FannieMae

Ann M. Kappler
Senior Vice President and
General Counsel
Legal Department

3900 Wisconsin Avenue, NW
Washington, DC 20016-2892
202 752 4850
202 752 4439 (fax)
ann_kappler@fanniemae.com

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BY ELECTRONIC MAIL AND COURIER

Alfred M. Pollard, Esq.
General Counsel
Office of Federal Housing Enterprise Oversight
1700 G Street, NW
Fourth Floor
Washington, D.C. 20552

Re: Comments on Proposed Safety and Soundness Regulation, RIN 2550-AA22

Dear Mr. Pollard:

Fannie Mae welcomes this opportunity to comment on the recent "safety and soundness regulation" proposed by the Office of Federal Housing Enterprise Oversight ("OFHEO"). *See* Safety and Soundness Regulation, Notice of Proposed Rulemaking, 67 Fed. Reg. 42200 (June 21, 2002) (to be codified at 12 CFR Part 1720) ("NPR"). The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("1992 Act") specifies that it is the duty of the Director of OFHEO to ensure that Fannie Mae and Freddie Mac are operating safely and adequately capitalized and we entirely support OFHEO's efforts to carry out its statutory responsibilities in this area. *See* 12 U.S.C. §4513(a). In particular, we appreciate and support OFHEO's interest in enhancing, through this rulemaking, the transparency and public awareness of the minimum supervisory standards contained in "policy guidances" the agency has adopted and may adopt in the future. The two policy guidances the agency has issued to date are a December 19, 2000 document setting forth minimum supervisory standards in eight broad areas, and a December 19, 2001 release establishing minimum safety and soundness standards for information systems and security. *See* OFHEO Policy Guidance PG-00-001, Minimum Safety and Requirements (Dec. 19, 2000); OFHEO Policy Guidance PG-01-002, Safety and Soundness Standards for Information (Dec. 19, 2001).

The specifics of the proposal seem straightforward. Proposed new 12 CFR §1720.1(a) would state that OFHEO is empowered to adopt supervisory policies by regulation, guidance and other process in the exercise of the Director's authority to take any action he deems appropriate to ensure that the companies are operated in a safe and sound manner. New section 1720.1(b) would specify that nothing in the proposal would limit any other authority of the Director, and that supervisory action under the proposal would in no way limit the Director's ability to take any other action he deemed appropriate. Proposed new 12 CFR §1790.2 would provide that policy guidances adopted from time to time by OFHEO and addressing safety and soundness standards would apply to the companies, and that if OFHEO determined a company had failed to meet a requirement set out in such a policy guidance, the agency could require corrective and remedial actions and take such enforcement action as the Director deemed appropriate.

These provisions would be largely redundant of existing authority; proposed section 1790.1(a) tracks language in PG-00-01 at 1,2, and reflects as well the broad assertion of agency authority over safety and soundness matters found at 12 CFR §1771.1(a). Proposed section 1790.2 essentially is duplicative of authority that OFHEO has asserted previously under 12 CFR §§1777.10(e), 1777.11, 1777.12 and 1780.1(b), and PG-00-001(14), to take action against unsafe and unsound practices and safety and soundness deficiencies. Thus, as a threshold matter, we are unclear as to the need for these duplicative reassertions of authority.

OFHEO notes that one of the explicit objectives of this rulemaking is to make clear that the policy guidances OFHEO has issued and may issue in the future are official, enforceable agency pronouncements, thus buttressing any claim the agency might someday make in litigation that such policy guidances are entitled to deference under the standard laid out in Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 457 U.S. 837 (1984), and recently elaborated upon in the cases of United States v. Mead Corp., 533 U.S. 218 (2001) and Christensen v. Harris County, 529 U.S. 576 (2000). *See* 67 Fed. Reg. at 42201. [1] We do not think that the proposal actually advances that goal beyond what the agency had accomplished in publishing the guidances in the first place. By its terms, the proposal does not convert OFHEO's policy guidances into rules subject to the Administrative Procedure Act and we request that the agency confirm that this is in fact the case.

Further, as we have discussed in some detail in our comments on OFHEO's regulations regarding Administrative Enforcement Proceedings and Prompt Supervisory Response and Corrective Action, we are concerned with OFHEO's interpretation of its authority under the 1992 Act.[2] Given, as noted, the fact that this proposal relies on the authority asserted in support of those previous initiatives, we wish to make clear that we continue to believe in the validity of the objections raised in those comments and incorporate them by reference to preserve them.

While Fannie Mae agrees with the transparency and disclosure objectives of the proposal, we believe these goals would be enhanced if OFHEO were to adopt, informally or by rulemaking, a defined process for the development and adoption of future policy guidance. Obviously, such guidance will be of importance to OFHEO and the enterprises. It would be beneficial to all concerned were OFHEO, as standard practice, to solicit input from the companies whenever it was developing a supervisory policy guidance. Seeking information and perspectives from the companies on an envisioned supervisory approach, and allowing adequate response time, would help assure the development of a balanced and well-informed product. It would minimize the

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[1] "[I]f the statute is silent or ambiguous with respect to the specific issue, the question...is whether the agency's answer is based upon a permissible construction of the statute." Chevron, *supra* at 843.

[2] Although courts are willing to defer to an agency's interpretation of ambiguous terms in powers Congress explicitly has granted that agency, they are less likely to presume that Congress has extended the power to determine "the very scope of an agency's authority." United States v. 25 Cases, More or Less, of an Article or Device, 942 F.2d 1179, 1182 (7th Cir. 1991); *see also* New York Shipping Association v. Federal Maritime Commission, 854 F.2d 1338, 1363 n 9 (D.C. Cir. 1988). "[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." American Civil Liberties Union v. Federal Communications Commission, 823 F.2d 1554,1567 n.32 (D.C. Cir. 1987).

possibility that such policy guidance would need further clarification, as has happened in the past. We recognize that the need for expeditious action in some circumstances may foreclose consultation with the companies.

Thank you for the opportunity to comment on this proposal. Please contact me if you have questions or would like clarification of any of our comments.

Sincerely,

Ann M. Kappler