



FHFA Policy Statement on Supervisory and Regulatory Access to Regulated Entity Privileged and Confidential Information

This statement explains the policy of the Federal Housing Finance Agency (FHFA or Agency) regarding its responsibilities, authorities, and expectations in the supervision and regulation of Fannie Mae, Freddie Mac, the Federal Home Loan Banks (Banks), and the Office of Finance for the Federal Home Loan Bank System (collectively, regulated entities).¹ Clear policy enables the regulated entities to fully understand the extent of their expected cooperation with FHFA staff, and enables FHFA staff to conduct all its activities, including supervision, examination, research, and regulatory functions as required by law without unnecessary obstacles. All data, information, books, and records obtained by FHFA, regardless of their source or the specific authority under which they are obtained, relate to functions at the core of FHFA's statutory mission.

The Agency's policy and position is that privilege is not a basis on which a regulated entity may object to and decline to provide full, complete, and prompt responses and delivery of information and data to FHFA for regulatory and supervisory oversight. That conclusion is bolstered with respect to Fannie Mae and Freddie Mac, as entities presently under conservatorship. FHFA retains discretion to assert privileges on behalf of the regulated entities in response to third-party requests directed to the Agency. As FHFA's requests are compulsory, a regulated entity's compliance with a request does not waive any privilege against disclosure *vis-à-vis* a third-party.

FHFA expects that the regulated entities will promptly provide FHFA staff with full, complete, and unimpeded access to all information requested during FHFA's activities, notwithstanding a regulated entity's trade secret protection, common law privileges, contractual obligations, or other confidentiality or restrictive disclosure requirements. A regulated entity's

¹ The Safety and Soundness Act defines "Fannie Mae and any affiliate thereof" and "Freddie Mac and any affiliate thereof" as regulated entities. 12 U.S.C. § 4502(20). "Affiliate" is defined for the purposes of the Safety and Soundness Act to include "any entity that controls, is controlled by, or is under common control with, an [E]nterprise." *Id.* at 4502(1). Therefore, Common Securitization Solutions, LLC (CSS), wholly owned jointly by the Enterprises in conservatorship, is a statutory affiliate of Fannie Mae and Freddie Mac, each; as well as an asset of each Enterprise. *See* 12 U.S.C. § 4511(b)(2) (FHFA has general regulatory authority over each regulated entity and the Office of Finance) and 12 U.S.C. § 4617(b)(2) (FHFA takes over the assets and operations of an entity in conservatorship.) Consequently, CSS is covered by FHFA's broad and comprehensive regulatory and conservatorship authorities, which may be exercised directly with respect to CSS or indirectly through regulation of Fannie Mae and Freddie Mac. The Office of Finance is a joint office of the Banks that primarily conducts operational functions as an agent for the Banks, related to the offering, issuance, and servicing of Bank consolidated obligations. 12 U.S.C. § 1431(b) and (c), 4502(19); the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 415; *see also* 12 CFR parts 1270 and 1273 (FHFA's regulations on Bank Liabilities and Office of Finance). The Safety and Soundness Act subjects the Office of Finance to FHFA's general regulatory authority. 12 U.S.C. § 4511(b)(2). The Office of Finance is also an "entity-affiliated party" subject to FHFA enforcement authority. 12 U.S.C. § 4502(11)(E); 4631(a). FHFA has also promulgated governance regulations that apply solely to the Office of Finance. 12 CFR part 1273 (FHFA's Office of Finance regulation).

failure to provide complete reports or access to information requested by FHFA is a violation of law for which FHFA will pursue all available, necessary, and appropriate remedies.

FHFA's functions rely on information and data produced by the regulated entities. While a reasonable level of dialogue between Agency staff and the regulated entities is expected as part of FHFA's data and information collection activities, undue delay in responding to a request is not consistent with a regulated entity's obligations or with FHFA's performance of its responsibilities. The regulated entities are expected to act in good faith when seeking to clarify and respond to Agency requests. FHFA staff requesting information are expected to be reasonable and will determine the appropriate scope of inquiry and timing of a request. This dialogue allows the Agency to benefit from better understanding the form, organization, volume, and storage of requested information and data, and allows the Agency to refine its data and information requests accordingly as needed. While production is compulsory, the process of data and information collection works best when Agency and regulated entity staff work together to ensure effective responsiveness to Agency requests and the protection of confidential regulated entity information as appropriate under FHFA policies and regulations and applicable law.

I. FHFA's Authority

A. FHFA has general regulatory and supervisory authority over its regulated entities.

FHFA is empowered by Congress to exercise "general regulatory authority over each regulated entity" to ensure that the purposes of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), the entities' statutory charters, and any other applicable laws are carried out.² These powers include the authority to: (1) examine and require reporting on the financial, operational, and management conditions at each regulated entity; (2) establish and enforce prudential management and operations standards; (3) establish capital requirements; and (4) supervise each regulated entity to ensure compliance with applicable law. In addition to general safety and soundness, mission, and legal and regulatory compliance matters, FHFA's obligations, powers, and authorities extend to regulating and supervising regulated entities' executive compensation, affordable housing programs, diversity and inclusion programs, fair lending compliance, and any other matters that affect the legal, financial, and structural health and soundness of a regulated entity. FHFA's comprehensive regulatory authority includes the power to obtain and compile data related to any of these matters.³

² See 12 U.S.C. § 4511(b)(1) and (2). 12 U.S.C. § 4511(b)(2) (FHFA "shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority . . . to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out."); 4517 (examination authority); 4631(a) (enforcement authority).

³ As part of and to support its general regulatory, supervision, and examination authorities and to fulfill its statutory duties, FHFA has authority to require data reporting by its regulated entities under specific statutory data collection authorities, incidental authorities, and to ensure that the regulated entities comply with applicable law, including fulfilling mortgage data reporting obligations under their statutory charters. See, e.g., 12 U.S.C. § 4514 (FHFA authority to require general or special reports); 12 U.S.C. § 1723a(m) (Fannie Mae mortgage data reporting

The Safety and Soundness Act provides the Director with the authority, discretion, and tools to ensure that the Agency can carry out its duties. The Director's authority and broad discretion to require examinations on any subject considered necessary, and to issue enforceable regulations and orders requiring reporting of any information specified by FHFA, are among the authorities available to require full access to information regardless of a regulated entity's privileges, privacy, or confidentiality interests. These tools all aid FHFA in determining compliance with rules and laws, the safe and sound condition and practices of the regulated entities, and other matters within FHFA's purview.⁴

FHFA's examination function is an integral part of its supervisory and regulatory oversight. The Safety and Soundness Act not only authorizes FHFA's full access to books, records, data, and information created and maintained by the regulated entities, it necessarily requires that FHFA possess and exercise that authority without obstruction, through the use of orders and examinations, as needed.

B. Full and complete access to regulated entities' books and records is the backbone of effective supervisory and regulatory oversight.

FHFA's supervision program depends on full, complete, and transparent access to all regulated entity books, records (including board minutes, board packages, and executive session minutes), data, and information. For that reason, FHFA requires that each regulated entity "shall make its records available promptly upon request by FHFA, at a location and in a form and manner acceptable to FHFA."⁵ In addition, Congress recognized the critical importance of the regulated entities providing FHFA with complete and accurate books and records for inspection, and specifically authorized FHFA to issue a temporary cease and desist order to address supervisory concerns where a regulated entity's books and records are incomplete or inaccurate.⁶ To be meaningful, the authority to issue a temporary cease and desist order to address production deficiencies requires that the regulated entities provide FHFA full and complete access to their books and records, notwithstanding privileges. FHFA's ability to supervise its regulated entities would be severely compromised if a regulated entity could avoid meaningful and full review through an assertion of privilege protection.

obligation); 1456(e) (Freddie Mac mortgage data reporting obligation); 12 U.S.C. § 1430(k) (Federal Home Loan Bank mortgage data reporting obligation).

⁴ See e.g., 12 CFR 1223.22 (requiring the regulated entities report to the Director their efforts to promote diversity and ensure the inclusion of women and minorities in management, employment, business activities, and contracts for services, and the results of those efforts).

⁵ See 12 CFR 1235.6. FHFA implemented part 1235, Record Retention for Regulated Entities and Office of Finance, to ensure that "complete and accurate records of each regulated entity and the Office of Finance are readily accessible to FHFA." 12 CFR 1235.1; see also 76 FR 33121, 33126 (June 8, 2011) (purpose of regulation is to ensure that "records are readily accessible for examination and other supervisory purposes").

⁶ See 12 U.S.C. § 4632(c)(1).

Compliance with FHFA requests and demands is compulsory. A regulated entity may not withhold responsive information based on its judgment that such information is not necessary or relevant to FHFA's execution of its duties, that alternative information would be sufficient to address FHFA's needs, or that the information is privileged *vis-à-vis* a third party. Failure to provide complete access to information or to provide complete reports required by FHFA is a violation of law, and FHFA may pursue all available, appropriate, and necessary remedies to obtain the information withheld.⁷

II. Preservation of Privileges

Unless otherwise advised by FHFA, a regulated entity's submission to FHFA of privileged information in the course of FHFA's supervisory, regulatory, or examination processes is compulsory, and not subject to any exercise of discretion by the regulated entity.⁸

⁷ See, e.g., 12 U.S.C. § 4514(c) (penalties for failure to make or transmit reports as required by FHFA); 4631(a) (cease and desist authority to remediate violations of law or regulation); 4636 (civil money penalties for violations of the Safety and Soundness Act and FHFA regulations); 12 CFR 1235.6 (each regulated entity "shall make its records available promptly upon request by FHFA, at a location and in a form and manner acceptable to FHFA").

⁸ FHFA's view is shared by other federal financial regulators. The Board of Governors of the Federal Reserve System (Federal Reserve Board) views its authorities as authorizing access to all books and records maintained by a regulated company or institution subject to examination. See *Federal Reserve Board, Bank Holding Company Supervision Manual* (Feb. 2020 rev.), § 1065.0.3 ("Under the Federal Reserve's statutory examination authority, examiners may review all books and records maintained on the premises of a financial institution that is subject to Federal Reserve supervision..."); Federal Reserve Board, *Commercial Bank Examination Manual* (Nov. 2020 rev.), § 1000.1 ("The Federal Reserve System's statutory examination authority permits examiners to review all books and records maintained by a financial institution that is subject to the Federal Reserve's supervision. This authority extends to all documents. Section 11(a)(1) of the Federal Reserve Act provides that the Board has the authority to examine, at its discretion, the accounts, books, and affairs of each member bank and to require such statements and reports as it may deem necessary. Therefore, Federal Reserve supervisory staff (including examination staff), may review *all* books and records of a banking organization that is subject to Federal Reserve supervision") (emphasis original); see also SR 97-17 (SUP) (June 6, 1997) ("Under the Federal Reserve's statutory examination authority, examiners may review all books and records maintained on the premises of a financial institution that is subject to Federal Reserve supervision. This authority extends to all documents on the premises"). The Office of Comptroller of the Currency (OCC) and the Consumer Financial Protection Bureau (CFPB) consider submission of privileged information by their supervised institutions under their supervision processes as involuntary submissions that do not waive any privilege. See, e.g., OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991), citing 12 U.S.C. § 161 (a national bank is required to publish "reports of condition" and additional reports of condition "containing such information as [OCC] may prescribe") and 12 U.S.C. § 481 (OCC examination authority to "make a thorough examination of all the affairs of the bank"); CFPB Final Rule on Confidential Treatment of Privileged Information, 77 FR 39617, at 39618-19 (July 5, 2012) ("submission of privileged information to a supervisory agency is not voluntary and therefore does not result in a privilege waiver"). CFPB's rule is intended to provide additional assurance to regulated institutions that any privilege would not be waived; CFPB Bulletin 12-01 (Jan. 4, 2012), citing 12 U.S.C. 5581 (CFPB has the examination authorities of prudential regulatory agencies), 12 U.S.C. §§ 1828(x) and 1785(j) (preservation of privilege for information submitted to Federal banking agencies in the course of their supervision processes), and *Boston Auction Co., Ltd. v. Western Farm Credit Bank*, 925 F. Supp. 1478, 1482 (D. Hawaii 1996) (finding that submission of privileged documents to supervisory agency that has access to all of the regulated entity's files and whose request cannot be refused absent punishment by the regulator, was not voluntary and therefore did not waive attorney-client privilege). See also, Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency before the U.S. House Subcommittees on Oversight and Investigations and on Financial Institutions and Consumer Credit (Mar. 6, 2001) ("It is also essential to protect the privileges that banks may assert over their own information that is in the possession of the Federal banking agencies. Since banks have no discretion as to the information they must disclose

As FHFA's requests are compulsory, a regulated entity's privileges *vis-à-vis* third-party requests for information are preserved. This conclusion is reinforced by the Federal Reserve bank examination practices since FHFA's examiners have the same authority as their Federal Reserve bank examiner counterparts.⁹ The Federal Reserve bank examiners are examiners for a Federal banking agency, and submission of any information to Federal Reserve bank examiners in the course of the Federal Reserve's supervisory process does not affect any privilege *vis-à-vis* a third party.¹⁰ Therefore, submission of information to FHFA in the course of FHFA's supervisory process would also not affect any privilege a regulated entity or other submitter may have *vis-à-vis* a third party. Privileges are also preserved where FHFA shares privileged information with the other Federal agencies.¹¹ FHFA has broad discretion whether to disclose data and information, including to assert privileges and protections in the future.

If a regulated entity believes the information and data requested by FHFA is privileged against disclosure to third parties or may otherwise be entitled to special sensitive treatment (*e.g.*, attorney-client privilege, attorney work product doctrine, deliberative process privilege, FOIA exemptions, trade secret or proprietary interests, privacy interests, confidentiality agreements in settlement agreements or other releases, contracts, or licenses, etc.), the regulated entity may designate the material and then produce the information and data to the requesting FHFA staff without redaction, when and as requested by FHFA. A regulated entity's election not to designate information does not affect the applicability of any privilege or other protection.

III. FHFA's Protection of Confidentiality

Non-public information submitted by a regulated entity during any FHFA supervisory and regulatory process, including examinations, is in many cases Confidential Supervisory Information (CSI). Access to CSI is integral to the planning, preparation, execution, and monitoring of examinations and compliance activities and is protected from disclosure under FHFA's regulations on non-public information, and FHFA's process for production of records, information, and testimony in third-party proceedings.¹² When the information is related to

to supervising agencies, the authority for bank examiners to enter upon bank premises and review all of a bank's books and records is plenary. Thus, self-evaluative, attorney-client and work product communications maintained anywhere in a bank's books and records fall properly within the scope of the banking agencies' examination authority and may be shared with the examining agency by the supervised institution. Such information in the hands of the Federal banking agencies remains privileged because it was obtained through statutory compulsion.”).

⁹ See 12 U.S.C. § 4517(e).

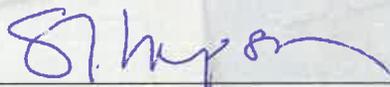
¹⁰ See 12 U.S.C. § 1828(x).

¹¹ See 12 U.S.C. § 1821(t).

¹² See 12 CFR part 1214 (FHFA's regulation on non-public information); 12 CFR part 1215 (FHFA's regulation on process for producing records, information, and testimony in third-party proceedings to protect sensitive, confidential information). In addition, communications and information FHFA receives from a regulated entity in the course of its supervision or examination is protected by FHFA's examination privilege. The rationale supporting the examination privilege is to support the candor and transparency necessary to ensure effective supervision and confidence in the institution and financial system. Courts have upheld the examination privilege for FHFA. See, *e.g.*, *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 273-74 (S.D.N.Y. 2013) (FHFA's regulation of the Enterprises implicates the same distinctive necessity for candid and informal regulation

examination, operating, or condition reports, such information, whether privileged or not, is exempt from mandatory public release under Exemption 8 of the Freedom of Information Act (FOIA).¹³ FOIA exempts privileged or confidential financial and commercial information from mandatory public release under Exemption 4. Information that, if disclosed, would invade another individual's personal privacy is similarly exempt from mandatory public release under FOIA Exemption 6.¹⁴ Subject to FHFA's discretion, data and information may also be protected from disclosure by other FHFA information protection policies, regulations, and other relevant laws.

Questions regarding the subject matter addressed in this Statement should be directed to Mark Laponsky, Deputy General Counsel, Mark.Laponsky@fhfa.gov; Ming-Yuen Meyer-Fong, Associate General Counsel, Ming-Yuen.Meyer-Fong@fhfa.gov; or Jason T. Kutcher, Senior Counsel, Jason.Kutcher@fhfa.gov.



Sandra L. Thompson, Acting Director



Date

present in the realm of banking regulation that justify the bank examination privilege; communications between Fannie Mae or Freddie Mac and FHFA are protected by the examination privilege); *Syron v. Federal Housing Finance Agency*, 2014 U.S. Dist. LEXIS 201813 (D.D.C. 2014) (because FHFA's regulation of the Enterprises implicates the same concerns present in bank regulators' regulation of banks -- *i.e.*, the need for effective day-to-day regulation and the necessity of maintaining public confidence in the financial system -- the bank examination privilege applies to communications between FHFA and the Enterprises even though the Enterprises are not banks in the traditional sense).

¹³ See 12 CFR 1202.4(a)(8). Such information may also be protected from disclosure under other FOIA exemptions. See 12 CFR 1202.4(a)(4) (confidential business information) and (a)(6) (privacy).

¹⁴ *Id.*