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VIA EMAIL

Alfred M. Pollard, Esq.
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Federal Housing Finance Agency
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RegComments@fhfa.gov

Re: Interim Final Rule on Suspended Counterparty Program Request for Comments, RIN 2590-AA60

Dear Mr. Pollard:

The undersigned Federal Home Loan Banks (collectively, the "FHLBanks") appreciate the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") Interim Final Rule on the Suspended Counterparty Program (the "Rule"), which was published on October 23, 2013. We are writing in response to the FHFA's request for comments on the Rule.

1. June 15, 2012 Memorandum and July 2012 Enforcement Manual Superseded

The FHFA provided the 12 Federal Home Loan Banks and the Office of Finance (collectively, the "Regulated Entities") with a memorandum dated June 15, 2012 (the "Program Memorandum"), describing the Suspended Counterparty Program, and requiring each Regulated Entity to implement a process for reporting under it by August 15, 2012. This was followed in July 2012 with a copy of the FHFA's Suspended Counterparty Program Enforcement Manual (the "Enforcement Manual"). We would like confirmation that, as of the effective date of the Rule, the Program Memorandum and Enforcement Manual have ceased to be operational, and only the final rule and any subsequently issued guidance will comprise the scope of the Suspended Counterparty Program that the Regulated Entities are to follow going forward. This clarification would eliminate potential conflicts in interpretation.

2. Preamble – Scope of Screening

With respect to the implementation of a final suspension order, the FHLBanks would like clarification as to the scope of screening that is expected against the FHFA's list of suspended counterparties. At the present time, each of the Regulated Entities has considered and developed procedures for screening against the Office of Foreign Asset Control's ("OFAC") list, as deemed appropriate, which may include areas such as hiring and engaging new vendors. We request confirmation that the scope of screening expected with respect to the Suspended Counterparty list is no broader than the existing OFAC screening practices of the Regulated Entities, so that the types of business relationships screened, and the method and frequency of screening, would be expected to be similar.

3. Preamble – Lower Tier Covered Transactions

In its discussion of Section 1227.3 – Scope of Suspension Orders, in the preamble, the FHFA invited comment on whether, in addition to a definition of "covered transaction," there should be a definition of "lower tier covered transactions," such that the Regulated Entities would have to develop procedures and contractual requirements that would "ensure that a suspended party will not continue to do business indirectly with a regulated entity through lower tier covered transactions." A similar concept was set forth on page 27 of the Enforcement Manual, by which the Regulated Entities are to require that "parties that do business directly with a regulated entity do not employ, contract for, or otherwise use the services of any person that has been suspended such that the suspended party would indirectly participate in a covered transaction." The FHLBanks have found this provision of the Enforcement Manual to be impracticable. It is not possible to mandate such a requirement in all agreements, and for those counterparties that may agree to such a provision, there is no practical means by which a Regulated Entity can monitor whether the provision has been breached. Unlike federal agencies, the Regulated Entities do not have any approval authority over lower tier contractors. The FHLBanks, therefore, request that such a concept be excluded from the final rule, and the Regulated Entities not be required to mandate such a requirement from their counterparties. As an alternative, the Regulated Entities could post a statement to their respective websites expressing their commitment to not do business with entities that have been suspended by the FHFA, and encouraging their counterparties to do the same.

4. Preamble – Investigation

The FHLBanks would like to clarify the language of the preamble regarding Section 1227.4 – Regulated Entity Reports on Covered Misconduct, which states that, "The regulated entities are not required to engage in any independent investigation of the underlying conduct."

This provision regarding no duty to investigate does not appear in the language of Section 1227.4, itself, and we request that it be included. We note that, for example, the field review staff, the sales staff, the QC staff, and the credit staff of the Federal Home Loan Banks are in regular contact with their members, and already provide reliable information to their respective Suspended Counterparty Program contact as such information becomes available.

5. <u>Preamble – Timing</u>

Under the Program Memorandum, each Regulated Entity was required to report to the FHFA if it became aware, with respect to "an individual or entity with which it has a contractual relationship," that such an individual or entity "[h]as, within the past three (3) years, been criminally convicted . . . or [w]as, within the past three (3) years, suspended or debarred . . . ." While this same look-back period is maintained in the Rule's definition of "Covered misconduct," both the preamble and the language of various sections appear to have added a three-year look-back period to the timing of the Regulated Entity's contractual relationship with the individual or entity. For example, the language of Section 1227.4(a) provides "that a person or any affiliates thereof with which the regulated entity is engaging or has engaged in a covered transaction within the past three (3) years has engaged in covered misconduct," and Section 1227.5(b)(1) provides, "The regulated entity is engaging or engaged in a covered transaction with the person or any affiliates thereof within the past three (3) years and the person or any affiliates thereof has engaged in covered misconduct . . . ." We request clarification that the conviction or suspension/debarment to be reported is one that has occurred within the past three years, but only with respect to an individual or entity with which the Regulated Entity has a contractual relationship at the time that it "becomes aware" of the conviction or suspension/debarment, and that references to a three-year look-back period with respect to when the Regulated Entity did business with the convicted/suspended individual or entity be stricken. The addition of such a three-year look-back period adds a layer of monitoring that (i) is beyond the scope of the procedures implemented by the Regulated Entities to comply with the terms of the Program Memorandum, and (ii) would be unduly burdensome on the Regulated Entities.

6. <u>Definitions</u>

The final rule defines "Affiliate" as "a party that either controls or is controlled by another person, whether directly or indirectly, including one or more persons that are controlled by the same third person." The FHLBanks request clarification as to the breadth of this definition, particularly as it relates to the meaning of the term "controls." The term appears to be intended to address parents and subsidiaries, although the CEO of a corporation could be considered an "Affiliate" of a corporation under this definition.

The FHLBanks would like confirmation that "any court of competent jurisdiction" under the definition of "Conviction" is limited to courts of the United States of America, and does not extend to courts in foreign jurisdictions. Further, with respect to the preamble's requirement that the Regulated Entities "have procedures in place to ensure that any relevant information will be gathered," we would like clarification that this does not include an expectation that the Regulated Entities conduct docket searches for convictions and/or monitor federal agency notices of debarment.

With respect to the definition of "Covered misconduct," the FHLBanks appreciate the FHFA's clarification that the Suspended Counterparty Program applies to offenses "in connection with a mortgage, mortgage business, mortgage securities or other lending product." This is a more workable definition than that used in the Program Memorandum, and places a more manageable reporting burden on the Regulated Entities.

Given the proposed definition of "Affiliate," it would be more accurate, when defining the imputation of conduct under subsection (2) of the definition of "Covered misconduct," to state that the "FHFA may impute covered misconduct among *persons* as follows[.]"

Further, under subsection (2) of the definition of "Covered misconduct," it is the understanding of the FHLBanks that the covered misconduct being imputed is the fraud, embezzlement, theft, etc., that gave rise to the conviction or sanction, not the conviction or sanction itself. To that end, the definition of covered misconduct might be more accurately stated as, "Any fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product, that resulted in any conviction or administrative sanction within the past three (3) years." In this way, it is clear that the conduct being imputed is the conduct that gave rise to the conviction or sanction, and not the conviction or sanction, itself.

7. <u>Interim Final Regulations</u>

Section 1227.3 – Scope of Suspension Orders, as it is currently written, provides that, "A suspending official may issue a final suspension order to the regulated entities directing them to cease or refrain from engaging in any covered transactions with a particular person and *any affiliates thereof* for a specified period of time . . . ." (emphasis added). The FHLBanks would like to see this reference to "any affiliates thereof" clarified as "any affiliates thereof, as set forth in the final suspension order," so that each suspended affiliate will be identified in the suspension order. It is difficult, if not impossible, for the Regulated Entities to know the full extent of the affiliates of any given entity, and including this limitation would be in keeping with the notice

that is required to be provided to the suspended party under Section 1227.6. We also suggest further clarification that the Regulated Entities are not required to research possible affiliate relationships with parties on the Suspended Counterparty list by adding, "This section does not require a regulated entity to perform an independent investigation to identify affiliate relationships that are not known to the regulated entity," to the end of Section 1227.4(a).

With respect to Section 1227.4 – Regulated Entity Reports on Covered Misconduct, the FHLBanks appreciate that the language from the Program Memorandum, specifically that the Regulated Entities must report when they become "aware" of covered misconduct based on "reliable information," has been retained. We would like clarification, however, with respect to the scope of reporting on such "reliable information." We do not believe it is necessary or appropriate for a Regulated Entity to be required to report on covered misconduct that receives national notoriety, such as the conviction of a major Wall Street figure, or that the FHFA will obtain through its daily business, such as the announcement of a suspension by a federal agency or a conviction reported through a press release by the FHFA-OIG. Such information is of the type that the FHFA could access just as easily as a Regulated Entity, and it seems particularly unreasonable that all Regulated Entities would be required to provide a report on the same, widely known conduct. Therefore, we request that the FHFA remove from the Regulated Entities' reporting obligation those instances of covered misconduct of which a Regulated Entity becomes aware through national news reports or the actions of a federal agency.

Further with respect to when a Regulated Entity becomes "aware" of covered misconduct, we would like confirmation that the FHFA does not expect any Federal Home Loan Bank to report information about covered misconduct that it may discover through a review of a member's examination report. Pursuant to the Federal Home Loan Bank Confidentiality Agreement entered into among the federal financial regulators and the 12 Federal Home Loan Banks (the "Confidentiality Agreement"), information provided by those regulators deemed "Confidential Information," which would include reports of examination, may not be released, disseminated, or transferred by a Federal Home Loan Bank to any person or entity, whether individual, corporate, or governmental (including any state, local, or federal agency, court, or legislative body) without the express written consent of the federal financial regulator. Given the limitations of the Confidentiality Agreement, we request confirmation that the Federal Home Loan Banks are not expected to violate that agreement, or any similar agreement, in order to provide reports of covered misconduct under the Suspended Counterparty Program.

Section 1227.4 provides a detailed description of the types of information that the FHFA is expecting in any report from a Regulated Entity. Although, as indicated above, the FHLBanks are anticipating that, with publication of the Rule, the Program Memorandum and Enforcement Manual are no longer operational, the FHFA did distribute a form of report in the summer of

2012. Will that form of report remain operational and, if so, does it constitute the format that the FHFA expects to receive from the Regulated Entities?

Finally, subsection (c) of Section 1227.5 – Notice Required, currently provides that, if a suspending official determines that grounds exist for issuance of a proposed suspension order, the official "may" issue a written notice of proposed suspension, and "shall" provide a copy of such notice to the regulated entity and to all of the other regulated entities. This suggests that, once the decision to suspend has been made, the issuance of a written notice of proposed suspension is optional. We would like clarification that, in such instances, the suspending official "shall" issue a written notice of proposed suspension, rather than making the issuance of a written notice discretionary. The notice is necessary for the rest of the suspension process to proceed as outlined, *e.g.*, for the respondent and the regulated entities to respond, and therefore can't be discretionary. Further, use of the word "may" with respect to issuance of such a notice contradicts language in the preamble, specifically pages 63009 ("the procedures under part 1227 provide that all affected parties *shall* receive notice of any proposed suspension order and an opportunity to respond before issuance of any final suspension order")(emphasis added) and 63010 ("Paragraph (c) *requires* the suspending official to provide written notice to each person and any affiliates thereof for whom suspension is proposed, and to provide a copy of such notice to the regulated entity and to all of the other regulated entities.")(emphasis added).

We appreciate your consideration of these comments.

Sincerely,

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