October 12, 2010

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, DC 20552
Attention: Comments/RIN 2590—AA14

BY FEDERAL EXPRESS AND E-MAIL: RegComments@FHFA.gov

RE: Rules of Practice and Procedure
RIN 2590-AA14

Dear Mr. Pollard:

Eleven Federal Home Loan Banks ("the FHLBanks") are writing to comment on the Federal Housing Finance Agency's ("Finance Agency") proposed rules of practice and procedure ("Proposal"). The FHLBanks appreciate this opportunity to comment and are generally supportive of the Proposal. The FHLBanks offer the following comments.

A. Equitable and Symmetrical Treatment of Parties

In some provisions, the Proposal appears to give the Finance Agency, in its capacity as a party to an administrative enforcement proceeding (together with its employees and counsel with investigative and prosecuting functions, the "Complainant"), unnecessarily inequitable advantages over the responding party and its representatives (the "Respondent"). The FHLBanks recognize that an administrative proceeding arising from an agency enforcement action involving a regulated entity or entity-affiliated party will not provide a Respondent with perfectly symmetrical treatment of the parties. However, some provisions in the Proposal are unnecessarily one-sided in favor of the Complainant. As a matter of procedural fairness and to ensure that a Respondent is given appropriate due process in the administrative proceeding, these provisions should be made symmetrical. For example:

- In proposed section 1209.12(c), Finance Agency counsel may file or require the filing of any document under seal upon making a determination that public disclosure of the document would be contrary to the public interest. While this provision may be rooted in 12 U.S.C. § 4639(d) and also be associated with the Director's role as the final administrative decisional authority, the final rule should provide similar authority to Respondent's counsel to file documents under seal voluntarily. A Respondent may have a legitimate private or public interest need to seek protection of filings from disclosure.

- In proposed section 1209.12(d), the presiding officer has authority to order any portion of the hearing closed to the public and issue protective orders to preserve the confidentiality of documents under seal, provided the order is acceptable to the Complainant's counsel. The final rule should make this provision less one-sided. At a minimum, the final rule should specify that the presiding officer must hear the position of the Respondent on such matters.

- The FHLBanks believe that Complainant's personnel who engage in communications prohibited by section 1209.14 should be subject to sanctions as would the Respondent's counsel or any other counsel appearing before the Finance Agency who engages in *ex parte* or other communications that are prohibited for the

purpose of preserving the integrity of the administrative process and the necessary separation of functions. For a proceeding to be administered fairly, there must be a deterrent to prohibited actions for both parties, not just one party.

Furthermore, the strict wall that must be preserved between the Finance Agency as Complainant and the Finance Agency's neutral parties (the neutral parties include the presiding officer, other decisional and reviewing employees, and the Director and are referred to herein as "Decisional Officers") is muddied by the statement which says "[t]his section shall not prohibit FHFA counsel from providing necessary and appropriate legal advice to the Director on supervisory or regulatory matters." While the provision, on its face, could be interpreted as a reasonable reference to advice in matters unrelated to the administrative proceeding, that interpretation is called into question by language in the preamble that states:

> Any employee or agent of the FHFA that participated in the examination, investigative, or prosecutorial functions on the case may not participate in or advise in the recommended decision on the final determination (*analysis of settlement offers and regulatory or supervisory matters are excepted from this prohibition*). 75 Fed. Reg. at 49323 (*emphasis added*).

The FHLBanks believe it would not be appropriate for Complainant personnel to participate in the consideration by the Decisional Officers of a settlement offer. The final rule should be clarified by inserting the italicized words in the provision, as follows: "[t]his section shall not *otherwise* prohibit FHFA counsel from providing necessary and appropriate legal advice to the Director on supervisory or regulatory matters *unrelated to the proceeding*." The preamble to the final rule should clarify that the Respondent must be given an opportunity to participate in all Complainant communications with the Decisional Officers relating to the proceeding, including analysis of settlement offers.

- Pursuant to section 1209.70, Subpart D does not apply to Finance Agency employees. This creates another inequitable differentiation between the Finance Agency as Complainant and a Respondent, because the presiding officer has the power to sanction Respondent's counsel for conduct specified in section 1209.74(a), but does not have the power to sanction Complainant's counsel for the same conduct.

The FHLBanks acknowledge that the uniform rules of practice and procedure (*see* 75 Fed. Reg. 49314 at n. 14, hereinafter the "Uniform Rules") include some of the inequities identified above, but nevertheless believe that, for fairness, unnecessary or unreasonable inequities between Complainant and Respondent such as those identified should be eliminated in the final rule.

B. Consistency with the Legal Standards of the Uniform Rules of Practice and Procedure

The FHLBanks support the Finance Agency's approach of looking to the Uniform Rules as a resource for development of the Proposal. We believe that, for consistency, there are several legal standards used in the Uniform Rules that the final rule should adopt. The use of different standards in a parallel context increases the potential for uncertainty and disparity in the administrative process, which can ultimately increase the burdens on both parties and give rise to time-consuming legal analyses, disparate treatment, and otherwise avoidable judicial review of legal standards. For example:

- Section 1209.11(b)(11) provides that the presiding officer may receive "materially relevant" evidence. This standard is stricter than that used in the Uniform Rules, which permit the administrative law judge ("ALJ") to receive "relevant" evidence. *See* 12 C.F.R. § 19.5(b)(3) (for ease of reference, we cite only the Uniform Rules as implemented by the Office of the Comptroller of the Currency ("OCC")).

- Section 1209.29(b) permits document discovery regarding any matter not privileged that is materially relevant "to the charges or allowable defenses raised in the pending proceeding." In contrast, the Uniform Rules permit document discovery regarding any matter not privileged that has material relevance "to the merits of the pending action." *See* 12 C.F.R. § 19.24(b).

- Section 1209.31(a)(1) requires a showing that the "documents [requested] are materially relevant to the charges and issues presented in the proceeding . . . ." The Uniform Rules require a mere showing of "general relevance." *See* 12 C.F.R. § 19.26(a).

C. Due Process for Immediate Suspension Orders

Proposed section 1209.8 leaves unclear the distinction between an immediate suspension/prohibition order issued pursuant to section 1209.8(b) and a final suspension/prohibition order issued pursuant to section 1209.8(c). The preamble to the Proposal states that, "[a]n immediate order of suspension issued under paragraph (b) of this section is effective when served. *See* 12 U.S.C. § 4636a(b)(2)(A)." 75 Fed. Reg. at 49321 col. 3. However, the text of proposed section 1209.8(b) does not make explicitly clear that an order issued pursuant to section 1209.8(b) is effective immediately. It does so only through a reference in section 1209.8(b)(2), which provides that the effective period of an order issued under section 1209.8(b) is limited by section 1377(b) of the Safety and Soundness Act (12 U.S.C. § 4636a(b)). Confusion can arise, however, because section 1377(b) includes a technical error. It states, in relevant part:

> (b)(2) Effective period
>
> Any order issued under this subsection –
>
> (A) shall become effective upon service; and
>
> (B) unless a court issues a stay of such order under subsection (g), shall remain in effect and enforceable until—
>
> (i) the date on which the Director dismisses the charges contained in the notice served under subsection (a) with respect to such party; or
>
> (ii) the effective date of *an order issued under subsection (b)*. 12 U.S.C. 4636a(b) (*emphasis added*).

The statute cannot be given logical meaning unless the emphasized words apply to subsection (c) rather than subsection (b). Congress cannot have intended the effective period of an order to be limited to the single day of its issuance. Therefore, in the final rule, the Finance Agency should give logical meaning to its regulation by specifying in section 1209.8(b)(2) that the effective period of a suspension order issued under section 1209.8(b) commences upon service and, unless a court issues a stay, remains effective until the Director either dismisses the charges or, pursuant to section 1209.8(c), the Director issues a final order.[1]

D. Subpoenas to Nonparties

Sections 1209.31(b)(4) and (c)(2) contain flat prohibitions against the imposition of stays in response to a non-party's assertions of rights to seek to quash or modify a subpoena or to seek district court enforcement of a non-party document production subpoena. The final rule should specify that the presiding officer has the discretion to issue a stay if she or he determines it to be appropriate under the circumstances.

[1] We have used the term "final order," with the intent that it be distinct from, and a necessary precursor to, a "final decision" issued under section 1209.103.

We believe section 1209.31 should be amended to expressly address the right of either party to object to a non-party subpoena on any applicable grounds, including based on a privilege. Both parties should be permitted to seek to protect their rights in regard to documents in the possession of a non-party.

E. Scope of Practice before the Finance Agency

In defining what constitutes "practice before the FHFA" for purposes of Subpart D, proposed section 1209.71 follows the approach of the Uniform Rules (*see* 12 C.F.R. § 19.191(a)), providing a definition that is significantly broader in scope than the Proposal's subject matter: agency enforcement actions. Subpart D appears to apply to any individual "transacting any business with the FHFA as counsel, representative or agent for any other person unless the Director orders otherwise." The FHLBanks ask the Finance Agency to consider whether the scope of proposed section 1209.71 should be narrowed to regulating which parties are eligible to represent a regulated entity in an enforcement proceeding and the discipline to which such parties are subject in connection with such a proceeding.

F. Hearing on Removal or Suspension

The FHLBanks believe Sections 1209.102(b)(3) and (c)(3) should be modified to clarify that the presiding officer may not exclude relevant testimony. At a minimum, in section 1209.102(c)(3), the second sentence should be amended as follows: "All oral statements, witness testimony, ~~if permitted,~~ and documents submitted that are found by the hearing officer to be materially relevant to the proceeding and not unduly repetitious ~~may~~*must* be considered."

Section 1209.102 does not require that a written transcript of the hearing be produced. In an issue as serious as a removal or suspension, the FHLBanks believe a hearing transcript is essential for preservation of the record and the production of the same should be mandatory. The Proposal states, "[a] transcript of the proceedings may be taken if the petitioner requests a transcript . . . ." Proposed § 1209.102. At a minimum, "may" should be replaced with "must."

G. Technical, Clarifying, and Other Comments

1209.3 – Definition of "Associated with the regulated entity": In Section 1209.3, the scope of the definition of "Associated with the regulated entity" appears to be broader and cover a wider range of potential parties than is covered by the term "Entity-affiliated party." To avoid potential conflicts in interpretation and because the term "Associated with the regulated entity" does not appear elsewhere in the proposed rule, the FHLBanks believe the six-year period in section 12 U.S.C. § 4637 should run beginning on the date such entity-affiliated party would no longer be deemed to be an entity-affiliated party.

1209.5 – Correction of deficiencies: Section 1209.5(a)(2) largely repeats the text of 12 U.S.C. § 4631, but omits the highlighted parenthetical phrase from the following relevant statute:

> If a regulated entity receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the Director may (*if the deficiency is not corrected*) deem the regulated entity to be engaging in an unsafe or unsound practice for purposes of subsection (a). 12 U.S.C. § 4631(b) (*emphasis added).*

For clarity, we believe the statute's words, "if the deficiency is not corrected," should be repeated in section 1209.5(a)(2) of the final rule.

1209.5 and 1209.8 – Judicial Review: Proposed section 1209.5 does not contain a provision referring to the availability of judicial review, which is provided for in 12 U.S.C. § 4634. References to the availability of judicial review are contained in proposed sections 1209.6(d) and 1209.7(d). We believe that, for clarity and consistency, these references should be added to proposed section 1209.5.

Proposed section 1209.8(d)(3)(ii) appears to inadvertently include the word "not" in its provision governing judicial review. If not corrected, this could have the effect of barring judicial review. The provision currently states:

> "Additionally, any refusal by the Director to consent to relief from an outstanding order under this part is committed wholly to the discretion of the Director, and shall *not* be a final agency action for purposes of seeking judicial review." Proposed section 1209.8(d)(3)(ii) (*emphasis added).*

We presume that this is an inadvertent error because neither the preamble nor the statute includes language that could be cited as authority to bar access to judicial review. Otherwise, the rules do not provide a mechanism for final agency action.

1209.6 and 1209.7 – Compliance with Section 1209.23 notice requirements: For clarity and consistency, we believe that sections 1209.6 and 1209.7 of the final rule should specify that a notice of charges in a civil money penalty proceeding must conform with section 1209.23 (commencement of proceeding and contents of notice of charges). Therefore, sections 1209.6 and 1209.7 should incorporate parallels to sections 1209.5(a)(1) and 1209.8(a)(1), which both specify that a notice of charges in a removal and prohibition proceeding must conform with the requirements of section 1209.23.

Furthermore, section 1209.8(a)(1) and section 1209.8(c)(1) appear to include redundancies that could give rise to confusion, because they repeat the requirement that a notice of intention to suspend, remove, or prohibit must conform with section 1209.23.

1209.7 – Civil Money Penalty: Section 1209.7(a)(2) appears to inadvertently omit that the civil penalty cap applies on a daily basis.

1209.29 – Assertion of Privilege: We believe that section 1209.29(d)(1)(ii) should be expanded to specify that, even in the absence of an agreement to permit a producing party to assert applicable privileges of a document even after production, the presiding officer may permit a party to assert privileges after production of a document, including in the case of inadvertent production of privileged material.

1209.73 – Waiver of Conflict of Interest: Section 1209.73(a) prohibits a representative from representing a party where it reasonably appears that the representation may be limited materially by the representative's responsibilities to a third-party or the representative's own interests. The FHLBanks believe that this prohibition should be made waivable by the person being represented or the presiding officer.

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We thank you very much for your consideration of our comments.

Sincerely,

Federal Home Loan Bank of Atlanta

Shaney B. Lokken
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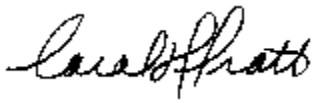
Federal Home Loan Bank of Boston



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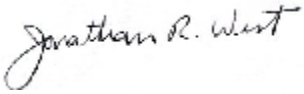

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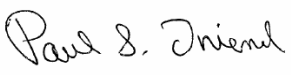

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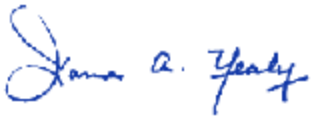

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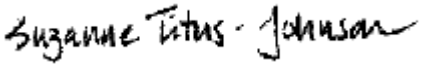

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