

8 CFR CHAPTER 1—DEPARTMENT OF HOMELAND SECURITY**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

■ 1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1624a, 8 CFR part 2, Public Law 101–410, 104 Stat. 890, as amended by Public Law 104–134, 110 Stat. 1321.

■ 2. Section 274a.1 is amended by revising paragraph (l) to read as follows:

§ 274a.1 Definitions.

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(l)(1) The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

Janet Napolitano,

Secretary.

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FEDERAL HOUSING FINANCE BOARD**12 CFR Part 915****FEDERAL HOUSING FINANCE AGENCY****12 CFR Part 1261**

RIN 2590–AA03

Federal Home Loan Bank Boards of Directors: Eligibility and Elections

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

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is adopting a final regulation on the eligibility and election of Federal Home Loan Bank (Bank) directors. The final rule implements section 1202 of the Housing and Economic Recovery Act of 2008, which amended section 7 of the Federal Home Loan Bank Act (Bank Act) as it relates to the eligibility and election of individuals to serve on the boards of directors of the Banks.

DATES: This final rule will become effective on November 6, 2009.

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SUPPLEMENTARY INFORMATION:**I. Statutory and Regulatory Background**

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008), transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Banks to FHFA, which is responsible for ensuring that the Enterprises and the Banks operate in a safe and sound manner and carry out their public policy missions. The Enterprises and the Banks continue to operate under regulations promulgated by the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board (Finance Board), respectively, until FHFA issues its own regulations.

Section 1202 of HERA amended section 7 of the Bank Act, 12 U.S.C. 1427, which governs the directorship structure of the Banks. The Finance Board regulation implementing section 7 was codified at 12 CFR part 915. Part 915 governed the nomination and

election only of those directors who are chosen from among the officers and directors of members of the Banks, which this final rule refers to as member directors. Section 1202(1) of HERA amended section 7(a) of the Bank Act to give the members the additional right to elect all of the other directors on the boards of directors of the Banks, which this rule refers to as independent directors.

On September 26, 2008, FHFA published an interim final rule (interim rule) to implement the amendments made by section 1202 of HERA. *See* 73 FR 55710, September 26, 2008. FHFA retained the basic process of elections that existed in part 915 as applied to member directorships, making changes as necessary to comply with the amendments to section 7 of the Bank Act. FHFA also added new provisions to govern the process for nominating individuals for independent directorships and for conducting elections of independent directors in conjunction with the elections of the member directors.

FHFA adopted the rule on an interim basis because there was insufficient time after the enactment of HERA for FHFA to conduct a full notice and comment rulemaking that would have allowed the Banks to conduct their 2008 elections before the end of 2008. Nonetheless, the interim rule afforded interested persons the opportunity to participate in the rulemaking process by submitting written comments on the interim rule, which FHFA has considered in adopting this final rule. The comment period closed on November 25, 2008.

Section 1201 of HERA (codified at 12 U.S.C. 4513(f)) requires the Director of FHFA to consider the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability, whenever promulgating regulations that affect the Banks. In preparing this final rule, the Director considered these factors and determined that the rule is appropriate, particularly because this final rule implements a statutory provision that applies only to the Banks. *See* 12 U.S.C. 1427.

II. Analysis of the Public Comments and Final Rule

FHFA received 15 public comments on the interim rule. Eleven Banks and one Bank member submitted comments. Two trade associations and a member of the United States House of

Representatives also submitted comments. There were common threads in the Bank comments, which FHFA considered in making revisions to the interim rule. The final rule establishes Subpart A—Federal Home Loan Bank Boards of Directors: Eligibility and Elections of part 1261 of the FHFA regulations, which now will be titled “Federal Home Loan Bank Directors.” Comments on specific issues are addressed in the section-by-section discussion below.

A. Section 1261.1 Definitions

FHFA received no comments on the definitions in the interim rule, but has made technical changes to some of the definitions that were in part 915, without changing their meanings. For example, in some definitions the final rule has replaced the word “person” with “individual” for purposes of consistency.

B. Section 1261.2 General Provisions

Section 1261.2 of the final rule includes two substantive amendments from the interim rule, noted below, as well as certain technical revisions. Section 7(a) of the Bank Act sets the size of a Bank’s board of directors at 13, or such other number as the Director may determine, provided the member directorships always constitute a majority and the independent directorships comprise at least 40 percent of the entire board. As a practical matter, however, the “grandfather” provision of section 7(c) of the Bank Act, which guarantees each State at least as many member directorships as it had in 1960, requires that nearly all of the Banks must have at least 8 member directorships. As a result, the minimum size board that could comply with both of those provisions is 14 persons, with 8 member directorships and 6 independent directorships. Section 1261.2(a) of the interim rule provided that the FHFA Director annually will set the number of directorships for each Bank and will designate the directorships as either member directorships or independent directorships. At least two independent directorships are required by the Bank Act to be public interest directorships. Some Banks commented that the boards of directors of the Banks should have the discretion to determine how many of the independent directors should be designated as public interest directors. In response to those comments, section 1261.2(a) of the final rule has been changed to require the board of directors of each Bank annually to determine how many of its independent directorships should be designated as public interest

directorships, provided that the Bank at all times has at least two public interest directorships.

Section 1261.2(c) of the interim rule carried forward the requirement in § 915.3(a) that the Banks conduct their elections, and provided that each Bank must hold one election each year for all directors, rather than separate elections for the independent directors and member directors. The final rule has amended the latter provision to clarify that the purpose of an election occurring in a particular year is to elect directors whose terms will commence on January 1 of the following year. Two commenters advocated that FHFA become more involved in the election process to help assure that elections result in an appropriate board composition. One trade association requested that FHFA “monitor the extent to which credit unions and other minority interests” are represented on the boards of the Banks and take actions, including encouraging nominations of individuals who are associated with minority interests, when such interests are not represented adequately. A member of the House of Representatives requested that FHFA consider “implementing safeguards” to assure that individuals from the general population, including minorities and women, are considered for nomination and are represented adequately on the boards.

FHFA believes that diversity among the members of each board of directors of the Banks would be beneficial to the Banks, and thus encourages the Banks to consider the diversity of their boards, both as to representation among the general population and as to representation of its members, as it requests nominees for member directorships from its members and as it goes through the process of nominating candidates for independent directorships. Each Bank could be assisted in the nomination of candidates for independent directorships by effectively integrating its process of consulting with the Bank’s Advisory Council, as required by § 1261.6(d) of the final rule, into the election process. Nonetheless, the final rule does not include any provisions mandating that the boards of the Banks include representatives from any particular industry groups or other populations. Such a provision could be contrary to the statutory provisions vesting the nominations of member and independent directors in the members and the boards of directors of the Banks, respectively, as well as to HERA’s repeal of the authority for the Finance Board to appoint directors to the boards of the

Banks. Moreover, the Banks have gone through only one election cycle since the enactment of HERA, and therefore it is difficult to assess the extent to which the new process will generate diverse boards.

C. Section 1261.3 Designation of Member Directorships

Section 1261.3 of the interim rule addressed the process by which the Director annually designates the member directorships at each Bank. The final rule adopts this provision with one substantive change, noted below, as well as several wording changes, none of which has substantive effect. Section 1261.3(c)(1) of the interim rule required that the designation of directorships be conducted in accordance with section 7(b) and (c) of the Bank Act. Section 1261.3(c)(2) of the interim rule further provided that if an existing directorship were to cease to exist as a result of the annual designation of directorships, then the incumbent director sitting in that directorship would not be eligible to serve after December 31 of that year. The final rule deletes section 1261.3(c)(2) in its entirety because it is largely duplicative of another provision of the interim rule, which is codified at § 1261.4(e) of the final rule.

D. Section 1261.4 Director Eligibility

Section 1261.4(a) of the interim rule carried forward § 915.7(b) of the Finance Board rule regarding the eligibility requirements of member directors. Several Banks commented that the final rule should clarify how these requirements should be applied when a Bank’s board must fill a vacancy. Specifically, these commenters asked whether a board of directors is limited to choosing officers or directors of institutions that were members at the time the position initially was filled, or may consider candidates from any institutions that are members when the board acts.

Section 7(f)(2) of the Bank Act requires a vacancy to be filled by an individual who meets the eligibility requirements applicable to his or her predecessor. The Bank Act, however, does not include a single list of provisions that are labeled “eligibility” requirements. Instead, certain requirements for directors are contained within the definitions of the types of directorships, while others exist elsewhere in the form of qualifications for persons to serve as directors. Section 1261.4(a)(2) of the interim rule included as part of the regulatory eligibility requirements for member directors a requirement that the person be an officer or director of an institution that

was a member as of the record date prior to the election. Commenters expressed concern about applying the record date requirement to a replacement director, and suggested that the final rule make clear that an institution's membership status as of the record date should not be deemed an eligibility requirement for a replacement director. FHFA agrees that this provision of the rule should be clarified and, because the Bank Act does not address the issue of the time of membership in determining whether a candidate is an officer or director of a member, believes that the rule should distinguish between directors elected by the members and those elected by the board to fill a vacancy. Accordingly, § 1261.4(a)(2) of the final rule provides that in the case of member directors elected by the members, the institution at which a candidate serves must have been a member as of the record date, but in the case of the board filling a vacancy, the institution at which the candidate serves as an officer or director must be a member of the Bank at the time the individual is elected by the board, whether or not it was a member as of the record date for the election of the predecessor.

Section 1261.4(a)(2) of the final rule also has been changed by replacing a reference to a member being located in a "voting State" with a reference to the member being located in the Bank's "district", which conforms more closely to the statutory language. The requirements relating to a voting State are located in a new paragraph (b) of the final rule. This has been added to maintain the requirement that each individual filling a member directorship must be an officer or director of a member that is located in the State to which the Director has allocated that directorship. This requirement applies to all individuals serving as member directors, though it is not designated as an eligibility requirement.

As a result of the addition of new § 1261.4(b), the final rule also redesignates § 1261.4(b)–(d) of the interim rule as § 1261.4(c)–(e) of the final rule and revises portions of the redesignated paragraphs (d) and (e). Section 1261.4(c)(1) of the interim rule described situations in which otherwise eligible individuals would not be eligible to serve, while § 1261.4(c)(2) clarified the application of the statutory term limits provision. The final rule makes certain changes relating to the application of the term limits, which are described below. The term limit provisions of section 7(d) of the Bank Act limit service of individuals who have been elected to and served all or part of three consecutive full terms.

Such individuals are ineligible for the two years following such service. Although § 1261.4(c)(2)(i) of the interim rule provided that terms adjusted subsequent to HERA would not be considered to be full terms, some commenters construed this to mean that FHFA would apply that provision only to the terms that commenced on January 1, 2009, but not to terms adjusted subsequently. It is possible that the discussion of the term limits provisions in the preamble to the interim rule, which focused primarily on the 2008 election, may have caused some misunderstanding about this provision, which is intended to apply whenever a term is adjusted by FHFA to fewer than four years, and not just to terms commencing on January 1, 2009. Because the language of that provision of the interim rule is clear, it has not been changed in the final rule, although the provision has been redesignated as § 1261.4(d)(2)(i).

Section 1261.4(c)(2)(iii) of the interim rule provided that a director's election to a three-year term prior to HERA constituted service in a full-term directorship. This provision also applied only to the terms of member directors. Some Bank commenters requested that this provision be changed to apply to all directors holding three-year directorships as of the effective date of HERA, and one trade association commented that only four-year terms should count toward the term limit provision. FHFA believes that the provision as it currently reads is in accordance with the Bank Act. The term limits provisions apply only to terms to which a director "has been elected." Prior to HERA, the minority members of the board of the Banks were appointed to three-year terms by the Finance Board. Because section 7(d) applies only to persons who have been elected, terms served by persons appointed by the Finance Board cannot count toward the consecutive term limitation. With regard to the other issue, prior to HERA a three-year term constituted a full term as a matter of law and FHFA cannot disregard that fact by limiting the application of the term limits provision solely to four-year terms. Accordingly, § 1261.4(c)(2)(iii) of the interim rule will remain the same in this respect, except that in the final rule it is redesignated as § 1261.4(d)(2)(ii) and includes certain other nonsubstantive wording changes.

One Bank asked FHFA to clarify whether the period of time served by a person who is elected to fill a vacancy constitutes a full term for purposes of the term limits provision. In the past, the Finance Board has interpreted section 7(d) of the Bank Act as applying

only when the director is elected by the members, and not to persons elected by the board of directors of a Bank to fill a vacancy. Moreover, because replacement directors serve only the unexpired portion of an existing term of office, they are not elected to serve a full term. Accordingly, the final rule includes a new provision, § 1261.4(d)(2)(iv), that makes clear that the time served by a replacement director filling a vacancy does not constitute a full term for purposes of the term limit provision.

Section 1261.4(d) of the interim rule addressed situations in which an incumbent Bank director becomes ineligible to remain in office if the directorship in which he serves is eliminated or is designated to another State as part of the annual designation of directorships before its term expires. The final rule redesignates this provision as section 1261.4(e), but does not make any substantive changes to the regulation. Paragraph (e)(2) has been revised slightly to include a cross reference to section 1261.14(a) of the final rule, which includes language that had previously been included in paragraph (e)(2) regarding how the board fills a redesignated directorship. Although the final rule does not change this provision, certain comments related to the issue of vacancies arising from the redesignation of a directorship to another State have prompted FHFA to consider whether the rule should be revised to allow the members in the affected States to select the person to fill the redesignated directorship, rather than the board of directors, which is the current practice. The Finance Board treated the redesignation of a directorship from one State to another as creating a vacancy on the board, which is to be filled by a Bank's board of directors. FHFA believes, however, that the relevant provisions of the Bank Act allow it to construe the redesignation of directorship to another State as the termination of the original directorship and the creation of a new directorship, which would allow the members in the new State to elect a person to fill the new directorship. Such treatment would have no effect on the staggering of the directorships, so long as the Director adjusts the term of the new directorship to match the unexpired portion of the original directorship. Because such a change would constitute a change in the policy established by the Finance Board, however, FHFA has not included that provision in this final rule, but intends to address this issue in a separate proposed rulemaking, which it intends

to publish in the Federal Register shortly after the final rule takes effect.

E. Section 1261.5 Determination of Member Votes

Section 1261.5 of the interim rule carried forward § 915.5 of the Finance Board rule, which sets forth how the Banks must determine the number of votes of each member. The final rule makes no changes to § 1261.5 of the interim rule, except that the reference to the specific Finance Board rules in paragraph (b) has been modified to reflect that they may at some time be replaced by FHFA rules that succeed them.

F. Section 1261.6 Nominations for Member and Independent Directorships

Section 1261.6 of the interim rule carried forth, in modified form, the requirements of § 915.6 of the Finance Board regulations regarding nominations for member directorships, and added provisions relating to the nomination of independent directorship candidates. In the final rule, § 1261.6(a)–(c) remain essentially the same as the corresponding provisions of the interim rule. The final rule does modify certain language used in paragraph (a)(5), relating to the nominating certificate that a Bank's election notice must include, and in paragraph (c), which includes certain editorial changes, none of which affect the substance of those provisions. Section 1261.6(d) of the interim rule addressed independent directorship nominations and implemented Section 7(b)(2) of the Bank Act, which requires independent directors to be nominated by each Bank's board of directors but to be elected by the members of each Bank. The final rule includes some modest revisions to certain provisions of § 1261.6(d), which are noted below, but otherwise does not differ from the interim rule. HERA amended the Bank Act to require that independent directors either must possess demonstrated knowledge or experience in certain specified subject matter areas, or must have more than four years of experience in representing certain consumer or community interests.

Section 1261.6(d)(1) of the interim rule generally reiterated those statutory requirements, which are somewhat more rigorous than were the pre-HERA requirements for the appointed directors. Certain Banks expressed concern about the effect of the new qualifications on their holdover appointed directors, and asked that the final rule allow those incumbent directors that do not satisfy the HERA requirements to stand for election so

long as they continue to comply with the pre-HERA requirements under which they were appointed initially. These Banks assert that the changes in qualifications are not significant and that board continuity with well-performing directors is more important than is compliance with the new qualifications. The final rule does not include the revisions suggested by the commenters because that would be contrary to the unambiguous language of the Bank Act, which does not allow a person who does not meet the new qualifications to stand for election as an independent director. Any such holdover appointed directors are deemed to be independent directors while they serve out the remainder of their terms, and any persons who were designated as public interest directors prior to HERA may retain that status until their term expires.

Section 1261.6(d)(2) of the interim rule required each Bank to include in its bylaws the procedures that it will follow for nominating and electing independent directors, and it is not being changed in any substantive way in the final rule. The Banks commented that this provision should be modified to allow them to incorporate the procedures in this rule into their bylaws by reference. While incorporation of this rule into the bylaws might be one method of including procedures in a Bank's bylaws, FHFA declines to include that in the regulation.

FHFA expects that each Bank will include in its bylaws provisions relating to the procedures that it believes will work best in identifying nominees and presenting them to the members, and FHFA prefers that approach over an approach that would prescribe bylaw provisions by regulation. The provisions adopted by each Bank should address how and when the board will consult with its Advisory Council, how applications from prospective nominees will be processed, and how the board will nominate candidates for independent directorships.

Section 1261.6(d)(3) of the interim rule required each Bank to determine the number of public interest directorships its board would have, subject to the statutory minimum of two, and to nominate at least as many individuals as there are independent directorships to be filled in the elections for that year.

The Banks commenting on this provision believe that their boards should have the flexibility to determine how many independent directorships should be designated as public interest directorships, provided they have at least two public interest directors. They

also believe that they should determine how many persons should be nominated for each type of directorship for which elections will be held, stating that the directors' fiduciary duties will ensure that they make appropriate decisions. One member commenting on this provision, however, contended that each Bank should be required to nominate all qualified candidates who apply, so that the members can decide who will serve as the independent directors.

The Bank Act does not require the board of directors to nominate any specific number of candidates for the independent directorships that are up for election, but it does require that each independent directorship be filled by the vote of the members. The FHFA has decided to leave this provision unchanged in the final rule, although the final rule does include other revisions, at § 1261.7(f), that are intended to strike a balance between the right of a board to nominate independent directors and the right of the members to elect those directors. As discussed later in this preamble, that provision would allow a board to nominate as few as one person for each open independent directorship, but if only one person is nominated for an open independent directorship, that person could not be elected without receiving at least 20 percent of the eligible votes. The provision is intended to ensure that the members retain a meaningful role in the election process.

Section 1261.6(e) of the interim rule implemented provisions of section 7(a) of the Bank Act that specify the qualifications that each independent director, other than public interest directors, must have. Section 7(a) also authorizes the Director to establish other knowledge or experience requirements that an independent director may have in addition to those specified in section 7(a). The interim rule provided that independent directors will be qualified if they have knowledge or experience in law or in the statutorily prescribed subjects, which are auditing or accounting, derivatives, financial management, organizational management, project development or risk management practices. In each case, the interim rule required a candidate's knowledge or experience to be commensurate with the knowledge or experience needed to oversee a business of the size and complexity of the Bank.

One Bank requested that the Director consider adding up to eight additional qualifications to the statutory list of qualifications, as authorized by section 7(a)(3)(B)(i) of the Bank Act. The Bank asserts that it has found each of the

additional qualifications to be helpful for corporate governance at the Bank. Although each of the suggested additional qualifications may be of value, the Bank Act heretofore has not specified qualifications for the independent directors, and the Director believes that the Banks should gain further experience applying the qualifications set forth in the statute and interim rule before FHFA considers adding additional qualifications. Other qualifications, indeed, may deserve consideration, and FHFA intends periodically to review whether additional qualifications should be added to the rule.

Section 1261.6(e) of the interim rule also addressed the knowledge or experience qualifications that each independent director must have. The final rule is retaining the substance of the provisions from the interim rule, but the final rule divides § 1261.6(e) into two paragraphs, one addressing independent directors generally, and one addressing only the public interest directors. The general qualifications for independent directors who are not also public interest directors remain as set forth in the interim rule, with some clarifying language, and are located in paragraph (1). The statutory qualifications for public interest directors have been added in paragraph (2).

As set forth in § 1261.6(f) of the interim rule, Banks must verify the eligibility of nominees for directorships before placing their names on the ballots. To verify eligibility for member director nominees, the Banks must use information on certification forms prescribed by FHFA. To verify eligibility and qualifications for nominees for independent directorships, the Banks must use information on the appropriate application forms. For incumbent nominees for independent directorships, the Banks may verify eligibility by using information on eligibility certification forms or, if a director was recently elected, on application forms. For all persons to be proposed as independent directorship nominees, the interim rule required the Banks to deliver the names and contemporaneously executed director application forms of the nominees to FHFA for its review before announcing the nominees. FHFA will review the information submitted and, if it has concerns about a nominee's qualifications, may so inform the Bank.

FHFA received several comments questioning how the FHFA review provision of the interim rule is intended to work, particularly how long a Bank

should wait to receive comments from FHFA on the nominees. Some Banks raised questions about when certification forms, but not application forms, are appropriate for verification. As a result of those comments, FHFA has revised § 1261.6(f) to set forth its requirements more clearly. The final rule separately sets forth the requirements with respect to member directors and independent directors. The final rule also provides for a two-week period after a Bank delivers application forms to FHFA before it may resume the next step in the election process, which previously was located in § 1261.7(a) of the interim rule. The final rule provides that the two-week period is to allow FHFA an opportunity to comment on nominees. FHFA expects that it will not comment in all cases, but if it does, the final rule gives the Bank's board of directors discretion to reopen the nominations and consider other candidates in light of those comments. FHFA believes that a two-week interval to allow for review and potential comments by FHFA should not disrupt the nomination process.

G. Section 1261.7 Election Process

Section 1261.7 of the interim rule addressed how the Banks must conduct the elections process, from the distribution of ballots to the members through the reporting of the election results to their members and FHFA. Apart from the revisions described below, the final rule generally retains the substance of the provisions of the interim rule.

Section 1261.7(a) of the interim rule addressed the content and distribution of the ballots, and included a provision regarding the two-week period for FHFA review of nominee application forms. As discussed above, FHFA received comments about how the two-week period for FHFA comments should work and has addressed that issue by relocating the provisions relating to the review period to § 1261.6(f) of the final rule. The final rule includes no other substantive changes to paragraphs (a) or (b) of this provision. Section 1261.7(c) of the interim rule addressed how a Bank is to proceed if the number of nominees for member directorships is equal to or less than the number of directorships to fill in an election. That provision directs a Bank to declare elected all eligible nominees, without holding an election, and provides that any unfilled directorship shall be deemed vacant on January 1 of the following year.

Several Banks commented that § 1261.7(c) should be revised to allow a Bank's board of directors to elect

someone to fill the vacancy as soon as the nomination process is closed because after that date the seat cannot be filled through election by the members and will become vacant on the following January 1. The final rule does not include the requested changes to § 1261.7(c) because FHFA has incorporated other revisions into § 1261.14(a) of the final rule, relating to vacancies generally, that would allow a Bank's board of directors to fill an anticipated vacancy under certain circumstances, which could be applied if a vacancy were to occur as a result of no persons being nominated for a member directorship. FHFA, therefore, has not changed § 1261.7(c) of the interim rule, except to provide some clarifying language.

The final rule has adopted without change § 1261.7(d) and (e) of the interim rule, which deal with the voting process and the counting of ballots, respectively. One Bank commented that the final rule should allow members the option of voting "no" for any independent director nominee, which would serve as an alternative to the requirement in § 1261.7(f) that a nominee for an independent directorship must receive 20 percent of the vote. FHFA has not adopted this suggestion, in light of the changes to the 20 percent requirement made in § 1261.7(f), discussed immediately below.

Section 1261.7(f) of the interim rule addressed the manner in which a Bank is to declare the results of its elections for the member and independent directorships and included a requirement that any nominee for an independent directorship must receive at least 20 percent of the number of votes eligible to be cast in order to be declared elected. FHFA included the 20 percent vote requirement in the interim rule as a means of ensuring that the members would maintain a meaningful role in the selection of the independent directors, and that the nomination process would not result in the board of directors effectively choosing the independent directors. FHFA also requested comment on whether the final rule should require that each Bank nominate more than one person for each independent directorship, as an alternative means of ensuring that the members retain a meaningful role in the process.

All of the commenting Banks and one trade association requested that the 20 percent vote requirement for independent directors be removed or reduced to a more manageable number, such as 10 percent. Some expressed concern about being able to obtain a minimum of 20 percent of the eligible

votes on the election of individuals who are not affiliated with the voting members, and others commented that the rule will have the effect of reducing the number of nominees in order to increase the likelihood that those nominated will receive 20 percent of the vote.

After reviewing the comments, FHFA has decided to modify, rather than to eliminate, the requirement that an independent director must receive at least 20 percent of the eligible votes in order to be elected. Accordingly, the final rule provides that if a Bank's board of directors nominates only one individual for each directorship, receipt of 20 percent of the eligible votes by that individual is the minimum level at which one could deem the members to have endorsed the board's choice, especially given the need for only a plurality of the votes. If, however, a Bank's board of directors nominates more persons for the type of independent directorship to be filled, either a public interest or other independent directorship, than there are directorships of that type to be filled in the election, then the final rule would allow the person with the highest number of votes to be declared elected, even if the total received was less than 20 percent of the votes eligible to be cast in the election. FHFA believes this change strikes an appropriate balance between allowing the boards of the Banks to identify and nominate individuals who are well qualified and ensuring that the members have a meaningful role in determining whether the nominees are to become independent directors.

Section 1261.7(g) of the interim rule required each Bank promptly to report the results of each election to its members, each nominee, and FHFA. The report must contain the number of voting members, the number of votes cast, and the number of votes received by each nominee, as well as other information specified therein. Although the interim rule did not require the submission of the total number of eligible votes that may be cast, FHFA needs this information to verify that the 20 percent vote, if required, has been met, and thus added a requirement to the final rule to provide this information.

If a Bank cannot fill an independent directorship because no nominee has received 20 percent of the eligible votes, § 1261.7(h) of the interim rule required a Bank to continue the election for such directorship by starting again with consideration of nominees by its board of directors and going through all the steps thereafter. The Bank must

continue repeated election procedures until the directorship is filled by a vote of 20 percent of the votes eligible to be cast. In their comments, the Banks requested more specific guidance on what steps should be taken in carrying out the repeated elections, and requested that they be allowed to shorten the amount of time required for various stages of the process. The Banks also suggested that a nominee's failure to receive 20 percent of the vote may have been caused by any number of factors, ranging from having too many nominees to voter apathy, and that the final rule should not prohibit their boards from renominating some or all of the original nominees.

After considering the comments, FHFA is revising § 1261.7(h) in the final rule to state more clearly what the Banks must do, starting with making nominations by the board of directors. The final rule allows the Banks to nominate any of the original nominees, as well as to shorten the voting period, provided they provide what they consider to be a reasonable voting period. However, because the original vote will have failed, the final rule requires the Banks to withhold placing names on ballots until FHFA has had an opportunity to approve them, without regard to any two-week time period.

H. Section 1261.9 Actions Affecting Director Elections

Section 1261.9 of the interim rule pertained to actions that representatives of a Bank may take in connection with the nomination and election of directors. Paragraphs (a) and (c) of the final rule are unchanged from the interim rule, apart from a wording change in paragraph (c).

Section 1261.9(b) of the interim rule generally authorized a Bank and its representatives to support any nominee for election to an independent directorship, but allowed support for a nominee to a member directorship only if the persons are acting in their personal capacity and, as to Bank directors only, do not purport to represent the views of the Bank.

Seven Banks requested that FHFA revise paragraph (b)(1) (which allowed Bank representatives to support member director nominees only when acting in their personal capacity and if not purporting to represent the views of the Bank) so that it would apply to all directorships, not just member directorships. Those commenters also asked that the prohibition on purporting to represent the views of the Bank be applied to all agents of the Bank, not just to the directors. The effect of that change would be to prohibit all such

agents from stating that their views on any candidate are the same as the Bank's views. Two other Banks advocated allowing directors to state that their views were the same as those of the Bank, so long as the statements were true.

Because all candidates for member directorships are nominated by the members, not the Banks, FHFA believes that a Bank should not take a position favoring any particular nominee for a member directorship. Revising the rule to allow an agent of a Bank to represent that his or her personal views are the same as those of the Bank could undermine that policy, and FHFA declines to broaden the rule in that respect. The interim rule had allowed certain representatives of a Bank, when acting in their personal capacity, to support member director nominees, but prohibited only Bank directors from purporting to represent the views of the Bank. Section 1261.9(b)(1) of the final rule corrects that discrepancy by providing that none of the listed representatives shall purport to represent the views of the Bank when they act in their personal capacity to support a nominee for any Bank directorship. FHFA believes that differences do exist in how member directors and independent directors are chosen and that those differences justify separate rules on support and nomination, so § 1261.9(b)(1) of the interim rule has not been expanded to cover actions with respect to independent directors.

Section 1261.9(b)(2) of the interim rule governs what is further allowed in one situation: After an individual has been nominated for an independent directorship. In this situation, individuals who are directors, officers, attorneys, employees or other agents of a Bank, as well as the Bank's board and Advisory Council may support those nominees, and the section does not prohibit supporters from stating that their views represent the views of the Bank. Some Banks request that the final rule specifically authorize members of the Advisory Council to support independent directorship nominees, since the interim rule specifically authorizes members of a Bank's board of directors to do so. FHFA has modified the final rule to clarify that members of the Advisory Council are included among those who may support a nominee for an independent directorship. Other clarifying changes also have been made to § 1261.9(b)(2) of the interim rule.

I. Section 1261.10 Independent Director Conflict of Interests

Section 1261.10(a) of the interim rule prohibits an independent director from serving as an officer of any Bank and from serving as a director, officer, or employee of any member of the Bank on whose board the director sits, or of any recipient of any advances from that Bank. It also requires any independent director or nominee to disclose such interests.

One Bank and one trade association commented that directors, officers and employees of nonmember institutions that are recipients of advances should not be disqualified from becoming independent directors solely because of that affiliation. They believe that such recipients of advances are treated unfairly by such a rule because their officers and directors also are not eligible to become member directors. However, the provision of the interim rule that prompted the comments simply reiterates a statutory prohibition, which FHFA cannot change. Accordingly, § 1261.10(a) has not been changed in the final rule, other than two instances in which the word “shall” has replaced “may”.

Section 1261.10(b) of the interim rule addressed situations in which a person's service with a holding company having subsidiaries that are members of, or that receive advances from, the Bank on whose board the independent director serves would be deemed to be service with a member. The interim rule included a reference to institutions that were members of, or received advances from, “any” Bank, which would have included institutions that were members of other Banks. In order to clarify the intended reach of this provision, the final rule has added language limiting the reach of this provision to institutions that are member of, or that receive advances from, the Bank at which the independent director serves.

J. Section 1261.11 Conflict-of-Interests Policy for Bank Directors

Section 1261.11 of the interim rule required each Bank to adopt a conflict-of-interests policy for the members of its board of directors, and set forth the minimum contents of the policy. The final rule adopts these provisions as they were stated in the interim rule, with the exception of the revisions noted below. Section 1261.11(a) specifies six specific minimum requirements that each Bank's conflict-of-interests policy must address, and allows a Bank to adopt a more expansive policy to address other issues if the Bank's board of directors deems it

appropriate to do so. Some commenters were unclear about what FHFA intends in one area, so the final rule modifies the fifth requirement of paragraph (a), relating to internal controls, to provide that the conflict-of-interests policy must require Bank management to establish internal controls with respect to disclosure and resolution of conflicts of interests.

Section 1261.11(d) of the interim rule prohibits the acceptance of gifts that are given with the intent to influence the director's actions as a member of the board of directors, or would have that appearance, and requires directors to discourage their family members from accepting gifts given with the intent of influencing the actions of the directors. The commenting Banks believed that the interim rule was too restrictive and argued that directors should be allowed to accept de minimis gifts and gifts that directors of insured depository institutions may accept.

The interim rule was intended to preclude gifts that are given with the intent to influence the actions of a director, as well as those that a director reasonably believes to have been given with that intent and those that have the appearance of being given with that intent. FHFA believes that any gift that is intended to influence a director's official actions is inappropriate and that it is not possible to eliminate the “corrupt intent” of the person giving the gift by establishing a de minimis exception. For that reason, § 1261.11(d) of the final rule has not adopted the comments that sought to relax the scope of the rule. Nonetheless, FHFA recognizes that at times it is customary for persons in business relationships to give insubstantial gifts without any intent to influence the business decisions of the recipients of those gifts. FHFA expects that such insubstantial gifts could not reasonably be viewed by a director as having been given with the intent to influence, nor would an objective person view the gift as having been given for the purpose of influencing business decisions, and it has included a provision to that effect in the final rule. FHFA expects that the Banks will include in their codes of conduct provisions governing the views of their board on what constitutes an insubstantial gift and how to determine whether any gift violates the provisions of the final rule.

K. Section 1261.12 Reporting Requirements for Bank Directors

Section 1261.12(a) of the interim rule required each sitting director to execute an annual eligibility certification form applicable to the directorship held by

the director. Section 1261.12(b) of the interim rule requires any sitting director of a Bank who believes or has reason to believe that she or he no longer meets the statutory or regulatory eligibility requirements to notify promptly both the Bank and FHFA. Likewise, any Bank that believes or has reason to believe that any of its directors no longer meets the eligibility requirements must notify FHFA promptly. The final rule does not change the interim rule in any substantive manner.

L. Section 1261.13 Ineligible Bank Directors

Section 1261.13 of the interim rule implemented section 7(f) of the Bank Act, which provides that a director's failure to meet any statutory requirements causes the directorship to become vacant immediately. The section provides that a vacancy occurs whenever FHFA or a Bank determines that the director has failed to meet any eligibility requirement set forth in the Bank Act or in part 1261 or has failed to comply with the reporting requirements in § 1261.12. As discussed above in section D. *Director Eligibility*, a Bank director must satisfy certain eligibility requirements as well as other qualifications in order to remain in office. Section 1261.13 is intended to encompass all such requirements, so the final rule makes this clarifying change.

M. Section 1261.14 Vacant Bank Directorships

Section 1261.14 of the interim rule implemented the requirements of section 7(f) of the Bank Act relating to how vacancies in Bank directorships are to be filled. Paragraph (a) of that provision stated that the board of the Bank must fill such a vacancy “as soon as practicable after any vacancy occurs”. Banks commenting on this provision asked that they also be allowed to elect a director to fill an anticipated vacancy that they know will occur, such as when a director resigns with an effective date some months into the future. FHFA believes that section 7(f) of the Bank Act, which uses the phrase “[i]n the event of a vacancy” to preface when a Bank can act, allows sufficient latitude for a Bank to fill an anticipated vacancy under certain circumstances. FHFA further believes that Banks could benefit from selecting persons to fill anticipated vacancies, such as by eliminating gaps in service that might otherwise arise and by allowing a new director more time to prepare for service prior to participating in his or her first board meeting. Section 1261.14(a) of the final rule, therefore, has been modified to allow a Bank to select a replacement director prior to the

occurrence of the vacancy, provided that it does so no earlier than the date of the board meeting that is scheduled to occur immediately prior to the date of the anticipated vacancy. The final rule also provides that in any event the board of a Bank must act as soon as practicable after a vacancy actually occurs.

Section 1261.14(b) of the interim rule required the board of directors to fill any vacancy with an individual who meets the eligibility requirements and the qualifications that applied to the predecessor director, except in the case of vacant public interest directorship where the Bank continues to have at least two other sitting public interest directors. In that case, the board of directors could fill the vacancy with an individual meeting the eligibility and qualification requirements for any independent directorship. Some Banks asked how they should apply the requirement that the replacement director satisfy the eligibility and qualification requirements that applied to the predecessor director if the predecessor was an appointed director who does not satisfy the HERA qualifications for independent directors. FHFA believes that the Bank Act distinguishes between eligibility requirements and qualifications for the independent directors and that a replacement director need only satisfy the eligibility requirements that applied to the predecessor, *i.e.*, citizenship and residency in the district, and not the other qualifications, as to which the replacement director may meet the requirements of the Bank Act and the rule in the same manner as any independent director. Section 1261.14(b) of the interim rule did not make this distinction, which the final rule does, albeit in § 1261.14(a)(3).

As to member directorships, some Banks expressed concern that the interim rule would limit them to filling a vacancy with an individual who is an officer or director of an institution that was a member of the Bank as of the record date preceding the election in which the predecessor director was elected. The commenters suggested that the final rule allow them to elect a person that is an officer or director of an institution that is a member of the Bank as of the date that the board votes to fill the vacancy. FHFA believes that there is merit in this suggestion and that revising the final rule in this manner would be consistent with the applicable provisions of the Bank Act. Section 1261.14(a)(3) of the final rule provides that a successor member director must satisfy the eligibility requirements and the other qualifications of the

predecessor director as of the date that the board acts and that a successor independent director must satisfy the eligibility requirements for independent directors and have at least one of the qualifications for an independent director. Thus, a Bank may fill a vacant member directorship with an individual who is a citizen of the United States and is an officer or director of a current member that is located in the State to which the Director has allocated the directorship.

The comments from the Banks also indicate some confusion about how to meet the requirements in § 1261.14(b) to verify eligibility for vacant directorships to be filled by the board of directors of a Bank. FHFA intends that the Banks verify eligibility for member directorships in the same manner as they verify eligibility of nominees for member directorships under § 1261.6(c) of the interim rule, which is by using the eligibility certification form prescribed by FHFA. FHFA intends that both eligibility and qualification for independent directorships be verified by using the independent director application form prescribed by FHFA. In addition, FHFA intends that the Banks deliver to FHFA, for its review, the application forms of all individuals that their boards will consider to fill independent directorship vacancies. The final rule has been revised to more clearly set forth these requirements.

N. Section 1261.16 Temporary Rule for 2008 Election of Directors

This temporary director election schedule ceased to be effective after December 31, 2008. The final rule reserves this section for future use.

III. Paperwork Reduction Act

The final rule will have no substantive effect on any collection of information covered by the Paperwork Reduction Act of 1995 (PRA). *See* 44 U.S.C. 3501 *et seq.* Therefore, FHFA has not submitted this final rule to the Office of Management and Budget (OMB) for review. The Finance Board used application and certification forms to collect information on prospective and incumbent directors, and those forms had been assigned control number 3069-0002 by the OMB. FHFA will direct the Banks to use a revised version of those forms, which revised version will not modify materially the approved information collection, pending the assignment by OMB of control numbers to the revised forms. FHFA will submit only the revised forms to OMB for review under the PRA.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (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 the final rule under the Regulatory Flexibility Act. FHFA certifies that the final rule 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 Banks, which are not small entities for the purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Parts 915 and 1261

Banks, Banking, Conflicts of interest, Elections, Ethical conduct, Federal home loan banks, Financial disclosure, Reporting and recordkeeping requirements.

■ Accordingly, the interim final rule removing part 915 of Title 12 CFR chapter IX and adding part 1261 of Title 12 CFR chapter XII, published at 73 FR 55710 on September 26, 2008, is adopted as a final rule, with the following changes:

PART 1261—FEDERAL HOME LOAN BANK DIRECTORS

■ 1. The authority citation for 12 CFR part 1261 is revised to read as follows:

Authority: 12 U.S.C. 1426, 1427, 1432, 4511 and 4526.

■ 2. The heading for part 1261 is revised to read as set forth above.

■ 3. Designate §§ 1261.1 through 1261.16 as Subpart A and add a new Subpart A heading above § 1261.1 to read as follows:

Subpart A—Federal Home Loan Bank Boards of Directors: Eligibility and Elections

■ 4. Subpart B is added after § 1261.16 and reserved to read as follows:

Subpart B—Federal Home Loan Bank Directors' Compensation and Expenses [Reserved]

■ 5. Subpart C is added after Subpart B and reserved to read as follows:

Subpart C—[Reserved]

■ 6. The Table of Contents is revised to read as follows:

Subpart A—Federal Home Loan Bank Boards of Directors: Eligibility and Elections

Sec.

- 1261.1 Definitions.
- 1261.2 General provisions.
- 1261.3 Designation of member directorships.
- 1261.4 Director eligibility.
- 1261.5 Determination of member votes.
- 1261.6 Nominations for member and independent directorships.
- 1261.7 Election process.
- 1261.8 [Reserved].
- 1261.9 Actions affecting director elections.
- 1261.10 Independent director conflict of interests.
- 1261.11 Conflict-of-interests policy for Bank directors.
- 1261.12 Reporting requirements for Bank directors.
- 1261.13 Ineligible Bank directors.
- 1261.14 Vacant Bank directorships.
- 1261.15 Minimum number of member directorships.
- 1261.16 [Reserved].

Subpart B—Federal Home Loan Bank Directors' Compensation and Expenses [Reserved]**Subpart C—[Reserved]**

■ 7. Amend § 1261.1 by revising the introductory text and the definitions of “Director”, “FHFA”, “FHFA ID number”, “Independent directorship”, “Member directorship”, “Method of equal proportions”, “Public interest director”, “Stock directorship”, and “Voting State” to read as follows:

§ 1261.1 Definitions.

As used in this Subpart A:

* * * * *

Director means the Director of the Federal Housing Finance Agency.

FHFA means Federal Housing Finance Agency.

FHFA ID number means the number assigned to a member by FHFA and used by FHFA and the Banks to identify a particular member.

* * * * *

Independent directorship means a directorship, as defined by section 7(a)(4)(A) of the Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members at large by an individual having the qualifications specified by section 7(a)(3)(B)(i) or (ii), 12 U.S.C. 1427(a)(3)(B)(i) or (ii).

Member directorship means a directorship, as defined by section 7(a)(4)(A) of the Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members located in a particular State by an individual who is

an officer or director of a member located in that State, and includes guaranteed directorships and stock directorships.

Method of equal proportions means the mathematical formula used by FHFA to allocate member directorships among the States in a Bank's district based on the relative amounts of Bank stock required to be held as of the record date by members located in each State.

Public interest director means an individual serving in a public interest directorship.

* * * * *

Stock directorship means a member directorship that is designated by FHFA as representing the members located in a particular voting State based on the amount of Bank stock required to be held by the members in that State as of the record date, other than a guaranteed directorship.

Voting State means the District of Columbia, Puerto Rico, or the State of the United States in which a member's principal place of business, as determined in accordance with 12 CFR part 925, or any successor provision, is located as of the record date. The voting State of a member with a principal place of business located in the U.S. Virgin Islands as of the record date is Puerto Rico, and the voting State of a member with a principal place of business located in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands as of the record date is Hawaii.

■ 8. Amend § 1261.2 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1261.2 General provisions.

(a) *Board size and composition.* Annually, the FHFA Director will determine the size of the board of directors for each Bank and will designate at least a majority, but no more than 60 percent, of the directorships as member directorships and the remainder as independent directorships. Annually, the board of directors of each Bank shall determine how many, if any, of the independent directorships with terms beginning the following January 1 shall be public interest directorships, ensuring that at all times the Bank will have at least two public interest independent directorships.

(b) *Term of directorships.* The term of office of each directorship commencing on or after January 1, 2009 shall be four years, except as adjusted pursuant to section 7(d) of the Act (12 U.S.C. 1427(d)) to achieve a staggered board,

and shall commence on January 1 of the calendar year so designated by FHFA.

(c) *Annual elections.* Each Bank annually shall conduct an election the purpose of which is to fill all directorships designated by FHFA as commencing on January 1 of the calendar year immediately following the year in which such election is commenced. Subject to the provisions of the Act and in accordance with the requirements of this subpart, the disinterested members of the board of directors of each Bank, or a committee of disinterested directors, shall administer and conduct the annual election of directors. In so doing, the disinterested directors may use Bank staff or independent contractors to perform ministerial and administrative functions concerning the elections process.

* * * * *

■ 9. Revise § 1261.3 to read as follows:

§ 1261.3 Designation of member directorships.

(a) *Determination of voting stock.* (1) On or before April 10 of each year, each Bank shall deliver to FHFA a capital stock report that indicates, as of the record date, the number of members located in each voting State in the Bank's district, the number of shares of Bank stock that each member (identified by its FHFA ID number) was required to hold, and the number of shares of Bank stock that all members located in each voting State were required to hold. If a Bank has issued more than one class of stock, it shall report the total shares of stock of all classes required to be held by the members. The Bank shall certify to FHFA that, to the best of its knowledge, the information provided in the capital stock report is accurate and complete, and that it has notified each member of its minimum capital stock holding requirement as of the record date.

(2) If a Bank's capital plan was not in effect as of the record date, the number of shares of Bank stock that any member was required to hold as of the record date shall be determined in accordance with 12 CFR 925.20 and 925.22, or any successor provisions. If a Bank's capital plan was in effect as of the record date, the number of shares of Bank stock that any member was required to hold as of the record date shall be determined in accordance with the minimum investment established by the capital plan for that Bank; however, for any member whose Bank stock is less than the minimum investment during a transition period, the amount of Bank stock to be reported shall be the number

of shares of Bank stock actually owned by the member as of the record date.

(b) *Designation of member directorships as stock directorships.* Using the method of equal proportions, the Director annually will conduct a designation of member directorships for each Bank based on the number of shares of Bank stock required to be held by the members in each State as of December 31 of the preceding calendar year. If a Bank has issued more than one class of stock, the Director will designate the directorships for each State in that Bank district based on the combined number of shares required to be held by the members in that State. For purposes of conducting the designation, if a Bank's capital plan was not in effect on the immediately preceding December 31, the number of shares of Bank stock required to be held by members as of that date shall be determined in accordance with 12 CFR 925.20 and 925.22, or any successor provisions. If a Bank's capital plan was in effect on the immediately preceding December 31, the number of shares of Bank stock required to be held by members as of that date shall be determined in accordance with the minimum investment established by such capital plan; however, for any members whose Bank stock is less than the minimum investment during a transition period, the amount of stock to be used in the designation of directorships shall be the number of shares of Bank stock actually owned by those members as of that December 31. In all cases, the Director will designate the directorships by using the information provided by each Bank in its capital stock report required by paragraph (a)(1) of this section.

(c) *Allocation of directorships.* The member directorships designated by the Director will be allocated among the States by the Director in accordance with section 7(b) and (c) of the Act.

(d) *Notification.* On or before June 1 of each year, FHFA will notify each Bank in writing of the total number of directorships established for the Bank and the number of member directorships designated as representing the members in each voting State in the Bank district. If the annual designation of member directorships results in an existing directorship being redesignated as representing members in a different State, the directorship shall be deemed to become vacant as of December 31 of that year, and the notice shall state that the directorship will be filled by the board of directors of the Bank with an eligible individual who is an officer or director of a member located in the newly designated State.

■ 10. Amend § 1261.4 as follows:

- a. Revise paragraph (a)(2);
- b. Redesignate paragraphs (b) through (d) as paragraphs (c) through (e);
- c. Add a new paragraph (b);
- d. Revise newly redesignated paragraph (d)(2); and
- e. Revise newly redesignated paragraph (e).

§ 1261.4 Director eligibility.

(a) * * *

(2) An officer or director of a member that is located in the district in which the Bank is located and that meets all minimum capital requirements established by its appropriate Federal banking agency or appropriate State regulator. In the case of a director elected by the members, the institution of which the director is an officer or director must have been a member as of the record date. In the case of a director elected by a Bank's board of directors to fill a vacancy, the institution of which the director is an officer or director must be a member at the time the board acts.

(b) *State designation for member directors.* Each member director, and each nominee to a member directorship, shall be an officer or director of a member that is located in the State to which the Director has allocated such directorship under § 1261.3(c).

* * * * *

(d) * * *

(2) For purposes of applying the term limit provision of section 7(d) of the Act (12 U.S.C. 1427(d)):

- (i) A term of office that is adjusted after July 30, 2008 to a period of fewer than four years shall not be deemed to be a full term;
- (ii) Any member director's election and service to a directorship with a three year term of office prior to July 30, 2008 shall be deemed to be a full term;
- (iii) Any three-year term of office that ends immediately before a term of office that is adjusted after July 30, 2008 to a period of fewer than four years, and any term of office commencing immediately following such adjusted term of office, shall constitute consecutive full terms of office; and

(iv) Any period of time served by a director who has been elected by the board of directors to fill a vacancy shall not be deemed to constitute a full term.

(e) *Loss of eligibility.* (1) A director shall become ineligible to remain in office if, during his or her term of office, the directorship to which he or she has been elected is eliminated or, with respect to a member directorship, is redesignated by FHFA as representing members located in another State, in accordance with § 1261.3(c). The incumbent director shall become

ineligible after the close of business on December 31 of the year in which the directorship is redesignated or eliminated. Any directorship ceasing through elimination or redesignation shall not be deemed to be a full-term directorship for purposes of this section.

(2) In the case of a redesignation to another State, the redesignated directorship shall be filled by a majority vote of the remaining Bank directors, in accordance with § 1261.14(a).

■ 11. Amend § 1261.5 by revising paragraph (b) to read as follows:

§ 1261.5 Determination of member votes.

* * * * *

(b) *Number of votes.* For each member directorship and each independent directorship that is to be filled in an election, each member shall be entitled to cast one vote for each share of Bank stock that the member was required to hold as of the record date. Notwithstanding the preceding sentence, the number of votes that any member may cast for any one directorship shall not exceed the average number of shares of Bank stock required to be held as of the record date by all members located in the same State as of the record date. If a Bank has issued more than one class of stock, it shall calculate the average number of shares separately for each class of stock, using the total number of members in a State as the denominator, and shall apply those limits separately in determining the maximum number of votes that any member owning that class of stock may cast in the election. If a Bank's capital plan was not in effect as of the record date, the number of shares of Bank stock that a member was required to hold as of the record date shall be determined in accordance with 12 CFR 925.20 and 925.22, or any successor provisions. If a Bank's capital plan was in effect as of the record date, the number of shares of Bank stock that a member was required to hold as of the record date shall be determined in accordance with the minimum investment requirement established by the Bank's capital plan; however, for any member whose Bank stock is less than the minimum investment during a transition period, the amount of Bank stock to be used shall be the number of shares of Bank stock actually owned by the member as of the record date.

* * * * *

■ 12. Amend § 1261.6 by revising paragraphs (a)(5), (c), (d)(1), (d)(2), (e), and (f) to read as follows:

§ 1261.6 Nominations for member and independent directorships.

(a) * * *

(5) If a member directorship is to be filled by members in a State, a nominating certificate for those members.

* * * * *

(c) *Accepting member directorship nominations.* Promptly after receipt of any nominating certificate, a Bank shall notify in writing any individual nominated for a member directorship. An individual may accept the nomination only by delivering to the Bank, prior to a deadline established by the Bank and set forth in its notice, an executed director eligibility certification form prescribed by FHFA. A Bank shall allow each nominee at least 30 calendar days after the date the Bank delivered the notice of nomination within which to deliver the executed form. A nominee may decline the nomination by so advising the Bank in writing, or by failing to deliver a properly executed director eligibility certification form prior to the deadline. Each Bank shall retain all information received under this paragraph for at least two years after the date of the election.

(d) *Independent directorship nominations.* (1) Any individual who seeks to be an independent director of the board of directors of a Bank may deliver to the Bank, on or before the deadline set by the Bank for delivery of nominating certificates, an executed independent director application form prescribed by FHFA that demonstrates that the individual both is eligible and has either of the following qualifications:

(i) More than four years experience representing consumer or community interests in banking services, credit needs, housing, or consumer financial protections; or

(ii) Knowledge of or experience in one or more of the areas set forth in paragraph (e) of this section.

(2) Any other interested party may recommend to the Bank that it consider a particular individual as a nominee for an independent directorship, but the Bank shall not nominate any individual unless the individual has delivered to the Bank, on or before the date the Bank has set for delivery of nominating certificates, an executed independent director application form prescribed by FHFA. The application form prescribed by FHFA will provide a means by which an individual can indicate an intent to be considered for a public interest directorship. The board of directors of the Bank may consider any individual for any independent directorship nomination, provided it has determined that the individual is eligible and qualified, but the board shall nominate

for a public interest directorship only an individual who indicates on the application form a desire to be considered for a public interest directorship. The board of directors of the Bank shall consult with the Bank's Advisory Council before nominating any individual for any independent directorship. Each Bank shall include in its bylaws the procedures it intends to use for the nomination and election of the independent directors, and shall retain all information received under this paragraph for at least two years after the date of the election.

* * * * *

(e) *Independent director qualifications.* (1) Each independent director and each nominee for an independent directorship, other than a public interest directorship, shall have experience in, or knowledge of, one or more of the following areas: auditing and accounting, derivatives, financial management, organizational management, project development, risk management practices, and the law. Before nominating any individual for an independent directorship, other than a public interest directorship, the board of directors of a Bank shall determine that such knowledge or experience of the nominee is commensurate with that needed to oversee a financial institution with a size and complexity that is comparable to that of the Bank.

(2) Each public interest independent director and each nominee for a public interest directorship shall have more than four years experience representing consumer or community interests in banking services, credit needs, housing or consumer financial protection.

(f) *Eligibility verification.* Using the information provided on member director eligibility forms prescribed by FHFA, each Bank shall verify that each nominee for each member directorship meets all the eligibility requirements for such directorship. Using the information provided on independent director application forms prescribed by FHFA, each Bank shall verify that each nominee for each public interest independent directorship and each other independent directorship meets all eligibility requirements and any knowledge or experience qualifications for such directorship, as set forth in the Act and this subpart. Before announcing any independent director nominee, the Bank shall deliver to FHFA, for the Director's review, a copy of the independent director application forms executed by the individuals nominated for independent directorships. If within two weeks of such delivery FHFA provides comments to the Bank on any

independent director nominee, the board of directors of the Bank shall consider the FHFA's comments in determining whether to proceed with those nominees or to reopen the nomination.

■ 13. Amend § 1261.7 by revising paragraphs (a) introductory text, (a)(1)(ii), (a)(1)(v), (c), (f), (g), and (h) to read as follows:

§ 1261.7 Election process.

(a) *Ballots.* Promptly after fulfilling the requirements of § 1261.6(f), each Bank shall prepare and deliver a ballot to each member that was a member as of the record date. The Bank shall include with each ballot a closing date for the Bank's receipt of voted ballots, which date shall be no earlier than 30 calendar days after the date such ballot is delivered to the member.

(1) * * *

(ii) An alphabetical listing of the names of each nominee for a public interest independent directorship and a brief description of each nominee's experience representing consumer and community interests;

* * * * *

(v) A confidentiality statement prohibiting the Bank from disclosing how any member voted.

* * * * *

(c) *Lack of member directorship nominees.* If, for any voting State, the number of nominees for the member directorships for that State is equal to or fewer than the number of such directorships to be filled in that year's election, the Bank shall deliver a notice to the members in the affected voting State (in lieu of including any member directorship nominees on the ballot for that State) that such nominees shall be deemed elected without further action, due to an insufficient number of nominees to warrant balloting. Thereafter, the Bank shall declare elected all such eligible nominees and in doing so shall designate particular nominees to guaranteed directorships or stock directorships, respectively, if necessary. The nominees declared elected shall be included as directors-elect in the report of election required under paragraph (g) of this section. Any member directorship that is not filled due to a lack of nominees shall be deemed vacant as of January 1 of the following year and shall be filled by the Bank's board of directors in accordance with § 1261.14(a).

* * * * *

(f) *Declaring results.* (1) *For member directorships.* The Bank shall declare elected the nominee receiving the highest number of votes. If more than

one member directorship is to be filled for a particular State, the Bank shall declare elected each successive nominee receiving the next highest number of votes until all such open directorships are filled.

(2) *For independent directorships.* (i) The bank shall tabulate separately the votes received for public interest independent director nominees and those received for other independent director nominees, in each case in accordance with paragraph (f)(2)(ii) of this section.

(ii) If the number of nominees exceeds the number of directorships to be filled, the Bank shall declare elected the nominee receiving the highest number of votes. If more than one directorship is to be filled, the Bank shall declare elected each successive nominee receiving the next highest number of votes for such directorship until all such open directorships are filled.

(iii) If the number of nominees is no more than the number of directorships to be filled, the Bank shall declare elected each nominee receiving at least 20 percent of the number of votes eligible to be cast in the election. If any directorship is not filled due to any nominee's failure to receive at least 20 percent of the votes eligible to be cast, the Bank shall continue the election process for that directorship under the procedures in paragraph (h) of this section.

(3) *Tie votes.* In the event of a tie for the last available directorship, the disinterested incumbent members of the board of directors of the Bank, by a majority vote, shall declare elected one of the nominees for whom the number of votes cast was tied.

(4) *Eligibility.* A Bank shall not declare elected a nominee that it has reason to know is ineligible to serve, nor shall it seat a director-elect that it has reason to know is ineligible to serve.

(5) *Record retention.* The Bank shall retain all ballots it receives for at least two years after the date of the election, and shall not disclose how any member voted.

(g) *Report of election.* Promptly following the election, each Bank shall deliver a notice to its members, to each nominee, and to FHFA that contains the following information:

(1) For each member directorship, the name of the director-elect, the name and location of the member at which he or she serves, his or her title or position at the member, the voting State represented, and the expiration date of the term of office;

(2) For each independent directorship, the name of the director-elect, whether the director-elect will fill

a public interest directorship and, if so, the consumer or community interest represented by such directorship, any qualifications under § 1261.6(e), and the expiration date of the term of office;

(3) For member directorships, the total number of eligible votes, the number of members voting in the election, and the total number of votes cast for each nominee, which shall be reported by State; and

(4) For independent directorships, the total number of eligible votes, the number of members voting in the election, and the total number of votes cast for each nominee, which shall be reported for the district at large.

(h) *Failure to fill all independent directorships.* If any independent directorship is not filled due to the failure of any nominee to receive at least 20 percent of the eligible vote, the Bank shall continue the election process for that directorship under the following procedures:

(1) The Bank's board of directors, after again consulting with the Bank's Advisory Council, shall nominate at least as many individuals as there are independent directorships to be filled. It may nominate individuals who failed to be elected in the initial vote. The Bank thereafter shall deliver to FHFA a copy of the independent director application form executed by each nominee.

(2) The Bank then shall follow the provisions in this section that are applicable to the election process for independent directors, except for the following:

(i) The Bank shall not place the name of any nominee on a ballot without prior approval of FHFA; and

(ii) The Bank may adopt a closing date that is earlier than 30 calendar days after delivery of the ballots to the eligible voting members, provided the Bank determines that an earlier closing date provides a reasonable amount of time to vote the ballots.

■ 14. Amend § 1261.9 by revising the section heading and paragraphs (b) and (c) to read as follows:

§ 1261.9 Actions affecting director elections.

* * * * *

(b) *Support for nomination or election.* (1) A Bank director, officer, attorney, employee, or agent, acting in his or her personal capacity, may support the nomination or election of any individual for a member directorship, provided that no such individual shall purport to represent the views of the Bank or its board of directors in doing so.

(2) A Bank director, officer, attorney, employee or agent and the board of

directors and Advisory Council (including members of the Council) of a Bank may support the candidacy of any individual nominated by the board of directors for election to an independent directorship.

(c) *Prohibition.* Except as provided in paragraphs (a) and (b) of this section, no director, officer, attorney, employee, or agent of a Bank shall:

(1) Communicate in any manner that a director, officer, attorney, employee, or agent of a Bank, directly or indirectly, supports or opposes the nomination or election of a particular individual for a directorship; or

(2) Take any other action to influence the voting with respect to any particular individual.

■ 15. Amend § 1261.10 by revising paragraphs (a) and (b) to read as follows:

§ 1261.10 Independent director conflict of interests.

(a) *Employment interests.* During any independent director's term of service, such director shall not serve as an officer, employee, or director of any member of the Bank on whose board the individual sits, or of any recipient of advances from such Bank, and shall not serve as an officer of any Bank. An independent director or nominee for any independent directorship shall disclose all such interests to the Bank on whose board of directors the individual serves or which is considering the individual for nomination to its board of directors.

(b) *Holding companies.* Service as an officer, employee, or director of a holding company that controls one or more members of, or one or more recipients of advances from, the Bank on whose board an independent director serves is not deemed to be service as an officer, employee or director of a member or recipient of advances if the assets of all such members or all such recipients of advances constitute less than 35 percent of the assets of the holding company, on a consolidated basis.

* * * * *

■ 16. Amend § 1261.11 by revising the section heading and paragraphs (a) introductory text, (a)(4), (a)(5), (a)(6), and (d) to read as follows:

§ 1261.11 Conflict-of-interests policy for Bank directors.

(a) *Adoption of conflict-of-interests policy.* Each Bank shall adopt a written conflict-of-interests policy that applies to all members of its board of directors. At a minimum, the conflict-of-interests policy of each Bank shall:

* * * * *

(4) Require directors to disclose actual or apparent conflicts of interests and establish procedures for addressing such conflicts;

(5) Require the establishment of internal controls to ensure that conflict-of-interests reports are made and filed and that conflict-of-interests issues are disclosed and resolved; and

(6) Establish procedures to monitor compliance with the conflict-of-interests policy.

* * * * *

(d) *Gifts.* No Bank director shall accept, and each Bank director shall discourage the director's immediate family members from accepting, any gift that the director believes or has reason to believe is given with the intent to influence the director's actions as a member of the Bank's board of directors, or where acceptance of such gift would have the appearance of intending to influence the director's actions as a member of the board. Any insubstantial gift would not be expected to trigger this prohibition.

* * * * *

■ 17. Revise § 1261.12 to read as follows:

§ 1261.12 Reporting requirements for Bank directors.

(a) *Annual reporting.* Annually, each Bank shall require each of its directors to execute and deliver to the Bank the appropriate director eligibility certification form prescribed by FHFA for the type of directorship held by such director. The Bank promptly shall deliver to FHFA a copy of the certification form delivered to it by each director.

(b) *Report of noncompliance.* At any time that any director believes or has reason to believe that he or she no longer meets the eligibility requirements set forth in the Act or this subpart, the director promptly shall so notify the Bank and FHFA in writing. At any time that a Bank believes or has reason to believe that any director no longer meets the eligibility requirements set forth in the Act or this subpart, the Bank promptly shall notify FHFA in writing.

■ 18. Revise § 1261.13 to read as follows:

§ 1261.13 Ineligible Bank directors.

Upon a determination by FHFA or a Bank that any director of the Bank no longer satisfies the eligibility requirements set forth in the Act or this part, or has failed to comply with the reporting requirements of § 1261.12, the directorship shall immediately become vacant. Any director that is determined to have failed to comply with any of

these requirements shall not continue to serve as a Bank director. Whenever a Bank makes such a determination, the Bank promptly shall notify the Bank director and FHFA in writing.

■ 19. Revise § 1261.14 to read as follows:

§ 1261.14 Vacant Bank directorships.

(a) *Filling unexpired terms.* (1) When a vacancy occurs on the board of directors of any Bank, the board of directors of the Bank shall elect, by a majority vote of the remaining Bank directors sitting as a board, an individual to fill the unexpired term of office of the vacant directorship, regardless of whether the remaining Bank directors constitute a quorum of the Bank's board of directors.

(2) The board of directors of the Bank may fill an anticipated vacancy prior to the effective date of the vacancy, provided the board does so no sooner than the date of the regularly scheduled board meeting that occurs immediately prior to the effective date of the vacancy.

(3) The board of directors shall elect only an individual who satisfies all the eligibility requirements in the Act and in this subpart that applied to his or her predecessor and, for independent directorships, also satisfies any of the qualifications in the Act or this subpart. If a Bank does not have at least two sitting public interest independent directors, the board of directors of the Bank shall designate the directorship as a public interest directorship and shall elect an individual who satisfies a public interest independent directorship qualification in the Act or in this subpart.

(b) *Verifying eligibility.* Prior to any election by the board of directors, the Bank shall obtain an executed member director eligibility certification form prescribed by FHFA from each individual being considered to fill a member directorship and an executed independent director application form prescribed by FHFA from each individual being considered to fill an independent directorship. Using the executed forms, each Bank shall verify each individual's eligibility and, as to independent directors, also shall verify the individual's qualifications. Before any independent director is elected by the board of directors of a Bank, the Bank shall deliver to FHFA for its review a copy of the application form of each individual being considered by the board. The Bank shall retain the information it receives in accordance with paragraphs (c) and (d) of § 1261.6.

(c) *Notification.* Promptly after allowing the individual to assume the

directorship, as provided in paragraph (b) of this section, a Bank shall notify FHFA and each member located in the Bank's district in writing of the following:

(1) For each member directorship filled by the board of a Bank, the name of the director, the name, location, and FHFA ID number of the member the director serves, the director's title or position with the member, the voting State that the director represents, and the expiration date of the director's term of office; and

(2) For each independent directorship filled by the board of a Bank, the name of the director, the name and location of the organization with which the director is affiliated, if any, the director's title or position with such organization, and the expiration date of the director's term of office.

§ 1261.16 [Removed and reserved]

■ 20. Remove and reserve § 1261.16.

Dated: September 30, 2009.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. E9-24063 Filed 10-6-09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2009-0367; Directorate Identifier 2009-NE-10-AD; Amendment 39-16023; AD 2009-19-07]

RIN 2120-AA64

Airworthiness Directives; Teledyne Continental Motors O-470, IO-470, TSIO-470, IO-520, TSIO-520, IO-550, and IOF-550 Series Reciprocating Engines; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting airworthiness directive (AD) 2009-19-06, which published in the **Federal Register** on September 22, 2009. That AD applies to Teledyne Continental Motors O-470, IO-470, TSIO-470, IO-520, TSIO-520, IO-550, and IOF-550 series reciprocating engines. The two references to the AD number are incorrect due to a software problem with the automated AD number assignment system. This document corrects those references. In all other respects, the original document remains the same.