

Federal Housing Finance Agency

§ 1215.2

regulated entity or the Office of Finance and the consultant has agreed in writing:

(i) To abide by the prohibition on the disclosure of confidential supervisory information contained in this section; and

(ii) That it will not use the confidential supervisory information for any purposes other than those stated in its contract to provide services to the regulated entity or the Office of Finance.

(c) *Law Enforcement Proceedings.* Notwithstanding the general prohibition of disclosure of non-public information, to the minimum extent required by the Inspector General Act, Public Law 95-452, 92 Stat. 1101 (1978), FHFA's Office of Inspector General is permitted under this section to disclose non-public FHFA information without Director approval.

(d) *Privilege.* FHFA retains all privilege claims for non-public information shared under §1214.4, including, but not limited to attorney-client, attorney-work product, deliberative process, and examination privileges.

PART 1215—PRODUCTION OF FHFA RECORDS, INFORMATION, AND EMPLOYEE TESTIMONY IN THIRD-PARTY LEGAL PROCEEDINGS

Sec.

- 1215.1 Scope and purpose.
- 1215.2 Applicability.
- 1215.3 Definitions.
- 1215.4 General prohibition.
- 1215.5 Delegation.
- 1215.6 Factors FHFA may consider.
- 1215.7 Serving demands and submitting requests.
- 1215.8 Timing and form of demands and requests.
- 1215.9 Failure to meet this part's requirements.
- 1215.10 Processing demands and requests.
- 1215.11 FHFA determination.
- 1215.12 Restrictions that apply to testimony.
- 1215.13 Restrictions that apply to records and information.
- 1215.14 Procedure in the event of an adverse FHFA determination.
- 1215.15 Conflicting court order.
- 1215.16 Fees.
- 1215.17 Responses to demands served on nonemployees.
- 1215.18 Inspector General.

AUTHORITY: 5 U.S.C. 301; 12 U.S.C. 4526.

SOURCE: 78 FR 39961, July 3, 2013, unless otherwise noted.

§ 1215.1 Scope and purpose.

(a) This regulation sets forth the policies and procedures that must be followed in order to compel an employee of the Federal Housing Finance Agency (FHFA) to produce records or information, or to provide testimony relating to the employee's official duties, in the context of a legal proceeding. Parties seeking records, information, or testimony must comply with these requirements when submitting demands or requests:

(b) FHFA intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving FHFA in controversial issues not related to its mission and functions;

(3) Maintain FHFA's impartiality;

(4) Protect employees from being compelled to serve as involuntary witnesses for wholly private interests, or as inappropriate expert witnesses regarding current law or the activities of FHFA; and

(5) Protect sensitive, confidential information and FHFA's deliberative processes.

(c) By providing these policies and procedures, FHFA does not waive the sovereign immunity of the United States.

(d) This part provides guidance for FHFA's internal operations. This part does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

(e) The production of records, information, or testimony pursuant to this part, does not constitute a waiver by FHFA of any privilege.

§ 1215.2 Applicability.

(a) This regulation applies to demands or requests for records, information, or testimony, in legal proceedings in which FHFA is not a named party.

(b) This regulation does not apply to:

(1) Demands or requests for an FHFA employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of FHFA;

§ 1215.3

12 CFR Ch. XII (1–1–23 Edition)

(2) Requests for the release of non-exempt records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(3) Congressional demands or requests for records or testimony.

§ 1215.3 Definitions.

As used in this part:

Confidential supervisory information means information prepared or received by FHFA that meets all of the following criteria:

(1) The information is not a document prepared by a regulated entity or the Office of Finance for its own business purposes that is in its possession;

(2) The information is exempt from the Freedom of Information Act, 5 U.S.C. 552 (1966); and

(3) The information:

(i) Consists of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports, or

(ii) Is gathered by FHFA in the course of any investigation, suspicious activity report, cease-and-desist order, civil money penalty enforcement order, suspension, removal or prohibition order, or other supervisory or enforcement orders or actions taken under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, 12 U.S.C. 4501 *et seq.*

(4) The inclusion of the term “confidential” within the definition of “confidential supervisory information” is not intended to invoke the meaning of “confidential,” as that term is used in Executive Order No. 13526, December 29, 2009 (75 FR 707 (Jan. 5, 2010) (President’s order on the classification of National Security Information). Confidential supervisory information is used in part 1215 to refer to the distinct category of information defined in § 1215.3. FHFA used the word “confidential” within the label for this category of information simply to be consistent with the manner in which federal banking agencies refer to similar or identical types of information.

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production of records, information, or tes-

timony that is issued in a legal proceeding.

Employee means:

(1) Any current or former officer or employee of FHFA or of FHFA-OIG;

(2) Any other individual hired through contractual agreement by or on behalf of FHFA who has performed or is performing services under such an agreement for FHFA; and

(3) Any individual who has served or is serving in any consulting or advisory capacity to FHFA, whether formal or informal.

Federal Home Loan Bank means a bank established under the authority of 12 U.S.C. 1423(a).

FHFA means the Federal Housing Finance Agency including the FHFA-OIG.

FHFA Counsel means an attorney in FHFA’s Office of General Counsel.

General Counsel means FHFA’s General Counsel or a person within FHFA’s Office of General Counsel to whom the General Counsel has delegated responsibilities under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Produce means provide, disclose, expose, or grant access to.

Records or information means, regardless of the person or entity in possession:

(1) All documents and materials that are FHFA agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in FHFA files; and

(3) All other information or materials acquired by an FHFA employee in the performance of his or her official duties or because of his or her official status, including confidential supervisory information.

Regulated entity has the same meaning as set forth in 12 U.S.C. 4502(20). For this regulation’s purposes, “regulated entity” also includes:

(1) The Office of Finance; and

Federal Housing Finance Agency

§ 1215.7

(2) Any current or former director, officer, employee, contractor or agent of a regulated entity.

Request means any informal request, by whatever method, in connection with a legal proceeding, seeking production of records, information, or testimony that has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, and recorded interviews made by an individual about FHFA information in connection with a legal proceeding.

§ 1215.4 General prohibition.

(a) No employee may produce records or information, or provide any testimony related to the records or information, in response to any demand or request without prior written approval to do so from the Director or the Director's designee.

(b) Any person or entity that fails to comply with this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current employee also may be subject to administrative or disciplinary proceedings.

§ 1215.5 Delegation.

To the extent permissible by statute, the Director may delegate his or her authority under this part to any FHFA employee and the General Counsel may delegate his or her authority under this part to any FHFA Counsel.

§ 1215.6 Factors FHFA may consider.

The Director may grant an employee permission to testify regarding agency matters, and to produce records and information, in response to a demand or request. Among the relevant factors that the Director may consider in making this determination are whether:

- (a) This part's purposes are met;
- (b) FHFA has an interest in the decision that may be rendered in the legal proceeding;
- (c) Approving the demand or request would assist or hinder FHFA in performing statutory duties or use FHFA resources;
- (d) Production might assist or hinder employees in doing their work;

(e) The records, information, or testimony can be obtained from other sources. (Concerning testimony, "other sources" means a non-agency employee, or an agency employee other than the employee named).

(f) The demand or request is unduly burdensome or otherwise inappropriate under the rules of discovery or procedure governing the case or matter in which the demand or request arose;

(g) Production of the records, information, or testimony might violate or be inconsistent with a statute, Executive Order, regulation, or other legal authority;

(h) Production of the records, information, or testimony might reveal confidential or privileged information, trade secrets, or confidential commercial or financial information;

(i) Production of the records, information, or testimony might impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(j) Production of the records, information, or testimony might result in FHFA appearing to favor one litigant over another;

(k) The demand or request pertains to documents that were produced by another agency;

(l) The demand or request complies with all other applicable rules;

(m) The demand or request is sufficiently specific to be answered;

(n) The relevance of the records, information, or testimony to the purposes for which they are sought, and for which they may be used for substantive evidence;

(o) Production of the records, information, or employee testimony may implicate a substantial government interest; and

(p) Any other good cause.

§ 1215.7 Serving demands and submitting requests.

(a) All demands and requests must be in writing.

(b) Demands must be served and requests must be submitted to the FHFA General Counsel at the following address: General Counsel, Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20219.

§ 1215.8

(c) Demands must not be served upon, nor requests submitted to any regulated entity for records, information, or testimony regardless of whether the records, information, or testimony sought are in the possession of, or known by, the regulated entity. If a regulated entity receives a request or demand for records, information, or testimony, the regulated entity must immediately notify the General Counsel and provide FHFA an opportunity to object to the demand or request before responding to the demand or request. Submitting a demand or request to a regulated entity may result in rejection of the demand or request under § 1215.9.

(d) If an employee receives a request or demand that is not properly routed through FHFA's General Counsel, as required under this section, the employee must promptly notify the General Counsel. An employee's failure to notify the General Counsel is grounds for discipline or other adverse action.

[78 FR 39961, July 3, 2013, as amended at 80 FR 80233, Dec. 24, 2015]

§ 1215.8 Timing and form of demands and requests.

(a) A party seeking records, information, or testimony must submit a request and receive a rejection before making a demand for records, information, or testimony.

(b) A demand or request to FHFA must include a detailed description of the basis for the demand or request and comply with the requirements in § 1215.7.

(c) Demands and requests must be submitted at least 60 days in advance of the date on which the records, information, or testimony is needed. Exceptions to this requirement may be granted upon a showing of compelling need.

(d) A demand or request for testimony also must include an estimate of the amount of time that the employee will need to devote to the process of testifying (including anticipated travel time and anticipated duration of round trip travel), plus a showing that no document or the testimony of non-agency persons, including retained experts, could suffice in lieu of the employee's testimony.

12 CFR Ch. XII (1–1–23 Edition)

(e) Upon submitting a demand or request seeking employee testimony, the requesting party must notify all other parties to the legal proceeding.

(f) After receiving notice of a demand or request for testimony, but before the testimony occurs, a party to the legal proceeding who did not join in the demand or request and who wishes to question the witness beyond the scope of the testimony sought must submit a separate demand or request within 60 days of receiving the notice required under paragraph (e) of this section and must then comply with paragraph (c) of this section.

(g) Every demand or request must include the legal proceeding's caption and docket number, the forum; the name, address, phone number, State Bar number, and, if available, electronic mail address of counsel to all parties to the legal proceeding (in the case of *pro-se* parties, substitute the name, address, phone number, and electronic mail address of the *pro-se* party); and a statement of the demanding or requesting party's interest in the case. In addition, the demanding or requesting party must submit a clear and concise written statement that includes: a summary of the legal and factual issues in the proceeding and a detailed explanation as to how the records, information or testimony will contribute substantially to the resolution of one or more specially identified issues in the legal proceeding. A copy of the complaint or charging document may accompany—but must not be substituted for—the required statement.

§ 1215.9 Failure to meet this part's requirements.

FHFA may oppose any demand or request that does not meet the requirements set forth in this part.

§ 1215.10 Processing demands and requests.

(a) The Director will review every demand or request received and, in accordance with this regulation, determine whether, and under what conditions, to authorize an employee to produce records, information, or testimony.

(b) The Director will process demands and requests in the order in which they

Federal Housing Finance Agency

§ 1215.13

are received. The Director will ordinarily respond within 60 days from the date that the agency receives all information necessary to evaluate the demand or request. However, the time for response will depend upon the scope of the demand or request. The Director may respond outside of the 60-day period:

(1) Under exigent or unusual circumstances; or

(2) When FHFA must receive and process records or information in the possession, custody, or control of a third party.

(c) The Director may confer with counsel to parties to a legal proceeding about demands or requests made pursuant to this part. The conference may be *ex-parte*. Failure to confer in good faith, in order to enable the Director to make an informed determination, may justify rejection of the demand or request.

(d) The Director may rely on sources of information other than those provided by the demanding or requesting parties as bases for making a determination.

(e) The Director may grant a waiver of any requirement in this section to promote a significant interest of FHFA or the United States, or for other good cause.

§ 1215.11 FHFA determination.

(a) The Director makes FHFA's determinations regarding demands and requests.

(b) The Director will notify the demanding or requesting party of FHFA's determination, the reasons for the approval or rejection of the demand or request, and any conditions that the Director may impose on the release of records, information, or testimony.

§ 1215.12 Restrictions that apply to testimony.

(a) The Director may impose conditions or restrictions on testimony, including but not limited to limiting the scope of testimony or requiring the demanding or requesting party and other parties to the legal proceeding to agree that the testimony transcript will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was re-

quested. The Director may also require a copy of the transcript of testimony to be provided to FHFA at the demanding or requesting party's expense.

(b) The Director may offer an employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the Director, the employee must not:

(1) Disclose confidential or privileged information; or

(2) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or FHFA's mission or functions. This provision does not apply to requests from the United States for expert or opinion testimony.

(d) The Director may assign FHFA Counsel to be present for an employee's testimony.

§ 1215.13 Restrictions that apply to records and information.

(a) The Director may impose conditions or restrictions on the release of records and information, including but not limited to requiring that parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access and further disclosure, or that parties take other appropriate steps to comply with applicable privacy requirements. The terms of a protective order or confidentiality agreement must be acceptable to the Director. In cases where protective orders or confidentiality agreements have already been executed, the Director may condition the release of records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the Director so determines, original agency records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their status as original records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

§ 1215.14

(c) The scope of permissible production is limited to that set forth in the prior, written authorization granted by the Director.

(d) If records or information are produced in connection with a legal proceeding, the demanding or requesting party must:

(1) Promptly notify all other parties to the legal proceeding that the records or information are FHFA records or information and are subject to this part and any applicable confidentiality agreement or protective order;

(2) Provide copies of any confidentiality agreement or protective order to all other parties; and

(3) Retrieve the records or information from the court or other competent authority's file when the court or other competent authority no longer requires the records or information and certify that every party covered by a confidentiality agreement, protective order, or other privacy protection has destroyed all copies of the records or information.

§ 1215.14 Procedure in the event of an adverse FHFA determination.

(a) *Procedure for seeking reconsideration of FHFA's determination.* A demanding or requesting party seeking reconsideration of FHFA's rejection of a demand or request, or of any restrictions on receiving records, information, or testimony, may seek reconsideration of the rejection or restrictions as follows:

(1) *Notice of Intention to Petition for Reconsideration.* The aggrieved demanding or requesting party may seek reconsideration by filing a written Notice of Intention to Petition for Reconsideration (Notice) within 10 business days of the date of FHFA's determination. The Notice must identify the petitioner, the determination for which reconsideration is being petitioned, and any dates (such as deposition, hearing, or court dates) that are significant to petitioner. The Notice must be served in accordance with § 1215.7.

(2) *Petition for Reconsideration.* Within five business days of filing Notice, the petitioner must file a Petition for Reconsideration (Petition) in accordance with § 1215.7. The Petition must contain a clear and concise statement of the

12 CFR Ch. XII (1–1–23 Edition)

basis for the reconsideration with supporting authorities. Determinations about petitions for reconsideration are within the discretion of the FHFA Director, and are final.

(b) *Prerequisite to judicial review.* Pursuant to section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to FHFA for reconsideration of a final determination made under the authority of this part is a prerequisite to judicial review.

§ 1215.15 Conflicting court order.

Notwithstanding FHFA's rejection of a demand for records, information, or testimony, if a court or other competent authority orders an FHFA employee to comply with the demand, the employee must promptly notify FHFA's General Counsel of the order, and the employee must respectfully decline to comply, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). An employee's failure to notify the General Counsel of a court or other authority's order is grounds for discipline or other adverse action.

§ 1215.16 Fees.

(a) The Director may condition the production of records, information, or an employee's appearance on advance payment of reasonable costs to FHFA, which may include but are not limited to those associated with employee search time, copying, computer usage, and certifications.

(b) Witness fees will include fees, expenses, and allowances prescribed by the rules applicable to the particular legal proceeding. If no fees are prescribed, FHFA will base fees on the rule of the federal district court closest to the location where the witness will appear. Such fees may include but are not limited to time for preparation, travel, and attendance at the legal proceeding.

§ 1215.17 Responses to demands served on nonemployees.

(a) FHFA confidential supervisory information is the property of FHFA, and is not to be disclosed to any person without the Director's prior written consent.

Federal Housing Finance Agency

§ 1217.2

(b) If any person in possession of FHFA confidential supervisory information, is served with a demand in a legal proceeding directing that person to produce FHFA's confidential supervisory information or to testify with respect thereto, such person shall immediately notify the General Counsel of such service, of the testimony requested and confidential supervisory information described in the demand, and of all relevant facts. Such person shall also object to the production of such confidential supervisory information on the basis that the confidential supervisory information is the property of FHFA and cannot be released without FHFA's consent and that production must be sought from FHFA following the procedures set forth in §§ 1215.7, 1215.8, and 1215.14 of this part.

§ 1215.18 Inspector General.

Notwithstanding the general prohibition of disclosure of records and information, to the minimum extent required by the Inspector General Act, Public Law 9-452 (1978), FHFA's Office of Inspector General is permitted under this section to disclose records and information and permit FHFA-OIG employee testimony without Director approval.

PART 1217—PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

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

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

SOURCE: 81 FR 43034, July 1, 2016, unless otherwise noted.

§ 1217.1 Purpose and scope.

(a) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make,

submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to FHFA or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted in accordance with the Administrative Procedure Act pursuant to part 1209, subpart C, of this chapter.

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

§ 1217.2 Definitions.

As used in this part:

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

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