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

RE: Resolution Planning (RIN 2590-AB13)

Submitted by Electronic Delivery to: RegComments@fhfa.gov

Dear Mr. Pollard:

On behalf of the National Association of Home Builders (NAHB), I appreciate the opportunity to provide comments in response to the Notice of Proposed Rulemaking (NPR) regarding Resolution Planning for Fannie Mae and Freddie Mac (the Enterprises). The Federal Housing Finance Agency (FHFA) is taking a forward-looking approach to ensuring plans are in place for the possibility that FHFA may be appointed receiver of the Enterprises as a prudent supervisory action. The potential for significant market disruption if the Enterprises were to be placed in receivership is mitigated with as much forethought as possible.

NAHB is a Washington DC-based trade association representing more than 140,000 members involved in all aspects of the development and construction of for-sale single-family homes, including homes for first-time and low- and moderate income home buyers, as well as the production and management of affordable rental housing. The ability of the home building industry to meet the demand for housing, including addressing affordable housing needs, and contribute significantly to the nation's economic growth is dependent on a sound and efficiently operating housing finance system.

Background

The Housing and Economic Recovery Act (HERA) of 2008 amended the Federal Housing Enterprises Financial Safety and Soundness Act (Safety and Soundness Act) of 1992 and created FHFA to provide supervision, regulation, and housing mission oversight of the Enterprises. HERA gave the Director of FHFA authority to place the Enterprises in conservatorship or receivership and name the agency as conservator or receiver. Until HERA included this authority for FHFA in the Safety and Soundness Act, there was no provision for Fannie Mae or Freddie Mac to enter receivership. As amended by HERA, the Safety and Soundness Act lays out the discretionary grounds for the Director to appoint FHFA as conservator or receiver of the Enterprises and spells out the mandatory grounds for receivership. The director of FHFA is mandated to appoint the agency as receiver of the Enterprises if he determines, in writing, that "(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or (ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally

paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due."[1]

FHFA recently finalized an enhanced regulatory capital framework for the Enterprises and has proposed numerous additional regulatory policies, as well as a current "Strategic Plan," that together demonstrate the agency's objective to strengthen the supervision and regulation of the Enterprises with the goal of preparing them for post-conservatorship success. Proposed regulations include a NPR on the process for prior approval of new products; an advance NPR on potential changes to the Enterprises' housing goals; a NPR to implement new liquidity and funding requirements; and, a request for input on the current and future climate and natural disaster risk to the housing finance system, the Enterprises and the Federal Home Loan Banks.

In September 2019, the U.S. Department of the Treasury (Treasury) issued a Housing Reform Plan as directed by a Presidential Memorandum issued March 27, 2019 by President Trump. Under the heading "Protecting Taxpayers Against Bailouts" Treasury noted the importance of the Enterprises having a credible resolution framework in place to "ensure that shareholders and unsecured creditors bear losses, thereby protecting taxpayers against bailouts, enhancing market discipline, and mitigating moral hazard and systemic risk"[2] in the event of receivership.

The Enterprises are not covered by the resolution framework used by the Federal Deposit Insurance Corporation (FDIC) for large insured depository institutions (IDIs) or Sec. 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010, "Enhanced Supervision and Prudential Standards for Nonbank Financial Companies Supervised by the Board of Governors and Certain Bank Holding Companies" that requires nonbank financial companies designated by the Financial Stability Oversight Council (FSOC) for enhanced supervision by the Federal Reserve (Systemically Important Financial Institutions or SIFIs) and large, interconnected bank holding companies to include resolution plans as a required prudential standard. Neither are Fannie Mae and Freddie Mac considered in Title II Orderly Liquidation Authority of Dodd-Frank in which the FDIC's receivership authority was expanded beyond commercial banks to include bank holding companies and all firms designated as SIFIs by FSOC.

The proposed resolution planning rule is a component of FHFA's effort to continue its work toward becoming a world-class regulator of the Enterprises by ensuring a receivership framework that acknowledges the unique purpose of the Enterprises while also acknowledging their status as large financial institutions.

Proposed Rule

As noted by FHFA, in developing the proposed resolution planning process, the agency had the benefit of considering the FDIC's receivership framework for resolving failed IDIs and the framework jointly established by the FDIC and the Board of Governors of the Federal Reserve (Federal Reserve) per Sec. 165 of Dodd-Frank for FSOC-designated SIFIs and certain bank holding companies. Though the Enterprises are unique in their statutory purposes and mission, as well as their relatively limited lines of business, there are general similarities to these financial institutions that make these two existing frameworks a good starting point for guiding the Enterprises in their resolution planning. The resolution planning process also is guided in large part by the Safety and Soundness Act, which in particular establishes the framework for a statutorily-mandated limited-life regulated

[1] 12 U.S. Code § 4617.Authority over critically undercapitalized regulated entities
[2] U.S. Department of the Treasury, Housing Reform Plan, September 2019, Page 31.

entity (LLRE) that would carry on the Enterprises' charter obligations and core businesses lines in the event of receivership. Liabilities and assets of the Enterprises would be transferred to or purchased by either the LLRE or the receivership estate.

The Safety and Soundness Act specifies that upon placing an Enterprise in receivership, FHFA shall organize the LLRE that shall "succeed to the charter of the Enterprise and operate in accordance with and subject to such charter."[3] In the event the Enterprises were to be put into receivership prior to Congress passing legislation to change their charters, the Enterprises would revert to the charter in effect for each Enterprise when it was placed in conservatorship in September 2008.

FHFA stipulates the Enterprises are to base their resolution planning on the following assumption: neither Enterprise would receive extraordinary support from the United States government to prevent either its becoming in danger of default or in default, or fund its resolution, including support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as regulator, conservator, or receiver of the Enterprise through the (*currently outstanding)* Preferred Stock Purchase Agreements (PSPAs) with the U.S. Department of the Treasury (Treasury). FHFA also cautions that as per the clear statutory construct of the Enterprises, the resolution plans must clearly and accurately reflect the Enterprises are not supported by the full faith and credit of the United States and their securities (including mortgage-backed securities that an Enterprise guarantees) and debt are not guaranteed by the United States. This mandate is intended to ensure the Enterprises do not encourage the implicit federal government guarantee long-assumed by the investor community as a result of the benefits granted the Enterprises by their original government sponsored charters.

The inclusion of this requirement is especially noteworthy. The financial crisis in the mortgage industry that led to the conservatorships of the Enterprises and their bailout by the federal government, i.e. taxpayers, proved the implicit federal government guarantee to be an explicit federal government guarantee.

NAHB Comments and Recommendations

NAHB understands FHFA is undertaking the development of this resolution process in its role as regulator of the Enterprises. Establishing a process for resolving the Enterprises is an important supervisory responsibility that has yet to be addressed by FHFA. However, planning for the resolution of the Enterprises is secondary to planning to ensure receivership does not occur and resolution will not be required, which FHFA already is working to ensure through the reform actions and outstanding proposals mentioned earlier.

Regardless of how deliberate the resolution planning process and how "rapid and orderly" the determined process of dividing the assets and liabilities between a receivership estate and the LLRE that will carry on the Enterprises core business lines, NAHB believes if either or both of the Enterprises were to be placed in receivership it would cause market turmoil and the mortgage market would be adversely affected. The Enterprises play an enormous role in the mortgage market, purchasing almost 60 percent of first-lien mortgages originated in 2020. [4] It also is likely that for such a situation to occur, the housing market, and perhaps the broad financial markets, already would be experiencing a crisis event. Therefore, we support FHFA's proposal that it

[3] 12 U.S. Code § 4617.Authority over critically undercapitalized regulated entities
[4] Urban Institute's Housing Finance Policy Center, *Housing Finance at a Glance,* February 2021. Page 8

may require the Enterprises to consider scenarios of severe adverse economic conditions presented by FHFA in the periodic updates to their resolution plans, which FHFA is proposing to require every two years.

Due to the stipulations of FHFA, NAHB assumes the proposed resolution planning process assumes the Enterprises have exited conservatorship after being appropriately capitalized and some extraordinary event has led the director of FHFA to appoint FHFA receiver for Fannie Mae and/or Freddie Mac due to the Enterprise(s) being in default or in danger of default (although there are other conditions under which the Enterprises may be placed in receivership.) Otherwise, if FHFA were to put the Enterprises into receivership directly from their current state of conservatorship, the process would have to consider the existing PSPAs would provide some extraordinary support of the Enterprises in the form of the outstanding Treasury Funding Commitment of $113.9 billion for Fannie Mae and $140.2 billion for Freddie Mac. Also, the outstanding PSPAs are providing an explicit federal government guarantee of the Enterprises' MBS that supports liquidity in the MBS market and allows the Enterprises to sustain a robust mortgage market.

NAHB finds it challenging to opine on a resolution process that does not allow for consideration that there will be extraordinary support for the Enterprises and their MBS. Such support was, in fact, provided swiftly by the Federal Reserve in the 2008 financial crisis and the more recent COVID-19 financial market stress and still exists through the PSPAs. NAHB does not believe the resolution planning process should be based on assumptions prior to conservatorship or future conditions preferred by FHFA. Assumptions that would have been relevant in 2007 are no longer applicable in 2021. Furthermore, NAHB is extremely hopeful that before the initial resolution plans are due, estimated to be close to two years after FHFA publishes a final resolution planning rule, Congress will have passed housing finance system reform legislation that provides an explicit federal government guarantee of Fannie Mae and Freddie Mac MBS.

We understand that at this point it is unknown whether there would be extraordinary support for the Enterprises in a future crisis and/or an explicit federal government guarantee on their MBS after conservatorship. Though the Safety and Soundness Act specifies that the LLRE that succeeds the Enterprises will inherit their charters and carry on their core business lines in accordance with their charters, the current charters do not provide an explicit federal government guarantee of the Enterprises MBS or their issued debt, and the current charters are, at this point, the only charters that exist. NAHB recommends FHFA consider how the development of the initial resolution plans would be disrupted if an explicit federal government guarantee is provided for by the passage of housing finance system reform legislation between the start of the resolution planning process and submission of the initial resolution plans. While FHFA may not agree an initial resolution plan is the place to address hypothetical scenarios, NAHB believes there should be some accommodation for the possibility that housing finance system reform will happen within the timeframe FHFA has established for this initial process.

As proposed, the resolution planning process would call for updates to the plans every two years, with a provision that FHFA can request an interim update after receiving notice of an "extraordinary" event. These updates will allow for the plans to incorporate housing finance system reforms or allow FHFA to propose other industry scenarios that could affect the resolution of the Enterprises for the Enterprises to consider in preparing the periodic updates to their resolution plans. NAHB supports this provision.

Core Business Lines

The determination of "core business lines" to be transferred to the LLRE for continued operation by the LLRE is identified by FHFA as the first step in the resolution planning process. FHFA considers defining a "core business line" as each business line of the Enterprise that plausibly would continue to operate in an LLRE considering the purposes, mission and authorized activities of the Enterprise set forth in its charter and the Safety and Soundness Act. Core business line would include operations, services, functions, and supports associated with the business line and necessary for the business line's continuation in the LLRE.

NAHB agrees that defining core business lines in this manner and distinct from the definition used by FDIC for IDIs and in Sec. 165 of Dodd-Frank for FSOC-designated SIFIs and certain bank holding companies is appropriate. The resolution planning rules for these other entities define core business lines as those whose failure would be thought to result in material loss of revenue, profit, or franchise value. The Enterprises core business lines should be determined according to their mortgage market significance and charter allowances.

As the LLRE would be required to carry on the statutory and charter purposes of the Enterprises, the core business lines should be those that comply with these limited purposes. These include providing liquidity, efficiency and stability to the secondary market for residential mortgages; meeting goals to support mortgage loans for low- and very low- income families and serve underserved housing markets; increasing the liquidity of mortgage investments; and improving the distribution of investment capital available for residential mortgage financing. FHFA, as regulator of the Enterprises, ensures all the Enterprises' business lines are in support of charter purposes and has authority to determine whether new or proposed activities are or are not in compliance with the Enterprises' charters.

Methodology for Determining Core Business Lines

FHFA proposes to require each Enterprise to review its business lines and provide FHFA notice of those business lines preliminarily determined to be core, subject to FHFA review. To identify its core business lines, each Enterprise would be required to develop and implement an identification process, including a methodology to evaluate the Enterprise's participation in activities and markets that are critical to fostering liquidity, efficiency, resilience, stability, and competition in the national housing finance markets or carrying out the statutory mission and purpose of the Enterprise. On review, FHFA may approve or disapprove any business line identified by an Enterprise as core (or of any operation, service, function, or support associated with any business line) and may independently identify any other business line as core. FHFA would not be required to utilize any particular methodology for identifying any core business line, but believes that it would be appropriate to consider the factors set forth above in the methodology for Enterprise identification. FHFA would be able to consider any other factor it deems appropriate.

NAHB does not support this proposed identification process and underlying evaluation methodology as it is not necessary and complicates a simple determination. NAHB believes it should be assumed that due to the charter purposes of the Enterprises and the Safety and Soundness Act requirements, all their business lines are core. If FHFA reserves the right to arbitrarily approve or disapprove a core business line proposed by an Enterprise or add a core business line, with no prescribed methodology or transparency, NAHB questions the need for the Enterprises to go through the methodology and identification processes and the submission of the proposed core business lines to FHFA. The process is time and resource intensive and could be eliminated. NAHB recommends FHFA should, in consultation with the Enterprises, determine the core business lines that are to be continued by the LLRE.

Related to this recommendation, in response to FHFA's request for comment on whether, due to similarities between the activities each Enterprise is authorized or directed to take in its charter, there would be benefit to FHFA's providing notice to each Enterprise of all core business lines identified or any removal of a core business line identification, across both Enterprises, NAHB believes the core business lines for each Enterprise should be determined by FHFA, in consultation with the Enterprises, and should be the same for both Enterprises.

Conclusion

The Enterprises are large, critical financial institutions and NAHB supports the resolution planning process as one that should be in place for organizations with such market significance. The possibility of either Enterprise being placed in receivership and the market turmoil that would ensue, regardless of how much resolution planning has taken place, simply underscores the need for comprehensive housing finance system reform legislation. Legislation is critical to create market certainty regarding an explicit federal government guarantee of the Enterprises' MBS and the structure of the Enterprises.

Thank you for your consideration of NAHB's comments. For more information, please contact Rebecca Froass, Director of Financial Institutions and Capital Markets at rfroass@nahb.org.

Sincerely,

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Housing Finance and Regulatory Affairs