

August 17, 2009

VIA EMAIL TO REGCOMMENTS@FHFA.COM

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, DC 20552
Attention: Comments/RIN 2590-AA11

RE: Proposed Rule for the Reporting of Fraudulent Financial Instruments

Dear Mr. Pollard:

The Federal Housing Finance Agency (the “*FHFA*”) has issued a proposed rulemaking with respect to the reporting of fraudulent financial instruments purchased or sold by a regulated entity (the “*Proposed Rule*”). This letter sets forth the comments of the Federal Home Loan Bank of Boston (the “*Bank*”) with respect to the Proposed Rule. We thank you for the opportunity to be heard on this important matter.

The Bank has long shared FHFA’s views regarding the importance of combating mortgage fraud and agrees that a Federal Home Loan Bank (an “*FHLBank*”) may be exposed to the risk of fraud, particularly when investing in whole mortgage loans. Given the importance of the topic, we believe it is especially critical that the requirements of the agency’s fraud reporting and detection regulation be clear to all regulated entities, to maximize the effectiveness of these anti-fraud efforts.

It is in light of the above -- what we believe to be our shared policy goals -- that we offer the following comments regarding the Proposed Rule.

I. Scope of the Proposed Rule

- Background: In 2008, the Office of Federal Housing Enterprise Oversight (OFHEO) issued policy guidance (the OFHEO Guidance) regarding the mortgage fraud programs of Fannie Mae and Freddie Mac.¹ The definition of “mortgage fraud” in the OFHEO Guidance covered material misstatements and omissions relied upon by an enterprise to fund or purchase -- or not to fund or purchase -- a single-family or multifamily mortgage, and then provided a nonexhaustive list of specific examples of in-scope mortgage fraud.² It is unclear whether the Proposed Rule is intended to expand fraud detection and reporting requirements beyond whole loan mortgage investments as contemplated by the OFHEO

¹ Examination of Mortgage Fraud Programs, PG-08-001 (January 10, 2008).

² Including false information contained in identification and employment documents, false mortgagee or mortgagor identity, fraudulent appraisals, theft of custodial funds, non-remitted payoff funds, misrepresentations of borrower funds, and property flipping where designed to falsely inflate property value.

Guidance or whether it is intended merely to apply those requirements to the FHLBanks' mortgage purchase programs.

- Comment: Please clarify the Proposed Rule by specifying whether the scope extends beyond whole loan mortgage investments of the type covered by the OFHEO Guidance. If the FHFA does intend a scope broader than whole loan mortgage purchases, please specify which other purchase and sale activities of the FHLBanks would be subject to the fraud and potential fraud detection and reporting requirements. If the FHFA does intend to expand the scope of fraud and potential fraud detection and reporting requirements in a significant way beyond whole loan mortgage investments, including to cover private-label mortgage-backed securities, the final rule should provide for a period prior to the final rule's effectiveness sufficient for the FHLBanks to implement the necessary systems, policy changes and related controls commensurate with such expanded scope. Further, in the case of such an expanded scope, the final rule should provide that the fraud detection and reporting requirements for FHLBank mortgage assets, including private-label mortgage-backed securities, are only applicable on a prospective basis and not to mortgage assets on an FHLBank's balance sheet prior to the effective date of the final rule.

II. Key Definitions of the Proposed Rule

- Background: The terms "fraud" and "possible fraud" of the Proposed Rule have the practical effect of expanding the scope of the Proposed Rule to be very broad, as set forth in Section I of this letter. "Fraud" is defined to mean a material misstatement, misrepresentation, or omission relied upon by a regulated entity", and "possible fraud" is defined to mean "that a regulated entity has a reasonable belief, based upon a review of information available to the regulated entity, that fraud may be occurring or has occurred."³ However, tort and criminal law generally require intent to deceive as an element of fraud. A representative example is the principal federal criminal statute applicable to a fraud upon an FHLBank is 18 U.S. Code § 1014, which makes it a crime punishable by a prison term of up to 30 years and a fine of up to \$1,000,000 to "knowingly make...any false statement or report, or willfully overvalue...any land, property or security, for the purpose of influencing in any way the action of...any Federal home loan bank." The definition of "fraud" in the Proposed Rule does not state explicitly whether intent is an element of the definition or if instead inadvertent misrepresentations or omissions are to be characterized as "fraud," notwithstanding the traditional understanding of this term in the broader context of tort and criminal law.
- Comment: Please clarify whether a regulated entity is required to report to FHFA misstatements or omissions which the regulated entity, after due diligence, has concluded were unintentional, rather than fraudulent.

III. Reporting Procedures

Background: Section 1233.3 of the Proposed Rule requires that fraud or possible fraud be communicated in writing promptly to the Director of the FHFA and in certain cases immediately by telephone or electronic communication in accordance with required formats.

³ Section 1233.1 of the Proposed Rule.

- Comment: Please revise this rule to permit a regulated entity to make fraud reports to its Examiner-in-Charge rather than directly to the Director. Please specify forms and/or formats that may be used to satisfy the reporting requirements and what information must be reported thereon in the final rule rather than pursuant to guidance from time to time. Providing such clarity will help each regulated entity to comply with the reporting requirements by centralizing the requirements.

IV. Reliance on Third Parties

- Background: Certain FHLBanks currently utilize third parties in connection with the quality control process (including mortgage fraud detection) for their mortgage purchase programs, in accordance with the delegation provisions of the Acquired Member Assets regulation.⁴ For example, in the Mortgage Partnership Finance program, the FHLBank of Chicago performs quality control on behalf of other FHLBanks participating in the MPF program.
- Comment: Please confirm that adequate and appropriate third-party reviews may constitute fraud detection controls sufficient to satisfy a regulated entity's obligations under Section 1233.4 of the Proposed Rule.

V. Supervisory Action

- Background: Section 1233.6 of the Proposed Rule provides that a regulated entity, its board members, officers, and/or employees may be subject to certain supervisory action for failing to comply with the Proposed Rule, including, but not limited to, cease-and-desist proceedings and civil money penalties.
- Comment: Please revise this section to remove references to enforcement actions against a regulated entity's board members, officers, and employees in the absence of willful and wrongful conduct directly resulting in the regulated entity's determination not to comply with the requirements of the rule. A rule that would otherwise impose individual liability may subject individuals to liability even in instances where sincere efforts to comply have been made.

Thank you for your consideration of our comments.

Sincerely,



Ellen McLaughlin
Senior Vice President/General Counsel

⁴ 12 C.F.R. § 955.5(a).