



Andrew S. Levine
Executive Vice President
Chief Legal Officer - General Counsel

October 21, 2022

The Honorable Sandra L. Thompson
Director
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20024

RE: Comprehensive Review of the Federal Home Loan Bank System

Dear Director Thompson:

SL Green Realty Corp. (“SL Green”) is a publicly-held real estate investment trust (“REIT”), S&P 500 company, and New York City’s largest office landlord. As of June 2022, SL Green holds interests in buildings totaling 34.4 million square feet across New York City and the surrounding metropolitan area, including ownership interests in a significant number of residential units as well as several loans held on residential and/or multi-family projects in the debt and preferred equity platform.¹ SL Green welcomes the Federal Housing Finance Agency’s (“FHFA”) efforts to conduct a comprehensive review of the Federal Home Loan Bank (individually, “FHLB”, and collectively, “FHLBs”) system, including the opportunity for public stakeholders to provide input via listening sessions held on September 29, 2022; September 30, 2022, and October 4, 2022 (each, a “Listening Session”, and collectively, the “Listening Sessions”) as well as a formal public comment process, and appreciates the opportunity to participate in such process. SL Green’s comments in this letter shall address eligibility requirements with respect to membership in the FHLB system, and in particular, shall explain why the FHFA, as part of its comprehensive review, should strongly consider exploring the responsible re-admission of captive insurer subsidiaries of mortgage REITs to the membership of the FHLB system because (i) the FHFA’s 2016 final rule² excluding captive insurer subsidiaries of mortgage REITs defied congressional intent reflected in the plain language of the Federal Home Loan Bank Act of 1932 (the “FHLB Act”)³, which expressly noted that insurance companies shall be eligible for membership; (ii) the activities of captive insurance subsidiaries of mortgage REITs advance the statutory mission of the FHLB system; and (iii) the inclusion of captive insurance subsidiaries of mortgages REITs in the FHLB System does not negatively impact the system’s safety and soundness. With these guiding principles, SL Green offers the following thoughts and encourages the FHFA to explore means by which captive insurance subsidiaries of mortgage REITs can be responsibly added as members of the FHLB system, and therefore, partner with the FHLB system in a mutually beneficial manner to reflect the importance of mortgage REITs and/or captive insurers within the housing finance ecosystem, and in doing so, materially advance the FHLB system’s statutory mission.

Background:

Insurance companies, including captive insurers, were eligible for FHLB membership since the FHLB system was first established by Congress in 1932 pursuant to the FHLB Act. The legislative history behind

¹ See *Corporate Profile*, available at <https://slgreen-ges-web.com> (October 2022).

² 12 CFR Part 1263 Members of the Federal Home Loan Banks; Final Rule.

³ 12 U.S.C. 1421, et seq.

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the FHLB Act indicates that while inclusion of insurance companies as eligible members of the FHLB system was debated, Congress ultimately made the decision that insurance companies were critical participants in the domestic housing finance ecosystem, and thus, deserved membership in the FHLB system in order for the FHLB system to satisfy its statutory mission.⁴ During the decades that followed enactment of the FHLB Act, insurance companies continued to be key participants in the domestic housing finance ecosystem, including by receiving liquidity and other funding by the FHLB system through numerous programs, including, but not limited to, the Affordable Housing Program (“AHP”) and the Community Investment Cash Advances program, among others. Since 1932, Congress has expanded eligibility for membership to the FHLB system three times by adding federally insured commercial banks and credit unions in 1989, non-depository community development financial institutions in 2008, and navy federal credit unions in 2015 respectively.⁵ In each of the foregoing cases, Congress has used its rightful legislative authority to expand the membership and/or mission of the FHLB system.

Despite Congress’ clear role as the arbitrator of membership within the FHLB system, the FHFA, in 2016, promulgated a final rule that effectively banned captive insurance subsidiaries of mortgage REITs from FHLB membership despite (i) the FHLB Act, as the authorizing statute of the FHLB system, expressly stating that all insurance companies are eligible members thereof⁶, and (ii) the key importance of captive insurer subsidiaries of mortgage REITs and mortgage REITs themselves to the domestic housing finance industry. In February 2020, the FHFA issued a request for information to the general public with respect to a number of questions regarding membership eligibility of captive insurer subsidiaries of mortgage REITs, among other market participants.⁷ Despite receiving a number of comments from key stakeholders in the domestic housing finance industry advocating for the inclusion of captive insurer subsidiaries of mortgage REITs in the FHLB system, the FHFA did not announce new formal regulations updating membership requirements with respect to mortgage REITs and/or their captive insurer subsidiaries. However, in September 2021, the FHFA announced new guidance on the subject of eligibility of insurance companies in the FHLB system, which by and large continued to exclude captive insurer subsidiaries of mortgage REITs from the FHLB system.⁸

Ultimately, prior to the FHFA’s implementation of the 2016 final rule regarding membership eligibility, SL Green had a mutually beneficial and productive relationship with the FHLB system. For approximately a decade, SL Green maintained Belmont Insurance Company (“Belmont”), a wholly-owned taxable subsidiary, as a captive insurer. In October 2015, Belmont became the first captive insurance company member of the FHLB of New York; however, its membership thereof terminated in accordance with the terms of the FHFA’s 2016 final rule. Similarly, Belmont was in the process of applying for membership to the FHLB of Boston in July 2014 when a three-month moratorium on admission of captive insurers was instituted in connection with the then-proposed rule excluding FHLB membership of captive insurers.

⁴ See, *The Evolving Role of the Federal Home Loan Banks in Mortgage Markets*, Fed. Res. Bank of Cleveland, available at <https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2003-economic-commentaries/ec-20030601-the-evolving-role-of-the-federal-home-loan-banks-in-mortgage-markets.aspx> (June 2003).

⁵ See *Federal Home Loan Bank Membership Request For Input*, available at <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/RFI-on-FHL-Bank-Membership.pdf> (February 2020).

⁶ 12 CFR Part 1263 Members of the Federal Home Loan Banks; Final Rule.

⁷ See *Federal Home Loan Bank Membership Request For Input*, available at <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/RFI-on-FHL-Bank-Membership.pdf> (February 2020).

⁸ See *FHFA, Supervisory Letter on FHLBank Membership Issues*, available at <https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/Supervisory-Letter-on-FHL-Bank-Membership-Issues-September-2021.aspx>. (September 2021).

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While some have argued that captive insurers existed only as conduits to access the FHLB system, the facts indicate that Belmont was created, and in fact, continued to operate, in accordance with the mission of the FHLB system by serving as a meaningful participant in the residential mortgage finance marketplace.

(I) The FHFA's 2016 Final Rule Regarding Membership Eligibility of the FHLB System Excluding Captive Insurers From the Definition of "Insurance Company" Was In Contravention of Congress' Express Legislative Intent:

SL Green strongly reiterates its position that the FHFA's 2016 final rule regarding membership eligibility of the FHLB system was in violation of Congress' express legislative intent underlying enactment of the FHLB Act and the definition of "insurance company" contained therein, and in doing so, encroached on Congress' jurisdiction by arbitrarily redefining the criteria for which types of entities constitute insurance companies.

The FHLB Act expressly states that "...any building and loan association, savings and loan association, cooperative bank, homestead association, **insurance company**, savings bank, community development financial institution, or any insured depository institution...shall be eligible to become a member of a Federal Home Loan Bank".⁹ In particular, the FHLB Act does not define the term "insurance company".¹⁰ At the time of enactment of the FHLB Act, and during future instances from time to time in which Congress amended membership eligibility for the FHLB system, Congress did not define the term "insurance company" as it did for other categories of eligibility such as "insured depository institutions".¹¹ The legislative history behind enactment of the FHLB Act indicates that the purpose of the legislation was to preserve broad membership in the FHLB system.¹² In light of Congress' express decision not to define the term "insurance company", the FHLB Act should be interpreted broadly given the express purpose of the FHLB Act is to promote liquidity in the housing finance market, particularly for regular participants in the mortgage finance industry.¹³ At the time the FHFA's final rule went into effect in 2016, there were approximately two dozen captive insurer subsidiaries of mortgage REITs, in addition to captive insurer subsidiaries of other non-depository institutions, admitted as members of various FHLBs.¹⁴ In the last few decades, non-depositories or traditional banks, have taken on an increasing role in originating residential mortgages, particularly for lower-income, communities of color, and other underserved communities.¹⁵ Accordingly, mortgage REITs and captive insurer subsidiaries thereof are without a doubt regular and increasingly significant participants in the mortgage finance industry. Given (i) the legislative history underlying the enactment and subsequent amendments of the FHLB Act, (ii) the significant role of

⁹ 12 U.S.C. § 1424(a)(1)(A)(2012)

¹⁰ Id.

¹¹ See *Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, Pub. L. 101-73 § 709, 103 Stat. 183 (amending the FHLB Act by adding certain language to the statutory definition of "insured depository institutions").

¹² See H.R. Rep. No. 72-1418, at 4 (1932) (noting that funding from the FHLB system was to be available to the most significant members of the housing industry, including "all building and loan associations, cooperative banks, homestead associations, savings banks, trust companies, and other banks with time deposits...and **insurance companies** subject to inspection and regulation under the banking laws or similar laws of the State or the United States").

¹³ See H.R. Rep. No. 72-1418, at 4 (1932) (noting that funding from the FHLB system was to be available to the most significant members of the housing industry, including "all building and loan associations, cooperative banks, homestead associations, savings banks, trust companies, and other banks with time deposits...and **insurance companies** subject to inspection and regulation under the banking laws or similar laws of the State or the United States").

¹⁴ 81 Fed. Reg. 3246.

¹⁵ See, *What's Behind the Non-Bank Mortgage Boom*, available at <https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp42> (June 2015).

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mortgage REITs and their captive insurer subsidiaries in the housing finance industry, and (iii) Congress' express decision to decline to prescribe a specific definition for the term "insurance company" as part of the various institutions eligible for membership in the FHLB system, it is clear that the FHFA's 2016 decision to prohibit the membership of captive insurer subsidiaries of mortgage REITs in the FHLB system encroached on Congress' express jurisdiction and intent while also ignoring the significant role that diverse institutions such as captive insurers play in the housing finance market. The FHFA certainly has the authority to promulgate regulations for the purposes of carrying out the FHFA's statutory mission under the FHLB Act; however, it does not have the authority to amend the provisions contained therein as a means of defying Congressional intent. We respectfully request that the FHFA, as part of its comprehensive review, re-assess the 2016 final rule's inconsistency with historical precedent and the benefits and diversity that membership of captive insurers would bring to the FHLB system.

(II) Mortgage REITs and Captive Insurer Subsidiaries Thereof Are Aligned With and Will Advance the FHLB System's Statutory Mission:

The FHFA's 2016 Notice of Proposed Rulemaking with respect to membership eligibility provided that the FHLBs' mission is to "enable the Banks to provide low cost wholesale funding to their member institution so that, in turn, those members could provide long-term home mortgage loans to consumers at a reasonable cost...[and]...to reserve the benefits of Bank membership for institutions that are likely to use those benefits to fill the primary purposes of the Bank Act"¹⁶. The FHFA's 2016 final rule regarding membership eligibility ignored historical precedent demonstrating that captive insurance subsidiaries of mortgage REITs have been key participants in the housing finance marketplace, and in doing so, have long demonstrated a strong commitment to housing finance and furthering the mission of the FHLB system. Mortgage REITs are real estate businesses established for the express purpose of investing in, and in certain cases, helping develop real estate, including residential housing and affordable housing. Further, the successes in advancing such goals by publicly-held REITs, including SL Green, are subject to daily accountability by the public markets. In fact, the Department of Treasury has previously indicated that the FHFA should revisit its rule excluding captive insurance companies from FHLB membership given the continued evolution of the housing finance system and the significant role such entities play in connection with the FHLB system's mission¹⁷.

A primary argument against inclusion of captive insurance subsidiaries of mortgage REITs is the notion that certain institutions that are ineligible for membership in the FHLB system utilize captive insurance subsidies as conduits through which such entities can obtain access to the FHLB system and the benefits such membership affords, including, but not limited to, liquidity in the form of advances and funding via various programs related to affordable housing and community development. We reiterate our position that this concern is not accurate in all cases, particularly with respect to SL Green and similarly situated entities such as mortgage REITs, and instead, reflects a blanket concern designed to apply a simple solution to a complex and highly nuanced issue.

For example, in 2014 when Belmont was in the process of applying for membership in the FHLB of Boston, Belmont had been successfully operating for over eight years and written approximately seven lines of

¹⁶ 79 Fed. Reg. 54848 (September 12, 2014).

¹⁷ See, *United States Department of Treasury, Housing Reform Plan*, available at <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> (Sept. 2019).



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insurance coverage. Belmont was not created to serve as a conduit for a parent company to obtain membership in the FHLB system; on the contrary, Belmont's activities aligned well with the mission of the FHLB system due to its impactful participation in the housing finance system. In addition, SL Green, as the parent entity of Belmont, has historically engaged in a number of housing finance and affordable housing related activities in furtherance of the FHLB system's statutory mission. Historically, SL Green had ownership interests in approximately 4.3 million square feet of residential rental apartments in New York City, which consisted of 4,541 units, including 1,218 units (27%) that were non-market rate (e.g. rent stabilized and/or rent controlled affordable units). As of the date hereof, all such properties have been sold, except for one such building that contains 209 units, of which 63 units thereof are non-market rate. A significant share of such properties were sold following the effective date of the FHFA's 2016 membership excluding captive insurers. The exclusion of membership in the FHLB system, and therefore, the ability to take advantage of liquidity in the form of advances and other programs, was a factor in the decision to sell such properties, which ultimately resulted in the reduced availability of affordable housing units.

In addition, SL Green has historically originated loans secured by residential properties, many of which contain a significant number of affordable housing units, in New York City totaling approximately \$2.9 billion. Specifically, during the time period in which Belmont was a member of the FHLB of New York, SL Green pledged six loans and borrowed approximately \$300 million in the aggregate. However, as of the date hereof, the aggregate loan balance remaining is \$228 million (vs. the historic sum of \$2.9 billion), of which the last residential loan origination occurred in early-2020. The remaining loan balance is relatively small in comparison to SL Green's historic lending amounts and reflects a shift in strategy away from investments in and lending for residential housing purposes, including affordable housing. This forced shift in strategy to scale back lending for residential housing purposes was, in part, due to the FHFA's decision to exclude captive insurers from membership in the FHLB system, which ultimately left SL Green and other similarly situated mortgage REITs as well as Belmont at a significant disadvantage when competing with local and community lenders. Lastly, we reiterate that the nation as a whole, but particularly in New York City, has a significant need for additional affordable housing opportunities. For example, the 421(a) and Affordable New York programs have been phased out without sufficient replacements to address the affordable housing crisis, especially during the current economic climate. The FHLB system implements a number of affordable housing programs, including, but not limited to, AHP. The responsible expansion of membership to captive insurer subsidiaries of mortgage REITs would allow more entities such as SL Green, Belmont, and other similarly situated entities to take advantage of such programs while simultaneously furthering the FHLB system's statutory mission.

Ultimately, SL Green strongly encourages the FHFA to revisit its 2016 final rule excluding captive insurers from membership in the FHLB system. Non-depositories are becoming an increasing portion of mortgage originators and participants in the housing finance industry. This trend has continued despite implementation of the FHFA's 2016 final rule. The responsible expansion of FHLB membership to include captive insurers subsidiaries of mortgage REITs whose interests align with that of the FHLB system would (i) reflect the depth of diversity and the evolution of participants in the housing finance industry and (ii) encourage greater private sector investment in and lending for affordable housing and other community-development related projects, particularly in underserved areas nationwide.

(III) FHLB Membership of Mortgage REITs and Captive Insurer Subsidiaries Will Not Negatively Impact the Safety and Soundness of the FHLB System:

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Certain stakeholders in the housing finance industry have asserted that given captive insurance companies are not subject to the same standards of prudential regulation as are traditional banking institutions, the inclusion of captive insurance companies into the FHLB system would introduce an unreasonable amount of risk to the safety and soundness of the overall FHLB system. These assertions ignore the robust State and/or federal regulatory frameworks to which captive insurance companies are subject.

A captive insurance company (like all insurance companies) is regulated by the State insurance department of the applicable State in which such captive insurance company is domiciled. This means that each captive insurance company must comply with the rules and regulations promulgated by its State's insurance department, including, but not limited to, licensing and reporting requirements as well as capital and surplus requirements, among others. Further, captive insurance companies are routinely subject to inspections and examinations by the applicable State insurance department. During the time period in which Belmont was a member of the FHLB of New York, it was subject to regulation and frequent inspections and examinations by the New York State Department of Financial Services, which has established a robust regulatory framework based on risk-mitigation and other key safeguards. Notably, the New York State Department of Financial Services supported Belmont's membership in the FHLB of New York. In addition, prior to the effective date of the FHFA's 2016 final rule, insurance companies, including captive insurers, were already subject to additional restrictions to which other non-insurance company members were not, including, but not limited to, higher collateralization rates and a requirement to actually deliver collateral to the applicable FHLB, among other things.

In addition, we emphasize that members of the FHLB system that are structured as captive insurer subsidiaries of publicly-traded mortgage REITs (such as SL Green) as opposed to other parent entities are also subject to a robust framework of federal and state securities-related regulations, securities exchange rules, and market best practices, which include regular and timely reporting requirements, among other things. For example, publicly traded mortgage REITs file a number of periodic public reports, including 10-Ks, 10-Qs and 8-Ks with the US Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934, as amended, as well as financial statements and accounting-related reporting deliverables under the Sarbanes Oxley Act. In addition, mortgage REITs are subject to several tax-related requirements, including, but not limited to, REIT income tests and asset tests, in order to maintain REIT status under the Internal Revenue Code.

Certain stakeholders have asserted that the membership of captive insurers to the FHLB system would bring additional risk to the system due to the sufficiency and availability of collateral pledged by such captive insurer in the event such captive insurer or its parent entity has defaulted pursuant to which a bankruptcy or other similar proceeding has commenced. We emphasize that in the almost-100 years that the FHLB system has existed, it has never experienced any credit losses on advances¹⁸. For the vast majority of such time period, captive insurers were included in the membership of various FHLBs. In fact, prior to the effective date of the FHFA's 2016 final rule regarding membership eligibility, all 11 FHLBs had policies in place with respect to eligible collateral and other safeguards related to non-depositories such as insurance

¹⁸ See, *Capital Markets Bureau Primer*, National Association of Insurance Commissioners, available at <https://content.naic.org/sites/default/files/capital-markets-primer-federal-home-loan-banks.pdf> (June 2020).

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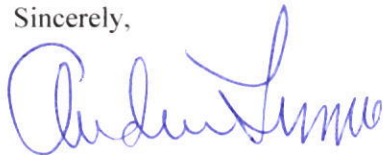
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companies.¹⁹ SL Green encourages the FHFA to consider a regulatory framework in which captive insurer subsidiaries of mortgage REITs may be granted membership to the FHLB system so long as they (or their parent entity, as applicable) satisfy a reasonable set of conditions, such as additional reporting requirements or eligible collateral, designed to promote the FHLB system's mission and mitigate any perceived risks to the safety and soundness of the system. That said, the FHFA must ensure that any proposed additional requirements be reasonable, and in no way, be so onerous that certain entities which are heavily involved in the housing finance ecosystem and have the potential to further improve their affordable housing and community development footprint following membership in the FHLB system be locked out of the system (e.g., a requirement that a mortgage REIT have a unreasonably high percentage of its assets or ownership interests thereof in residential buildings vs. commercial buildings would lock out SL Green and similarly situated entities who currently have a larger ownership interest in office buildings as opposed to residential buildings, but would be highly interested in investing more in residential buildings, particularly those buildings containing affordable housing units, in the event it (or its captive insurer subsidiary) is granted membership in the FHLB of New York, as applicable).

Conclusion:

On behalf of SL Green and Belmont, I thank you for the opportunity to comment on the FHFA's ongoing comprehensive review. As noted earlier and reinforced during the Listening Sessions, the FHLB system has been a critical source of liquidity for market participants, affordable housing, and community development over the last 90 years. As the FHFA prepares to upgrade the FHLB system to reflect new market conditions and address evolving market trends, we respectfully urge the FHFA to revisit its 2016 final rule excluding captive insurance subsidiaries of mortgage REITs from the definition of "insurance company", and explore ways in which mortgage REITs and captive insurance subsidiaries thereof can continue to build on their significant roles in the domestic housing finance system while simultaneously taking advantage of the FHLB system's programs, and in doing so, furthering its statutory mission.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Andrew Linn', is written below the word 'Sincerely,'.

¹⁹ See, *Federal Home Loan Bank System Lending and Collateral Q&A*, FHLB Office of Finance, available at https://www.fhlf.com/ofweb_userWeb/resources/lendingqanda.pdf (March 2022).