

June 30, 2023

Mr. Clinton Jones
General Counsel
Federal Housing Finance Agency
400 Seventh Street, SW
Washington, DC 20219

By email to RegComments@fhfa.gov

**Re: Prudential Management and Operations Standards Proposed Rule;
Comments/RIN 2590-AB10**

Dear Mr. Jones:

Freddie Mac appreciates the opportunity to comment on the Federal Housing Finance Agency (“FHFA”) proposal to amend its Prudential Management and Operations Standards Rule¹ (the “Rule”). The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008 (“HERA”) requires the Director of the FHFA to establish prudential management and operational standards by regulation or guidelines (the “Standards”).² The current Standards apply to Freddie Mac, Fannie Mae, and the Federal Home Loan Banks and, if finalized as proposed, would also apply to the Office of Finance of the Federal Home Loan Bank System (collectively “Regulated Entities”). For the reasons described below, we recommend that, in adopting the proposal, FHFA specify that it will use a public notice and comment rulemaking process whenever establishing, modifying, or revoking a Standard established by guideline.

In the proposal, FHFA requests comment on the “processes for establishing, modifying, and revoking Standards established as guidelines.”³ The current Rule provides in part: “[T]he Director may modify, revoke, or add to the Standards, or any one or more of them, at any time by order or notice.”⁴ As amended, the Rule would require a “material modification” of a Standard established by guideline to be issued for public notice and comment but would not require this process to make other modifications or to revoke a Standard established by guideline.⁵

We believe the modification and revocation processes regarding guidelines in the existing Rule, and in the proposed amendments, should be modified to conform to the rulemaking requirements of the Administrative Procedure Act (the “APA”).

Standards established by guidelines are rules under the APA⁶ and commonly referred to as “legislative rules” under well-established case-law.⁷ For example, HERA directs FHFA to establish a Standard related to the “adequacy of internal controls and information systems taking into account

¹ 88 Fed. Reg. 28433 (May 4, 2023).

² 12 U.S.C. 4501.

³ 88 Fed. Reg. 28433, 28435.

⁴ 12 C.F.R. §1236.3(b).

⁵ Proposed 12 CFR §1236.3(b); 88 FR 28433, 28437.

⁶ 5 U.S.C. 551(4).

⁷ See *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015).

the nature and scale of business operations” (“Standard 1”)⁸ and in turn, FHFA prescribed 16 detailed guidelines.⁹ In total, FHFA has established more than 100 guidelines interpreting, implementing, and applying the 10 Standards set forth in HERA. In addition, the Rule sets forth enforcement consequences facing Regulated Entities that fail to comply. As such, we believe FHFA’s process of establishing Standards as guidelines is rulemaking and would require public notice and comment under the APA whenever FHFA formulates, amends, or repeals a guideline.¹⁰

Standards established as guidelines form the foundation of a regulated entity’s risk management framework and affect most facets of a Regulated Entity’s business. Compliance with guidelines can require significant resources, and even a modification deemed not to be material could have consequences that are not readily apparent to FHFA absent the benefit of public notice and comment. The application and enforcement of guidelines can have a significant impact on regulated entities. Recently, two national banks operating under the Office of the Comptroller of the Currency’s safety and soundness guidelines¹¹ received combined civil money penalties of more than \$480 million and public Cease and Desist Orders.¹² Given these potential regulatory consequences, the Regulated Entities would benefit from the regulatory certainty provided by the APA’s rulemaking process requirements.

Additionally, the proposed amendments provide that FHFA may revoke Standards established as guidelines at any time.¹³ While revocation of guidelines may potentially ease administrative burden, revocation without public notice and comment may introduce uncertainty concerning whether the removal of the guideline was consistent with APA requirements. For example, consumer advocates or other interested parties who disagree with a revocation may legally challenge FHFA’s decision on APA grounds. The potential for extended litigation could also cause regulatory uncertainty for the Regulated Entities.

For these reasons, we respectfully recommend that FHFA, in finalizing the proposal, adopt processes that provide the public with notice of, and the opportunity to comment on, any Standard established as a guideline, as well as provide the public with notice of, and the opportunity to comment on, any modification or revocation of any Standard established as a guideline.

Freddie Mac appreciates your consideration of our comments and recommendation. We hope you find the recommendation practical and straightforward in mitigating the potential for regulatory and legal uncertainty for Regulated Entities and FHFA under the current Rule and proposed amendments. If you have any questions, please contact me at Heidi.Mason@freddiemac.com.

Sincerely,



Heidi L. Mason
Executive Vice President and General Counsel

⁸ 12 U.S.C. 4513b(a)(1).

⁹ 12 C.F.R. §1236.4 and 1236.5.

¹⁰ 5 U.S.C. 551(5) and 553.

¹¹ 12 C.F.R. Part 30, Appendix D: Heightened Standards Guidelines.

¹² Capital One N.A. enforcement action (www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-101.html) and Citibank, N.A. enforcement (www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-132.html).

¹³ Proposed 12 CFR §1236.3(b); 88 FR 28433, 28437.