims or statements to FHFA made when FHFA was engaged in supervisory, regulatory, enforcement, conservatorship, or receivership activities.¹¹

Finally, FHFA also notes that its PFCRA rule would not apply to false claims or statements made by any person to any regulated entity, an affiliate of an Enterprise, or the OF. PFCRA generally does not apply to false claims or statements made to private companies conducting private business activities, but instead creates an administrative remedy for false claims or statements for money, property, services, or benefits provided by the United States government through an agency. Thus, PFCRA would apply to a private company only where that company is acting on behalf of an agency and allocating money, property, services, or benefits for which the actual provider is the United States government. The regulated entities, including any affiliate of an Enterprise, and the OF do not provide United States government money, property, services, or benefits on FHFA's behalf to any person. Therefore, FHFA's proposed rule does not apply to any false claim or statement by any person to any regulated entity, including any affiliate of an Enterprise, or the OF.¹²

¹¹ FHFA's statement of scope in the proposed rule is nearly identical to the scope provision adopted by the FDIC in its PFCRA rule, which applies to FDIC's employment and contracting activities but does not apply to false claims or statements made in connection with FDIC's regulatory, supervision, enforcement, insurance, receivership, or liquidation responsibilities. *See* 12 CFR 308.500(c). FDIC explained that, as so limited, its rule was consistent with PFCRA's underlying purpose "to provide federal agencies with an administrative remedy for 'small dollar fraud' cases for which there is no other remedy because the cases are too small for the [DOJ] to prosecute," and distinguished FDIC's circumstances from those of other agencies based on its other available administrative remedies and on its independent litigating authority. 65 FR 52352 (Aug. 29, 2000) (proposed rule); *see also* 66 FR 9187, 9188 (Feb. 7, 2001) (final rule).

¹² If a regulated entity, an affiliate of an Enterprise, or the OF were to act on behalf of another agency in providing United States government money, property, services, or benefits to any person, then any PFCRA rule of that other agency may be applicable.

Process. Pursuant to PFCRA and the proposed rule, FHFA's "investigating official" (under PFCRA, the FHFA IG or the IG's designee) would initiate an investigation of any claim or statement believed to be false.¹³ The investigating official would submit a report containing information about the case (including exculpatory information), the potential violation, and other relevant information relating to liability to FHFA's "reviewing official" (the General Counsel of FHFA, as designated by the Director of FHFA).¹⁴ The reviewing official, or the designee thereof, would then be required to make a determination of whether there is adequate evidence of liability. If so, the reviewing official would provide written notice to the Attorney General of the intent to refer the allegations to an ALJ as presiding officer. Under the terms of PFCRA and the authority of the Attorney General, DOJ could elect to bring an action for civil relief under other applicable law, or the FHFA action may be deferred or postponed to avoid interference with a criminal investigation or prosecution by the Attorney General.

If the Attorney General approves the use of PFCRA, FHFA's reviewing official may refer the case to an ALJ as presiding officer. To initiate the action, the reviewing official must provide notice to any person who is subject to the allegation of liability. That person may then request a formal hearing on the record and is entitled to all exculpatory information in the possession of the investigating official or the reviewing official. If a hearing is requested, the ALJ would determine liability based on the preponderance of the evidence and the amount of any penalty (and, if appropriate, any assessment) to be imposed. The proposed rule implements statutory provisions for an

¹³ See 31 U.S.C. 3801(a)(4)(A).

¹⁴ See 31 U.S.C. 3801(a)(8)(A), requiring the agency head to designate a reviewing official; *see also* footnote 5, *supra*.

appeal of the ALJ's decision to the Director of FHFA as the "authority head" and then to the appropriate U.S. District Court.

The proposed rule provides for hearing and appeal rights of persons subject to allegations of liability for any penalty or assessment under PFCRA. FHFA currently has Rules of Practice and Procedure in place at title 12 of the Code of Federal Regulations, Part 1209, which establish evidentiary, hearing, and appeals procedures and processes for hearings on the record at FHFA. Similar to the HUD rule, FHFA's proposed rule cross-references its existing administrative enforcement procedures for purposes of PFCRA actions. FHFA's existing rules of procedure were issued subject to a notice and comment rulemaking process and, by proposing to use them for purposes of any PFCRA action, FHFA seeks to ensure due process and procedural consistency.

Maximum Penalty Amount. PFCRA establishes a maximum civil penalty of \$5,000 for each violation of the Act.¹⁵ That amount is required to be adjusted for inflation by the Federal Civil Penalties Inflation Adjustment Act of 1990, which limits the first such adjustment to not more than 10% of the original statutory penalty.¹⁶ As a result, the proposed rule provides for the imposition of a civil penalty of not more than \$5,500 for each fraudulent claim or statement, a 10% increase over the statutory amount. In the case of a false, fictitious, or fraudulent claim on which payment was made by the United States government, PFCRA also authorizes an assessment in lieu of damages of up to twice the amount of the claim.¹⁷ PFCRA civil penalties and assessments are in

¹⁵ See 31 U.S.C. 3802(a).

¹⁶ See 28 U.S.C. 2461 note.

¹⁷ 31 U.S.C. 3802(a)(1).

addition to any other remedy prescribed by law.¹⁸ Therefore, commenters should be aware that any final rule adopted by FHFA would not preclude imposition of other authorized actions or sanctions currently employed by FHFA, including debarment and suspension of contractors.

III. Paperwork Reduction Act

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

IV. Regulatory Flexibility Act

The 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, including small businesses and 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.¹⁹ FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that 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, because the regulation would merely fulfill a statutory requirement under PFCRA to establish procedures for imposing civil penalties and assessments against those persons who have violated existing prohibitions against making fraudulent claims or statements to FHFA in its contracting and employment activities, and does not alter any underlying

¹⁸ See 31 U.S.C. 3802(a).

¹⁹ See 5 U.S.C. 605(b).

requirements or prohibitions or impose any new requirements or prohibitions on persons subject to regulation by FHFA.

List of Subjects in 12 CFR Part 1217

Civil remedies, Program fraud.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, and under the authority of 12 U.S.C. 4511, 4513, 4514, 4526, 4585 and 4636 and 31 U.S.C. 3803, FHFA proposes to amend subchapter A of Chapter XII of Title 12 of the Code of Federal Regulations by adding a new Part 1217 to read as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

SUBCHAPTER A—ORGANIZATION AND OPERATIONS

1. Add part 1217 to subchapter A to read as follows:

PART 1217—PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

- 1217.1 Purpose and scope.
- 1217.2 Definitions.
- 1217.3 Basis for civil penalties and assessments.
- 1217.4 Investigation.
- 1217.5 Request for approval by the Department of Justice.
- 1217.6 Notice.
- 1217.7 Response.
- 1217.8 Statute of Limitations.
- 1217.9 Hearings.
- 1217.10 Settlements.

Authority: 12 U.S.C. 4501; 12 U.S.C. 4526, 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812.

§ 1217.1 Purpose and scope.

- (a) Purpose. This part:

- (1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to FHFA or to its agents; and
- (2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted in accordance with the Administrative Procedure Act pursuant to part 1209, subpart C, of this chapter.

(b) Scope. This part applies only to persons who make, submit, or present or cause to be made, submitted, or presented false, fictitious, or fraudulent claims or written statements to FHFA or to those acting on its behalf in connection with FHFA employment matters and FHFA contracting activities. It does not apply to false claims or statements made in connection with matters or activities related to FHFA's supervisory, regulatory, enforcement, conservatorship, or receivership responsibilities, as other civil and administrative actions available to FHFA to redress fraud in such areas provide for remedies that are equal to or exceed those available through this part.

§ 1217.2 Definitions.

Ability to pay is determined based on a review of the respondent's resources available both currently and prospectively, from which FHFA could ultimately recover the total penalty, and as appropriate, assessment, which may be predicted based on historical evidence.

Assessment means a monetary penalty that is in addition to a civil penalty and may be imposed if FHFA has made any payment, transferred property, or provided

services for a claim that is determined to be in violation of paragraph (a)(1) of § 1217.3.

An assessment may not exceed an amount that is twice the amount of the claim or portion of the claim determined to be in violation of paragraph (a)(1) of § 1217.3. A civil penalty other than an assessment may be imposed whether or not FHFA has made a payment, transferred property, or provided services in response to the false claim or statement.

Benefit means anything of value, including, but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, or status.

Claim means any request, demand, or submission:

- (1) Made to FHFA for property, services, or money (including money representing benefits);
- (2) Made to a recipient of property, services, or money from FHFA or to a party to a contract with FHFA:
 - (i) For property or services, if FHFA:
 - (A) Provided such property or services;
 - (B) Provided any portion of the funds for the purchase of such property or services; or
 - (C) Will reimburse such recipient or party for the purchase of such property or services; or
 - (ii) For the payment of money (including money representing benefits) if the United States:
 - (A) Provided any portion of the money requested or demanded; or
 - (B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to FHFA, which has the effect of decreasing an obligation to pay or account for property, services, or money.

Investigating official means the FHFA Inspector General, or an officer or employee of the FHFA Office of Inspector General designated by the FHFA Inspector General.

Knows or has reason to know. (1) For purposes of establishing liability under 31 U.S.C. 3802 and this part, means that a person, with respect to a claim or statement:

- (i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
 - (ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or
 - (iii) Acts in reckless disregard of the truth or falsity of the claim or statement.
- (2) No proof of specific intent to defraud is required for purposes of establishing liability under 31 U.S.C. 3802 or this part.

Makes a claim or statement includes making, presenting, or submitting the claim or statement and causing the claim or statement to be made, presented, or submitted.

Notice means the charging document served by FHFA to commence an administrative proceeding to impose a civil penalty and, if appropriate, an assessment under chapter 38 of subtitle III of title 31, U.S.C., and this part.

Person means any individual, partnership, corporation, association, or private organization.

Presiding officer means an administrative law judge appointed under 5 U.S.C. 3105 or detailed to FHFA under 5 U.S.C. 3344.

Reasonable prospect of collecting an appropriate amount of penalties and assessments is determined based on a generalized analysis made by the reviewing official, based on the limited information available in the report of investigation for purposes of determining whether the allocation of FHFA's resources to any particular action is appropriate.

Report of investigation means a report containing the findings and conclusions of an investigation under chapter 38 of subtitle III of title 31, U.S.C., by the investigating official, as described in § 1217.4.

Respondent means any person alleged to be liable for a civil penalty or assessment under § 1217.3.

Reviewing official means the General Counsel of FHFA, as so designated by the Director pursuant to 31 U.S.C. 3801(a)(8)(A).

Statement means, unless the context indicates otherwise, any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

- (1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or
- (2) With respect to (including relating to eligibility for) a contract with, or a bid or proposal for a contract with, or benefit from, FHFA or any State, political subdivision of a State, or other party, if FHFA provides any portion of the money or property under such contract or benefit, or if FHFA will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such benefit.

§ 1217.3 Basis for civil penalties and assessments.

- (a) False, Fictitious or Fraudulent Claims. (1) A civil penalty of not more than \$5,500 may be imposed upon a person who makes a claim to FHFA for property, services, or money where the person knows or has reason to know that the claim:
- (i) Is false, fictitious, or fraudulent;
 - (ii) Includes or is supported by a written statement that:
 - (A) Asserts a material fact which is false, fictitious, or fraudulent; or
 - (B) Omits a material fact and, as a result of the omission, is false, fictitious, or fraudulent, where the person making, presenting, or submitting such statement has a duty to include such material fact; or
 - (iii) Is for payment for the provision of property or services to FHFA which the person has not provided as claimed.
- (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim for purposes of this part.
- (3) A claim shall be considered made to FHFA, a recipient, or party when the claim is actually made to an agent, fiscal intermediary, or other entity, acting for or on behalf of FHFA, the recipient, or the party.
- (4) Each claim for property, services, or money is subject to a civil penalty, without regard to whether the property, services, or money actually is delivered or paid.
- (5) There is no liability under this part if the amount of money or value of property or services claimed exceeds \$150,000 as to each claim that a person submits. For purposes of this paragraph (a), a group of claims submitted simultaneously as part of a single transaction shall be considered a single claim.

(6) If the FHFA has made any payment, transferred property, or provided services for a claim, then FHFA may make an assessment against a person found liable in an amount of up to twice the amount of the claim or portion of the claim that is determined to be in violation of paragraph (a)(1) of this section. This assessment is in addition to the amount of any civil penalty imposed.

(b) False, Fictitious or Fraudulent Statements. (1) A civil penalty of up to \$5,500 may be imposed upon a person who makes a written statement to FHFA with respect to a claim, contract, bid or proposal for a contract, or benefit from FHFA that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Omits a material fact and is false, fictitious, or fraudulent as a result of such omission, where the person making, presenting, or submitting such statement has a duty to include such material fact; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to FHFA when the statement is actually made to an agent, fiscal intermediary, or other entity acting for or on behalf of FHFA.

(c) Joint and several liability. A civil penalty or assessment may be imposed jointly and severally if more than one person is determined to be liable.

§ 1217.4 Investigation.

(a) General. FHFA may initiate an action under chapter 38 of subtitle III of title 31, U.S.C., and this part against a respondent only upon an investigation by the investigating official.

(b) Subpoena. Pursuant to 31 U.S.C. 3804(a), the investigating official may require by subpoena the production of records and other documents. The subpoena shall state the authority under which it is issued, identify the records sought, and name the person designated to receive the records. The recipient of the subpoena shall provide a certification that the documents sought have been produced, that the documents are not available and the reasons they are not available, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(c) Investigation report. If the investigating official concludes that an action under chapter 38 of subtitle III of title 31, U.S.C., and this part may be warranted, the investigating official shall prepare a report containing the findings and conclusions of the investigation, including:

- (1) A description of the claim or statement at issue;
- (2) The evidence supporting the allegations;
- (3) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1217.3; and
- (4) Any exculpatory or mitigating circumstances that may relate to the claim or statement.

(d) Referrals to the Attorney General. The investigating official may refer allegations directly to the Department of Justice for civil relief under other applicable

law, as appropriate, or may defer or postpone submitting a report to the reviewing official to avoid interference with a criminal investigation or prosecution.

§ 1217.5 Request for approval by the Department of Justice.

(a) General. If the reviewing official determines that the report of investigation supports an action under this part, the reviewing official must submit a written request to the Department of Justice for approval to issue a notice under § 1217.6.

(b) Content of request. A request under this section shall include:

- (1) A description of the claim or statement at issue;
- (2) The evidence supporting the allegations;
- (3) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1217.3;
- (4) Any exculpatory or mitigating circumstances that may relate to the claim or statement; and
- (5) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Determining there is a reasonable prospect of collecting an appropriate amount of penalties and assessments is separate from determining ability to pay, and may not be considered in determining the amount of any penalty or assessment in any particular case.

§ 1217.6 Notice.

(a) Commencement of action; notice. Upon obtaining approval from the Department of Justice, the reviewing official may commence an action to establish liability of the respondent under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*) and this part. To commence an action, the reviewing official must

issue a notice to the respondent of the allegations of liability against the respondent. The notice shall be mailed, by registered or certified mail, or shall be delivered through such other means by which delivery may be confirmed.

(b) Notice contents. The notice required under this section shall include:

- (1) The allegations of liability against the respondent, including the statutory basis for liability, the claim or statement at issue, and the reasons why liability arises from that claim or statement;
- (2) A statement that the required approval to issue the notice was received from the Department of Justice;
- (3) The amount of the penalty and, if applicable, any assessment for which the respondent may be held liable;
- (4) A statement that the respondent may request a hearing by submitting a written response to the notice;
- (5) The addresses to which a response must be sent in accordance with § 1209.15 of this chapter;
- (6) A statement that failure to submit an answer within 30 days of receipt of the notice may result in the imposition of the maximum amount of penalties and assessments sought, without right of appeal;
- (7) A statement that the respondent must preserve and maintain all documents and data, including electronically stored data, within the possession or control of the respondent that may relate to the allegations; and
- (8) A copy of this part 1217 and part 1209, subpart C of this chapter.

(c) Obligation to preserve documents. Upon the issuance of a notice under this section, FHFA and the respondent shall each preserve and maintain all documents and data, including electronically stored data, within their respective possession or control that may relate to the allegations in the complaint.

§ 1217.7 Response.

(a) General. (1) To obtain a hearing, the respondent must file a written response to a notice under § 1217.6:

- (i) In accordance with § 1209.24 of this chapter; and
- (ii) Not later than 30 days after the date of service of the notice.

(2) A timely filed response to a notice under § 1217.6 shall be deemed to be a request for a hearing.

(3) A response to a notice under § 1217.6 must include:

- (i) The admission or denial of each allegation of liability made in the notice;
- (ii) Any defense on which the respondent intends to rely;
- (iii) Any reasons why the penalty and, if appropriate, any assessment should be less than the amount set forth in the notice; and
- (iv) The name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) Failure to respond. If no response to a notice under this part is timely submitted, FHFA may file a motion for default judgment in accordance with § 1209.24(c) of this chapter.

§ 1217.8 Statute of Limitations.

The statute of limitations for commencing a hearing under this part shall be tolled:

- (a) If the hearing is commenced in accordance with 31 U.S.C. 3803(d)(2)(B) within 6 years after the date on which the claim or statement is made; or
- (b) If the parties agree to such tolling.

§ 1217.9 Hearings.

- (a) General. Hearings under this part shall be conducted in accordance with the procedures in subpart B of part 1209 of this chapter, governing actions in accordance with subchapter II of chapter 5, U.S.C. (commonly known as the Administrative Procedure Act).
- (b) Factors to consider in determining amount of penalties and assessments. In determining an appropriate amount of any civil penalty and, if appropriate, any assessment, the presiding officer and, upon appeal, the Director or designee thereof, shall consider and state in his or her opinion any mitigating or aggravating circumstances. The amount of penalties and assessments imposed shall be based on the presiding officer's and the Director's or designee's consideration of evidence in support of one or more of the following factors:
- (1) The number of false, fictitious, or fraudulent claims or statements;
 - (2) The time period over which such claims or statements were made;
 - (3) The degree of the respondent's culpability with respect to the misconduct;
 - (4) The amount of money or the value of the property, services, or benefit falsely claimed;
 - (5) The value of the actual loss to FHFA as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;
 - (6) The relationship of the civil penalties to the amount of the loss to FHFA;

(7) The potential or actual impact of the misconduct upon public health or safety or public confidence in the management of FHFA programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the respondent has engaged in a pattern of the same or similar misconduct;

(9) Whether the respondent attempted to conceal the misconduct;

(10) The degree to which the respondent has involved others in the misconduct or in concealing it;

(11) If the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;

(12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;

(13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;

(15) Whether the respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly;

(16) The need to deter the respondent and others from engaging in the same or similar misconduct;

- (17) The respondent's ability to pay; and
- (18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

(c) Stays ordered by the Department of Justice. If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General notifies the Director in writing that continuation of FHFA's action may adversely affect any pending or potential criminal or civil action related to the claim or statement at issue, the presiding officer or the Director shall stay the FHFA action immediately. The FHFA action may be resumed only upon receipt of the written authorization of the Attorney General.

§ 1217.10 Settlements.

(a) General. The reviewing official, on behalf of FHFA, and the respondent may enter into a settlement agreement under § 1209.20 of this chapter at any time prior to the issuing of a notice of final decision under § 1209.55 of this chapter.

(b) Failure to comply. Failure of the respondent to comply with a settlement agreement shall be sufficient cause for resuming an action under this part, or for any other judicial or administrative action.

Dated: December 16, 2015.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

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