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December 3, 2014

Alfred M. Pollard, General Counsel
Attention: Comments/RIN 2590-AA39
Federal Housing Finance Agency
400 Seventh Street SW, Eighth Floor
Washington, DC 20024
email: RegComments@fhfa.gov

Re: Members of Federal Home Loan Banks
Notice of Proposed Rulemaking, RIN 2590-AA39

Dear Mr. Pollard:

I am writing to request withdrawal of the above cited Notice of Proposed Rulemaking and to request other changes as noted below.

My name is Paul Borja, and I served on the Board of Directors of the Federal Home Loan Bank of Indianapolis (FHLBI) from 2008 through 2010. I am writing in my personal capacity, and my comments herein do not necessarily represent those of my current employer Flagstar Bank, FSB, located in Troy, Michigan, and of which I currently serve as the Senior Deputy General Counsel.

As a former Director, I saw first-hand, during the 2008 credit crisis, the failure of Standard Life Insurance Company of Indiana (Standard Life), which was an FHLBI member with over $500 million of advances outstanding. FHLBI was fully collateralized and the Indiana insurance regulators well understood FHLBI's role as a secured creditor and liquidity provider. The rehabilitation took over a year, but, working in partnership, FHLBI and the rehabilitator accomplished a successful workout where neither the FHLBI nor any insurance policy holder took a loss.

The story of the Standard Life rehabilitation provides strong, real-world evidence to support maintaining the long-standing practice of determining an insurance company's principal place of business (PPB) based on place of incorporation, domicile or charter (the "Domicile Test"). The FHFA's proposal at 12 CFR §1263.4(b) provides for a new exception to the Domicile test based on where decisions and records reside, which needlessly promotes district forum shopping and undermines an FHLBank's ability to develop close working relationships with insurance regulators. As borne out in the Standard Life case, such relationships are invaluable, as compared to what might have happened if we found ourselves having to deal with an unfamiliar regulator from outside of our District. FHLBI enjoys a good working relationship with both the Indiana Department of Insurance and the Michigan Department of Insurance and Financial Services, and it would be impracticable at best, and so costly as to be impossible, for each of the different FHLBanks to develop separate relationships with regulators throughout the fifty states to ensure the kind of regulatory cooperation needed during the crisis.

As you know, the FHLBank Act provides, generally, that an institution is eligible to become an FHLBank member only in the district in which the institution maintains its "principal place of business,"[1] or PPB. In turn, the FHFA regulations provide for the Domicile Test by specifying that an institution's PPB is the state in which it "maintains its home office established as such in conformity with the laws under which the institution is organized."[2] The regulations also permit an institution, for purposes of FHLBank membership, to designate a state - other than the one in which it maintains its home office - as its PPB, provided that each of the following three tests are met (the "Three-Part Test"): (i) at least 80% of the institution's accounting books, records and ledgers are maintained in that state; (ii) a majority of the institution's board of directors and board committee meetings are held in that state; and (iii) a majority of the institution's five highest paid officers have their places of employment in that state.[3] For many years, both the FHFA and the FHLBanks have applied the Domicile Test in determining an insurance company's PPB.

Surprisingly, the FHFA is seeking to replace the objective, and well-tested, Domicile Test with a fact sensitive investigation, the burden of which falls squarely on the FHLBanks. Under the NPR, an FHLBank must determine if an insurance company "conducts business operations" from its state of domicile, and if it does not, "a Bank shall designate as the principal place of business the geographic location from which the institution actually conducts the predominant portion of its business activities...based on the totality of the circumstances of the particular case and...evidenced by objective factors."[4] This proposed rule change is not only burdensome, it also ignores years of policy built on prohibiting district forum shopping.

The FHFA, and its predecessor agencies, have a long-held position to reduce the risk of forum shopping among FHLBank members. When the Three-Part Test was enacted in the late 1980s, it was carefully crafted to make sure members could not easily change districts to get more favorable advances, collateral terms, or pricing, higher dividends, or gain preferable or selective regulatory treatment. This was a concern among the FHLBanks' Principal Supervisory Agents since each FHLBank, pre-FIRREA, had exam responsibility for FSLIC-insured thrifts.

Based on district forum shopping concerns, the FHFA has also traditionally denied or refused to process 12 USC §1424(b) "demanded by convenience" applications filed by members.[5] In the early 1990s, Old National Bank (ONB) applied to relocate the membership of one of its entities from the Chicago FHLBank to FHLBI based on convenience. The subject entity was chartered in Illinois, but ONB wanted to consolidate its membership in FHLBI with its other related entities that were all Indiana chartered and FHLBI members. Such facts seem to be a perfect fit for §1424(b)'s "demanded by convenience" provision to join an adjacent FHLBank, but ONB's application was denied, again, mainly due to concerns about selective forum shopping. Although slightly different, in 2001 Washington Mutual requested dual FHLBank membership due to the size and scope of its operations, but, for the same forum shopping policy reasons, the application was denied.

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[1] 12 U.S.C. § 1424(b).

[2] 12 C.F.R. § 1263.18(b).

[3] 12 C.F.R. § 1263.18(c)(1).

[4] 79 Fed. Reg. 54878-54879 (Sep. 12, 2014).

[5] "An institution eligible to become a member under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the Director." 12 U.S.C. § 1424(b).

In a 2012 regulatory interpretation[6] and, again, in the NPR, the FHFA is drawing its logic for abandoning the Domicile Test from a Supreme Court case on diversity jurisdiction, *Hertz Corp. v. Friend.*[7] In *Hertz*, the Supreme Court defined "principal place of business" only as it relates to the test of federal court jurisdiction under 28 U.S.C. § 1337, which is not applicable to the FHLB Act membership criteria. The only common thread between *Hertz* and the proposed PPB rule change is that both tests - corporate citizenship for diversity jurisdiction and FHLBank membership criteria - share an underlying rationale of providing a clear, simple, and predictable test. However, the proposal is inconsistent with this underlying rationale because it discards a simple and predictable test for a complex one with potentially confusing and inconsistent outcomes.

The federal court diversity analysis applies for numerous touch points in order to show that an out-of-state entity conducted sufficient business within a state to support obtaining federal jurisdiction, thereby, expanding the states under which a party might be hailed into federal court, which is inapposite to the goal of determining a single PPB. Missing from the FHFA's analysis are the facts that diversity jurisdiction does not rule out suing an institution in its domicile state and that it helps to prevent a business from insulating itself from the laws of the states where it operates by incorporating in a foreign jurisdiction. The FHFA also appears to be ignoring or at least drastically understating the significance of the ongoing contacts an insurance company maintains with its domiciliary state where its appropriate regulator is located. In short, while the diversity jurisdiction analysis applies in the world of civil litigation to affirmatively accomplish federal jurisdiction across many states; it is not useful in the controlled, regulated environment of FHLB membership in a district-based System where each FHLB already has a designated service area, or jurisdiction, and there is no overriding federal jurisdictional goal being achieved.

A better model for determining PPB can be found in the Uniform Commercial Code (UCC). When the drafters of the UCC revised Article 9 on secured transactions in 2001, which was adopted in all fifty states, they changed the rule on the choice of law governing perfection from the location of the collateral to the location of the debtor, with a registered organization's location being the state of its registration.[8] The collateral location test was unreliable and forced secured lenders to bear the burden of searching throughout the fifty states for competing secured interests and to chase their collateral from state to state. However, looking to a debtor's location inspires confidence in the perfection and priority of secured interests and the applicable law. This is a valid and well-tested example of a clear, simple, and predictable test, similar in all respects to the current Domicile Test. Conversely, determining PPB under a diversity jurisdiction model, which is similar to a collateral location test, is complex, unreliable, and allows for gamesmanship and forum shopping. The drafters of the UCC and the legislatures of all fifty states who adopted it rejected such a test for the financial industry, and the FHFA should do the same.

As correctly noted in the NPR, the existing Domicile Test and the Three Part Test work well to determine membership for commercial banks, so, the same should hold true for insurance companies.

To preserve valuable relationships with insurance regulators and to maintain reliability in the FHLBank System, I respectfully request that the FHFA withdraw the NPR and rescind the regulatory interpretation (as it relates to insurance companies) that created the uncertainty. Finally, the FHFA

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[6] FHFA Regulatory Interpretation 2012-RI-02.

[7] 559 U.S. 77 (2010).

[8] U.C.C. § 9-307(e).

should preserve the current, well-established, and reliable Domicile Test for determining the PPB of insurance company members.

Sincerely,

Paul D. Borja
Executive Vice President
Senior Deputy General Counsel