

June 4, 2018

Via Electronic Submission

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Constitution Center
400 7th Street SW, 8th Floor
Washington, DC 20219

RE: Comment on Docket No. 2018-N-03—Notice of Regulatory Review

Dear Mr. Pollard:

U.S. Mortgage Insurers (“USMI”)¹ welcomes the opportunity to submit a comment on the Federal Housing Finance Agency’s (“FHFA”) Notice of Regulatory Review (“Notice”)² as part of the agency’s five-year Regulatory Review Plan to identify agency rules that should be modified, streamlined, expanded, or repealed. One regulation that USMI believes should be reassessed is the FHFA’s “Prior Approval for Enterprise Products” interim final rule for Fannie Mae and Freddie Mac, the government-sponsored enterprises (“GSEs”), published in the Federal Register on July 2, 2009 (“Regulation”)³. The Regulation implemented Section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992⁴, as amended by Section 1123 of the Housing and Economic Recovery Act of 2008 (“HERA”)⁵, to establish a process for the GSEs to obtain prior approval from the FHFA for new products and provide prior notice to the FHFA for new activities. For the reasons provided within this submission, USMI encourages the FHFA to withdraw the Regulation and resubmit a new proposed rule for a formal notice and comment period with additional clarity on the FHFA’s role and authority as conservator and regulator of the GSEs, as well as a workable approach for assessing new activities and products.

HERA requires, and the Regulation implements, a process for review and approval of new activities and products at the GSEs in which, among other things, the FHFA must facilitate a public notice period for new products and then review and approve or deny based on whether the product is permitted by the GSE’s charter⁶, in the public interest, and consistent with the safety and soundness of the GSE and overall mortgage finance system. More generally, the GSEs are required to submit notices of new activity before commencing a new activity.

¹ USMI is a trade association comprising the following private mortgage insurance companies: Essent Guaranty, Inc.; Genworth Mortgage Insurance Corporation; Mortgage Guaranty Insurance Corporation; National Mortgage Insurance Corporation; and Radian Guaranty Inc.

² 83 Fed. Reg. 14605 (April 5, 2018).

³ 74 Fed. Reg. 31602 (July 2, 2009).

⁴ Pub. L. 102-550, 106 Stat. 3672 (October 1992).

⁵ Pub. L. 110-289, 122 Stat. 2654 (July 2008).

⁶ See Federal National Mortgage Association Charter Act, 12 U.S.C. § 1716 (2010) and Federal Home Loan Mortgage Corporation Act, Pub. L. 91-351, 84 Stat. 450 (2010).

Neither HERA nor the Regulation gives the GSEs or the FHFA an explicit option to ignore the process set forth in the Regulation, but this appears to be what has occurred since the Regulation was implemented in 2009:

- Former Acting Director Edward DeMarco wrote to Congress in 2010, stating that “permitting the Enterprises to engage in new products is inconsistent with the goals of conservatorship” and that “the Enterprises will be limited to continuing their existing core business activities and taking actions necessary to advance the goals of conservatorship.”⁷
- Current Director Melvin Watt stated that “If I took comment on every pilot we did, we would never do any,”⁸ while testifying before the Senate Banking Committee on May 23, 2018.
- Subject to definitive confirmation under the Freedom of Information Act⁹, USMI has not been able to discover any use of the Regulation since implementation.

To be sure, the GSEs are very different entities than they were prior to being placed into conservatorship during the financial crisis and when Acting Director DeMarco wrote to Congress in 2010. The Regulation is still the same, however – unused and apparently not fit for purpose – which is why USMI requests a reappraisal of the purposes underlying the Regulation and the means by which they are addressed. New activities and products have the potential to significantly impact many stakeholders in the housing finance ecosystem – GSEs, lenders, private mortgage insurers, borrowers, and the American taxpayer – and it is wholly appropriate for the FHFA, as regulator of the GSEs, to have and use a deliberative and transparent process for the review of proposed new activities and products developed by the GSEs.

There is an additional benefit to having an FHFA reappraisal of the Regulation. HERA also created conservatorship authority for FHFA to exercise with regard to the GSEs, and the conservatorships are nearing their 10th anniversaries – well beyond the reasonable expectations of Congress and President George W. Bush when HERA became law. FHFA’s dual authorities under HERA as regulator and conservator are distinct and, as federal courts have held, carry different legal consequences depending of which authority is exercised and how. FHFA has not addressed the interaction between its regulatory and conservatorship authorities even as FHFA has pursued “GSE reform”¹⁰ and consistently supported efforts by the GSEs to explore new ways to act within the housing finance system. Oversight exercised as a conservator standing in the shoes of the entities under conservatorship could generate a different perspective and set of judgments than oversight exercised by a regulator concerned with the function and stability of its regulated entities within the context of the larger housing finance system and coordinate

⁷ Letter from FHFA Acting Director Edward DeMarco to Sen. Chris Dodd, Sen. Richard Shelby, Rep. Barney Frank, and Rep. Spencer Bachus (February 2, 2010). *Available at*: https://www.fhfa.gov/Media/PublicAffairs/Documents/Letter_to_Dodd_Frank_Shelby_Bachus-02-02-2010_n508.pdf

⁸ United States. Cong. Senate. Committee on Banking, Housing, and Urban Affairs. *Ten Years of Conservatorship: The Status of the Housing Finance System. May 23, 2018.* 115th Cong. 2nd sess.

⁹ 5 U.S.C. § 552 *et seq.*

¹⁰ *Id.* Director Watt has on numerous occasions drawn a distinction between “GSE reform” that can be accomplished by the FHFA and a broader “housing finance reform” that should be driven by Congress.

federal/state financial regulators. Congress and the public should not have to guess which perspective is being employed as the GSEs continue to evolve. Given the GSEs' expansion in the scope of their activities during their nearly decade-long conservatorships, it is critical that the FHFA develop and implement a regulatory process that it actually uses to assess and determine whether individual activities and products comply with the GSEs' charters to remain in the secondary market and that the GSEs do not reorder the primary mortgage market without substantial discussion and clear agreement that such actions are merited but are still capable of being challenged meaningfully by those affected.

Innovation at the GSEs should be subject to a transparent and coherent review process at the FHFA that recognizes and preserves the "bright line" distinction between the primary market where lenders make mortgage loans to qualified borrowers and the secondary market where those loans are sold to investors. USMI finds it concerning that the GSEs continue to roll out – with little to no transparency or publicly-available analysis from the FHFA – and introduce into the market new programs that disintermediate private capital and primary market participants without robust public discussion beforehand. FHFA's Regulatory Review Plan process creates an opportunity to identify flaws in the Regulation that have caused it to remain unused and substitute a new proposed rule that addresses the shortcomings identified. Housing finance system stakeholders should not have to rely on mechanisms that sidestep the Administrative Procedure Act¹¹ such as "requests for input" to offer feedback on new activities and programs proposed by the GSEs.

Thus, USMI and its member companies encourage the FHFA to withdraw the Regulation and resubmit a proposed rule that comprehensively addresses FHFA's dual authorities as regulator and conservator of the GSEs and the approach taken to satisfy HERA's requirement regarding the evaluation and approval of new activities and products. USMI appreciates the opportunity to comment on the FHFA's Notice of Regulatory Review and questions or requests for further information may be directed to Lindsey Johnson, President of USMI, at ljohnson@usmi.org or 202-280-1820.

Sincerely,



Lindsey Johnson
President

¹¹ Pub. L.79-404, 60 Stat.237 (1946).