

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1227**

**RIN 2590-AB23**

**Suspended Counterparty Program**

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Proposed rule.

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**SUMMARY:** On July 21, 2023, the Federal Housing Finance Agency (FHFA) published a proposed rule to amend its Suspended Counterparty Program (SCP) regulation by expanding the categories of covered misconduct on which a suspension could be based to include sanctions arising from certain forms of civil enforcement. After reviewing the comments and reconsidering the proposed rule's substantive and procedural amendments, FHFA has determined that a number of material changes to the rule are necessary. Therefore, it is publishing this second proposed rule.

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

**ADDRESSES:** You may submit your comments, identified by regulatory information number (RIN) 2590-AB23, by any of the following methods:

- *Agency website:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).
- *Federal eRulemaking Portal:* <https://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 FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590-AB23.

- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590-AB23, Federal Housing Finance Agency, 400 Seventh Street, SW, Washington, DC 20219. Deliver the package at 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: Clinton Jones, General Counsel, Attention: Comments/RIN 2590-AB23, Federal Housing Finance Agency, 400 Seventh Street, SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Karen Heidel, Assistant General Counsel, Office of General Counsel, Karen.Heidel@fhfa.gov, (202) 738-7753; or Joseph Germany, Honors Counsel, Office of General Counsel, Joseph.Germany@fhfa.gov, (202) 649-3643. These are not toll-free numbers. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

**SUPPLEMENTARY INFORMATION:**

**I. Comments**

FHFA invites comments on all aspects of this second proposed rule, and will take all comments into consideration before issuing a final rule. Comments will be posted to the electronic rulemaking docket on the FHFA public website at <http://www.fhfa.gov>, except as described below. Commenters should submit only information that the commenter wishes to make available publicly. FHFA may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. FHFA may, in its discretion, redact or refrain from posting all or any portion of any comment that contains content that is obscene, vulgar, profane, or threatens harm. All comments, including those that are redacted or not posted, will be retained in their original form in FHFA's internal rulemaking file and considered as required by all applicable laws. Commenters that would like FHFA to consider any portion of their comment exempt from disclosure on the basis that it contains trade secrets, or financial, confidential or proprietary data or information, should follow the procedures in section IV.D. of FHFA's *Policy on Communications with Outside Parties in Connection with FHFA Rulemakings*, see [https://www.fhfa.gov/sites/default/files/documents/Ex-Parte-Communications-Public-Policy\\_3-5-19.pdf](https://www.fhfa.gov/sites/default/files/documents/Ex-Parte-Communications-Public-Policy_3-5-19.pdf). FHFA cannot guarantee that such data or information, or the identity of the commenter, will remain confidential if disclosure is sought pursuant to an applicable statute or regulation. See 12 CFR 1202.8, 12 CFR 1214.2, and FHFA's FOIA Reference Guide <https://www.fhfa.gov/about/foia-reference-guide> for additional information.

## **II. Background**

## **A. The SCP Regulation**

The SCP requires a regulated entity—the Federal Home Loan Mortgage Corporation (Freddie Mac) and any affiliate thereof, the Federal National Mortgage Association (Fannie Mae) and any affiliate thereof (individually, an Enterprise and together, the Enterprises), and any Federal Home Loan Bank (Bank) (hereinafter the Enterprises and Banks are collectively referred to as the regulated entities)—to submit a report to FHFA if it becomes aware that an individual or institution with which it does business has been found within the past three years to have committed certain forms of misconduct. FHFA may issue proposed and final suspension orders based on the reports it has received from the regulated entities or based on other information. FHFA offers the affected individual or institution and the regulated entities an opportunity to respond to any proposed suspension order. FHFA may issue a final suspension order if FHFA determines that the underlying misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity. Final suspension orders direct the regulated entities to cease or refrain from doing business with the suspended counterparties, subject to terms as provided in the orders.

The reporting that is required under the SCP regulation is authorized by sections 1313, 1313B, and 1314 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (Safety and Soundness Act). Section 1314(a) of the Safety and Soundness Act authorizes FHFA to require the regulated entities to submit regular reports on their activities and operations, as the Director considers appropriate. *See* 12 U.S.C. 4513, 4514b, and 4514(a).

The orders issued under the SCP regulation fall within FHFA's general supervisory authority over the regulated entities, specifically its authority under sections 1313, 1313B, and 1319G of the Safety and Soundness Act. Section 1313B of the Safety and Soundness Act authorizes FHFA to establish standards, by regulation or guideline, for each regulated entity regarding prudential management of risks. *See* 12 U.S.C. 4513b. The Director may also require by order that the regulated entities take any action that will best carry out the purposes of that section. *See* 12 U.S.C. 4513(b)(2)(B)(iii). Section 1319G(a) of the Safety and Soundness Act authorizes FHFA to issue any regulations, guidelines, or orders necessary to ensure that the purposes of the Safety and Soundness Act and the Enterprise charter acts are accomplished. *See* 12 U.S.C. 4526(a). Finally, section 1313(a)(2) of the Safety and Soundness Act authorizes FHFA to exercise such incidental powers as may be necessary in the supervision and regulation of each regulated entity. *See* 12 U.S.C. 4513(a)(2).

FHFA established the SCP regulation in June 2012 by letter to the regulated entities. The requirements and procedures for the SCP regulation were generally codified at 12 CFR part 1227 by the interim final rule.<sup>1</sup> FHFA amended the SCP regulation via final rule.<sup>2</sup> The SCP does not replace or relieve the regulated entities' duties and responsibilities to manage their operations in a safe and sound manner. Each regulated entity must adopt and implement prudent measures to identify areas where fraud or financial misconduct may present a risk to the regulated entity and take all appropriate measures to address any such risks.<sup>3</sup> These measures include establishing third-party

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<sup>1</sup> 78 FR 63007 (Oct. 23, 2013).

<sup>2</sup> 80 FR 79675 (Dec. 23, 2015).

<sup>3</sup> *See* 78 FR 63007, 63008 (2013).

provider contractual relationships which can be terminated by the regulated entity for cause.

## **B. The First Proposed Rule**

On July 21, 2023, FHFA published in the *Federal Register* a proposed rule (first proposed rule) to amend the SCP regulation by including certain orders or judgments in civil matters under the definition of “conviction” at § 1227.2 and by adding new §§ 1227.11 and 1227.12, which would have created a process for imposing immediate suspensions and a procedure for requesting their vacation. The first proposed rule would have expanded the categories of covered misconduct on which a suspension could be based to include sanctions arising from certain forms of civil enforcement. Additionally, the first proposed rule would have added “knowingly committed a material breach of contract” to the definition of “conviction” in addition to the offenses enumerated in the definition of “covered misconduct.” Finally, where a suspension was based on an administrative sanction, the first proposed rule also would have eliminated the requirement that a final suspension order be preceded by a proposed suspension order. The 60-day comment period closed on September 19, 2023.<sup>4</sup>

FHFA received eleven unique comment letters in response to the first proposed rule. Seven of the comment letters expressed strong opposition to the proposed rule. Six of these commenters expressed concern with the substantive changes in the first proposed rule: that it was overly broad; granted FHFA with undue discretion; and risked capture of relatively minor misconduct that would not pose a risk to the regulated entities’ safety

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<sup>4</sup> See 88 FR 47077 (July 21, 2023).

and soundness. Six commenters expressed concern with the due process implications of the proposed rule's authorization of immediate suspension in certain circumstances.

Four commenters expressed support for the first proposed rule. These commenters supported the expansion of the definition of covered misconduct. Commenters in support of the rule viewed the expanded definition as increasing accountability and suggested that further expansion would be beneficial. However, two of these commenters still urged FHFA to clarify what types of misconduct would give rise to suspension under the first proposed rule. One commenter supported the first proposed rule's elimination of the requirement for a proposed suspension where the suspension was based upon administrative sanctions, due to the administrative burden imposed by the proposed suspension requirement.

### **III. The Second Proposed Rule**

Following the close of the comment period on the first proposed rule, FHFA reviewed all of the comments received and considered the issues raised by the commenters, including how to capture misconduct posing a risk to the regulated entities' safety and soundness while excluding relatively *de minimis* actions. As a result, FHFA concluded that the current requirement for a proposed suspension should be retained in all cases instead of authorizing immediate suspension in certain cases. FHFA also determined that the substantive changes to the rule should be more narrowly tailored, both to provide greater clarity and to avoid capture of relatively minor misconduct that does not pose a risk to the safety and soundness of the regulated entities. FHFA believes that these changes represent a significant enough departure from the approach taken in

the first proposed rule to warrant the publication of this second proposed rule, which supersedes the first proposed rule.

In this second proposed rule, no changes would be made to the current regulation's procedural requirement that a proposed suspension is first issued, maintaining counterparties' ability to respond prior to the issuance of a final suspension. Substantively, under the second proposed rule, covered misconduct would include prohibition orders and civil monetary penalty orders as defined. However, the scope of those additions would be limited to capture only orders from certain Federal agencies and, where applicable, above a numerical threshold. Specific comments, FHFA's responses, and differences between the first and second proposed rules are described in greater detail below in the sections describing the relevant rule provisions.

As a result of these changes, the second proposed rule is organized differently. Under the second proposed rule, the definition of "conviction" remains unchanged. Instead, the definition of "covered misconduct" would be amended to include the additional bases of "prohibition order" and "civil monetary penalty order." Separate definitions for both of those terms are provided under the proposed amendments to § 1227.2. The definition of "covered misconduct" would also be amended to include breach of contract actions in civil monetary penalty orders, unlike the first proposed rule in which it would have appeared under the definition of "conviction." FHFA believes that these organizational changes and definitions will better fulfill the purposes of the SCP regulation by tailoring the scope of captured misconduct more narrowly to the SCP's safety and soundness purpose.

#### **A. Covered Misconduct**



The first proposed rule would have amended the definition of “conviction” in § 1227.2 to include “[a]n order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of ‘covered misconduct’ or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.”

Six commenters specifically opposed these proposed substantive changes, while four either supported the substantive changes or encouraged greater expansion. Commenters in opposition to the proposed substantive changes expressed concern that relatively minor misconduct would be captured under the first proposed rule. Four commenters opposed the amount of discretion that would be given to FHFA in determining what forms of misconduct fell within the scope of the first proposed rule. Commenters also expressed concern that the first proposed rule’s substantive changes were overly broad.

Based upon the comments received and internal discussion, FHFA reconsidered the changes to the definition of “conviction” in the first proposed rule, and determined that the changes in the second proposed rule would achieve FHFA’s goal of capturing misconduct that poses a risk to the safety and soundness of the regulated entities, while avoiding capture of relatively minor misconduct. Commenters also expressed a desire for greater clarity as to what misconduct would be captured under the first proposed rule. Under the new approach, rather than amending the definition of “conviction,” the

definition of “covered misconduct” would be amended to include new terms “prohibition order” and “civil monetary penalty order.” In response to the comments requesting greater clarity, definitions for each new term would be provided under § 1227.2.

Under this second proposed rule, a “prohibition order” would be defined to include only orders issued by the enumerated Federal agencies having the effect of prohibiting a person from participating in the affairs of an institution or market or in mortgage- or real estate-related activities, as applicable, overseen by such agencies.<sup>5</sup> Likewise, “civil monetary penalty order” would refer only to an order by one of three Federal agencies, the U.S. Department of Housing and Urban Development, U.S. Department of Agriculture, or U.S. Department of Veterans Affairs, where the agency had imposed a civil monetary penalty of at least \$1,000,000.

Similarly, the first proposed rule’s amendment to the definition of “conviction” to include knowing, material, breach of contract actions has been removed. Instead, the second proposed rule would amend the definition of “covered misconduct” to include breach of contract actions, but only with respect to civil monetary penalty orders. Additionally, the first proposed rule would have amended the definition of “covered misconduct” to include misconduct in connection with the management or ownership of real property. This second proposed rule retains this amendment. As discussed in the preamble to the first rule, real property management and real property ownership both demonstrate potential risk to the regulated entities and are significant functions

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<sup>5</sup> The enumerated Federal agencies are the Board of Governors of the Federal Reserve System (Federal Reserve), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), National Credit Union Administration (NCUA), Consumer Financial Protection Bureau (CFPB), Securities and Exchange Commission (SEC), and Commodity Futures Trading Commission (CFTC).

performed by certain regulated entity counterparties, especially those participating in Enterprise multifamily loan transactions.

One commenter expressed support for this amendment, reasoning that failing to suspend beneficiaries of financing who commit fraud related to property management or ownership would pose a major risk to the safety and soundness of the Enterprises. Two commenters expressed specific opposition to this amendment in the first proposed rule, with one stating that the proposed amendment lacked any limiting standard. FHFA believes that the proposed amendments elsewhere in the second proposed rule are responsive in providing sufficient limiting standards, such as the \$1,000,000 threshold set forth in the definition of “civil monetary penalty order.”

#### **B. Immediate Suspension Orders**

The current SCP regulation establishes a series of procedures governing the issuance of a final order of suspension. Under the current SCP regulation, FHFA must first issue a proposed order of suspension and provide the relevant counterparty and each regulated entity an opportunity to respond. Only after the response period does the regulation authorize issuance of a final suspension order, and any such suspension order may not be effective sooner than 45 days after signature by the suspending official.

Under the first proposed rule, the SCP regulation would have been amended to add § 1227.11, giving FHFA the ability to issue immediate suspension orders where the basis of the covered misconduct was an administrative sanction. Additionally, the proposed rule would have created § 1227.12, granting counterparties the corresponding right to request FHFA to vacate such an order. In the first proposed rule, FHFA reasoned that another Federal agency’s conclusion to limit a counterparty’s right to do business

with the government warranted particular deference, and that issuance of immediate suspension efforts in such situations would avoid excessive delay.

FHFA received seven comments specifically opposing the proposed addition of immediate suspension orders. Several of those comments emphasized the due process concerns implicated by immediate suspension orders. One commenter stated that the proposed rule was unclear as to how immediate suspensions would be applied to a counterparty's affiliates. Other commenters stated that admissions of guilt could be absent from an administrative action, creating additional due process concerns. Only one commenter expressed support for elimination of the requirement for a proposed suspension order where suspension is based on an administrative sanction, reasoning that it would be a reasonable and efficient way to streamline the suspension process.

In the process of developing a final rule, FHFA considered the objections raised to the procedural changes contemplated in the first proposed rule and ultimately decided to retain the current procedure. Accordingly, the first proposed rule's addition of §§ 1227.11 and 1227.12 are not included as part of this second proposed rule.

### **C. Section-by-Section Analysis**

#### *1. § 1227.2 Definitions*

As in the first proposed rule, § 1227.2 of this second proposed rule sets forth a definition for "covered misconduct." As noted, the first proposed rule would have amended the definition of "conviction" to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the

definition of “covered misconduct” or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct. It would also have amended the definition of “covered misconduct” to include misconduct in connection with the management or ownership of real property.

For the reasons discussed above in section III.A, this second proposed rule would not amend the definition of “conviction.” Instead, this second proposed rule would amend paragraph (1) of the definition of “covered misconduct” to read “[a]ny conviction, prohibition order, civil monetary penalty order, or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, or, with respect to a civil monetary penalty order only, breach of contract, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product, or ownership or management of real property.”

Additionally, the second proposed rule would amend § 1227.2 to add “civil monetary penalty order,” defined as “[a]ny order issued by the U.S. Department of Housing and Urban Development, U.S. Department of Agriculture, or U.S. Department of Veterans Affairs, pursuant to the relevant Federal agency’s authority to impose civil monetary penalties, that requires a person to pay an amount no less than \$1,000,000.”

Finally, the second proposed rule would amend § 1227.2 to add “prohibition order,” defined as any order issued by:

1. The Board of Governors of the Federal Reserve System, the Federal Deposit

Insurance Corporation, the Office of the Comptroller of the Currency, or the National Credit Union Administration that has the effect of prohibiting a person from participating in the affairs of any institution for which the Federal agency has supervisory authority;

2. The Consumer Financial Protection Bureau that has the effect of prohibiting a person from participating in mortgage- or real estate-related activities; or

3. The Securities and Exchange Commission or the Commodity Futures Trading Commission, or a judicial authority, that has the effect of prohibiting a person from participating in the relevant regulated market overseen by the Federal agency.

## *2. § 1227.11 Immediate Suspension Order and § 1227.12 Request to Vacate*

The first proposed rule would have amended the SCP regulation to create § 1227.11, allowing for immediate suspensions under certain circumstances, and § 1227.12, creating procedures to provide respondents the opportunity to request vacation of an immediate suspension. For the reasons described above, the second proposed rule makes no changes to the current procedure for requiring proposed suspensions prior to issuance of a final suspension. Accordingly, neither amendment is included in the second proposed rule.

## *3. Miscellaneous Provisions*

The first proposed rule would have amended § 1227.6(a) to specify that a final suspension order may be issued only if preceded by a proposed suspension order, pursuant to the requirements of § 1227.5. Despite this requirement already being implicit within the SCP regulation, FHFA believed that amendment was appropriate in light of the proposed addition of immediate suspensions. Further, the first proposed rule would have made a series of revisions to include reference to immediate suspension orders.

However, as this second proposed rule would not add immediate suspension orders, these amendments are no longer warranted and thus are not proposed.

#### **IV. Consideration of Differences Between the Banks and the Enterprises**

Section 1313(f) of the Safety and Soundness Act requires FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Enterprises and the Banks with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; joint and several liability; and any other differences FHFA considers appropriate.<sup>6</sup> In preparing this second proposed rule, FHFA considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the second proposed rule is appropriate. No commenters raised any issues relating to this statutory requirement as applied to the first proposed rule.

#### **V. Paperwork Reduction Act**

The second proposed 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.*). Therefore, FHFA has not submitted any information to OMB for review.

#### **VI. 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

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<sup>6</sup> See 12 U.S.C. 4513(f).

businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis 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)). FHFA has considered the impact of the second proposed rule under the Regulatory Flexibility Act. FHFA certifies that the second proposed rule, if adopted as a final rule, would not have a significant economic impact on a substantial number of small entities because the second proposed rule is applicable only to the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

## **VII. Providing Accountability Through Transparency Act of 2023**

The Providing Accountability Through Transparency Act of 2023 (5 U.S.C. 553(b)(4)) requires that a notice of proposed rulemaking include the internet address of a summary of not more than 100 words in length of a proposed rule, in plain language, that shall be posted on the internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov). The proposal and the required summary can be found at [www.regulations.gov](http://www.regulations.gov).

### **List of Subjects in 12 CFR Part 1227**

Administrative practice and procedure, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, FHFA proposes to amend part 1227 of chapter XII of title 12 of the Code of Federal Regulations as follows:

#### **PART 1227—SUSPENDED COUNTERPARTY PROGRAM**

1. The authority citation for part 1227 continues to read as follows:



**Authority:** 12 U.S.C. 4513, 4513b, 4514, 4526.

2. Amend § 1227.2 by:

a. Adding a definition of “Civil monetary penalty” in alphabetical order;

b. Revising paragraph (1) in the definition of “Covered misconduct” by:

i. Adding the words “prohibition order, civil monetary penalty order,” after the words “Any conviction,”;

ii. Adding the words “or, with respect to a civil monetary penalty order only, breach of contract,” after the words “any similar offense,”; and

iii. Adding the words “, or ownership or management of real property.” after the words “other lending product,”.

c. Adding in alphabetical order a definition for “Prohibition order”.

The additions and revisions read as follows:

**§ 1227.2 Definitions.**

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*Civil monetary penalty order* means any order issued by the U.S. Department of Housing and Urban Development, U.S. Department of Agriculture, or U.S. Department of Veterans Affairs, pursuant to the relevant Federal agency’s authority to impose civil monetary penalties, that requires a person to pay an amount no less than \$1,000,000.

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*Covered misconduct* \*\*\*

(1) Any conviction, prohibition order, civil monetary penalty order, or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements

