List of Subjects in 12 CFR Part 226

Advertising, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604 and 1637(c)(5).

■ 2. In Supplement I to Part 226, under *Section 226.32—Requirements for Certain Closed-End Home Mortgages,* under Paragraph 32(a)(1)(ii), paragraph 2.xvii. is added to read as follows:

Supplement I to Part 226—Official Staff Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 226.32—Requirements for Certain Closed-End Home Mortgages 32(a) Coverage

* * * * *

Paragraph 32(a)(1)(ii)

* * * * *

2. * * *

xvii. For 2012, $611, reflecting a 3.2 percent increase in the CPI–U from June 2010 to June 2011, rounded to the nearest whole dollar.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, June 13, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–15179 Filed 6–17–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1229 and 1237

RIN 2590–AA23

Conservatorship and Receivership

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final rule to establish a framework for conservatorship and receivership operations for the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks, as contemplated by the Housing and Economic Recovery Act of 2008 (HERA). HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) by adding, among other provisions, section 1367, Authority Over Critically Undercapitalized Regulated Entities. The rule will implement this provision, and will ensure that these operations advance FHFA's critical safety and soundness and mission requirements. The rule seeks to protect the public interest in the transparency of conservatorship and receivership operations for the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises), and the Federal Home Loan Banks (Banks) (collectively, the regulated entities).

DATES: *Effective Date:* This rule is effective July 20, 2011.

FOR FURTHER INFORMATION CONTACT: Frank Wright, Senior Counsel, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552, (202) 414–6439 (not a toll-free number); or Mark D. Laponsky, Deputy General Counsel, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552, (202) 414–3832 (not a toll-free number). The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

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), and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) (Bank Act) to establish FHFA as an independent agency of the Federal government.[1] FHFA was established as an independent agency of the Federal Government with all of the authorities necessary to oversee vital components of our country's secondary mortgage markets—the regulated entities and the Office of Finance of the Federal Home Loan Bank System.

The Safety and Soundness Act provides that FHFA is headed by a Director with general supervisory and regulatory authority over the regulated entities and over the Office of Finance,[2] expressly to ensure that the regulated entities operate in a safe and sound manner, including maintaining adequate capital and internal controls; foster liquid, efficient, competitive, and resilient national housing finance markets; comply with the Safety and Soundness Act and rules, regulations, guidelines, and orders issued under the Safety and Soundness Act and the authorizing statutes (*i.e.,* the charter acts of the Enterprises and the Bank Act); and carry out their respective missions through activities and operations that are authorized and consistent with the Safety and Soundness Act, their respective authorizing statutes, and the public interest.[3]

In addition, this law combined the staffs of the now abolished Office of Federal Housing Enterprise Oversight (OFHEO), the now abolished Federal Housing Finance Board (Finance Board), and the Government-Sponsored Enterprise (GSE) mission office at the Department of Housing and Urban Development (HUD). By pooling the expertise of the staffs of OFHEO, the Finance Board, and the GSE mission staff at HUD, Congress intended to strengthen the regulatory and supervisory oversight of the 14 housing-related GSEs.

The Enterprises, combined, own or guarantee more than $5 trillion of residential mortgages in the United States (U.S.), and play a key role in housing finance and the U.S. economy. The Banks, with combined assets of nearly $850 billion, support the housing market by making advances (*i.e.,* loans secured by acceptable collateral) to their member commercial banks, thrifts, and credit unions, assuring a ready flow of mortgage funding.

Because FHFA's mission is to promote housing and a strong national housing finance system by ensuring the safety and soundness of the Enterprises and the Banks, HERA amended the Safety and Soundness Act to make explicit FHFA's general regulatory and supervisory authority. To this end, section 1311(b)(1) of the Safety and Soundness Act expressly makes each regulated entity ''subject to the supervision and regulation of the Agency,'' thus amplifying the broad supervisory authority of the Director. *See* 12 U.S.C. 4511(b)(1). Moreover, the Safety and Soundness Act underscores the breadth of this authority by

[1] *See* Division A, titled the ''Federal Housing Finance Regulatory Reform Act of 2008,'' Title I, section 1101 of HERA.

[2] *See* sections 1101 and 1102 of HERA, amending sections 1311 and 1312 of the Safety and Soundness Act, codified at 12 U.S.C. 4511and 4512.

[3] *See* 12 U.S.C. 4513(a)(1)(B).

expressly conveying ''general regulatory authority'' over the regulated entities to the Director. *See* 12 U.S.C. 4511(b)(2); *see also* 12 U.S.C. 4513(a)(1)(B).[4] In addition, the Safety and Soundness Act, as amended by HERA, provides that ''[t]he Agency may prescribe such regulations as the Agency determines to be appropriate regarding the conduct of conservatorships or receiverships.'' 12 U.S.C. 4617(b)(1).

The Enterprises are currently in conservatorship. FHFA as Conservator has been responsible for the conduct and administration of all aspects of the operations, business, and affairs of both Enterprises since September 6, 2008, the date on which the Director placed Fannie Mae and Freddie Mac in conservatorship. As Conservator, FHFA is authorized to take such action as may be ''necessary to put the regulated entity in a sound and solvent condition'' and ''appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'' 12 U.S.C. 4617(b)(2)(D). Similarly, FHFA, as Conservator, may ''transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.'' *Id.* 4617(b)(2)(G).

The United States Department of the Treasury (''Treasury'') facilitated FHFA's decision to utilize its statutory conservatorship powers in an effort to restore the Enterprises' financial health by agreeing to make funding available to the Enterprises pursuant to Senior Preferred Stock Purchase Agreements (''Treasury Agreements'').[5] Pursuant to these Agreements, as subsequently amended, Treasury has made available, through the Conservator, capital (''Treasury Commitments'') to each of the Enterprises in return for senior preferred stock carrying a preference with regard to dividends and the distribution of assets of the Enterprise in liquidation. As Conservator, FHFA has already drawn on the Treasury Commitments several times to prevent a negative net worth position that would trigger mandatory receivership of each Enterprise.

Congress authorized the Treasury Agreements in section 1117 of HERA, which amended each of the Enterprises' authorizing statutes (Fannie Mae, 12 U.S.C. 1716 *et seq.;* Freddie Mac, 12 U.S.C. 1451 *et seq.*) to empower Treasury to purchase securities of the Enterprises subject to certain conditions. These conditions include that Treasury ''protect the taxpayers'' by taking into consideration, among other things, ''[t]he need for preferences or priorities regarding payments to the Government'' and ''[r]estrictions on the use of corporate resources.'' Pursuant to this statutory mandate, the Treasury Agreements imposed several such preferences, priorities, and restrictions. For instance, while the Treasury Agreements authorize the Conservator to draw on the Treasury Commitment for funds equal to the amount by which an Enterprise's liabilities exceed its assets, excluded from this calculation are liabilities that the Conservator determines shall be subordinated, including ''a claim against [an Enterprise] arising from rescission of a purchase or sale of a security issued by [an Enterprise] * * * or for damages arising from the purchase, sale, or retention of such a security.'' Treasury Agreements § 1, definition of ''Deficiency Amount,'' subparagraph (iii). In other words, the Conservator may determine to subordinate such a liability, with the effect that funds could not be drawn under the Treasury Agreements to satisfy it. The Treasury Agreements also contain restrictions on the declaration or payment of dividends or other distributions with respect to the Enterprises' equity interests; redeeming, purchasing, retiring, or otherwise acquiring for value any of the Enterprises' equity interests; or selling, transferring, or otherwise disposing of all or any portion of the Enterprises' assets other than in the ordinary course of business or under other limited exceptions. Treasury Agreements §§ 5.1 and 5.4. In promulgating these regulations, FHFA is required to ''ensure that the purposes of * * * the authorizing statutes,'' including the authorizing statutes' provisions for stock purchases by Treasury and the preferences, priorities, and restrictions attendant to such purchases, ''are accomplished.'' 12 U.S.C. 4526(a).

At the time FHFA established the conservatorships, and on several occasions since, FHFA has noted that the conservatorships, combined with the Treasury Senior Preferred Stock Agreements described above, provide an opportunity for Congress to direct the ultimate resolution of the Enterprises.

II. Final Rule

This final regulation describes, codifies, and implements the changes to the statutory regime enacted by HERA, the authorities granted to FHFA, and eliminates ambiguities regarding those changes. The final rule does not, and the proposed rule, published in the **Federal Register** at 75 FR 39462 (July 9, 2010), did not, recite all provisions of law relevant to the regulated entities in conservatorship or receivership. It sets out the basic and general framework for conservatorships and receiverships, supplementing statutory provisions that FHFA believed needed elaboration or explanation. The rule cannot be read or applied in isolation, but must be read while also consulting the enabling statutes of FHFA and the regulated entities. The regulation is part of FHFA's implementation of the powers provided by HERA, and does not seek to anticipate or predict future conservatorships or receiverships.

The final rule includes provisions that describe the basic authorities of FHFA when acting as conservator or receiver, including the enforcement and repudiation of contracts. Reflecting the approach in HERA, the rule parallels many of the provisions in the Federal Deposit Insurance Corporation (FDIC) receivership and conservatorship regulations. The rule necessarily differs in some respects, however, from the FDIC regulations, because not all of the regulated entities are depository institutions, none is a Federally insured depository institution, and their important public missions, reflected in congressional charters, differ from those of banks and thrifts.

The final rule establishes procedures for conservatorship and receivership and priorities of claims for contract parties and other claimants. These priorities set forth the order in which various classes of claimants will be paid, partially or in full, in the event that a regulated entity is unable to pay all valid claims.

The final rule contains several provisions that address whether and to what extent claims against the regulated entities by current or former holders of their equity interests for rescission or damages arising from the purchase, sale, or retention of such equity interests will be paid while those entities are in

[4] Other provisions in the Safety and Soundness Act recognize the independence and general regulatory authority of the Director. Section 1311(c) of the Safety and Soundness Act provides that the authority of the Director ''to take actions under subtitles B and C [of Title I of HERA] shall not in any way limit the general supervisory and regulatory authority granted to the Director under subsection (b).'' *See* 12 U.S.C. 4511(c). Similarly, section 1319G(a) of the Safety and Soundness Act provides ample, independent authority for the issuance of ''any regulations, guidelines, or orders necessary to carry out the duties of the Director under this title or the authorizing statutes, and to ensure that the purposes of this title and the authorizing statutes are accomplished.'' *See* 12 U.S.C. 4519G(a).

[5] The Treasury Agreements and their amendments are available to the public for review at *http://www.fhfa.gov/webfiles/1099/conservatorship21709.pdf* and *http://www.financialstability.gov/roadtostability/homeowner.html.*

conservatorship or receivership. The potential impact of such claims may be significant and may jeopardize FHFA's ability to fulfill its statutory mission to restore soundness and solvency to insolvent regulated entities and to preserve and conserve their assets and property.

The rule clarifies that for purposes of priority determinations, claims arising from rescission of a purchase or sale of an equity security of a regulated entity, or for damages arising from the purchase, sale, or retention of such a security, will be treated as would the underlying security that establishes the right to the claim. The rule also classifies a payment of these types of claims as a capital distribution, which is prohibited during conservatorship, absent the express approval of the Director. Moreover, the rule provides that payment of securities litigation claims will be held in abeyance during a conservatorship, except as otherwise ordered by the Director. In the event of receivership, such claims will be treated according to the process established by statute and by regulations in this part.

A. Comments

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.

FHFA received comments from a variety of sources, including shareholders for the Enterprises in conservatorship, counsel for shareholder litigants, members of Congress, and the Federal Home Loan Banks.

B. Final Rule Provisions

1. Comments Relating to Shareholder Claims

Some of the fiercest objections to the proposed rule were made against the provisions that would address the status of shareholder claims in conservatorship and receivership. FHFA received several comments from Enterprise shareholders, attorneys for shareholders engaged in litigation against the Enterprises, and several members of Congress, who raised the following concerns:

Redress for victims of securities fraud. Shareholders urged FHFA not to adopt the proposed rule because the rule would deny victims of securities fraud any avenue for meaningful redress. These commenters also argued that the proposed rule would insulate Fannie Mae and Freddie Mac and their management from accountability for fraud.

After full consideration of these comments, FHFA has determined their concerns to be unfounded. The reality in any insolvency is that there are not enough assets to satisfy everyone with a claim on those assets. The priority provisions of 12 U.S.C. 4617(c) and regulations in this part simply recognize that reality. In light of the different risk profiles that investors and creditors accept when dealing with a business entity, subordination is the rule in corporate bankruptcies. The comments offer no sound reasons why the public policies supporting the rule in bankruptcy are not equally applicable in the context of the entities regulated by FHFA. If anything, the policy justifications for subordination of shareholder claims relative to the Enterprises currently in conservatorship is even greater because of the unique arrangements by which the Enterprises are being kept solvent through infusions of Treasury funds. If securities litigation claimants were treated as ordinary creditors, payment of such a claim against the Enterprises would represent a wealth transfer from the taxpayers of the United States to certain current and former shareholders of Fannie Mae and Freddie Mac. This was not the intent of the Treasury Agreements, and subordination avoids this unintended and unfair result.

FHFA does not intend to allow anyone under its jurisdiction to escape accountability for fraud. The rule, however, deals with a different issue: The priority of competing claims against a limited estate. In the conservatorships of Fannie Mae and Freddie Mac, FHFA immediately replaced the management that was in charge of Fannie Mae and Freddie Mac at the time plaintiffs in the pending securities cases allege the fraud occurred. As set forth in FHFA's 2008 Report to Congress, FHFA fundamentally changed Enterprise management and governance practices by appointing new CEOs, nonexecutive chairmen, and boards of directors to both Enterprises, and by working with both Enterprises to establish a new board committee structure with key changes in charters and responsibilities.[6] Therefore, whether shareholder plaintiffs can collect on claims or judgments against Fannie Mae or Freddie Mac has no connection to and does not further any interest plaintiffs may have in holding accountable the alleged perpetrators of any fraud. Given the financial situations of the Enterprises, the burden of payments on private claims would fall on the U.S. taxpayers, who through the Treasury Agreements provide infusions of cash to make up any quarterly net worth deficits, not on individuals alleged to be responsible for fraud.

Treatment and subordination of securities fraud claims. Shareholder counsel objected to § 1237.9 of the proposed rule, which would address, among other things, the priority of securities litigation claims in receivership. The proposal reflected a balancing of interests based on the sources of claims. Securities fraud claims in litigation would not exist but for ownership of the underlying security. Therefore, the proposal called for subordinating such claims and, as a matter of fundamental fairness, treating them just as any other claim based on ownership of the security.

By permitting recovery by equity-holders only after creditors have been paid in full, this rule reflects the longstanding ''general rule of equity'' that ''stockholders take last in the estate of a bankrupt corporation.'' *Gaff* v. *FDIC,* 919 F.2d 384, 392 (6th Cir. 1990); *see also In re Stirling Homex Corp. (Jezarian* v. *Raichle),* 579 F.2d 206, 211 (2d Cir. 1978) (''[A]fter all creditors have been paid, provision may be made for stockholders. When the debtor is insolvent, the stockholders, as such, receive nothing.''). The rationale underlying this rule is that ''[b]ecause, unlike creditors and depositors, stockholders stand to gain a share of corporate profits, stockholders should take the primary risk of the enterprise failing.'' *Gaff,* 919 F.2d at 392. Moreover, creditors deal with a corporation ''in reliance upon the protection and security provided by the money invested by the corporation's stockholders—the so-called 'equity cushion.' '' *Stirling Homex,* 579 F.2d at 214.

The provisions of § 1237.9, confirming that a securities litigation claim has the same priority in receivership as the underlying security out of which it arises, would harmonize aspects of receiverships under the Safety and Soundness Act with the

[6] FHFA Report to Congress—2008 (May 18, 2009), at 80, available at *http://www.fhfa.gov/webfiles/2335/FHFA_ReportToCongress2008508rev.pdf.*

bankruptcy regime that applies to most publicly traded corporations. In aligning the priority of securities litigation Claims in receivership with their treatment in bankruptcy, FHFA follows in the path of a number of Federal circuit courts that have looked to the U.S. Bankruptcy Code for guidance on relative priorities of shareholder claims as well as other issues arising in receiverships of financial institutions. *See, e.g., Gaff,* 919 F.2d at 393–96; *Office and Professional Employees Int'l Union* v. *FDIC,* 962 F.2d 63, 68 (D.C. Cir. 1992) (Ruth Bader Ginsburg, J.); *First Empire Bank-New York* v. *FDIC,* 572 F.2d 1361, 1368 (9th Cir. 1978).

The shareholder counsel contend that the Supreme Court's decision in *Oppenheimer* v. *Harriman National Bank & Trust Co. et al.,* 301 U.S. 206 (1937), mandates that securities fraud claims be treated as creditor claims unless the statute includes specific language akin to section 510(b) of the Bankruptcy Code. They assert that the majority of courts have rejected subordination of securities litigation claims in financial institution receiverships, and that the legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, from which much of the structure of HERA's conservatorship and receivership regime was drawn, contradicts FHFA's proposed interpretation of HERA, citing cases such as *FDIC* v. *Jenkins et al.,* 888 F.2d 1537 (11th Cir. 1989), *Howard* v. *Haddad,* 916 F.2d 170 (4th Cir. 1990), and *Hayes* v. *Gross,* 982 F.2d 104 (3d Cir. 1992).

FHFA disagrees. *Oppenheimer* is not controlling, fundamentally because it involved a receivership under a different statute. Furthermore, it did not hold that subordination of shareholder claims is inappropriate in all receiverships, or that a statute must use ''magic words'' to provide or allow for subordination. As one court has explained, *Oppenheimer's* holding was heavily dependent on the fact that the rescinding shareholder previously satisfied his statutory obligation to creditors under then-existing ''double liability'' laws. *Northwest Racquet Swim & Health Clubs, Inc.* v. *Resolution Trust Corp. (RTC),* 927 F.2d 355, 361 n.17 (8th Cir. 1991) (rejecting attempt by holder of failed thrift's subordinated debt to rescind for alleged fraud and thereby recover on par with general creditors).

The courts' decisions in *Jenkins, Howard,* and *Hayes* do not address subordination of securities litigation claims in relation to competing creditors of an institution. They address the priority of FDIC claims against a failed bank's officers and directors relative to the claims private plaintiffs have against those same defendants. The proposed rule and final rule do not address the priority that FHFA's claims against officers and directors of the Enterprises have versus private plaintiff claims. This rule confirms and clarifies the priority among competing claims against the Enterprises themselves. The *Jenkins, Howard,* and *Hayes* decisions do not reach that issue or contradict the proposed rule. For example, in *Jenkins* the court observed that section 510(b) of the Bankruptcy Code provides for subordination of shareholder ''claims against the debtor or an affiliate of the debtor,'' but noted that ''[i]n the present case, however, the shareholders are not attempting to collect on assets of the failed bank. Rather, they are proceeding against solvent third-parties in non-derivative shareholder suits,'' a different situation than is addressed by section 510(b). 888 F.2d at 1545.

Prohibiting capital distributions and payment of securities litigation judgments.

Shareholder counsel also asserts that HERA does not grant FHFA as conservator the authority to prohibit capital distributions or payment of securities litigation claims. In one of their comments, shareholder counsel argued that the agency could not assert the authority to define securities litigation claims as capital distributions and to prohibit such distributions absent an express statutory grant of such authority.

FHFA rejects this argument, as it ignores the fact that the Safety and Soundness Act and HERA grant FHFA broad authority as Conservator to manage the conservatorship estate, including the authority to restrict capital distributions that would cause a regulated entity to become undercapitalized. As one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship assets would be inconsistent with the agency's statutory goals, as they would result in removing capital at a time when the Conservator is charged with rehabilitating the regulated entity. Under the Safety and Soundness Act and HERA, FHFA has a statutory charge to work to restore a regulated entity in conservatorship to a sound and solvent condition, and to take any action authorized by this section, which FHFA determines to be in the best interests of the regulated entity or FHFA. This express statutory grant of authority grants FHFA as Conservator authority to address capital distribution and other claims against the conservatorship estate in the manner that it deems appropriate.

Shareholder counsel also asserts that HERA does not authorize the Conservator to defy or disregard a Federal court judgment. They suggest that this alleged lack of authority for proposed §§ 1237.12 and 1237.13 is underscored by the fact that 12 U.S.C. 4617(b)(11)(C), which forbids attachment or execution of receivership assets, does not apply during conservatorship, which means a judgment creditor could seize an Enterprise's assets during conservatorship using conventional execution remedies.

FHFA believes that this comment misperceives both the nature of a money judgment and the role of a conservator. In Federal court, ''[a] money judgment 'is not an order to the defendant; it is an adjudication of his rights or liabilities.' '' 12 Wright & Miller, Federal Practice & Procedure, § 3011 at 94 (2d ed. 2010) (quoting D. Dobbs, Handbook of the Law of Remedies (1971)). ''[W]hen a party fails to satisfy a court-imposed money judgment, the appropriate remedy is a writ of execution, not a finding of contempt.'' *Combs* v. *Ryan's Coal Co. Inc.,* 785 F.2d 970, 980 (11th Cir. 1986); *accord Shuffler* v. *Heritage Bank,* 720 F.2d 1141, 1147–48 (9th Cir. 1983). Thus, not voluntarily writing a check to cover a money judgment out of a limited estate does not constitute ''defiance'' or ''disregard'' of that judgment. Moreover, because the essential function of a conservator is to preserve and conserve the institution's assets, courts are loath to require a conservator to make any particular expenditure out of the conservatorship estate. *See, e.g., Rosa* v. *RTC,* 938 F.2d 383, 398 (3d Cir. 1991) (reversing injunction requiring bank in conservatorship to make pension contributions required by the Employee Retirement Income Security Act because ''implementation of the injunctive provisions would clearly require the distribution of the assets of City Savings and thereby encroach on the power of the conservator (now receiver) to preserve and dispose of those assets within its control. * * * [and] could result in forcing City Savings to accord the [pension] trustee, and therefore the beneficiaries of the plan, a preference over other creditors'').

Validity of final rules issued by FHFA.

Counsel for shareholder litigants raised a further objection to the proposed rule, arguing that any final rule issued by FHFA would be fundamentally flawed and invalid

because FHFA's head is not a validly appointed officer. They contend that the absence of a Senate-confirmed Director for FHFA means that the Appointments Clause of the U.S. Constitution [7] has not been met satisfied which makes it impossible for FHFA to issue binding regulations. FHFA's statute provides for a presidentially designated and Acting Director, without Senate confirmation. FHFA is led by such an Acting Director designated by the President in September 2009. Nonetheless, shareholder counsel argues that the Appointments Clause only permits such acting officials to serve temporarily, and not for an extended or indefinite period of time. They also assert that the designation and appointment of FHFA's Acting Director is invalid unless the appointee succeeds a Senate-confirmed Director because HERA only allows the Acting Director to carry out the duties of a Director. Shareholders' counsel argues that the Acting Director's authority is only derivative of the preceding FHFA Director, a Senate-confirmed Director of a predecessor agency who served as Director of FHFA as provided by statute rather than by a Senate-confirmed appointment to the position. Therefore, according to shareholders' counsel, the Acting Director has no authority because his predecessor had no authority without a Senate confirmation.

The argument is without foundation. FHFA's Acting Director, was properly designated by the President as Acting Director pursuant to 12 U.S.C. 4512(f), which does not require Senate confirmation. Nor does the U.S. Constitution require Senate confirmation for an official designated to serve in an acting capacity. The former Director was the incumbent Director of OFHEO and properly took office pursuant to HERA's transitional provision, 12 U.S.C. 4512(b)(5), when OFHEO's functions were transferred to FHFA as its successor agency. Any alleged question about the validity of the former Director's service would not, in any event, impair the President's subsequent designation of FHFA's Acting Director. Finally, neither the U.S. Constitution nor the statute limits the time period for which FHFA's Acting Director may serve. Accordingly, the Acting Director is properly serving as Acting Director and FHFA has the power to issue this final rule.

2. Joint Comment by the Federal Home Loan Banks

The twelve Federal Home Loan Banks (Banks) submitted a joint comment in response to the proposed rule that introduced a number of concerns about the proposed rule.

Differences between the Banks and the Enterprises.

The Banks commented that the proposed rule did not address the unique differences between the Banks and the Enterprises, as required by section 1201 of HERA.[8] They assert that the final rule should apply only to the Enterprises and that FHFA should issue a separate proposed rule specific to the Banks.

According to the Banks, the proposed rule failed to account for their banking activities, including the rights of depositors and the treatment of assets held in safekeeping arrangements, trust or custodial accounts, and other third-party assets. The Banks assert that this failure is highlighted by a few words in the proposed rule's Supplementary Information stating that the ''GSEs are not depository institutions,'' [9] noting that the statement is untrue with respect to the Banks. While the Banks do take deposits from members, they are not insured depository institutions and such deposits are not a significant funding source for them. Consolidated obligations (''COs'') are their principal funding source. FHFA continues to believe, after consideration of the statutory factors, that the regulations in this part are appropriate to both the Enterprises and the Banks. The joint comment also notes that the proposed rule does not include provisions contained in FDIC conservatorship and receivership regulations, such as provisions addressing qualified financial contracts, treatment of financial assets transferred in connection with a securitization or participation, post-insolvency interest, or various policy statements issued by the FDIC with respect to conservatorship and receiverships. The joint comment suggests that these provisions provide certainty for parties seeking to do business with depository institutions regulated by the FDIC, and suggests that FHFA consider whether these issues should be addressed in connection with the proposed rule.

FHFA believes that the proposed rule adequately accounts for the unique differences between the Banks and the Enterprises and does not require special provisions relating to one or the other. Section 1145 of HERA amended section 1367 of the Safety and Soundness Act to establish a comprehensive and overarching conservatorship and receivership process for both the Enterprises and the Banks. The proposed rule was not, and the final rule is not, intended to codify in regulations the entirety of the statutory conservatorship and receivership regime. The final rule must be read in its context as elaborating on, not substituting for or replacing, statutory text. Moreover, while the proposed rule sought to develop and expand a regulatory framework that parallels the FDIC approach to conservatorships and receiverships, the goal of the proposed rule was never to create a regulatory framework that precisely mirrored the FDIC regulatory regime. This is partly due to differences between the enabling statutes of FHFA and the FDIC, and to the important differences between the regulated entities and the depository institutions insured by the FDIC. The agency has elected to address these issues, to the extent it may become necessary to do so, through policy statements, policy guidances, and decisions by the agency, the conservator or the receiver.

The statutory provisions for conservatorship and receivership, as explained below, provide the guidance necessary for matters that the Banks contend were ignored in the proposed rule. The Banks' comment boils down to an objection that the proposed rule does not recite the statute or does not seek to embellish clear statutory language that applies to them, but might not apply to the Enterprises.

The statutory provisions for conservatorship and receivership provide that ''[t]he rights of the conservator or receiver appointed under this section shall be subject to the limitations on the powers of a receiver under sections 402 through 407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).[10] Section 402 of the FDICIA defines ''depository institution,'' ''net entitlement,'' ''net obligation,'' and ''netting contract,'' as they apply to banking transactions. 12 U.S.C. 4402(6), (12), (13) and (14). Section 403 of the FDICIA (''Enforceability of security agreements'') requires:

> The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of Title 11) [relating to bankruptcy], *and shall*

[7] U.S. Const. Art. II, § 2, cl. 2.

[8] 12 U.S.C. 4513, as amended.

[9] 75 FR 39462, 39464. The entire sentence in Supplementary Information to the proposed rule reads: ''The proposed regulation necessarily differs in some respects, however, from the FDIC regulations, because the GSEs are not depository institutions, and their important public missions differ from those of banks and thrifts.''

[10] 12 U.S.C. 4402–4407.

not be stayed, avoided, or otherwise limited by any State or Federal law (other than section 1821(e) of this title [relating to the FDIC's authority to affirm a conservator's and receiver's authority with respect to certain types of contracts], section 1787(c) of this title, and section 78eee(b)(2) of Title 15).

12 U.S.C. 4403(f) (emphasis added).

Section 1367(b)(5)(D) of the Safety and Soundness Act (''Authority to Disallow Claims'') covers the receiver's authority to disallow any portion of any claim by a creditor or claim of security, preference, or priority that is not proven to the satisfaction of the receiver. Section 1367(b) also limits the scope of a receiver's authority to disallow claims with respect to ''(I) any extension of credit from any Federal Reserve Bank, Federal Home Loan Bank, or the United States Treasury; or (II) any security interest in the assets of the regulated entity securing any such extension of credit.'' 12 U.S.C. 4617(b)(5)(D)(iii) (emphasis added).

Consolidated obligations and joint and several liability.

The Banks argued that the proposed rule did not adequately address the joint and several liability of the Banks for COs that they issue. FHFA does not believe that COs require separate treatment in the rule, as opposed to policy statements or discretionary decisions in the context of specific conservatorships and receiverships.

The Banks note that, under 12 CFR 966.9(a), each Bank, individually and collectively, has an obligation to make full and timely payment of all principal and interest on COs when due. Based upon this joint and several liability structure, the Banks contend that if a Bank were placed in conservatorship or receivership and could not make required payments on its COs, this would trigger the requirement that one or more other Banks make the principal and interest payments on the COs on a continuing basis. They noted that this obligation is subject to a right of reimbursement by the non-paying Bank. According to the Banks, the proposed rule's infirmity is its failure to explain how this reimbursement right, including the right to receive interest, would be treated by the conservator or receiver. However, they offered no explanation for why the rule should address these obligations as distinct from any others.

FHFA does not believe that specific provisions are needed in this regulation to address COs and the Banks' joint and several liability on them. Unpaid COs of a defaulted Bank would be general-creditor obligations of that Bank's receivership. In such a case, the Director might well direct other Banks to make payments on those COs to ensure that investors in them received timely payment and market confidence in the Bank System was maintained. The Director has authority to do that under current regulation,[11] which regulations in this part do not affect. Under that regulation, the Banks that paid COs on which a defaulted Bank was primarily liable would have a claim for reimbursement against the defaulted Bank,[12] and that claim would be a general-creditor obligation of the defaulted Bank. None of these outcomes require special provision in this rule. As a practical matter, a troubled Bank might be resolved without creating receivership claims based on COs. In the case of a Bank placed in conservatorship, the Bank would likely continue to pay on its COs as the payments came due. Similarly, if a Bank were closed and the COs transferred to a limited-life regulated entity (LLRE), that LLRE would likely also continue to pay on those COs as the payments came due. In addition, in the case of a Bank that was closed and its assets and liabilities transferred to one or more acquiring Banks, those transactions would plausibly include assignment and apportionment of the failed Bank's COs to and among the acquiring Banks, which would continue to pay on those COs as the payments came due. Therefore, the priority of receivership claims relating to COs would be relevant only in a case of a Bank placed in a liquidating receivership. As stated above, FHFA believes that the situation can be addressed by regulations in this part without making specific provision for COs.

The Banks argued that their joint and several liability for COs could result in a troubled Bank being merged with another Bank under section 26 of the Bank Act, as amended by section 1209 of HERA. 12 U.S.C. 1446.[13] They urged FHFA to delay issuing a conservatorship and receivership rule that covers the Banks until it first publishes proposed rules on Bank voluntary mergers. FHFA does not make any speculation on whether such mergers might result from the Banks' joint and several liability on COs, and does not consider either this rule on conservatorship and receivership or a rule on voluntary mergers of the Banks as dependent on each other. In any event, the rule on voluntary mergers has already been proposed,[14] and work is proceeding on the final rule.

Administrative expenses.

The Banks raised an issue about claims for administrative expenses that receive heightened priority in a resolution. They argued that, in the event a Bank were in a troubled condition, or in default or in danger of default, one or more other Banks could voluntarily provide (or be required to provide by court order, or by FHFA direction or otherwise) some form of managerial, financial, or other assistance to the Bank. They asserted that, because of the Banks' joint and several liability for COs issued by any of the Banks, the final rule should address the priority of a Bank's claim for repayment from another Bank, when the latter Bank is placed into conservatorship or receivership. The determination of whether an expense incurred, either before or during receivership, is entitled to priority as an administrative expense of the receiver, is vested in the discretion of the receiver. FHFA does not believe that the statute requires, or that prudence counsels in favor of, advance prescriptive determination that certain specific types of claims, even those based on providing financial support for a troubled institution, always will be administrative expenses.

The Banks observe that the FDIC has a regulation stating that ''administrative expenses of the receiver * * * shall include both pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution.'' [15] FHFA does not believe that further elaboration of that type is needed in FHFA's regulation, because section 1367(c)(3) of the Safety and Soundness Act already defines ''administrative expenses'' to include ''any obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the regulated entity.'' 12 U.S.C. 4617(c)(3).

Priority of expenses and unsecured claims.

The Banks suggested FHFA add clarifying language to § 1237.9 of the proposed rule, which states that the lowest priority of claim is accorded to ''[a]ny obligation to current or former shareholders or members arising as a result of their current or former status as shareholders or members, including without limitation, any Securities

[11] 12 CFR 966.9(d)(1).

[12] 12 CFR 966.9(d)(2).

[13] Section 1209 of HERA (''Voluntary Mergers Authorized'') amended section 26 of the Bank Act, and provides, in part, that any Bank may, with the approval of the Director of FHFA and the boards of directors of the Banks involved, merge with another Bank.

[14] 75 FR 72751 (Nov. 26, 2010).

[15] 12 CFR 360.4.

Litigation Claim.'' They argue that members, or former members, of a Bank may have a wide range of transactions and relationships with a failed Bank that could result in obligations that constitute creditor rather than equity holder claims against the receivership. They asserted that members can maintain deposits with a Bank, or enter into transactions under which they are otherwise treated as a creditor of a Bank. These obligations, transactions and relationships arise, because of the nature of the Bank System, from the shareholder status of the member or former member. But, the Banks maintain these types of member transactions and relationships are distinct from a member's, or former member's, ownership of capital stock. They urged FHFA to exempt from § 1237.9(a)(4) of the proposed rule obligations of a failed Bank to members or former members arising from transactions or relationships other than the ownership of capital stock in that Bank, so that those obligations would be treated the same as similar claims by nonmembers.

FHFA is persuaded that the organizational uniqueness of the Bank System requires a clarification to § 1237.9(a)(4) of the final rule. The final rule clarifies that, with respect to members of a failed Bank, the lowest priority position does not apply to claims arising from transactions or relationships distinct from the claimant's past or present ownership, purchase, sale or retention of an equity security of the Bank.

The Banks also commented that eleven of the twelve Banks operate under capital plans adopted under 12 U.S.C. 1426, and approved by the Finance Board. They stated that these capital plans, in accordance with the Bank Act and implementing regulations, may provide for different priorities among holders of various forms of capital stock of a Bank and recommend that FHFA further amend § 1237.9(a)(4) of the proposed rule to address this issue of competing priorities. FHFA agrees that when a regulated entity has issued multiple classes of capital stock, priority as between holders of those different classes should be determined by the capital plans or other underlying corporate instruments, even though all are within § 1237.9(a)(4). Thus, there may be multiple subpriorities within § 1237.9(a)(4). The Safety and Soundness Act establishes the general priorities, including claims of capital stock owners. 12 U.S.C. 4617(c). Within the fourth priority of claims, the priority inhabited by stockholders' claims, FHFA intends to recognize the different stock priorities that may exist among classes and categories of stock, including preferred and common stockholders, and has added language to this effect to § 1237.9(a)(4).

Perfected security interests, safekeeping, and other trust holdings.

The Banks contend that perfected security interests (including exceptions for preferences and fraudulent conveyances), safekeeping, and other trust holdings should be addressed specifically in the final rule to ensure that the interests and legitimate legal rights of third-parties are recognized.

FHFA considered the comment and concludes that no revision of the proposed rule is necessary to address the concerns the Banks have raised. Protection of security interests, with appropriate exceptions for preferential and fraudulent transfers, is provided in 12 U.S.C. 4617(d)(12). The avoidance of fraudulent transfers also is covered in 12 U.S.C. 4617(b)(15). Property held in trust and in custodial arrangements generally is not considered a part of a receivership estate available to satisfy general creditor claims. To the extent appropriate, FHFA expects to follow FDIC and bankruptcy practice in giving effect to this concept in a receivership of a regulated entity.

Period for contract repudiation.

The Banks objected to the provision of the proposed rule that would create an 18-month period for the conservator or receiver to determine whether to repudiate burdensome contracts of a troubled regulated entity. In their joint comment, the Banks suggested that FHFA instead adopt a six-month period for repudiation determinations, or address such matters on a case-by-case basis. While maximizing the discretion of a conservator or receiver by remaining silent as to the reasonable time for repudiation may have some appeal, FHFA does not believe that either a six-month or an open-ended period is appropriate.

FHFA has considered whether to revise that provision of the proposed rule, and has determined that the 18-month period should remain in the final rule. In the proposed rule, FHFA explained that FHFA's experiences as conservator for Fannie Mae and Freddie Mac have shown that it could take at least 18 months for a conservator or receiver to obtain the facts needed to make accurate determinations about its rights of repudiation. Due to the complexity of the contracts and commercial relationships of the regulated entities, FHFA believes that an 18-month period adequately and appropriately balances the need to fully assess the state of a troubled institution, the need for repudiation and the interests of contractual counterparties. Subsequently, experiences as Conservator have given FHFA no reason to change that decision. Moreover, the interests of contractual counterparties are protected by provisions such as 12 U.S.C. 4617(d)(7)(B), which mandates that payments to a counterparty for performance that a conservator or receiver accepts under a pre-conservatorship or -receivership contract for services before making a determination to repudiate the contract shall be treated as an administrative expense of the conservatorship or receivership.

Distinctions between FHFA as conservator and FHFA as receiver.

The Banks' joint comment suggests that § 1237.3 of the proposed rule failed to properly distinguish between actions FHFA is authorized or directed to take in its capacity as conservator from those that the agency is authorized or directed to take as receiver. Specifically, the joint comment notes that § 1237.3 of the proposed rule would provide FHFA as receiver with the authority to continue the missions of the regulated entity; ensure that the operations and activities of each regulated entity foster liquid, efficient, competitive and resilient national housing markets; and ensure that each regulated entity operates in a safe and sound manner. The Banks contend that this authority is limited exclusively to the actions of FHFA as conservator, because FHFA is required to liquidate a regulated entity in receivership.

The ultimate responsibility of FHFA as receiver is to resolve and liquidate the existing entity. A conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition. While operating an entity in conservatorship, continuation of the mission of the institution and fostering liquid, efficient, competitive and resilient national housing markets may be in the regulated entity's best interest, and are consistent with the Safety and Soundness Act's provisions governing operating entities. These activities of a conservator may not be aligned with the ultimate duty of a receiver, although in the process of finally resolving a regulated entity FHFA will need to strike the proper balance between continuing certain operations pending liquidation and terminating other operations. This balance may include temporarily operating in support of the failed institution's mission. FHFA agrees with the Banks that some activities appropriate in conservatorship are less consistent with a receivership. Section 1237.3 of the final rule has been

revised to recognize the receiver's responsibility to liquidate an entity in receivership.

Treatment of certain types of contracts and commercial agreements.

The Banks' joint comment raises questions about the possible treatment of several types of contracts and commercial agreements in conservatorship and receivership, including the treatment of completed sales of certain assets and liabilities between individual Banks and third-parties, standby letters of credit issued on behalf of Bank members and housing associates, subsidies provided under a Bank's Affordable Housing Program, or contracts for services provided to one or more other Banks. The Banks suggest that the treatment of these various contracts and agreements be addressed in the rule, and ask that FHFA state that it will not use its powers of repudiation as conservator or receiver to set aside or repudiate these obligations and transactions.

FHFA has considered whether to make a declaration about the status of those and other contracts in this rule, and has determined that this rulemaking is not the appropriate vehicle for such an announcement. This rule is not designed and FHFA has declined to limit the discretion of the agency as a future conservator or receiver. The circumstances of any future conservatorship and receivership can vary greatly, and it is necessary for FHFA to preserve the flexibility for the agency as conservator or receiver to make decisions based upon the specific issues facing that troubled regulated entity.

Expedited determination of claims.

The Banks observed that § 1237.7 of the proposed rule provides that FHFA, as receiver, will determine whether or not to allow a claim within 180 days from the date the claim is filed. They contend, however, that the Safety and Soundness Act requires FHFA to establish a separate procedure for expedited relief and claim determination within 90 days after the date of filing for certain claimants. The Banks suggest that the rule should establish the expedited claims process.

Although section 1367(b)(8) of the Safety and Soundness Act requires FHFA to ''establish a procedure for expedited relief outside of the routine claims process * * * [in section 1367(b)(5)]'' and a 90-day determination period for certain claims, the statute does not require a regulation establishing the expedited procedures. In fact, the statutory text is so explicit that codifying regulatory procedures for expedited claims is more likely to confuse than clarify processing. FHFA believes that implementing these specific provisions is best left to internal operating procedures that can be adjusted quickly as needed to provide consistent notice to claimants and set up internal processes for handling expedited claims separately from routine claims. The purpose of the rule is not to recite the statute, and in this instance the statute is sufficient.

Alternate resolution procedures.

Section 1237.8 of the proposed rule provides that claimants seeking ''a review of the determination of claims may seek alternative dispute resolution [(''ADR'')] from [FHFA] as receiver in lieu of a judicial determination.'' The Banks asserted that Congress intended ADR to be an alternative to the normal process established under 12 U.S.C. 4617(b)(5) for the receiver to make the initial determination on a claim. Therefore, referring to 12 U.S.C. 4617(b)(7)(A)(i), they contend that FHFA is limited to offering claimants a choice of both non-binding ADR that does not bar subsequent judicial review or binding ADR that precludes judicial review.

FHFA believes that the Banks' interpretation of the statute is excessively narrow and ignores the broad authority and command to the agency. Section 1367(b)(7) of the Safety and Soundness Act provides that ''[t]he Agency shall establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i) [*i.e.,* the routine claims allowance/disallowance provision].'' 12 U.S.C. 4617(b)(7)(A)(i). This language unambiguously leaves to FHFA the determination of appropriateness. The statute is expressly optional with respect to whether binding or non-binding ADR should be used and that the choice to participate in ADR cannot be forced by one party. 12 U.S.C. 4617(b)(7)(A)(iii). FHFA has determined that ADR is appropriate if all parties agree to it and accept that a condition of ADR is that it is in lieu of seeking judicial relief. Specific procedures and processes are left to development ''by order, policy statement, or directive,'' as provided in § 1237.8 of the proposed rule. No change in the proposal is required or warranted.

Limited-Life Regulated Entities.

The Banks raised numerous issues regarding proposed rule §§ 1237.10 and 1237.11 with respect to the establishment and operation of a LLRE. They objected that the proposed rule failed to identify or address the wide range of issues that could arise in the context of an LLRE, including the impact of such an entity on members of the Bank in receivership, holders of Bank COs, and other creditors and counterparties of the Bank in receivership. The Banks asked whether a ''LLRE Bank'' would be considered a new Bank that would cover the same district, and have the same membership, that was served by the Bank in receivership or whether a new permanent Bank would be established to serve that district contemporaneously with the LLRE; whether the LLRE Bank would assume some or all of the primary obligations on COs of the Bank in receivership or on the contracts of the failed Bank; whether it could fund its operations by becoming a primary obligor on new Bank System COs (and, if so, how would such primary obligations be treated upon the termination of the LLRE Bank); and how the existence of the LLRE Bank would impact the Securities and Exchange Commission disclosure obligations of the related Bank for FHFA reporting purposes.

FHFA responds that there is no requirement for the establishment of an LLRE in the case of a failed Bank, unlike in the case of a failed Enterprise. Further, reasons for and details of the operation and establishment of an LLRE are likely to vary based on the specific reasons for failure, the nature of the failed institution's assets and liabilities, and the resolution methodology selected by the receiver. The specificity the Banks suggested, if contained in regulatory text, could restrict the receiver's ability to structure the resolution of a failed institution and leverage its assets and liabilities for the best interests of the Bank System. To the extent that statutory language does not provide answers to the Banks questions, FHFA does not believe it appropriate to limit the resolution tools available to it through a regulation.

Such flexibility is consistent with the statutory framework. For example, section 1367(i)(1)(B)(i) of the Safety and Soundness Act provides that a LLRE may ''assume such liabilities of the regulated entity that is in default or in danger of default as the Agency may, in its discretion, determine to be appropriate. * * *'' 12 U.S.C. 4617(i)(1)(B)(i). Subparagraph (B)(ii) authorizes the LLRE to ''purchase such assets of the regulated entity that is in default, or in danger of default, as the Agency may, in its discretion determine to be appropriate.'' Subparagraph (B)(iii) authorizes the LLRE to ''perform any other temporary function which the Agency may, in its discretion, prescribe in accordance with this section.'' The statutory discretion vested in the agency

is significant and necessary. FHFA declines to restrict the discretion Congress vested in it to unnecessarily tie its hands when resolving failed institutions in the future.

The Banks also suggest that the language in § 1237.13(b) of the proposed rule, stating that no shareholder or creditor of a regulated entity shall have any right or claim against the charter of that regulated entity once FHFA has been appointed receiver for the regulated entity and a limited-life regulated entity has succeeded to the charter, does not appear to apply to a Bank in receivership, since 12 U.S.C. 4617(i)(1)(A)(i) provides for FHFA to grant a temporary charter to a limited-life regulated entity for a Bank in receivership.

FHFA does not agree with this comment. The charters are not entities in receivership against which claims can be asserted, nor are the charters assets of a receivership estate from which claims can be paid.

3. Comments From Other Sources

In addition to the comments received from shareholders for the Enterprises in conservatorship, counsel for shareholder litigants, members of Congress, and Banks, FHFA received comments from various other parties, who raised the following concerns:

The conservatorships of Fannie Mae and Freddie Mac.

The Mortgage Bankers Association (MBA) commented that the proposal was too theoretical, preferring a rule that more specifically addressed the issues associated with the current conservatorships of Fannie Mae and Freddie Mac. The MBA suggested that a rule should answer questions such as the specific treatment of subordinated and senior debtholders, and could identify the operations and departments of the Enterprises that are likely to be retained in receivership.

The MBA suggested that FHFA should have used the rulemaking process to explain to the public the criteria that FHFA might use in deciding whether to place the Enterprises into receivership. In their view, announcing in advance the factors or milestones that would trigger receivership would prevent that determination from appearing arbitrary. Finally, the MBA suggested that FHFA could use the rule to set forth the agency's goals in a receivership. They argued that this would give FHFA a chance to explain how several of the possible roles for receivership—a least-cost resolution of the Enterprises, maintaining ongoing support of the housing market by protecting the infrastructure of the Enterprises, or using the assets of the Enterprises to lay the foundation for a new secondary housing market structure—would be applied by FHFA as receiver.

Bank of America also recommended that any final rule issued by FHFA clearly, narrowly, and carefully define the goals of conservatorship or receivership, and other commenters also noted that the proposed rule did not provide a specific model for Fannie Mae and Freddie Mac after the end of the conservatorships and the absence of a detailed restructuring plan for the Enterprises. Other commenters also argued that the proposed rule failed to address the treatment of Fannie Mae or Freddie Mac preferred shareholders in an Enterprise receivership or the potential for harm to shareholders by diminishing or extinguishing the value of their equity interests.

The rule is designed to implement and expand the general framework for conservatorship and receivership operations for the regulated entities. This rule and rulemaking generally are not appropriate vehicles through which to predict the specific resolution of hypothetical future events. It would be too limiting on agency authority to use the rule to explain to the public the criteria that FHFA might use in deciding whether to place the Enterprises into receivership. The criteria for establishing receiverships are enumerated in the Safety and Soundness Act.[16] Congress left considerable decision-making discretion to the agency, and FHFA sees no reason to limit that discretion through a final rule when future circumstances are unknown.

It would be inappropriate to use the rule to explain how several of the asserted possible roles for receivership—a least-cost resolution of the Enterprises, maintaining ongoing support of the housing market by protecting the infrastructure of the Enterprises, or using the assets of the Enterprises to lay the foundation for a new secondary housing market structure—would be applied by the agency as receiver. By leaving such strategic decisions about receivership for the future, the rule retains necessary discretion for the agency to deal with events as they unfold and not artificially limiting a future receiver's choices.

Moreover, this rule is not intended to address discretionary decisions about the treatment of assets in the conservatorship estate, as general policies on that subject are more appropriately handled in FHFA policy guidances and other agency policy statements. More specific discretionary decisions are better addressed by the Conservator on a case-by-case basis. In either case, neither type of decisions is appropriate for a rule that would address conservatorship and receivership operations for all the regulated entities. This rule seeks to avoid limiting the discretion of FHFA as Conservator or Receiver in future insolvencies. The circumstances of each conservatorship or receivership are unique to the issues facing that particular troubled regulated entity. For that reason FHFA has decided to preserve the discretionary authority of the agency as conservator or receiver in addressing those issues, instead of attempting to craft one set of policies that would govern every circumstance.

Notice and hearing before transfer or sale of any asset or liability.

Bank of America has also suggested modifying § 1237.3(c) to provide that the transfer or sale of any asset or liability of an Enterprise in conservatorship or receivership occur only after provision of notice to affected parties and an opportunity for a hearing, unless such transfer or sale is part of the Enterprise's ordinary course of business. FHFA rejects this suggestion. Implementing such a proposal would unnecessarily restrict the ability of FHFA as conservator or receiver to act quickly and decisively in preserving and conserving the assets of a regulated entity. The commenter did not describe any precedent for such a potentially cumbersome process in the conservatorship and receivership practices and procedures of other financial regulators.

Language clarifications for § 1237.9 of the rule.

Bank of America also suggested making § 1237.9 of the proposed rule clearer by substituting the word ''claimants'' for ''creditors'' in paragraph (b), and substituting the term ''claim of'' for ''obligation to'' in paragraph (a)(4). In response to these suggestions, ''creditors'' has been changed to ''claimants'' in § 1237.9(b), and ''obligation to'' has been changed to ''claim by'' in § 1237.9(a)(4), and conforming changes have been made to the rule.

Payment of dividends to shareholders during conservatorship.

Some commenters suggested that the rule should address the payment of dividends to shareholders during conservatorship. While FHFA as conservator may restrict dividends for safety and soundness reasons under the Safety and Soundness Act and the Bank Act, a regulated entity may generally

[16] 12 U.S.C. 4617(a).

pay dividends to shareholders only when it is adequately capitalized. It is unlikely that a regulated entity in conservatorship would be permitted to pay dividends while it is unable to meet its capital requirements. This rulemaking is not the appropriate vehicle for establishing a policy for the payment of dividends by a regulated entity in conservatorship, as this rule was not intended to address specific discretionary decisions about the treatment of assets from the conservatorship estate, and was not designed to limit the discretion of FHFA as conservator in future conservatorships.

Definitional changes.

The proposed definition of ''Executive officer'' required adjustment to identify the different sources for the definition with respect to the Enterprises and the Banks. The term is clarified in this final rule. A technical correction is made to the definition of ''Authorizing statutes.'' The proposed definition of ''Capital distribution'' was located in part 1229, the FHFA rule on capital classifications and prompt corrective action, as more appropriate than amending an OFHEO rule that predated the enactment of HERA.

The definition of ''Capital distribution'' to include payments of securities litigation claims applies only to the Enterprises. 12 U.S.C. 4513(f) requires FHFA, prior to promulgating regulations relating to the Banks, to consider the differences between the Banks and Enterprises, relating to, among other things, the Banks' cooperative ownership structure and capital structure. There is no established marketplace for capital stock of the Banks and it is not publicly traded. Although the Banks are registered with the Securities and Exchange Commission, the capital stock of the Banks is purchased by members, and redeemed by the applicable Bank, at stated par value rather than any market price. As a result, the Banks face less exposure to securities litigation claims than the Enterprises, whose equity securities are publicly traded with fluctuating market prices. For the Banks, ''capital distribution'' during conservatorship and receivership shall retain the meaning assigned in Subpart A of FHFA's rule on capital classifications and prompt corrective action, at § 1229.1.

III. Regulatory Impacts

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (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 businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of this final regulation under the RFA. FHFA certifies that the final regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the regulated entities, which are not small entities for purposes of the RFA.

List of Subjects

12 CFR Part 1229

Capital, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

12 CFR Part 1237

Capital, Conservator, Federal home loan banks, Government-sponsored enterprises, Receiver.

Accordingly, for the reasons stated in the Supplementary Information, under the authority of 12 U.S.C. 4513b, 4526, and 4617 the Federal Housing Finance Agency amends chapter XII of Title 12, Code of Federal Regulations, as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Subchapter B—Entity Regulations

PART 1229—CAPITAL CLASSIFICATIONS AND PROMPT CORRECTIVE ACTION

■ 1. Amend part 1229 of subchapter B by adding new subpart B to read as follows:

Subpart B—Enterprises

Sec.
1229.13 Definitions.

Authority: 12 U.S.C. 4513b, 4526, 4613, 4614, 4615, 4616, 4617.

Subpart B—Enterprises

§ 1229.13 Definitions.

For purposes of this subpart:

Capital distribution means—

(1) Any dividend or other distribution in cash or in kind made with respect to any shares of, or other ownership interest in, an Enterprise, except a dividend consisting only of shares of the Enterprise;

(2) Any payment made by an Enterprise to repurchase, redeem, retire, or otherwise acquire any of its shares or other ownership interests, including any extension of credit made to finance an acquisition by the Enterprise of such shares or other ownership interests, except to the extent the Enterprise makes a payment to repurchase its shares for the purpose of fulfilling an obligation of the Enterprise under an employee stock ownership plan that is qualified under the Internal Revenue Code of 1986 (26 U.S.C. 401 *et seq.*) or any substantially equivalent plan as determined by the Director of FHFA in writing in advance; and

(3) Any payment of any claim, whether or not reduced to judgment, liquidated or unliquidated, fixed, contingent, matured or unmatured, disputed or undisputed, legal, equitable, secured or unsecured, arising from rescission of a purchase or sale of an equity security of an Enterprise or for damages arising from the purchase, sale, or retention of such a security.

■ 2. Add part 1237 to subchapter B to read as follows:

PART 1237—CONSERVATORSHIP AND RECEIVERSHIP

Sec.
1237.1 Purpose and applicability.
1237.2 Definitions.

Subpart A—Powers

1237.3 Powers of the Agency as conservator or receiver.
1237.4 Receivership following conservatorship; administrative expenses.
1237.5 Contracts entered into before appointment of a conservator or receiver.
1237.6 Authority to enforce contracts.

Subpart B—Claims

1237.7 Period for determination of claims.
1237.8 Alternate procedures for determination of claims.
1237.9 Priority of expenses and unsecured claims.

Subpart C—Limited-Life Regulated Entities

1237.10 Limited-life regulated entities.
1237.11 Authority of limited-life regulated entities to obtain credit.

Subpart D—Other

1237.12 Capital distributions while in conservatorship.
1237.13 Payment of Securities Litigation Claims while in conservatorship.
1237.14 Golden parachute payments [Reserved].

Authority: 12 U.S.C. 4513b, 4526, 4617.

§ 1237.1 Purpose and applicability.

The provisions of this part shall apply to the appointment and operations of the Federal Housing Finance Agency (''Agency'') as conservator or receiver of a regulated entity. These provisions implement and supplement the procedures and process set forth in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, by the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289 for conduct of a conservatorship or receivership of such entity.

§ 1237.2 Definitions.

For the purposes of this part the following definitions shall apply:

Agency means the Federal Housing Finance Agency (''FHFA'') established under 12 U.S.C. 4511, as amended.

Authorizing statutes mean—

(1) The Federal National Mortgage Association Charter Act,

(2) The Federal Home Loan Mortgage Corporation Act, and

(3) The Federal Home Loan Bank Act.

Capital distribution has, with respect to a Bank, the definition stated in § 1229.1 of this chapter, and with respect to an Enterprise, the definition stated in § 1229.13 of this chapter.

Compensation means any payment of money or the provision of any other thing of current or potential value in connection with employment.

Conservator means the Agency as appointed by the Director as conservator for a regulated entity.

Default; in danger of default:

(1) *Default* means, with respect to a regulated entity, any official determination by the Director, pursuant to which a conservator or receiver is appointed for a regulated entity.

(2) *In danger of default* means, with respect to a regulated entity, the definition under section 1303(8)(B) of the Safety and Soundness Act or applicable FHFA regulations.

Director means the Director of the Federal Housing Finance Agency.

Enterprise means the Federal National Mortgage Association and any affiliate thereof or the Federal Home Loan Mortgage Corporation and any affiliate thereof.

Entity-affiliated party means any party meeting the definition of an entity-affiliated party under section 1303(11) of the Safety and Soundness Act or applicable FHFA regulations.

Equity security of any person shall mean any and all shares, interests, rights to purchase or otherwise acquire, warrants, options, participations or other equivalents of or interests (however designated) in equity, ownership or profits of such person, including any preferred stock, any limited or general partnership interest and any limited liability company membership interest, and any securities or other rights or interests convertible into or exchangeable for any of the foregoing.

Executive officer means, with respect to an Enterprise, any person meeting the definition of executive officer under section 1303(12) of the Safety and Soundness Act and applicable FHFA regulations under that section, and, with respect to a Bank, an executive officer as defined in applicable FHFA regulations.

Golden parachute payment means, with respect to a regulated entity, the definition under 12 CFR part 1231 or other applicable FHFA regulations.

Limited-life regulated entity means an entity established by the Agency under section 1367(i) of the Safety and Soundness Act with respect to a Federal Home Loan Bank in default or in danger of default, or with respect to an Enterprise in default or in danger of default.

Receiver means the Agency as appointed by the Director to act as receiver for a regulated entity.

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.

Securities litigation claim means any claim, whether or not reduced to judgment, liquidated or unliquidated, fixed, contingent, matured or unmatured, disputed or undisputed, legal, equitable, secured or unsecured, arising from rescission of a purchase or sale of an equity security of a regulated entity or for damages arising from the purchase, sale, or retention of such a security.

Transfer means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the equity of redemption of the regulated entity.

Subpart A—Powers

§ 1237.3 Powers of the Agency as conservator or receiver.

(a) *Operation of the regulated entity.* The Agency, as it determines appropriate to its operations as either conservator or receiver, may:

(1) Take over the assets of and operate the regulated entity with all the powers of the shareholders (including the authority to vote shares of any and all classes of voting stock), the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(2) Continue the missions of the regulated entity;

(3) Ensure that the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets;

(4) Ensure that each regulated entity operates in a safe and sound manner;

(5) Collect all obligations and money due the regulated entity;

(6) Perform all functions of the regulated entity in the name of the regulated entity that are consistent with the appointment as conservator or receiver;

(7) Preserve and conserve the assets and property of the regulated entity (including the exclusive authority to investigate and prosecute claims of any type on behalf of the regulated entity, or to delegate to management of the regulated entity the authority to investigate and prosecute claims); and

(8) Provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

(b) *Agency as receiver.* The Agency, as receiver, shall place the regulated entity in liquidation, employing the additional powers expressed in 12 U.S.C. 4617(b)(2)(E).

(c) *Powers as conservator or receiver.* The Agency, as conservator or receiver, shall have all powers and authorities specifically provided by section 1367 of the Safety and Soundness Act and paragraph (a) of this section, including incidental powers, which include the authority to suspend capital classifications under section 1364(e)(1) of the Safety and Soundness Act during the duration of the conservatorship or receivership of that regulated entity.

(d) *Transfer or sale of assets and liabilities.* The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale. Exercise of this authority by the Agency as conservator will nullify any restraints on sales or transfers in any agreement not entered into by the Agency as conservator. Exercise of this authority by the Agency as receiver will nullify any restraints on sales or transfers in any agreement not entered into by the Agency as receiver.

§ 1237.4 Receivership following conservatorship; administrative expenses.

If a receivership immediately succeeds a conservatorship, the administrative expenses of the conservatorship shall also be deemed to be administrative expenses of the subsequent receivership.

§ 1237.5 Contracts entered into before appointment of a conservator or receiver.

(a) The conservator or receiver for any regulated entity may disaffirm or repudiate any contract or lease to which such regulated entity is a party pursuant to section 1367(d) of the Safety and Soundness Act.

(b) For purposes of section 1367(d)(2) of the Safety and Soundness Act, a reasonable period shall be defined as a period of 18 months following the appointment of a conservator or receiver.

§ 1237.6 Authority to enforce contracts.

The conservator or receiver may enforce any contract entered into by the regulated entity pursuant to the provisions and subject to the restrictions of section 1367(d)(13) of the Safety and Soundness Act.

Subpart B—Claims

§ 1237.7 Period for determination of claims.

Before the end of the 180-day period beginning on the date on which any claim against a regulated entity is filed with the Agency as receiver, the Agency shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim. This period may be extended by a written agreement between the claimant and the Agency as receiver, which may include an agreement to toll any applicable statute of limitations.

§ 1237.8 Alternate procedures for determination of claims.

Claimants seeking a review of the determination of claims may seek alternative dispute resolution from the Agency as receiver in lieu of a judicial determination. The Director may by order, policy statement, or directive establish alternative dispute resolution procedures for this purpose.

§ 1237.9 Priority of expenses and unsecured claims.

(a) *General.* The receiver will grant priority to unsecured claims against a regulated entity or the receiver for that regulated entity that are proven to the satisfaction of the receiver in the following order:

(1) Administrative expenses of the receiver (or an immediately preceding conservator).

(2) Any other general or senior liability of the regulated entity (that is not a liability described under paragraph (a)(3) or (a)(4) of this section).

(3) Any obligation subordinated to general creditors (that is not an obligation described under paragraph (a)(4) of this section).

(4) Any claim by current or former shareholders or members arising as a result of their current or former status as shareholders or members, including, without limitation, any securities litigation claim. Within this priority level, the receiver shall recognize the priorities of shareholder claims *inter se,* such as that preferred shareholder claims are prior to common shareholder claims. This subparagraph (a)(4) shall not apply to any claim by a current or former member of a Federal Home Loan Bank that arises from transactions or relationships distinct from the current or former member's ownership, purchase, sale, or retention of an equity security of the Federal Home Loan Bank.

(b) *Similarly situated creditors.* All claimants that are similarly situated shall be treated in a similar manner, except that the receiver may take any action (including making payments) that does not comply with this section, if:

(1) The Director determines that such action is necessary to maximize the value of the assets of the regulated entity, to maximize the present value return from the sale or other disposition of the assets of the regulated entity, or to minimize the amount of any loss realized upon the sale or other disposition of the assets of the regulated entity; and

(2) All claimants that are similarly situated under paragraph (a) of this section receive not less than the amount such claimants would have received if the receiver liquidated the assets and liabilities of the regulated entity in receivership and such action had not been taken.

(c) *Priority determined at default.* The receiver will determine priority based on a claim's status at the time of default, such default having occurred at the time of entry into the receivership, or if a conservatorship immediately preceded the receivership, at the time of entry into the conservatorship provided the claim then existed.

Subpart C—Limited-Life Regulated Entities

§ 1237.10 Limited-life regulated entities.

(a) *Status.* The United States Government shall be considered a person for purposes of section 1367(i)(6)(C)(i) of the Safety and Soundness Act.

(b) *Investment authority.* The requirements of section 1367(i)(4) shall apply only to the liquidity portfolio of a limited-life regulated entity.

(c) *Policies and procedures.* The Agency may draft such policies and procedures with respect to limited-life regulated entities as it determines to be necessary and appropriate, including policies and procedures regarding the timing of the creation of limited-life regulated entities.

§ 1237.11 Authority of limited-life regulated entities to obtain credit.

(a) *Ability to obtain credit.* A limited-life regulated entity may obtain unsecured credit and issue unsecured debt.

(b) *Inability to obtain credit.* If a limited-life regulated entity is unable to obtain unsecured credit or issue unsecured debt, the Director may authorize the obtaining of credit or the issuance of debt by the limited-life regulated entity with priority over any and all of the obligations of the limited-life regulated entity, secured by a lien on property of the limited-life regulated entity that is not otherwise subject to a lien, or secured by a junior lien on property of the limited-life regulated entity that is subject to a lien.

(c) *Limitations.* The Director, after notice and a hearing, may authorize a limited-life regulated entity to obtain credit or issue debt that is secured by a senior or equal lien on property of the limited-life regulated entity that is already subject to a lien (other than mortgages that collateralize the mortgage-backed securities issued or guaranteed by an Enterprise) only if the limited-life regulated entity is unable to obtain such credit or issue such debt otherwise on commercially reasonable terms and there is adequate protection of the interest of the holder of the earlier lien on the property with respect to which such senior or equal lien is proposed to be granted.

(d) *Adequate protection.* The adequate protection referred to in paragraph (c) of this section may be provided by:

(1) Requiring the limited-life regulated entity to make a cash payment or periodic cash payments to the holder of the earlier lien, to the extent that there is likely to be a decrease in the

value of such holder's interest in the property subject to the lien;

(2) Providing to the holder of the earlier lien an additional or replacement lien to the extent that there is likely to be a decrease in the value of such holder's interest in the property subject to the lien; or

(3) Granting the holder of the earlier lien such other relief, other than entitling such holder to compensation allowable as an administrative expense under section 1367(c) of the Safety and Soundness Act, as will result in the realization by such holder of the equivalent of such holder's interest in such property.

Subpart D—Other

§ 1237.12 Capital distributions while in conservatorship.

(a) Except as provided in paragraph (b) of this section, a regulated entity shall make no capital distribution while in conservatorship.

(b) The Director may authorize, or may delegate the authority to authorize, a capital distribution that would otherwise be prohibited by paragraph (a) of this section if he or she determines that such capital distribution:

(1) Will enhance the ability of the regulated entity to meet the risk-based capital level and the minimum capital level for the regulated entity;

(2) Will contribute to the long-term financial safety and soundness of the regulated entity;

(3) Is otherwise in the interest of the regulated entity; or

(4) Is otherwise in the public interest.

(c) This section is intended to supplement and shall not replace or affect any other restriction on capital distributions imposed by statute or regulation.

§ 1237.13 Payment of Securities Litigation Claims while in conservatorship.

(a) *Payment of Securities Litigation Claims while in conservatorship.* The Agency, as conservator, will not pay a Securities Litigation Claim against a regulated entity, except to the extent the Director determines is in the interest of the conservatorship.

(b) *Claims against limited-life regulated entities.* A limited-life regulated entity shall not assume, acquire, or succeed to any obligation that a regulated entity for which a receiver has been appointed may have to any shareholder of the regulated entity that arises as a result of the status of that person as a shareholder of the regulated entity, including any Securities Litigation Claim. No creditor of the regulated entity shall have a claim against a limited-life regulated entity unless the receiver has transferred that liability to the limited-life regulated entity. The charter of the regulated entity, or of the limited-life regulated entity, is not an asset against which any claim can be made by any creditor or shareholder of the regulated entity.

§ 1237.14 Golden parachute payments [Reserved]

Dated: June 14, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2011–15098 Filed 6–17–11; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM459; Special Conditions No. 25–432–SC]

Special Conditions: Gulfstream Aerospace LP (GALP) Model G250 Airplane Automatic Power Reserve (APR), an Automatic Takeoff Thrust Control System (ATTCS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Gulfstream Aerospace LP (GALP) Model G250 airplane. This airplane will have a novel or unusual design feature associated with go-around performance credit for use of Automatic Power Reserve (APR), an Automatic Takeoff Thrust Control System (ATTCS). The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is June 13, 2011. We must receive your comments by August 4, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, *Attn:* Rules Docket (ANM–113), Docket No. NM459, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM459. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2011; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because the substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

If you want us to acknowledge receipt of your comments on these special conditions, include with your comments a self-addressed, stamped postcard on which you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On March 30, 2006, GALP applied for a type certificate for their new Model G250 airplane. The G250 is an 8–10