

mandates, the President's priorities or principles set forth in the Executive Order.

USDA certifies that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96-534, as amended (5 U.S.C. 601 *et seq.*).

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, (44 U.S.C. 3501 *et seq.*), do not apply to any collections of information contained in this final rule because any such collections of information are made during the conduct of administrative action involving an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

List of Subjects in 7 CFR Part 1

Administrative practice and procedure.

Accordingly, Title 7 of the Code of Federal Regulations is amended as follows:

PART 1—ADMINISTRATIVE REGULATIONS

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

Authority: 5 U.S.C. 301, unless otherwise noted.

Subpart J—Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department

- 2. Amend § 1.186 by revising paragraph (b) to read as follows:

§ 1.186 Allowable fees and expenses.

(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

- 3. Amend § 1.187 by revising paragraph (a) to read as follows:

§ 1.187 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special

circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than \$150 per hour in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

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Thomas J. Vilsack,
Secretary of Agriculture.

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FEDERAL HOUSING FINANCE BOARD

12 CFR Part 932

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1225

RIN 2590-AA01

Minimum Capital

AGENCY: Federal Housing Finance Board and Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final rule to implement a provision of the Federal Housing Enterprises Financial Safety and Soundness Act, as amended, that provides for a temporary increase in the minimum capital level for the entities regulated by FHFA—the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Home Loan Banks. The final rule establishes standards for imposing a temporary increase and for rescinding such an increase, and a time frame for review of such an increase.

DATES: This rule is effective April 4, 2011.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

A. Establishment of the Federal Housing Finance Agency

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110-289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act) to establish FHFA as an independent agency of the Federal Government. FHFA was established to oversee the operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Federal Home Loan Banks (Banks) (collectively, regulated entities). FHFA is to ensure that the regulated entities operate in a safe and sound manner including being capitalized adequately; that their operations foster liquid, efficient, competitive and resilient national housing finance markets; that they comply with the Safety and Soundness Act and their authorizing statutes, and with rules, regulations, guidelines and orders issued under those statutes; that they carry out their missions through activities authorized and consistent with the Safety and Soundness Act and their authorizing statutes; and that the activities and operations of the entities are consistent with the public interest.¹ The regulated entities continue to operate under regulations promulgated by the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board, and the relevant regulations of the Department of Housing and Urban Development, until such time as the existing regulations are supplanted by regulations promulgated by FHFA.²

B. The Bank System Generally

The twelve Banks are instrumentalities of the United States organized under the Federal Home Loan Bank Act (Bank Act).³ See 12 U.S.C. 1423, 1432(a). The Banks are cooperatives: Only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by

¹ 12 U.S.C. 4513.

² Sections 1302 and 1312 of HERA.

³ Each Bank is generally referred to by the name of the city in which it is located. The twelve Banks are located in: Boston, New York, Pittsburgh, Atlanta, Cincinnati, Indianapolis, Chicago, Des Moines, Dallas, Topeka, San Francisco, and Seattle.

a Bank. See 12 U.S.C. 1426(a)(4), 1430(a), 1430(b). Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential credit through its member institutions. See 12 U.S.C. 1427. Any eligible institution (generally a federally insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock. See 12 U.S.C. 1424; 12 CFR part 1263.

As government-sponsored enterprises, the Banks are granted certain privileges under federal law. In light of those privileges, the Banks typically can borrow funds at spreads over the rates on U.S. Treasury securities of comparable maturity lower than most other entities. The Banks pass along a portion of their funding advantage to their members—and ultimately to consumers—by providing advances and other financial services at rates that would not otherwise be available to their members. Consolidated obligations (COs), consisting of bonds and discount notes, are the principal funding source for the Banks. The Office of Finance issues all COs on behalf of the twelve Banks. Although each Bank is primarily liable for the portion of consolidated obligations corresponding to the proceeds received by that Bank, each Bank is also jointly and severally liable with the other eleven Banks for the payment of principal and interest on all COs. 12 CFR 966.9.

C. The Enterprises Generally

The Enterprises are chartered by Congress for the purpose of establishing secondary market facilities for residential mortgages. See 12 U.S.C. 1716 *et seq.*; 12 U.S.C. 1451 *et seq.* Congress established the Enterprises to provide stability in the secondary mortgage market for residential mortgages, to respond appropriately to the private capital market, to provide ongoing assistance to the secondary market for residential mortgages, and to promote access to mortgage credit throughout the nation. *Id.*

On September 6, 2008, the Director of FHFA appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act, as amended by HERA. The Enterprises remain under conservatorship at this time. Although the Enterprises' substantial market presence has been important to restoring market stability, neither company would be capable of serving the mortgage market today without the ongoing financial support provided by the United States

Department of Treasury. While reliance on the Treasury Department's backing will continue until legislation produces a final resolution to the Enterprises' future, FHFA is monitoring the activities of the Enterprises to: (a) Limit their risk and exposure by avoiding new lines of business; (b) ensure profitability in their new books of business without deterring market participation or hindering market recovery; and (c) minimize losses on the mortgages already on their books.

D. The Proposed Rule

On February 8, 2010, FHFA published in the **Federal Register** a proposed rule that set forth standards and procedures FHFA would employ to determine whether to require or rescind a temporary increase in the minimum capital levels of a regulated entity or entities pursuant to 12 U.S.C. 4612(d). The 60-day comment period closed on April 9, 2010. See **Federal Register** 75 FR 6151 (February 8, 2010).

Section 1111 of HERA amended section 1362 of the Safety and Soundness Act to provide additional authorities for FHFA regarding minimum capital requirements. Section 1362(a) establishes a minimum capital level for the Enterprises, while section 1362(b) incorporates the minimum capital level for the Federal Home Loan Banks established by the Federal Home Loan Bank Act (Bank Act).⁴ The section explicitly authorizes the Director, by regulation, to provide for capital levels higher than the minimum levels specified for the Enterprises or the Banks to promote safe and sound operations.⁵ Also, section 1362(e) provides for additional capital and reserve requirements to be issued by order or regulation with respect to a product or activity.⁶ Section 1362(f) provides for a periodic review of core capital maintained by an Enterprise, the amount of capital retained by the Banks and the minimum capital levels set forth for the regulated entities required under this section.⁷

⁴ The Bank Act's current minimum capital requirements apply to the eleven banks that have converted to the capital structure provided in the Bank Act as amended by the Gramm-Leach-Bliley Act of 1999, see Bank Act section 6(a)(2), 12 U.S.C. 1426(a)(2), but do not apply to the Federal Home Loan Bank of Chicago. The Federal Home Loan Bank of Chicago is subject to capital requirements as set forth in a 2007 Cease and Desist Order, as amended. See 74 FR 5597 (January 30, 2009). As a result, the definition of "minimum capital level" as set forth in the proposed regulation is structured to take into account the current supervisory status of the Federal Home Loan Bank of Chicago.

⁵ 12 U.S.C. 4612(c).

⁶ *Id.* at (e).

⁷ *Id.* at (f).

In addition, section 1362(d) provides that the Director, by order, may temporarily increase an established minimum capital level, when the Director determines "that such an increase is necessary and consistent with the prudential regulation and the safe and sound operations of a regulated entity."⁸ The section also provides that the Director shall rescind the temporary minimum capital level when the Director determines circumstances no longer justify the temporary level.⁹ To implement section 1362(d), the Director must issue regulations setting forth standards for the imposition of a temporary increase, standards and procedures that will be used to make the determination regarding rescission, and a time frame for periodic review of any temporary increase in the minimum capital level to make a determination regarding rescission.¹⁰

Section 1362(d) recognized the need for the Director to be able to respond when necessary to conditions affecting a regulated entity by imposing an appropriately higher capital requirement in an expeditious manner. The proposed rule also sets forth procedures and standards as required in the Safety and Soundness Act for a temporary increase in the minimum capital levels of the Enterprises or the Banks, including a determination to order an increase, to rescind all or part of the increase, and the time for periodic review of an increase as provided in section 1362(d).

E. Consideration of Differences Between the Banks and the Enterprises

Section 1201 of HERA (codified at 12 U.S.C. 4513(f)) requires the Director, when promulgating regulations relating to the Banks, to consider the following differences between the Banks and the Enterprises: Cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. The Director also may consider any other differences that are deemed appropriate. In preparing this final rule, FHFA considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate.

In particular, FHFA has evaluated the relevance of the factors that are part of the standard for determining that a change in the minimum capital standard is appropriate, and added a factor that is unique to the Banks: The ratio of a

⁸ *Id.* at (d)(1).

⁹ *Id.* at (d)(2).

¹⁰ *Id.* at (d)(3).

Bank's market value of equity to the par value of its capital stock. FHFA also considered the Banks' circumstances when crafting the procedural elements of the rule, including the relevance of the Banks' capital structure plans, and concluded that the statutory requirement that the Banks operate under capital structure plans does not require that a different rule be crafted specifically for them, although a Bank's capital structure plan will undoubtedly be relevant to the steps a Bank would take to meet a new, increased minimum capital level. As a tool supportive of safety and soundness, the capital authority conferred by the statute and implemented in this regulation will, overall, be supportive of the Banks' unique structure and mission.

II. Final Rule

A. Comments

In the proposed rule, FHFA provided for notice of a temporary increase in a regulated entity's minimum capital requirement; standards for imposing a temporary increase in minimum capital; standards for rescission of a temporary increase; timeframe for review of temporary increase for the purpose of rescission; requirements for written plans to augment capital; and promulgation of future guidance. FHFA received a total of five comment letters on the proposed rule. Comments were received from the Federal Home Loan Bank of Boston (Boston Bank); the Federal Home Loan Bank of Dallas (Dallas Bank); the Federal Home Loan Bank of San Francisco (San Francisco Bank); a joint letter from the Federal Home Loan Banks of Atlanta, Chicago, Des Moines, Indianapolis, Pittsburgh, Seattle and Topeka (Joint Bank Letter); and a letter from a private citizen (consisting of a one sentence statement regarding "limitations on seller financing" that was not germane to the rulemaking).

FHFA has considered all of the comments in developing the final rule. FHFA accepted some of the commenters' recommendations and has made changes in the final rule, although the basic approach adopted in the proposed rule remains the same. The changes made in the final rule improve upon the basic approach proposed by FHFA by clarifying certain provisions and by improving the structure of the rule. Specific comments, FHFA's responses, and changes adopted in the final rule are described in greater detail below in the sections describing the relevant rule provisions.

B. Final Rule Provisions

1. General Comment

Three Bank letters offered similar comments regarding the application of section 1201 of the Housing and Economic Recovery Act of 2008 (HERA) requiring the Director to consider the differences between the Banks and the Enterprises before promulgating regulations, or taking formal or informal actions of general applicability relating to the Banks. The commenters noted that the proposed rule does not indicate whether the Director conducted the review required under section 1201, and lacks a statement to that effect, which typically has been included in most agency actions promulgated by FHFA.¹¹ FHFA agrees with the commenters that this rule is subject to HERA section 1201. As noted above, FHFA has reviewed the rule in the context of the differences enumerated in section 1201 and has determined that it is appropriate.

The three Bank letters also suggest that FHFA should consider separating the requirements for temporary increases for the Banks and the Enterprises into separate rules. FHFA did not agree with the commenters' suggestion, as the rule has been crafted taking into account the differences between the regulated entities. As the rule is structured, there is sufficient regulatory flexibility to evaluate and respond to the unique circumstances that may impact one or more regulated entities causing the Director to impose, or rescind, a temporary increase. Separating the proposed rule into two rulemakings would not enhance FHFA's ability to respond to unique or institution-specific circumstances.

2. Section 1225.2—Definitions

FHFA has adopted the definitions as proposed. FHFA did not receive any comments that addressed the proposed definitions.

3. Section 1225.3—Procedures

All of the Banks commented on proposed § 1225.3, which sets forth the requirements for notice of a temporary increase in the minimum capital requirement. As a general matter, the Banks objected to the length of the time period for the notice of a temporary increase in the minimum capital requirement and the potential impact the provision could have on existing timelines built into each Bank's capital plan. The San Francisco Bank

commented that "these time periods for response and compliance with respect to something so fundamentally critical to a Bank as its capital level are unrealistically short in light of the possible strategic financial management changes and other actions [a Bank] may need to take in order to meet the increased requirement * * * for purposes of the Final Rule, a notice period of at least 60 days, with at least 30 days to respond, is more appropriate."¹² The San Francisco Bank also stated that the final rule should indicate that the effective date of any required increase should take into account a Bank's compliance with the terms of its capital plan, including applicable notice requirements, and that the order should be subject to a more formal procedure, including an opportunity for a hearing under 12 CFR Part 907.¹³

FHFA considered the comment and did not make the requested changes. The statutory provision is designed to elicit an immediate response, if necessary, by the subject institution to an unusual condition. A Bank would be able to address capital-plan issues in its response to a temporary capital increase notice; however, the terms of a capital plan do not limit the Director's power under this statutory provision. A hearing requirement would not be consistent with the need for rapid action, and is not provided in other capital contexts, such as the prompt corrective action (PCA) framework.¹⁴

Two of the Banks suggested that the final rule cross-reference 12 CFR 1229.11 for requiring Banks to temporarily increase minimum capital. The Joint Bank Letter states: "In promulgating 12 CFR Part 1229, the FHFA recognized that the [Banks] are limited in their ability to quickly raise additional capital because of the [Bank's] cooperative capital stock structure and capital plans. In light of these limitations, the FHFA requires

¹² San Francisco Bank, section I., at 1.

¹³ San Francisco Bank, section I., at 1–2. *See also* Dallas Bank, section II., at 3, stating that "the final rule should clarify whether the effective date for a temporary minimum capital requirement refers to the date on which [a Bank] is required to issue additional capital stock to its members or the date on which the [Bank] must implement the steps under its capital plan that are required to impose a change in the minimum stock requirement of that [Bank's] members * * *. The Dallas Bank suggests that the notice period in the final rule take into account that the [Banks] are bound to operate in compliance with the terms of their capital plans with respect to increases in their members' minimum stock purchase requirement and that a temporary increase in the minimum stock purchase requirement may require an amendment to [a Bank's] capital plan."

¹⁴ Sections 1361–1369(D) of the Safety and Soundness Act (12 U.S.C. 4611–4623).

¹¹ Joint Bank Letter, section I., at 1–2; Boston Bank Letter, section I., at 1; and Dallas Bank Letter, section I., at 2.

undercapitalized and significantly undercapitalized [Banks] to submit a capital restoration plan * * *. We believe that it would be helpful to apply the same capital restoration plan requirements to [a Bank] in the event the FHFA temporarily increases the minimum capital requirement, particularly given the close interaction of these two provisions of the regulations.”¹⁵

FHFA considered the comments and determined that it would retain the provision as proposed. FHFA determined that the differences between the PCA regulation and the proposed rule reflect differences in the respective statutory provisions. The PCA statute sets out defined time periods for capital restoration plans; section 1362(d) does not, giving the Director discretion regarding timing of increasing the minimum capital requirement. The rule seeks to retain that flexibility. However, in response to the commenters’ more general objection that the practicalities of capital-raising by Federal Home Loan Banks require a longer time period than the notice and reply periods prescribed in the rule, FHFA notes that the concept of those periods is not necessarily that the regulated entity be able to come into compliance with the new requirement within 30 days after notification by the Director, but rather that the regulated entity have an opportunity to respond to the agency on the appropriateness of the temporary increased capital level within that period. Depending upon a particular Federal Home Loan Bank’s circumstances, there may be a period between the setting of the new capital level and the regulated entity’s compliance with it during which the regulated entity would be undercapitalized and subject to the statute’s restrictions on activities by undercapitalized entities, notably capital distributions. Similarly, if that same entity is also determined to be undercapitalized under the PCA capital classification process—which also proceeds on a 30-day notice (Safety and Soundness Act section 1368(c))—it would be subject to those restrictions until its capital restoration plan is approved and implemented. It is appropriate that those restrictions apply to an entity whose capital level is not adequate to the risks to which it is subject.

¹⁵ Joint Bank Letter, section II., at 3. *See also* Boston Bank, section II., at 2.

4. Section 1225.4(a)(1)—Current or Anticipated Declines in the Value of Assets Held

The Dallas Bank commented that FHFA should clarify the “nature and magnitude of the decline in the value of assets that would warrant an order to temporarily increase minimum capital levels.”¹⁶ According to the Dallas Bank, current or anticipated declines in asset values may not accurately reflect the underlying economic value of the asset. The Dallas Bank commented that a temporary increase in minimum capital in “instances of temporary illiquidity or market volatility with respect to a regulated entity’s assets could prove to be harmful to the [Bank] and to its membership given member sensitivity and concerns regarding additional capital calls.”¹⁷

FHFA considered the comment and did not make the requested change. FHFA concluded that amending the provision in the suggested manner would not be feasible, as the provision is meant to be applied on a case-by-case basis. FHFA also notes that, with respect to instances involving “illiquid or volatile” markets, concerns regarding potential harm caused by a proposed capital increase could be addressed by a regulated entity in its response to the notice of a temporary increase in the minimum capital requirement.

The Boston Bank also commented that “the concept of basing a temporary increase in the minimum capital requirements of [a Bank] on ‘anticipated’ declines is hard for us to understand as it is generally recognized that it is not possible to predict market movements and future prices.”¹⁸ The Boston Bank suggested that FHFA should limit the standard to current “decline[s] in the [market] value of assets that would warrant an order to temporarily increase minimum capital levels.”¹⁹

FHFA considered the comment and concluded that since capital often acts as a lagging indicator, delaying action until a decline is recognized may be inconsistent with the need for prompt action. The proposed regulation would provide FHFA with an additional

¹⁶ Dallas Bank, section III.A., at 3.

¹⁷ *Id.* *See also* San Francisco Bank, section II.A., at 2; and Joint Bank Letter, section III.A., at 4. According to the Joint Comment Letter, the current provision “could be pro-cyclical and lead to long-lasting declines in membership and business volume, further weakening the affected [Bank]. The FHFA should consider clarifying the nature and magnitude of the decline in the value of assets that would warrant an order to temporarily increase minimum capital levels.”

¹⁸ Boston Bank, section III.A., at 3.

¹⁹ *Id.*

regulatory tool to address potential problems that may arise as the result of relying solely on a lagging indicator such as capital. Certain assets on an entity’s balance sheet are valued based on historical cost and may not reflect all available information as to the assets’ actual values. Therefore, FHFA has not made the requested change.

Although FHFA did not adopt the proposed comments, it ultimately determined that it was appropriate to remove the phrase “the amounts of a regulated entity’s mortgage-backed securities” to avoid singling out any particular category of assets in the provision.

5. Section 1225.4(a)(2)—Credit (including Counterparty), Market, Operational and Other Risks Facing a Regulated Entity

FHFA did not receive comments on this provision. However, the phrase “a depreciation in the value of its capital or assets, a decline in liquidity, or” was removed from the provision. FHFA determined that the language was redundant, as declines in capital and assets and concerns about liquidity are addressed in § 1225.4(a)(1) and § 1225.4(a)(3), respectively.

6. Section 1225.4(a)(4)—Compliance With Regulations, Written Orders or Agreement

The Boston Bank commented that the standard should apply only to “material non-compliance with regulations, written orders or agreements that negatively impact [a Bank’s] financial health or that are indicative of its potential risk of failure.” The comment further states that “Without clarification, it would appear that any violation of any regulation, order or agreement could permit the FHFA to order [a Bank] to increase temporary minimum capital levels.”²⁰

FHFA considered the comment and agreed that the standard should apply only to material non-compliance with a regulation, order, or agreement. FHFA did not intend the provision to require a capital increase in response to an immaterial infraction. FHFA did not agree with the Boston Bank comment that the factor relate only to material non-compliance with some regulations, orders or agreements, those asserted to negatively impact financial health, because all material violations could potentially have a negative impact on financial health, if only because of the remediation that might be required.

²⁰ Boston Bank, section III.B., at 3. *See also* Dallas Bank, section III.B., at 3–4; Joint Bank Letter, section III.B., at 4; and San Francisco Bank, section II.B., at 2.

7. Section 1225.4(a)(5)—Unsafe or Unsound Operations or Practices, or Circumstances That Reflect Unsafe and Unsound Conduct by a Regulated Entity

FHFA removed this provision from the final rule, as the remaining standards address specific conditions and practices. As well, to the extent that an unsafe or unsound condition is identified by the Director, FHFA determined that § 1225.4(a)(9), Other Conditions as Detailed by the Director, would be a more appropriate vehicle for responding to such a contingency.

8. Section 1225.4(a)(6)—Housing Finance Market Conditions

The San Francisco Bank suggested that the factor be deleted from the final rule because it believes it to be vague and that “the relevance of this factor to a Regulated Entity’s capital level is unclear, except to the extent that housing finance market conditions result in a decline in the value of housing-related assets held by the [Banks].” The comment also states that this matter is already covered by Section 1225.4(a)(1).²¹

FHFA considered the comment and decided to retain the provision as proposed. Housing market conditions other than asset values, such as market volatility and prepayment risk, may pose risks to a regulated entity that could warrant holding additional capital.

9. Section 1225.4(a)(7)—Level of Reserves or Retained Earnings

The Dallas Bank commented that FHFA should focus on “the aggregate capital levels of the [Bank]” as a more accurate gauge of a Bank’s financial health instead of focusing on specific types of capital.²² The San Francisco Bank suggested that the standard “be expanded to ensure that, in addition to considering reserves and retained earnings in determining a Regulated Entity’s financial health, the Finance Agency is recognizing the Regulated Entity’s demonstrated commitment and actions toward building retained earnings, and also is taking into consideration the aggregate capital levels of the Regulated Entity, which provides a more accurate indication of a Regulated Entity’s health or risk of failure.”²³

FHFA did not agree with the comment and will retain the provision

as proposed. Specific elements of capital can have independent significance. For example, retained earnings are relevant to a Bank’s ability to maintain the par value of its capital stock, which is important to the financial stability of a Federal Home Loan Bank and of the System. Further, while this provision is a factor, among possible others, that may be used by the Director to make a determination regarding capital, it does not set a specific requirement. Finally, with respect to recognition of a Bank’s commitment to build retained earnings, such activity would most appropriately be evaluated on a case-by-case basis and could be addressed in the Bank’s response to a notice of capital increase.

10. Section 1225.4(a)(8)—Initiatives, Operations, Products, or Practices That Entail Heightened Risk

FHFA did not receive comment regarding this provision. The provision will be adopted as proposed.

11. Section 1225.4(a)(9)—The Ratio of the Market Value of Equity to the Par Value of Capital Stock

The Dallas Bank questioned the inclusion of the MVE/PVCS ratio in the proposed rule, stating: “In the final capital classification rule issued just eight months ago, the FHFA indicated it would ‘continue to weigh whether it would be appropriate to propose a separate target for retained earnings and/or MVE/PVCS, either as a stand-alone regulation or as part of any risk-based capital proposal. * * * We are unaware of any subsequent FHFA rulemaking, guidance, analysis or pronouncements concerning the utility and applicability of MVE/PVCS.”²⁴ The Dallas Bank also noted that “neither the [Banks], their member institutions nor other stakeholders would be able to determine ahead of time with any certainty—perhaps not until after a temporary order has been issued—how the FHFA applies this factor on an ongoing basis.”²⁵ The Bank also requests that in the final rule, FHFA “detail its thinking, including the results of any studies or analysis it has conducted, on how this factor should be defined and applied” or “use the release of the final rule to provide clear definitions and explanations of how this factor may be applied.”²⁶

The Dallas Bank also expressed concern with the MVE/PVCS ratio for two reasons: (i) “The proposed rule does not define ‘[the] market value of equity’” and (ii) “the rule places no parameters or standards for the FHFA to use in applying this ratio.”²⁷ The Joint Comment Letter requested additional information in the final rule regarding FHFA’s “thinking, including the results of any studies or analysis it has conducted, on how this factor should be defined and applied.”²⁸ The Joint Bank Letter also indicated that FHFA should “define MVE (including during periods of severe market illiquidity)” and indicate “why it is appropriate to use the MVE/PVCS ratio to determine whether a [Bank’s] minimum capital should be increased.”²⁹

The Joint Bank Letter asked FHFA to address two specific questions:

(1) “Is MVE for purposes of the temporary minimum capital regulation defined as set forth in 12 CFR 932.5 * * * as the market value of total capital (defined as Class A stock, general allowance for losses, Class B stock and retained earnings) or otherwise?” and

(2) “Will MVE be defined in accordance with the liquidation value, or the going-concern value, of the [Bank]?”³⁰

The Joint Bank Letter concludes with an expression of general concern regarding the use of MVE/PVCS as a factor related to a temporary increase in minimum capital without considering the existing risk-based capital regime, and the letter urges FHFA to consider this standard in a separate rulemaking.³¹

The Boston Bank commented that FHFA should “clarify the definition of the market value of equity (MVE) by reference to 12 CFR 932.5.” The Bank also commented that it remained “generally concerned with using MVE/PVCS as a factor for imposing a temporary minimum capital increase without consideration of the existing risk-based capital regulatory framework that already takes this relationship into consideration to some extent in establishing [a Bank’s] risk-based capital requirements.”³²

The San Francisco Bank commented that using an MVE/PVCS ratio could result in a “double charging” effect on a Bank. According to the San Francisco Bank “the existing risk-based regulation

determining [a Bank’s] minimum capital requirement.”

²⁷ Dallas Bank, section III.E., at 5.

²⁸ Joint Bank Letter, section III.D., at 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 6.

³² Boston Bank, section III.C., at 3.

²¹ San Francisco Bank, section II.C., at 2–3. *See also* Joint Bank Letter, section III.C., at 4; and Dallas Bank, section III.C., at 4.

²² Dallas Bank, section III.D., at 4. *See also* San Francisco Bank, section II.D., at 3.

²³ San Francisco Bank, section II.D., at 3.

²⁴ Dallas Bank, section III.E., at 4. *See also* Joint Bank Letter III.D., at 4.

²⁵ Dallas Bank, section III.E., at 4.

²⁶ *Id.* *See also* Joint Bank Letter, section III.D., at 4 stating “[w]ithout analytically supported guidance, it is difficult to judge fully the appropriateness of using MVE/PVCS as a factor in

already imposes an additional risk-based capital charge on any [Bank] that has a market value of total capital less than 85% of the book value of its total capital, so that using an MVE/PVCS ratio to impose an additional increase in [a Bank's] minimum capital requirement would have the effect of 'double charging' that [Bank] on the basis of the same criteria."³³ The San Francisco Bank also stated that the proposed rule does not define "market value of equity." The letter notes that "If the Agency determines MVE with reference to liquidation value, then we do not believe that such a measure provides a sound basis for increasing [a Bank's] minimum capital level. * * * Instead, we encourage the Finance Agency to develop an MVE model that reflects certain going concern assumptions and makes MVE determinations in the context of other factors, including market conditions."³⁴ The San Francisco Bank concluded with a recommendation to establish "parameters or standards" surrounding the use of the MVE/PVCS ratio. According to the San Francisco Bank, "[t]here's no indication * * * at what level(s) the Director would consider it appropriate to increase [a Bank's] minimum capital requirement based on this ratio."³⁵

FHFA considered and did not adopt the Dallas Bank's comment to provide additional detail regarding the application of the MVE/PVCS ratio. FHFA concluded that the factor would be applied on a case-by-case basis, considering the specific circumstances of a particular Bank. In instances where a Bank has a low MVE/PVCS ratio, this rule would serve as one reason, among many, for a Bank to address the issue.

FHFA also considered the questions posed by the Dallas Bank. FHFA concluded that use of the MVE/PVCS ratio is an important element in assessing the financial health of an institution. The use of the MVE/PVCS ratio also provides a useful indicator of capital strength in addition to capital ratios that are based on generally accepted accounting principles.

However, it is only one factor among a number enumerated in the rule that the Director may consider in assessing whether a Bank should hold more capital. That assessment is sufficiently case-specific such that it is not feasible to provide general rules or parameters around the use of any particular factor.

With respect to the comment offered in the Joint Bank Letter, FHFA does

intend that, for purposes of this factor, the Director would look to market value of equity as calculated by a Bank using a method approved by the agency under 12 CFR 932.5. The issue of going-concern versus liquidation value, however, is an accounting issue that is not applicable to the calculation of that ratio. However, MVE/PVCS ratio is only one factor among a number enumerated in the rule that the Director may consider in assessing whether a Bank should hold more capital. That assessment is sufficiently case-specific that it is not feasible to provide general rules or parameters around the use of any particular factor. The Joint Bank Letter also asked for a separate rulemaking for the provision. FHFA did not agree with the comment. FHFA believes that a separate rulemaking to address the existing risk-based capital regime, including the role of MVE in it, may be appropriate, but such a rulemaking, unlike this rule, would not address the need to address temporary or unusual circumstances.

FHFA also considered the comment offered by the Boston Bank regarding its general concern regarding use of the MVE/PVCS ratio as a factor for imposing an increase. FHFA notes that any decision to impose a temporary increase in the minimum capital requirement would consider the existing minimum capital requirements. The MVE would be used as one factor in evaluating the financial condition of a Bank in the event that a Bank's existing capital position is determined to be insufficient.

Finally, FHFA considered the San Francisco Bank's comment regarding establishment of standards and parameters for the provision. FHFA does not agree that standards or parameters should be set around the use of the MVE/PVCS ratio. It is not necessary or appropriate to determine in advance the significance of a shortfall of this ratio in consideration of the other factors identified in this rule. FHFA did not adopt the Bank's recommendation.

12. Section 1225.4(a)(10)—Other Conditions as Detailed by the Director

The Joint Bank Letter suggested that FHFA provide guidance on "what other conditions might be relevant in determining whether to impose temporary increases in minimum capital levels * * * and provide the [Banks] a chance to comment on any new proposed standards."³⁶ FHFA considered the comment and retained

the provision as proposed. The purpose of the provision is to address factors that are unforeseeable under current circumstances but that turn out to be relevant at a later date. FHFA has determined that a provision that allows the agency to respond to unforeseen circumstances without substantial delay is prudent, reasonable, and necessary.

13. Section 1225.4(a)(11)—Written Plan To Augment Capital

The Joint Bank Letter noted that the requirement to submit a written plan to augment capital is a procedural requirement and not a standard or factor. The Joint Bank Letter suggested that the requirement be moved to a different section of the rule.³⁷ FHFA agreed with the comment and the final rule incorporates the provision in § 1225.3, regarding procedures.

14. Section 1225.4—Standards and Factors

The San Francisco Bank commented that standards regarding rescission of an increase are not addressed. The letter recommends reducing uncertainty in the area by "addressing in the Proposed Rule such critical issues as the size of a fluctuation that would weigh significantly in favor of the issuance or rescission of a temporary order."³⁸ FHFA considered the comment and revised the section to add clarity to the standards regarding rescission of an increase. In addition, although FHFA did not receive specific comment regarding proposed § 1225.4(c), FHFA determined that the provision clearly addresses a procedural as opposed to substantive matter. FHFA has redesignated the provision as § 1225.3(e).

15. Section 1225.4(d)—Promulgation of Future Guidance

Three Banks expressed concern regarding proposed § 1225.4(d) detailing the Director's authority to issue guidance regarding the regulation.³⁹ Two Banks suggested that FHFA remove § 1225.4(d) from the regulation based on concerns regarding application of the Administrative Procedure Act.⁴⁰ In the alternative, the three Bank commenters suggested that "to the extent that guidance expands or adds substantive detail to the existing regulation, it

³⁷ Joint Bank Letter, section III.F., at 6. See also Boston Bank, section III.D., at 4; and Dallas Bank, section III.G., at 5.

³⁸ San Francisco Bank, section ILE., at 3.

³⁹ Joint Bank Letter, section IV., at 6; San Francisco Bank, section III., at 4; and Dallas Bank, section IV., at 6.

⁴⁰ Dallas Bank, section IV., at 6–7; and Joint Bank Letter, section IV., at 7.

³³ San Francisco Bank, section ILE., at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Joint Bank Letter, section III.E., at 6. See also Dallas Bank, section III.F., at 5; and San Francisco Bank, section II.F., at 4.

would be better for the guidance to be issued as a formal rulemaking and subject to the requirements of the Administrative Procedure Act, with advance notice and an opportunity to comment by the [Banks] and their members.”⁴¹ FHFA considered the comment, but included the proposed provision in the final rule. FHFA will review each issue as it arises and take appropriate action, including notice and comment rulemaking, and promulgation of guidance with or without comment, depending on the nature of the issue. FHFA has also redesignated this provision as new § 1225.5 of the final rule.

16. Sections 932.2 and § 932.3

FHFA is also amending the Banks' capital regulations to remove § 932.2(b) and § 932.3(b) which allowed the regulator to raise the Banks' capital requirements for reasons of safety and soundness. These specific regulations were adopted pursuant to the Finance Board's general safety and soundness authority under old section 2A(a)(3)(A) of the Bank Act, a section which was removed by HERA. Final Rule: Capital Requirements for the Federal Home Loan Banks, 66 FR 8262, 8282–83 (January 30, 2001). Given that FHFA is adopting new part 1225 of its regulations and the fact that the Safety and Soundness Act as amended by HERA provides specific authority under which the Director may raise the Banks' minimum capital requirements, FHFA no longer views § 932.2(b) and § 932.3(b) as controlling and is removing these provisions.

III. Paperwork Reduction Act

The final 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 final rule applies only to the Banks and the Enterprises, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 650(b), FHFA certifies that this final rule will not have significant economic impact on a substantial number of small entities.

List of Subjects

12 CFR Part 932

Credit, Federal Home Loan Banks, Reporting and recordkeeping requirements.

12 CFR Part 1225

Federal Home Loan Banks, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Capital, Filings, Minimum capital, Procedures, Standards.

Accordingly, for the reasons stated in the Supplementary Information, under the authority of 12 U.S.C. 4513, 4526 and 4612, the Federal Housing Finance Agency amends Chapters IX and XII of Title 12 of the Code of Federal Regulations as follows:

Chapter IX—Federal Housing Finance Board

PART 932—FEDERAL HOME LOAN BANK CAPITAL REQUIREMENTS

- 1. Revise the authority citation for part 932 to read as follows:

Authority: 12 U.S.C. 1426, 1440, 1443, 1446, 4513, 4526.

- 2. Revise § 932.2 to read as follows:

§ 932.2 Total capital requirement.

Each Bank shall maintain at all times:

- (a) Total capital in an amount at least equal to 4.0 percent of the Bank's total assets; and

- (b) A leverage ratio of total capital to total assets of at least 5.0 percent of the Bank's total assets. For purposes of determining the leverage ratio, total capital shall be computed by multiplying the Bank's permanent capital by 1.5 and adding to this product all other components of total capital.

- 3. Revise § 932.3 to read as follows:

§ 932.3 Risk-based capital requirement.

Each Bank shall maintain at all times permanent capital in an amount at least equal to the sum of its credit risk capital requirement, its market risk capital requirement, and its operations risk capital requirement, calculated in accordance with §§ 932.4, 932.5 and 932.6, respectively.

Chapter XII—Federal Housing Finance Agency

Subchapter B—Entity Regulations

- 4. Add part 1225 to subchapter B to read as follows:

PART 1225—MINIMUM CAPITAL—TEMPORARY INCREASE

Sec.

1225.1 Purpose.

1225.2 Definitions.

1225.3 Procedures.

1225.4 Standards and factors.

1225.5 Guidances.

Authority: 12 U.S.C. 4513, 4526 and 4612.

§ 1225.1 Purpose.

FHFA is responsible for ensuring the safe and sound operation of regulated entities. In furtherance of that responsibility, this part sets forth standards and procedures FHFA will employ to determine whether to require or rescind a temporary increase in the minimum capital levels for a regulated entity or entities pursuant to 12 U.S.C. 4612(d).

§ 1225.2 Definitions.

For purposes of this part, the term: *Enterprise* means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and the term *Enterprises* means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Minimum capital level means the lowest amount of capital meeting any regulation or orders issued pursuant to 12 U.S.C. 1426(a)(2) and 12 U.S.C. 4612, or any similar requirement established for a Federal Home Loan Bank by regulation, order or other action.

Regulated entity means—

- (1) The Federal National Mortgage Association and any affiliate thereof;
 - (2) The Federal Home Loan Mortgage Corporation and any affiliate thereof;
- and
- (3) Any Federal Home Loan Bank.

Rescission means a removal in whole or in part of an increase in the temporary minimum capital level.

§ 1225.3 Procedures.

(a) *Information*—(1) *Information to the regulated entity or entities.* If the Director determines, based on standards enunciated in this part, that a temporary increase in the minimum capital level is necessary, the Director will provide notice to the affected regulated entity or entities 30 days in advance of the date that the temporary minimum capital requirement becomes effective, unless the Director determines that an exigency exists that does not permit such notice or the Director determines a longer time period would be appropriate.

(2) *Information to the Government.* The Director shall inform the Secretary of the Treasury, the Secretary of Housing and Urban Development, and the Chairman of the Securities and Exchange Commission of a temporary increase in the minimum capital level contemporaneously with informing the affected regulated entity or entities.

(b) *Comments.* The affected regulated entity or entities may provide comments

⁴¹ See e.g., San Francisco Bank, section III., at 4.

regarding or objections to the temporary increase to FHFA within 15 days or such other period as the Director determines appropriate under the circumstances. The Director may determine to modify, delay, or rescind the announced temporary increase in response to such comments or objection, but no further notice is required for the temporary increase to become effective upon the date originally determined by the Director.

(c) *Communication.* The Director shall transmit notice of a temporary increase or rescission of a temporary increase in the minimum capital level in writing, using electronic or such other means as appropriate. Such communication shall set forth, at a minimum, the bases for the Director's determination, the amount of increase or decrease in the minimum capital level, the anticipated duration of such increase, and a description of the procedures for requesting a rescission of the temporary increase in the minimum capital level.

(d) *Written plan.* In making a finding under this part, the Director may require a written plan to augment capital to be submitted on a timely basis to address the methods by which such temporary increase may be attained and the time period for reaching the new temporary minimum capital level.

(e) *Time frame for review of temporary increase for purpose of rescission.*—(1) Absent an earlier determination to rescind in whole or in part a temporary increase in the minimum capital level for a regulated entity or entities, the Director shall no less than every 12 months, consider the need to maintain, modify, or rescind such increase.

(2) A regulated entity or regulated entities may at any time request in writing such review by the Director.

§ 1225.4 Standards and factors.

(a) *Standard for imposing a temporary increase.* In making a determination to increase temporarily a minimum capital requirement for a regulated entity or entities, the Director will consider the necessity and consistency of such an increase with the prudential regulation and the safe and sound operations of a regulated entity. The Director may impose a temporary minimum-capital increase if consideration of one or more of the following factors leads the Director to the judgment that the current minimum capital requirement for a regulated entity is insufficient to address the entity's risks:

(1) Current or anticipated declines in the value of assets held by a regulated entity; the amounts of mortgage-backed securities issued or guaranteed by the

regulated entity; and, its ability to access liquidity and funding;

(2) Credit (including counterparty), market, operational and other risks facing a regulated entity, especially where an increase in risks is foreseeable and consequential;

(3) Current or projected declines in the capital held by a regulated entity;

(4) A regulated entity's material non-compliance with regulations, written orders, or agreements;

(5) Housing finance market conditions;

(6) Level of reserves or retained earnings;

(7) Initiatives, operations, products, or practices that entail heightened risk;

(8) With respect to a Bank, the ratio of the market value of its equity to par value of its capital stock where the market value of equity is the value calculated and reported by the Bank as "market value of total capital" under 12 CFR 932.5(a)(1)(ii)(A); or

(9) Other conditions as detailed by the Director in the notice provided under § 1225.3.

(b) *Standard for rescission of a temporary increase.* In making a determination to rescind a temporary increase in the minimum capital level for a regulated entity or entities, whether in full or in part, the Director will consider the consistency of such a rescission with the prudential regulation and safe and sound operations of a regulated entity. The Director will rescind, in full or in part, a temporary minimum capital increase if consideration of one or more of the following factors leads the Director to the judgment that rescission of a temporary minimum-capital increase for a regulated entity is appropriate considering the entity's risks:

(1) Changes to the circumstances or facts that led to the imposition of a temporary increase in the minimum capital levels;

(2) The meeting of targets set for a regulated entity in advance of any capital or capital-related plan agreed to by the Director;

(3) Changed circumstances or facts based on new developments occurring since the imposition of the temporary increase in the minimum capital level, particularly where the original problems or concerns have been successfully addressed or alleviated in whole or in part; or

(4) Such other standard as the Director may consider as detailed by the Director in the notice provided under § 1225.3.

§ 1225.5 Guidances.

The Director may determine, from time to time, issue guidance to

elaborate, to refine or to provide new information regarding standards or procedures contained herein.

Dated: February 22, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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BILLING CODE 8070-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30769; Amdt. No. 492]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, March 10, 2011.

FOR FURTHER INFORMATION CONTACT:

Harry Hodges, Flight Procedure Standards Branch (AMCAFS-420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954-4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is