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January 9, 2015

Mr. Melvin Watt
Director
Federal Housing Finance Authority
400 Seventh Street S.W., Eighth Floor
Washington, D.C. 20024

Mr. Alfred Pollard
General Counsel
Federal Housing Finance Authority
400 Seventh Street S.W., Eighth Floor
Washington, D.C. 20024

Re: RIN 2590-AA39, Notice of Proposed Rulemaking and Request for Comments Involving Proposed Changes to the Regulations Concerning Federal Home Loan Bank Membership Criteria

Dear Messrs. Watt and Pollard,

Old Georgetown Insurance Co., LLC and Woodmont Insurance Co. LLC (collectively, the "Insurance Companies") are duly organized as Missouri limited liability companies and are in good standing with the Missouri Secretary of State. The Insurance Companies are licensed by the Missouri Department of Insurance, Financial Institutions and Professional Commerce and Insurance as pure captive insurance companies pursuant to the provisions of Missouri Revised Statutes 379.1300 et seq. Both Insurance Companies and their respective parents – American Capital Agency Corp. ("AGNC") and American Capital Mortgage Investment Corp. ("MTGE"), publicly-traded real estate investment trusts ("REITs") – support the U.S. residential mortgage market through investments in agency and non-agency residential mortgage-backed securities and other mortgage-related investments. Representatives of the Insurance Companies have been engaged in membership discussions with the Federal Home Loan Bank of Des Moines (the "FHLBDM") since the first quarter of 2014 and submitted formal applications for membership on June 13, 2014. As a result of the 90-day moratorium imposed by the Federal Home Loan Banks ("FHLBs") regarding the admission of new captive members, however, no action has been taken in respect of the applications, other than a review upon receipt by FHLBDM to confirm the application was complete.

THE PROPOSED RULE

On September 2, 2014,[1] the FHFA released Proposed Rule RIN 2590-AA39 (the "Proposed Rule"), which, among other things, (i) prohibits captive insurance companies from becoming members of the FHLBs, (ii) imposes a five year "sunset" period for phasing out current captive insurance company members of the FHLBs, and (iii) specifies that any captive insurance companies admitted as FHLB members subsequent to the publication date of the Proposed Rule will have their membership withdrawn upon the implementation of the final rule.

In explaining the rationale for the changes to the "insurance company" definition and the FHLB membership eligibility standards described in the Proposed Rule that effectively prohibit captive insurance membership, the FHFA states that it has "supervisory" and "safety and soundness" concerns. The basis for the FHFA's supervisory concerns is FHFA believes that institutions otherwise ineligible for FHLB membership are using captives as vehicles through which they can obtain FHLB advances to fund their business operations.[2] "These supervisory concerns are particularly acute when the amount of advances sought in the name of the captive insurance subsidiary are larger by far than the amount of its insurance liabilities or are comparable to the total assets of the captive. Such circumstances confirm that the advances are not being used by the captive member, but for the

[1] The Proposed Rule was initially released to the general public on September 2, 2014 but was not published in the Federal Register until September 12, 2014.

[2] *See* Proposed Rule RIN 2590-AA39, page 24.

business needs of its parent company or an affiliate, which may be barred by law from obtaining [FHLB] advances in its own name."[3]

The FHFA has indicated that amending the definition of "insurance company" as described in the Proposed Rule addresses this concern. Further, the FHFA states that the amendment of the definition reflects the "likely intent of Congress" because the concept of captive insurance did not exist when the Federal Home Loan Bank Act (the "FHLB Act") was passed and, therefore, captive insurance company membership could not have been contemplated.[4] The "supervisory concerns" discussion in the Proposed Rule specifically addresses the use of captives by REITs. In particular, the FHFA states that "[a]lthough mortgage REITs are involved in the residential housing finance markets, they are not among the types of institutions that Congress has authorized to become FHLB members or to borrow from the FHLBs, and through the use of captives they have been able to borrow indirectly from the FHLBs—something the statute precludes them from doing directly. The proposed rule is intended to prevent these arrangements, which FHFA views as circumventing the intent of Congress that the benefits of membership are to be available only to the types of eligible institutions enumerated in the FHLB Act."[5]

With respect to the "safety and soundness concerns," the Proposed Rule states that "captives present a number of safety and soundness concerns for the [FHLBs] beyond those presented by insured depository institutions and traditional insurance companies, including the potential that the captive's financial condition could worsen without the FHLBs knowledge due to the relative unavailability of objective financial information and ratings as other insurers and depository institutions."[6] The Proposed Rule also suggests that the alignment of financial interests and the potential non-diversification of insurance exposures also make captives a greater risk to the FHLBs than their traditional insurer counterparts.

RECOMMENDATION

The Insurance Companies hereby request that the Proposed Rule be withdrawn. The Proposed Rule exceeds the FHFA's authority to interpret and implement the FHLB Act through the amendment of the definition of "Insurance Company" under the FHLB Act in a manner inconsistent with both the plain language of and legislative intent underpinning the FHLB Act. Further, captive insurance companies such as the Insurance Companies are dedicated to supporting housing finance, consistent with the mission of the FHLB system, because a material portion of their investment portfolios are comprised of real estate assets. An absolute restriction upon their membership eligibility will have an adverse impact upon their ability to continue to provide private capital for residential loans. In addition, several captive insurance companies were admitted to the FHLB system in the weeks prior to the submission of the Insurance Companies' applications, and the arbitrary exclusion of the Insurance Companies from the FHLB system based upon the passage of a few weeks has caused and will continue to cause irreparable harm to the Insurance Companies and their respective parents. Ultimately, the concerns raised by the FHFA are largely theoretical and / or unsubstantiated, whereas the harms caused by the implementation of the Proposed Rule would be tangible, immediate and significant to the Insurance Companies and similarly situated entities.

EXECUTIVE SUMMARY

Set forth below is a brief summary of the points discussed in further detail in the body of this comment letter regarding issues with and considerations regarding the Proposed Rule:

Supervisory Concerns

- The FHLB Act expressly states that *any* insurance company is eligible to become an FHLB member so long as certain specified conditions are met. The FHFA's proposal to define the term "insurance company" and the manner in which the term is defined (i) conflicts with the plain and unambiguous language of the

[3] *Id.*

[4] *Id.*

[5] *Id.* at 25-26.

[6] *Id.* at 26.

FHLB Act and (ii) constitutes an unlawful usurpation by the FHFA of legislative powers that are exclusively reserved to Congress.

- The FHFA's proposal to narrow the scope of eligible FHLB members is inconsistent with Congress' demonstrated application and interpretation of the membership provisions in the FHLB Act. Congress has reviewed the FHLB membership eligibility on numerous occasions and has repeatedly adopted an inclusive and expansive approach, extending membership to commercial banks and credit unions in 1989 and, more recently, to community development financial institutions ("CDFIs") in 2008. In addition, the FHFA's argument that eligible FHLB members only include those entities types in existence and specifically contemplated by Congress in the enactment of the FHLB Act is inconsistent with general principles of statutory interpretation.

- Most (if not all) of the current and prospective captive insurance company members of the FHLBs have a substantial commitment to the U.S. mortgage market missions of the FHLBs. In many cases, the entire investment portfolio of captive insurance company members is comprised of assets that would qualify as FHLB mission-specific and eligible collateral for borrowings. In the Proposed Rule, the FHFA characterizes captive insurance companies as "conduits" that are being used to facilitate access to FHLB borrowing for organizations that otherwise would not qualify as members. It is not clear that captive insurance companies serve as any more of a "conduit" for FHLB-advanced funds than other member entities that utilize FHLB advances as wholesale funding for lending activities. In addition, the ultimate result of the perceived "conduit" is the advancement of the mission of the FHLBs through increased investment in U.S. mortgages.

- FHLB borrowing requires members to pledge eligible collateral, which are generally limited to residential and multi-family commercial whole loans, agency and non-agency residential mortgage-backed securities and commercial mortgage-backed securities. Because the access to FHLB-advance funds is limited to the amount and availability of the member's eligible collateral, there is a natural safeguard against the occurrence of what the FHFA refers to as "mission creep," or the use of FHLB funds to finance activities that are not necessarily consistent with the U.S. mortgage market-specific purpose of the FHLBs.

Safety and Soundness Concerns

- The FHLBs have been in existence for over eighty years. During that time, they have successfully navigated numerous credit cycles and have not sustained a loss that resulted in taxpayer exposure, a testament to the FHLBs' processes and procedures to manage credit risk. The processes and procedures include (but are not limited to) imposing membership and activity stock purchase requirements that increase the capitalization of the FHLBs with increases in member advance levels, imposing overall borrowing capacity limitations, specifically underwriting members' credit and valuing collateral on a case-by-case basis, requiring physical possession of certain types of collateral, and imposing various "haircuts" that adjust based on the type and nature of the collateral at the FHLB's discretion. The exact same policies, procedures and collateral apply to captive insurance companies as other FHLB members. Thus, captive insurance companies do not pose any different or additional credit risk to the FHLB system.

- Contrary to the FHFA's suggestion, captive insurance companies generally have much better financial / solvency ratios and a much lower rate of failure than traditional insurers. Many of the current and prospective captive insurance company members of the FHLBs are organized as single parent, pure captive insurance company. In surveying the regulators in several of the largest U.S. captive domiciles, the Insurance Companies did not identify an instance involving the failure of a single parent, pure captive insurance company. Furthermore, the insurance programs of the FHLB captive insurance company members are generally straightforward and losses are typically fully funded in capital. As a result, the credit risk associated with captive insurance company members is almost exclusively associated with the investment risk of FHLB mission-specific assets.

- Captive insurance companies are licensed and regulated by states in a manner similar to traditional insurers. Captive insurance companies are subject to regulatory supervision and, among other things, typically are

required to file annual audited financial statements with the regulators, which would, in turn, be available to the relevant FHLB. Furthermore, captives are prohibited from transferring assets without regulatory approval, which requires confirmation of ongoing solvency following the transfer.

Additional Considerations

- The Proposed Rule is inequitable in that it allows current FHLB captive insurance company members to remain members for a five year "sunset" period, despite the fact that many of such entities applied for membership within the six months preceding the Insurance Companies' application for membership. In fact, had the FHLBs' not implemented the captive moratorium, the Insurance Companies likely would have been admitted as members prior to the issuance of the Proposed Rule, assuming FHFA approved the submission.

- The FHFA does not provide any tangible or empirical evidence to support the concerns noted in the Proposed Rule and does not offer any analysis regarding the financial impact of the Proposed Rule to the FHLBs, their members or the mortgage market as a whole. This type of information and analysis is of the utmost importance to the informed discussion that is a fundamental component of notice-and-comment rulemaking. Because many of the FHFA's assertions regarding captive insurance companies in the Proposes Rule are inaccurate and because implementation of the Proposed Rule would have adverse consequences to a vast number of parties, including the general public as participants in the U.S. mortgage market, it is imperative that the FHFA carefully consider, analyze and describe the costs and benefits of the Proposed Rule. The Insurance Companies strongly believe that such analysis will confirm the need to withdraw the Proposed Rule.

DISCUSSION

I. Supervisory Concerns

The FHFA suggests that captive insurance company members are problematic because: (i) their membership is not consistent with congressional intent under the FHLB Act and (ii) they are being used as "conduits" to access FHLB borrowing for otherwise ineligible entities.

a. The Membership Eligibility Provisions in the Proposed Rule are Inconsistent with the Plain Language of the FHLB Act and the Intent Of Congress

Under the FHLB Act, the membership eligibility provisions are very broad, stating that "*[a]ny* 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."[7] The FHLB Act neither defines "insurance company"[8] nor expressly authorizes the FHFA (as the FHLB Act did with respect to banker's banks[9]) to adopt additional rules and regulations that could further restrict ongoing membership. Furthermore, in 1932 when the FHLB Act was passed and insurance companies were originally included as eligible members, insurance companies engaged in the business of providing or investing in residential mortgage loans were predominantly life insurance companies. Nevertheless, Congress elected not to define the term "insurance company" or limit eligibility to life insurance companies, further illustrating, beyond the clear meaning of the text of the FHLB Act itself, Congress' intent for FHLB membership eligibility to be construed as broadly as possible to support the U.S. residential mortgage industry.

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[7] 12 U.S.C. § 1424(a)(1)(A).

[8] 12 U.S.C. § 1422 (statutory definitions); 12 C.F.R. § 1263.1 (regulatory definitions).

[9] 12 U.S.C. § 1444(b) (stating that the eligibility of certain banks is "subject to additional rules and regulations as the Direct [of the FHFA] may provide.").

Defining the term "insurance company" to exclude captive insurance companies, which are organized, licensed and regulated as insurance companies, is not, as the Proposed Rule suggests, within the scope of the FHFA's rulemaking authority. Instead, it directly conflicts with the clear and unambiguous text of the FHLB Act. The task of amending the text of the FHLB Act is exclusively vested in Congress. The FHFA may promulgate and enforce regulations and orders to implement the provisions of the FHLB Act. However, the FHFA does not have the authority to amend the FHLB Act or stray from the plain and unambiguous language of its provisions.[10] In this regard, if the FHFA legitimately believes that the phrase "any insurance company" in the FHLB Act is ambiguous and really means "certain insurance companies" that satisfy the FHFA's proposed definition, then the issue of amending the language should be raised for Congress' consideration.

In the event that words or phrases are unclear or ambiguous, which is not the case in this instance for the reasons noted above, the FHFA may look to the legislative history of a statute, established canons of statutory construction and its own reasoned analysis.[11] In disregarding the plain and unambiguous language of "any insurance company," the FHFA attempts to support the need to define the term "insurance company" and its proposed definition by asserting (i) its "*belief that in some cases*" captive insurance companies are being improperly utilized as conduits to access FHLB funds by otherwise ineligible entities[12] and (ii) arguments based on the intent of Congress in passing the FHLB Act. However, the FHFA's belief of what may be occurring in *some cases* does not constitute reasoned analysis. The Proposed Rule does not cite any specific examples of the conduit scenario, or, more importantly, provide any basis for the conclusion that conduit-type activity is not permitted. In fact, nothing in the FHLB Act or the Proposed Rule precludes a savings bank, insurance company or other FHLB member from utilizing advances from a FHLB to provide financing to third parties, including REITs. For example, an unaffiliated insurance company could offer repo financing to a REIT, accept mortgage-backed securities ("MBS") from the REIT as collateral, and subsequently pledge the MBS to a FHLB as collateral for an advance, thereby financing its repo lending to REITs with FHLB advances.

Furthermore, the FHFA's argument regarding congressional intent is without merit. The FHFA states in the Proposed Rule that captive insurance companies did not exist when the FHLB Act was passed and, therefore, Congress could not possibly have intended to include the entities in the category of eligible "insurance companies." This argument is meritless for a number of reasons. First, the plain language of the FHLB Act clearly indicates that the law was written to achieve the particular result of enhancing liquidity in the U.S. mortgage market. Accordingly, the broad and unambiguous language precludes a reading of the phrase "any insurance company" to include only a particular subset of insurance companies described by the FHFA. Instead, it necessitates a comprehensive and inclusive approach to FHLB membership eligibility for organizations falling into one of the categories enumerated in the FHLB Act, especially when the operations and activities of the organizations in question are consistent with the purpose of the FHLB Act.

Finally, it is important to note that since the passage of the FHLB Act, Congress has only acted to expand the categories of eligible members and facilitate access to the important funding the FHLBs provide. Specifically, Congress expanded membership to commercial banks and credit unions in 1989 and,[13] more recently, to community development financial institutions ("CDFIs") in 2008.[14] During these recent amendments to the FHLB Act, Congress has not considered limiting the definition of insurance company, despite the existence and FHLB memberships of captive insurance companies during this time period. This demonstrated approach by Congress, including the fact that the scope of membership eligibility has never been restricted by Congress in the eighty-two years of the FHLB Act's existence, provides strong support for the argument that narrowly construing the term "any insurance company" to exclude certain types of insurance companies is inconsistent with the FHLB Act and the underlying legislative intent.

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[10] *See* 5 U.S.C. § 706(2)(C).

[11] *See, e.g., Fox Television Stations v. FCC*, 129 S. Ct. 1800, 1810-11 (2009).

[12] *See* Proposed Rule RIN 2590-AA39, pages 24 and 26.

[13] *See* Financial Institution Reform, Recovery and Enforcement Act § 704.

[14] *See* Housing and Economic Recovery Act § 1206.

b. The FHFA Mischaracterizes Mission-Specific Financings as Problematic "Conduits"

One of the concerns raised by the FHFA most frequently in the Proposed Rule pertains to their characterization of captive insurance companies are acting as "conduits" for financing activities of non-eligible entities, like real estate investment trusts. The conduit characterization, and ultimate use of advanced funds, is irrelevant under the FHLB Act, which instead describes broad categories of eligible FHLB members and collateral. The FHLBs may make advances to eligible members, including insurance companies, that pledge appropriate collateral. The use of such funds is not addressed or restricted by the FHLB Act. Further, due to the fungible nature of money, it is impossible to track the use of specific FHLB borrowings by any type of FHLB member, captive insurance company or otherwise. As discussed above, other types of FHLB members could, and presumably do, match fund their own repo lending practices with third parties with FHLB advances, thereby acting as a conduit to FHLB funding for the third party.

The FHFA has expressed concern with the volume and concentration of the captive insurance companies' financing and investment activities. To our knowledge, neither Congress nor FHFA have ever proposed restrictions upon FHLB advances based upon the magnitude of operational activity of a member, and to preclude an entire class of members based on a perception of excessive financing advances relative to business operations is not based in any statutory authority. Further, from a credit perspective, FHLB advances to captive insurance companies are secured by the same collateral pledged by other members (*e.g.*, MBS) and, therefore, subject to the same collateral valuation process and associated advance limitations that the FHLBs have enforced since inception without a credit loss to taxpayers.

In short, the purpose of the FHLB Act and the mission of the FHLBs is to provide liquidity to the U.S. mortgage market by providing members with access to low-cost borrowings on favorable terms. The borrowings are provided on an over-collateralized basis and the type of collateral that may be pledge is restricted. Accordingly, within that framework, an ideal FHLB member candidate (from a conceptual perspective) is one with a significant concentration of eligible collateral, evidencing its commitment to provide liquidity to the U.S. mortgage market. Rather than identifying captive insurance companies as a significant opportunity for the FHLBs to advance their mission in accordance with the FHLB Act as many FHLBs have done, the FHFA instead has cited it as a basis for the need to eliminate captive insurance companies as eligible members altogether.

c. The Current Membership Criteria and Borrowing Policies and Procedures Generally Protect Against "Mission Creep"

Akin to the "conduit" argument discussed above, the FHFA cites the use of captive insurance companies as "mission creep," meaning the access to and use of FHLB-advance funds to finance activities that are not necessarily consistent with the U.S. mortgage market-specific purpose of the FHLBs. The Insurance Companies acknowledge the interest of the FHFA and FHLBs in ensuring that members' activities are consistent with the purpose of the FHLB Act and the mission of the FHLBs. The collateral eligibility requirements and the over-collateralized nature of the FHLB borrowings, however, already provide a natural protection mechanism against "mission creep." Specifically, members can only borrow from the FHLBs to the extent they have eligible assets available to be pledged. The necessary result is that the ongoing borrowing capacity and access to funds directly correlate with the replenishment of eligible assets by the members. As a result, if there was truly an issue on "mission creep" whereby FHLB funds are used for non-mission specific purposes, then any potential harm would be mitigated by the self-defeating nature of the arrangement. This mechanism is important because it provides a natural way to police the mission-specific scope of activities without requiring the FHFA or the FHLBs to trace the use of particular funds or monitor the scope of activities of all members, both of which would be virtually impossible in light of the fungible nature of funds and the significant number of FHLB members.

II. Safety and Soundness Concerns

The FHFA argues that captive insurance company members present unique and material credit risks to the FHLBs.

a. The FHLBs Have Processes and Procedures in Place to Mitigate Credit Risk

In over eighty years of existence, the FHLBs have never sustained a systemic loss resulting in the need for government intervention or taxpayer / investor exposure. In light of the number of credit cycles that have been effectively navigated during that eighty year period, it is reasonably safe to assume this means that the FHLBs have sufficient processes, procedures and controls in places to protect against the credit risk of member borrowing, regardless of whether the member is an insurance company, bank, credit union, or other entity.

Captive insurance companies pledge the exact same types of collateral as other FHLB members. Furthermore, like all other members, captive insurance companies are required to purchase (i) membership stock based on the applicable asset test of the FHLB, and (ii) activity stock based on the amount of active borrowings. Therefore, if FHLB advances are provided on an over-collateralized basis and the FHLB credit / collateral policies and procedures and stock purchase requirements are consistently applied, then it is unclear how or why captive insurance company members would present any greater or lesser credit risk to the FHLBs.

b. Captive Insurance Companies Do Not Present Unique Credit Risks

The FHFA does not provide any evidence to support its claim that captive insurance companies pose greater credit / default risk than other members, including traditional insurance companies. Industry data demonstrates that captive insurance companies fail at a much lower rate, proportionally, than traditional insurers.[15] The explanation for the lower rate of failure is actually one of the reasons cited by the FHFA as a potential concern – alignment of interests. Because many (but not all) captive insurance companies insure the risks attributable to their owners, the owner-insureds have a vested interest in ensuring the ongoing solvency and financial strength of the entity. If a captive insurance company becomes insolvent, then the owners potentially lose both their insurance coverage (*i.e.*, they become uninsured or self-insured and directly responsible for paying loses) and their investment in the subsidiary.

Not only do captive insurance companies generally have a lower default rate than traditional insurers, but also the default of single parent captive insurance companies is extraordinarily rare. Most FHLB captive insurance companies (including the Insurance Companies) are formed as single parent, pure captives and, in most cases, the insurance risk is fully funded, or nearly fully funded, in capital. As a result, the likelihood that an FHLB captive insurance company member would experience a default in connection with its insurance program is negligible. Therefore, unlike most other eligible FHLB members, the credit risk of captive insurance company members is almost exclusively tied to the underwriting of FHLB mission-specific investments (which, as noted above, the FHLBs have processes in place to protect against).

c. Captive Insurance Companies are Subject to Similar Regulatory Regimes as Traditional Insurers

Captive insurance companies are subject to the same or similar regulatory framework as traditional insurance companies and,[16] as a general matter, are subject to far more oversight and regulation than CDFIs. As part of the regulatory framework, captive insurers (i) must submit financial information (including, in most jurisdiction, audited financial statements and certifications from an actuary regarding the sufficiency of funding) to the state regulator at least annually, (ii) must maintain minimum capital and surplus to satisfy state law (net of the actuarially determined loss reserves), (iii) are prohibited from distributing assets from the captive without regulatory approval, (iv) must submit a business plan to the regulator, conduct business solely in accordance with such plan, and submit any proposed changes to the regulator for approval, (v) must engage an independent auditor and independent insurance manager, and (vi) generally have at least one independent manager/director serving on the board. If the

[15] *See* A.M. Best, *Special Report on U.S. Captive Insurance* (August 2014) (comparing various financial and solvency ratios of captive insurance companies with traditional insurers and finding that captives "substantially outperformed" their traditional insurer counterparts; also representatives of the Insurance Companies researched the issue of captive insurer default, which included communicating with regulators in some of the largest captive insurance, and did not identify an instance involving a single parent, pure captive insurance company.

[16] *See e.g.*, Comments of the Delaware Department of Insurance, MN 2590-AA39 3-4 (Apr. 1, 2011); Comments of the Vermont Department of Banking, Insurance, Securities' and Health Care Administration, RIN 2590-AA39 2 (Feb. 23, 2011); Comments of the Captive Insurance Company Association, RIN 2590-AA39, 1-2 (Mar. 27, 2011); *see also* NAIC, Captive Insurance Companies (Aug. 5, 2014), http://www.naic.orgicipr_topics/topic_captives.htm ("Once established the captive operates like any commercial insurance company and are subject to state regulatory requirements including reporting, capital and reserve requirements.")

ongoing solvency of a captive becomes a concern, state regulators typically intervene to varying degrees depending on the level of concern. Such intervention can include actions such as requiring that the parent company contribute more capital, requiring the captive to charge higher premiums, requiring more frequent financial reports, or, in worst case scenarios, suspending the captive's license.

III. The Proposed Rule is Harmful to the FHLBs and the U.S. Mortgage Market

The Proposed Rule does not address the impact the rule would have on the FHLBs (both from a financial and membership status perspective), the U.S. mortgage market or the affordable housing grant programs ("AHPs"), which receive, in the aggregate, 10% of the annual income of the system. As has been discussed in other comment letters, analysis and discussion of the consequences of the Proposed Rule is of fundamental importance to sound and legitimate rulemaking. Furthermore, the provision of such information and analysis by the FHFA is critical in order to facilitate the type of informed discussion and cost-benefit analysis that underlies the purpose of notice-and-comment rulemaking.

IV. The Proposed Rule Results in Unequal Treatment of Similarly Situated Entities

In the Proposed Rule, the FHFA (i) distinguishes captive insurance companies from all other types of eligible FHLB members (including traditional insurance companies) for purposes of excluding captives from membership, and (ii) distinguishes between captive insurance companies that have been admitted as FHLB members prior to the publication date of the Proposed Rule and all other captive insurance companies (including those delayed in the membership application process by the moratorium) for purposes of the five year membership and borrowing sunset period.

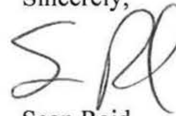
As discussed throughout this letter, with respect to matters relevant to the intent of the FHLB Act, there is no material difference between captive insurance companies and traditional insurance companies. Because captive insurance companies and traditional insurance companies are indistinguishable for purposes of the membership eligibility criteria enumerated in the FHLB Act, there is no rational basis for the FHFA to categorically exclude captive insurance companies as eligible FHLB members.

In addition to the foregoing, the Insurance Companies believe that is also unfair and unlawful for the FHFA to treat, or require the FHLBs through the Proposed Rule to treat, current captive insurance company members differently from prospective captive insurance company members. Despite the fact that the FHFA has approved captive insurance company members of the FHLBs for twenty years, the Proposed Rule would result in different treatment of similar captive insurance companies based on FHLB membership status as of the date the Proposed Rule was published. The Insurance Companies are nearly identical to the captive insurance companies that are current members of the FHLBs by virtue of the fact that they applied for FHLB membership only months or weeks prior to the Insurance Companies. Accordingly, it is inequitable to distinguish between organizations like the Insurance Companies and current captive insurance company FHLB members for purposes of determining the entitlement to access the benefits of FHLB membership, regardless of whether such distinction applies for one day or for the entire five year sunset period. The disadvantage and harm to the Insurance Companies is significant by comparison to the captive insurance companies that were members as of the publication date of the Proposed Rule. As noted above, the moratorium prevented the Insurance Companies from becoming FHLB members prior to that date. As such, the Insurance Companies believe that captive insurance companies should be treated similarly under the Proposed Rule and permitted to be members for identical terms.

V. Conclusion

As this letter demonstrates, the concerns articulated by the FHFA in the Proposed Rule regarding captive insurance companies are entirely theoretical and largely unsubstantiated, whereas the harm that would result from the implementation of the Proposed Rule is tangible and significant. Captive insurance companies have been members of the FHLB system in good standing for over twenty years. It is important to recognize that captive insurance companies have historically played a role in supporting the mission of the FHLBs and can continue to play and expand that role in a safe and sound manner in the future. Accordingly, for the reasons stated herein and in other comments submitted, the Insurance Companies respectfully request that the FHFA refrain from implementing the provisions of the Proposed Rule concerning captive insurance company membership and eligibility.

Sincerely,



Sean Reid
Treasurer