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MORTGAGE BANKERS ASSOCIATION

April 5, 2024

The Honorable Sandra Thompson
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20219

RE: Concerns Regarding Title Acceptance Pilot

Dear Director Thompson,

The Mortgage Bankers Association[1] (MBA) writes to express our deep concerns regarding the Federal Housing Finance Agency's (FHFA) recent announcement[2] of the approval of a "Title Acceptance Pilot" which aims to reduce costs for a small group of borrowers by allowing Fannie Mae to remove existing requirements that a lender's title insurance policy or Attorney Opinion Letter (AOL) be obtained for certain transactions. It is particularly concerning that to our knowledge this pilot program has not gone through the proper procedures required by FHFA for new products and activities and appears to violate "bright line" principles by encroaching into the primary mortgage market.

Title insurers play an important role in managing risk in various parts of mortgage transactions for both the borrower and the lender. They are an integral part of the settlement and closing process as they validate the legitimacy of the parties involved in the transaction and ensure all documentation is compliant with real estate laws. Title insurance also protects a homebuyer from losses linked to issues with the title, such as an outstanding lien or disputed ownership of the property on the seller's end. Eliminating the requirement for title insurance exposes lenders, borrowers, the Enterprises, and therefore taxpayers, to increased risk and jeopardizes existing processes and practices that are necessary for smooth functioning of the housing market.

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] https://www.fhfa.gov/Media/PublicAffairs/Pages/Director-Sandra-Thompson-Statement-on-Title-Acceptance-Pilot.aspx

Any new activity undertaken by the Enterprises that could materially increase risk to the housing market must go through the proper process for approval, including public notice and comment. On December 20, 2022, FHFA published a final rule that clarified and improved the process by which potential new single-family and multifamily Enterprise products and activities are evaluated, and established criteria for FHFA to seek public input on these potential new Enterprise products. For several years, MBA advocated for a more transparent process by which the Enterprises develop new activities and products or undertake pilots, and we were supportive of many aspects of the final rule that went into effect in April 2023.

The final rule states that if an Enterprise engages in an activity on or before the effective date of the regulation, but the Enterprise enhances, alters, or modifies the activity after the effective date of the regulation so as to: (1) require a new resource, type of data, policy (or modification to an existing policy), process, or infrastructure; (2) expand the scope or increase the level of credit risk, market risk, or operational risk to the Enterprise; or (3) involve a new category of borrower, investor, counterparty, or collateral, then the resultant activity would be considered a "new activity.[3]"

The Final Rule includes two additional categories of new activities: (1) any pilot engaged in by an Enterprise after the effective date of the regulation; and (2) any modification to the volume or duration of a pilot that occurs after the effective date of the regulation, regardless of whether the Enterprise initially engaged in the pilot before or after the effective date of the regulation.[4] Based on the definitions established in the final rule, the title acceptance pilot should be considered a new activity.

Since a pilot program is a new activity, FHFA must determine if this new activity is a "new product". The final rule describes a new product as any new activity that FHFA determines merits public notice and comment about whether it is in the public interest.[5] The public interest factors that would be considered by FHFA include the degree to which the new product:

- Advances any of the purposes of the Enterprise under the applicable authorizing statute;
- Serves underserved markets and Enterprise housing goals;
- Could be supplied by other market participants and/or promotes or stifles competition;
- Overcomes natural market barriers or inefficiencies;
- Raises or mitigates risks to the mortgage finance or financial system;
- Furthers fair housing and fair lending; and
- Involves other factors as determined appropriate by FHFA for consideration of the public interest.

A pilot that aims to eliminate title insurance for certain loans delivered to the Enterprises certainly meets several of the public interest factors listed. A public notice and comment

[3] See Section 1253.3(a)(2)
[4] See Section 1253.3(a)(3)
[5] See Section 1253.4(b)

period is therefore warranted. Bypassing the established requirements prevents FHFA from receiving important feedback regarding the possible wide-ranging impacts of this pilot, especially as it seeks to take over a primary mortgage market function currently performed in the private sector at no risk to taxpayers.

Title insurance is part of the origination process and thus associated with primary mortgage market activities. Both Enterprises' charters prohibit the use of their lending authority "to originate mortgage loans." While very little information has been shared since the seemingly rushed announcement of this pilot, the FAQ document released by FHFA states that there will be a lender fee applied to each loan sold through the pilot, which is intended to cover the cost of curing any title defects that are discovered. This fee structure appears to be self-insurance, with the lender fee equating to an insurance premium, and the expenses to cure title defects equating to claims, further cementing this process as a primary market function that the Enterprises should not be permitted to engage in. MBA has consistently supported a longstanding "bright line" policy (see attached MBA policy) intended to provide greater clarity on the distinctions between primary and secondary mortgage markets activities consistent with the limitations set forth in the Enterprises' charters. It is critical that new Enterprise activities and products be reviewed through the lens of whether they are secondary market in character, or whether they encroach upon decisions or choices that should be made in the primary market. MBA believes that valuable feedback regarding the role of title insurance in the housing market and the risks associated with eliminating it for certain loans should be taken into account prior to considering the title acceptance pilot for approval.

We urge the FHFA to take the appropriate steps as outlined in the New Products and Activities Final Rule and grant a public notice and comment period. FHFA has a duty to be a stabilizing force in the housing market and should evaluate all aspects of this pilot program to ensure it does not cause disruption, increased risk, or unintended consequences.

Thank you for considering our concerns. MBA appreciates its ongoing partnership with FHFA and requests the opportunity to discuss this critical issue further at your earliest convenience.

Sincerely,

Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association