

**COMPARISON OF REGULATORY AND SUPERVISORY POWERS OF FEDERAL BANKING AGENCIES,
FEDERAL HOUSING FINANCE BOARD, AND THE OFFICE OF FEDERAL HOUSING
ENTERPRISE OVERSIGHT (OFHEO)**

**PREPARED FOR
THE HOUSING POLICY COUNCIL
THE FINANCIAL SERVICES ROUNDTABLE**

**BY
BARNETT SIVON & NATTER, P.C.**

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COMPARISON OF THE SUPERVISORY POWERS OF THE FEDERAL BANKING AGENCIES, FHFB AND OFHEO

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
1. GENERAL REGULATORY POWERS				
<i>1.1. Primary Duty and General Rulemaking Authority</i>	<p>No similar provision regarding primary duty.</p> <p>The Comptroller is granted general authority to prescribe rules and regulations to carry out the responsibilities of the Office.</p>	<p>The primary duty of the FHFB is to ensure that the FHL Banks operate in a financially safe and sound manner. To the extent consistent with the primary duty, the FHFB shall also supervise the FHB Banks, ensure that they carry out their housing finance mission, and ensure that the Banks remain adequately capitalized and able to raise funds in the capital markets. [12 USC §1422a]</p> <p>The FHFB has the authority to promulgate and enforce such regulations and orders as are necessary to carry out the FHL Bank Act. [12 USC § 1422b(a)]</p>	<p>The duty of the Director is to ensure that the GSEs are adequately capitalized and operating safely, in accordance with the 1992 Act. [12 USC 4513]</p> <p>The Director is authorized to issue regulations to carry out the safety and soundness provisions of the 1992 Act. [12 USC § 4513(b)]</p> <p>The Secretary of HUD has general regulatory authority over the GSEs for all matters other than safety and soundness. [12 USC § 4541].</p>	
<i>1.2. Safety and Soundness Standards</i>	<p>By statute, the banking agencies are required to promulgate standards relating to internal controls, information systems, internal audit, loan documentation, credit underwriting, interest rate exposure, asset growth, excessive compensation and benefits, and any other operational and managerial standards determined to be appropriate. If a bank fails to meet a standard prescribed by the agency, the agency may require the bank to submit a safety and soundness compliance plan. If the bank fails to submit a plan, or fails to implement an approved plan, the agency may issue a safety and soundness order and in addition, may limit the bank's growth, require additional capital, restrict interest rates paid on deposits, or take any</p>	<p>No similar provision.</p>	<p>By regulation, the OFHEO has adopted safety and soundness guidance similar in scope to those developed by the banking agencies. If a GSE does not meet the standards in the guidance, OFHEO may request the GSE to submit a compliance plan or take other remedial action. [12 CFR 1720.1, 1720.2]</p>	<p>Regulations of the type adopted by OFHEO are better supported by specific statutory language.</p>

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	other action. Under appropriate circumstances, the order may be issued <u>ex parte</u> and will be immediately effective.			
1.3. <i>Subpoena Authority</i>	Banking agencies may issue a subpoena in the course of an enforcement proceeding, and may go to court to enforce compliance.	FHFB may issue a subpoena in the course of an enforcement proceeding, and may go to court to enforce compliance. [12 USC § 1422b(a)(5); 12 CFR 908.8]	OFHEO may issue a subpoena in the course of an enforcement proceeding. Only the AG may go to court to enforce. [12 USC § 4641]	Unlike the banking agencies and FHFB, OFHEO must obtain the Attorney General's consent to enforce its subpoena in the courts.
1.4. <i>Examination Authority</i>	Under the OCC model, the Comptroller is given plenary authority to examine national banks as often as necessary. The examiner is to make a thorough exam and has the power to administer oaths, examine any officer or agent, as well as affiliated companies (other than a member bank). [12 USC § 481] Banking agencies are required to conduct on-site examinations of all insured banks on an annual basis, or on an 18-month basis for banks with less than \$250 million in assets. [12 USC § 1820(d)]	FHFB is to make at least annual examination of all FHL Banks. FHFB examiners are given all of the rights and powers of national bank examiners and Federal reserve examiners. [12 USC § 1440]	OFHEO is required to conduct an annual on-site examination of each GSE, and may conduct other examinations whenever necessary. Examiners have the same rights and powers as Federal reserve examiners. [12 USC 4517]	FHFB examinations are not required to be "on-
1.5. <i>Golden Parachutes</i>	<p>With certain exceptions, no bank or bank holding company may make a golden parachute payment to any Institution-Affiliated Party (IAP)¹ without the approval of the FDIC and primary Federal regulator.²</p> <p>Under section 304 the Sarbanes-Oxley Act ("SOX"), if an issuing company is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, the CEO and CFO must reimburse the issuer for any bonus or similar payment, or profit from the sale of the issuer's securities, received within 12 months following the filing or public issuance</p>	Section 304 of SOX will apply to Federal Home Loan Banks when they register with the SEC on various dates later in 2005.	<p>The Director shall prohibit compensation to an executive officer or director that is not reasonable and comparable with similar businesses or major financial services companies. Director may not set a specific level or range of pay. [12 USC § 4513(b)(8) & 4518]</p> <p>The GSEs may not enter into a contract, on or after 10/28/1992, to compensate an executive officer upon his or her termination, unless the Director approves the agreement</p>	<p>Neither the FHFB nor OFHEO have explicit authority to prohibit a golden parachute payment. In <u>Brendsel v. OFHEO</u>, (D.D.C. 8/30/04) the court issued a preliminary injunction against OFHEO's attempts to withhold Mr. Brendsel's termination benefits. The court noted that OFHEO could not review compensation packages for reasonableness and comparability with industry standards.</p> <p>OFHEO may have the ability to prospectively limit golden parachute payments through its review and approval authority for employment contracts</p>

¹ An IAP includes any director, officer, employee, controlling shareholder, or agent. An IAP also includes a non-controlling shareholder, consultant, joint venture partner, and any other person who participates in the conduct of the affairs of the bank. Independent contractors, such as attorneys, appraisers and accountants must be shown to have knowingly or recklessly participated in a violation of law, breach of fiduciary duty or unsafe practice that causes or is likely to cause more than a minimal loss to the bank.

² A Golden parachute is generally defined as a payment made to an IAP that is contingent on termination of employment and is payable or received after the bank becomes troubled.

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	<p>of the document.</p> <p>Section 1103 of the Sarbanes-Oxley Act authorizes the SEC to get a temporary court injunction to prohibit certain excessive payments in the course of an investigation of possible securities laws violations. Total length of injunction cannot exceed 90 days.</p>	<p>Section 1103 does not apply to the FHL Banks.</p>	<p>in advance. [12 USC § 1723a(d)(3)(B) & 12 USC § 1452(h)(2)] It is OFHEO's position that section 304 of SOX applies to Fannie Mae. Section 304 of SOX does not apply to Freddie Mac. Section 1103 of SOX applies to both GSEs.</p>	<p>entered into after 10/28/1992. However, the standard for review of such employment contra again comparability with public and private ind norms.</p>
1.6. Reports	<p>Banking agencies may obtain reports and special reports from banks, in such form and containing such information as may be prescribed.</p>	<p>The Board is to require examinations and reports from the FHL Banks in such form as the Board shall prescribe. [12 USC § 1440]</p>	<p>OFHEO may require reports of financial condition and operations and special reports as necessary, but may not require information that "is not <i>reasonably obtainable</i> by the enterprise." [12 USC § 4514]</p>	<p>Only OFHEO has a limitation on the reports it obtain from a GSE.</p>
1.7. Funding	<p>Banking agencies are self-funded and appropriations legislation is not required. In the case of OCC and OTS, a surplus may be retained for future use.</p>	<p>The Board is to assess each FHL Bank for its expenses. Surpluses are to be deducted from the assessment on the FHL Banks for the following year. 12 USC § 1438(b)]</p>	<p>OFHEO is funded by annual assessments of the GSEs, but only to the extent provided in appropriations Acts. Any surplus remaining after expenses must be credited to the assessment for the following year. [12 USC § 4615(d)]</p>	<p>Required appropriations subjects OFHEO to additional potential political pressure. Inability save surplus reinforces the importance of Appropriations.</p>
1.8. Limitation on Rulemaking	<p>The OCC may not issue regulation regarding branches and securities activities conducted directly by national banks.³</p>	<p>No similar provision limitation.</p>	<p>The Director shall issue any rules and order necessary to carry out the 1992 Act before the expiration of the 18-month period beginning on the appointment of the Director. A regulation may not be published for comment until 15 days after it has been submitted to the House Committee on Financial Institutions and the Senate Banking Committee.⁴ [12 USC §. 4526]</p>	<p>OFHEO relies on other authority to promulgate regulations.</p>

³ Regulations regarding securities activities in financial or operating subsidiaries are limited by this provision.

⁴ OFHEO also has authority to issue regulations under 12 USC 4513(b). Arguably, the limitations in 12 USC 4526 do not apply to regulations issued under 12 USC 4513(b).

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2. ENFORCEMENT POWERS				
<i>2.1. Formal Agreement</i>	A written agreement between a bank and the regulator to correct an identified problem. It is a public document. A violation may result in a civil money penalty (CMP) or a cease-and-desist (C&D) order to require compliance.	Same.	Same.	
<i>2.2. Cease-and-Desist Order (C&D)</i>	An order requiring a bank or IAP to cease a specified activity or to take an affirmative action.	C&D orders may be issued against a FHL Bank or any executive officer or director. [12 USC § 1422b(a)(5)]	Same as FHFB. [12 USC § 4631]	
<i>2.2.1. Scope of C&D Order</i>	As previously noted, an IAP includes an officer, director, employee, controlling shareholder, agent, accountant, attorney or other party who participates in the conduct of the affairs of the bank. ⁵	<i>FHL Bank employees, contractors, and consultants and other IAPs are not covered.</i> [12 USC § 1422b(a)(5)]	<i>GSE employees, contractors, and consultants (IAPs) are not covered.</i> [12 USC § 4631]	The statutory scope of C&D authority for both FHFB and OFHEO is limited compared to banking agencies. For example, they cannot issue a C&D to accountants, attorneys, contractors and others who may have been involved in misfeasance with respect to the GSE FHL Bank. ⁶
<i>2.2.2. Grounds for C&D Order: Violation of law</i>	A C&D may be issued if the bank or an IAP has engaged, is engaging, or the agency has reasonable cause to believe is about to engage in: (i) violation of <i>any law</i> or regulation	Same as banking agencies. 12 USC § 1422b(a)(5)].	A C&D may be based on: (i) violation of certain portions of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (hereinafter “1992 Act”); or (ii) the respective GSE Organic	OFHEO cannot base a C&D solely on violation of any law. Thus banking agencies and FHFB, but not OFHEO, can issue C&D for violation of such laws as the FTC Act, Securities and Exchange Act, or State unfair and

⁵ Independent contractors, such as an attorney, appraiser, or accountant, must knowingly or recklessly participate in a violation of law, breach of fiduciary duty, or unsafe or unsound practice, likely to cause a more than a minimal loss to the bank.

⁶ This chart identifies differences in the statutory authority of the banking agencies and FHFB and OFHEO. It is beyond the scope of this analysis to determine if, and to what extent, the FHFB or OFHEO can, despite these differences in statutory language, utilize the enforcement tools statutorily available to the banking agencies through innovative interpretations of FHFB or OFHEO’s statutes. However, it is clear that such innovative approaches may not be upheld when challenged. See, e.g. Brendsel v. OFHEO (D.D.C. 8/30/2004), enjoining the OFHEO from attempting to require Fred Mac to seize certain compensation benefits payable to its former chief executive. In any case, clear statutory authority would resolve any legal uncertainty regarding these innovative interpretations.

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2.2.6. <i>Inadequate Anti-Money Laundering Compliance Program</i>	The banking agencies must issue a C&D against an institution that has failed to establish and maintain a money laundering compliance program, or fails to correct any deficiency in an existing program.	No similar provision.	Acts; [12 USC § 4631] No similar provision.	deceptive practices law.
2.2.7. <i>C&D to Prevent Dissipation of Assets</i>	A C&D may prohibit an IAP from withdrawing, transferring or dissipating funds or assets.	No specific provision.	No specific provision.	While FHFB and OFHEO may be able to use their C&D authority to achieve similar result with executive officer/directors, it would not reach other IAPs.
2.2.8. <i>Affirmative Actions</i>	A C&D may require the bank or the IAP to take affirmative action to: <ul style="list-style-type: none"> • correct the problem; • restrict growth, limit activities; • dispose of any loan or asset; • rescind contracts; • employ new directors or officers subject to agency approval; • make restitution or similar payments or guarantees, if there was unjust enrichment to the bank (or IAP) or the violation was in <i>reckless disregard</i> of applicable law, regulations or orders; and • take any other action the agency determines appropriate. 	Same as banking agencies, including authority to take “any other appropriate action.” However, under the statute the C&D does not cover all IAPs, other than executive officer or director. [12 USC § 1422b(a)(5)]	The same as FHFB, including the authority to take “any other appropriate action.” However, under the statute: <p>(i) An OFHEO order to an executive officer or director to provide restitution or reimbursement requires (I) unjust enrichment to the officer or director; or (II) a finding that the individual <i>Aknowingly</i> engaged in conduct that would be likely to cause a substantial loss to the GSE; and</p> <p>(ii) OFHEO may order a GSE to obtain restitution or reimbursement from another party. [12 USC § 4631(d)]</p> <p>By <u>regulation</u>, affirmative actions may also include:</p> <p>(i) obtain new capital;</p>	All agencies may order restitution if there was unjust enrichment of a party. However, if this finding cannot be made, OFHEO has a higher burden than the other agencies. It needs to find that party “knowingly” engaged in conduct likely to cause a “substantial” loss to the GSE. A “substantial” loss for a GSE might easily be a very high number of absolute dollars. <p>For both FHFB and OFHEO, restitution and other C&D remedies are limited to the institution and executive officer/directors. Banking agencies may issue orders against any IAP.</p> <p>Regulations of this type are better supported by specific statutory language.</p>

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			(ii) improve design or implementation of internal policies, compliance efforts, controls, risk measurements and management reports; and (iii) require adherence to limits on activities or functions. [12 CFR 1780.1(b).	
2.3. Temporary Cease-and-Desist Order	Following initiation of a C&D action, the agency may issue an <u>ex parte</u> order directing a bank or IAP to immediately cease an activity or to take a specified action.	Same, except it cannot be applied to all IAPs. [12 USC § 1422b(a)(5)]	Same, except it cannot be issued against all IAPs. If a GSE violates a temporary C&D, OFHEO may request the AG to bring an action in US District. [12 USC § 4632(e)]	Only OFHEO is dependent the AG to bring an action in court to enforce its orders.
2.3.1. Grounds for Temporary C&D	The agency must find that the violation or threatened violation or unsafe act or practice is likely to cause B (i) insolvency or significant dissipation of the assets or earnings of the institution; (ii) is likely to weaken the condition of the bank; or (iii) otherwise prejudice the interests of depositors; prior to the completion of the permanent C&D.	The Board must find that conduct or violation, or threatened conduct or violation is likely to cause - (i) insolvency or a significant depletion of <i>total capital</i> ; or (ii) <i>irreparable</i> harm to the Bank; prior to the completion of the C&D proceedings. [12USC § 1422b(a)(5) &12 CFR 908.5]	The Director must find that conduct or a violation, or threatened conduct or violation, is likely to cause - (i) insolvency or a <i>significant depletion of the core capital</i> of the GSE; or (ii) <i>irreparable</i> harm to the GSE; prior to the completion of the C&D proceedings. [12 USC § 4632(a)]	It is considerably more difficult for the FHFBB and the OFHEO to issue a temporary C&D than for the banking agencies. While the banking agencies need only find the likelihood of a significant dissipation of assets or earnings, the FHFBB and OFHEO must find a significant depletion of <i>capital</i> a much more serious result. The banking agencies only need to find a potential weakening of the bank or a prejudice to depositors, both FHFBB and OFHEO need to find “irreparable harm”
2.3.2. Grounds for Temporary C&D: Incomplete Books and Records	If bank's records are so incomplete or inaccurate that the agency is unable to determine the condition of the	Same. [12 USC§ 1422b(a)(5)]	Same. [12 USC § 4632(c)]	

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	bank or the details or purpose of a material transaction, a temporary C&D may be issued to -B (i) cease any practice that led to the records being inaccurate or incomplete; or (ii) take actions to restore the books and records.			
<i>2.4. Removal/Suspension/ Prohibition</i>	An agency may remove or suspend an IAP who B (i) violated any law or regulation, final C&D, condition imposed in writing in connection with an application or request, or any written agreement; (ii) participated in an unsafe or unsound practice with respect to the institution or other business; or (iii) breached his or her fiduciary duty to the institution.	The Board may suspend or remove “for cause” a director, officer, employee, or agent of any Bank or joint office. ⁷ [12 USC §.1422b(a)(2)] No authority to remove or suspend other parties (IAPs), such as consultants.	No specific removal or suspension provision. However, a C&D order may require a GSE to employee qualified officers or employees subject to the approval of the Director. A C&D order may also limit the activities or functions of the GSE or any <i>executive</i> officer or director. [12 USC § 4631(d)&(e)].	The banking agencies have clear authority and statutory standards to remove an officer, director, or other approval. The FHFB may remove or suspend an executive officer or director “for cause.” It is not clear how the courts will interpret this standard. OFHEO had no explicit removal authority.
<i>2.4.1. Requirement for Loss or Personal Gain</i>	Removal/Suspension action requires: (i) A financial loss or probable financial loss or other damage to the bank or to another business; or (ii), A finding that the interests of insured depositors may be prejudiced; or (iii) A finding that the IAP received financial gain or other benefit.	No similar provision.	No similar provision.	
<i>2.4.2. Requirement for Personal Dishonesty or Disregard for Institution</i>	The agency must also show that the violation or practice involves personal dishonesty on the part of the IAP, or a willful or continuing disregard for the safety and soundness of the institution or other business.	No similar provision.	No similar provision.	

⁷ Grounds for removal or suspension are not currently specified. However, on December 18, 2000, the FHFB published a proposed rule that would have specified grounds for removal or suspension as: Amisfeasance in office= including failure to: (i) operate a FHL Bank in a safe and sound manner; (ii) maintain applicable capital; (iii) carry out the housing finance mission; (iv) maintain the ability of any FHLB to raise funds in the capital markets. Other grounds included violation of certain criminal laws or conduct that the FHFB determines to be a material inefficiency or an abuse of authority. See proposed 12 CFR. 908.7, 65 F.R. 78994 (2000).

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<i>2.4.3. Other Grounds</i>	<p>-Violation of certain money laundering laws, if the violation was not inadvertent or unintentional.</p> <p>-Violation of the Management Interlocks Act by an officer or director.</p> <p>-An officer or director knowing that an IAP violated specified money laundering or bank secrecy crimes did not take appropriate actions to prevent reoccurrence.</p>	No similar	No similar provision.	
<i>2.4.4. Indictment for Certain Crimes</i>	<p>An agency may suspend or prohibit participation by an IAP charged with a</p> <p>(i) felony involving dishonesty or breach of trust; or</p> <p>(ii) criminal violation of certain bank secrecy or money laundering provisions.</p> <p>The agency must find that continued service of the IAP may pose a threat to depositors or impair public confidence in the bank.</p>	No similar provision.	No similar provision.	
<i>2.4.5. Conviction of Certain Crimes</i>	<p>An agency may remove an IAP who is convicted of (or agrees to enter into a pretrial diversion or similar program) a felony involving dishonesty or beach of trust. The agency must find that continued service of the IAP may pose a threat to depositors or impair public confidence in the institution.</p> <p>An agency <u>must</u> remove an IAP convicted of certain money laundering and bank secrecy offenses.</p>	No similar provision.	No similar provision.	

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2.4.6. <i>Effect of Removal/Suspension/Prohibition</i>	An IAP subject to a removal, suspension, or prohibition order may not, without the written agency permission, hold any office, or participate in any manner, in the affairs of any insured institution, credit union, bank holding company, bank regulatory agency, or the FHFH.	No similar provision.	No similar provision.	
2.4.7. <i>Ex Parte Suspension Order</i>	If the agency issues a removal notice, it may also issue, <i>ex parte</i> , a written suspension order that is immediately effective, if such action is necessary for the protection of the bank or insured depositors.	The effect of a suspension is not specified.	No similar provision.	
2.5. <i>Civil Money Penalties</i>	There are 3 categories of CMP that may be imposed on an institution or IAP:	There are 3 categories of CMP that may be imposed on a FHL Bank or executive officer or director:	There are 3 categories of CMP that may be imposed on a on a GSE or executive officer or director:	CMP authority for both FHFH and OFHEO is limited to the institution executive officers and directors thus cannot reach all IAPs. FHFH and OFHEO may impose first tier CMP only on a FHL Bank or on a GSE, r on an individual.
2.5.1. <i>Tier 1</i>	A CMP up to \$6,500 ⁸ per day may be imposed on a bank or IAP for violating – (i) any law or regulation; (ii) any C&D, removal, suspension, PCA or monetary transaction compliance order, (iii) a condition imposed in writing, or (iv) any written agreement with an agency.	Tier 1 penalties are capped at \$5,000 per day and <i>can only be issued against the FHL Bank</i> . Grounds are: (i) violates the FHL Bank Act; (ii) violates a C&D order; (iii) violates a written agreement with FHFH.	Tier 1 penalties are capped at \$5,000 per day and <i>can only be issued against the GSE</i> . Grounds are:– (i) violates the 1992 Act, or the respective GSE Organic Acts; (ii) violation of any C&D order or PCA order based on the capital category of the GSE; or (iii) any written agreement with the Director.	Unlike the banking agencies, a CMI issued by FHFH or the OFHEO can be based on violating any law, but o certain laws. FHFH and OFHEO c base a CMP on a violation of a conc imposed in writing in connection wi application or other request, the ban agencies can. For FHFH and OFHE Tier 1 penalties are only available against the institution.

⁸ As adjusted for inflation, 69 F.R. 65068 (Nov. 10, 2004).

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2.5.2. Tier 2	<p>A CMP up to \$32,500 per day for –</p> <p>(i) committing a violation described above; or breach of a fiduciary duty; or <i>recklessly</i> engaging in an unsafe or unsound practice, and</p> <p>(ii) is part of a pattern of misconduct; or is likely to cause more than a <i>minimal loss</i> to the institution; or results in any pecuniary gain or other benefit to the party.</p>	<p>A penalty on an executive officer or director of up to \$10,000 per day, or of up to \$25,500 per day on a FHL Bank, for conduct described in (tier 1) if the Board finds that the conduct was part of a pattern of misconduct; or involved recklessness and caused or would be likely to cause a <i>material loss</i> to the Bank.⁹ [12 USC § 1422b(a)(5); 12 CFR 908.6]</p>	<p>A penalty on an executive officer or director of up to \$11,000 per day, or of up to \$27,500 per day on a GSE, for conduct described in (tier 1) if the Director finds that the conduct was part of a pattern of misconduct or involved recklessness and caused or would be likely to cause a <i>material loss</i> to the GSE.¹⁰ [12 USC § 4636]</p>	<p>For second tier CMP, banking agencies need to find a pattern of misconduct that is likely to cause more than a <i>minimal loss or any pecuniary gain</i>. FHLB and OFHEO need to find that the conduct was part of a pattern, or reckless conduct that is likely to cause a <i>material loss</i>. A material loss to a FHL Bank or GSE may be significantly higher than the “<i>minimal loss or pecuniary gain</i>” standard for the banking agencies.</p> <p>Finally, both FHLB and OFHEO must find “recklessness” unless the conduct is part of a pattern. The banking agencies do not need to find “recklessness” for certain conduct to justify tier 2 CMI. Breach of fiduciary duty is a predicate ground for the banking agencies only.</p>
2.5.3. Tier 3	<p>A fine up to \$1,250,000¹¹ per day for –</p> <p>(i) knowingly commits a violation described in tier 1 above or knowingly engages in any unsafe or unsound practice or knowingly breaches any fiduciary</p>	<p>A penalty on an executive officer or director of up to \$100,000 per day, or of up to \$1,000,000 per day on a FHL Bank, for conduct described in</p>	<p>A penalty on an executive officer or director of up to \$110,000 per day, or of up to \$1,150,000 per day on a GSE, for conduct described in tier 1</p>	<p>Both FHLB and OFHEO have lower penalties for individuals than the banking agencies. Both FHLB and OFHEO must find likely “substantia</p>

⁹ Under the FHL Bank Act, another ground for a tier 2 penalty is “any conduct that causes or is likely to cause a loss to an enterprise,” if the conduct was part of a pattern of misconduct. [12 USC §.1422b(a)(5); 12 CFR 908.6]

¹⁰ The 1992 Act also provides that a ground for a tier 2 penalty is “any conduct that causes or is likely to cause a loss to an enterprise,” if the conduct was part of a pattern of misconduct. 12 USC § 4636]

¹¹ Id. The penalty for an insured institution is capped at the lesser of \$1,250,000 or 1% of the institution=s total assets.

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	duty; and (ii) knowingly or recklessly causes a substantial loss to the institution or obtains a substantial pecuniary gain or other benefit.	tier 1 or 2, if the Board finds the violation was “knowing and caused or would be likely to cause a substantial loss to the Bank.” [12 USC §1422b(a)(5); 12 CFR 908.6]	or 2 if the Director finds the violation was “knowing and caused or would be likely to cause a substantial loss to the enterprise.” [12 USC § 4636]	loss” to the institution. Banking agencies can find either a “substantial loss” to the institution or “substantial pecuniary gain or other benefit” to the individual. Breach of fiduciary duty predicate ground for the banking agencies only.

3. CAPITAL REGULATIONS

<p><i>3.1. Risk-Based Capital Standards</i></p>	<p>By statute, the banking agencies are to establish a risk-adjusted capital standard. The agencies require banks meet an 8% ratio of total capital to risk-adjusted assets, and a tier 1 capital to risk-adjusted ratio of at least 4%.¹²</p>	<p>Each FHL Bank must meet a minimum capital requirement that includes: (i) a risk-based requirement; and (ii) a leverage or non-risk adjusted requirement, and (iii) a total capital requirement. The risk based capital requirement includes a measure for market risk and operations risk. [12 USC § 1426(a)]</p>	<p>By statute, OFHEO is to establish risk-based capital standard, such that the GSE would remain solvent for a ten-year period in which described changes in defaults and interest rates occur. A capital charge for management and operations risk is also included. [12 USC § 4611]</p>	<p>Only the banking agencies have complete discretion to set all capital levels by regulation, other than the critical capital standard.</p>
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¹² Tier 1 capital consists of stockholders equity, noncumulative perpetual preferred stock, and minority interests in consolidated subsidiaries.

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
3.2 <i>Leverage Ratio</i>	A bank that is rated 1 under the CAMELS rating system must have a leverage ratio of at least 3%, otherwise a 4% ratio applies.	By statute the minimum leverage ratio is set at 5% of total asset. The statute also defines another non-risk adjusted measure of “total capital” and sets the minimum level of that measure at 4% of assets. ¹³ [12 USC § 1426(a)]	Minimum capital is set by statute at: 2.5% of on-balance sheet assets, ; plus 0.45% of unpaid principal balance of outstanding mortgage-backed securities and equivalent instruments issued or guaranteed by the GSE; plus 0.45% of other off-balance sheet obligations. [12 USC § 4612]	
3.3. <i>Capital Directive</i>	A banking agency may direct a bank to increase its capital to above that generally required. The capital directive may require the bank to submit a plan to raise capital and take other steps, such as a reduction in assets, or limit on dividends. The directive and the capital plan are enforceable in the same manner as a C&D, and violation of the plan or directive may result in the imposition of a CMP.	FHFB is required to issue regulations prescribing “uniform capital standards applicable to each FHL Bank.” [12 USC § 1426(a)]. By regulation, FHFB asserts the authority to require higher minimum capital levels for a particular FHL Bank. [12 CFR §§ 932.2, 932.3]	No specific authority. However, <u>if grounds exist</u> for the issuance of a C&D, one of the possible actions authorized by OFHEO’s regulations (but not mentioned in the statute) is to require the GSE to obtain “new capital.” C&D authority also permits the agency to take “any other appropriate action.” [12 CFR 1780.1(b)(2)]	<i>If grounds for a C&D exist</i> , OFHEC regulations assert the authority to raise the capital level of a GSE above the “adequate” level. Banking agencies issue a capital directive even if grounds for a C&D are not present. Further, OFHEO regulation noted would be better supported by specific statutory authority.
3.4. <i>Prompt Corrective Action (PCA)</i>	The PCA statute requires the agencies to define, by regulation, 5 capital categories: (i) well capitalized; (ii) adequately capitalized; (iii) undercapitalized; (iv) significantly undercapitalized; and (v) critically undercapitalized. ¹⁴ The PCA statute provides that the agencies may not set the level for a critically undercapitalized below 2 percent of total assets.	No similar provision.	By statute, OFHEO is directed to classify the GSEs into one of 4 capital categories: (i) adequately capitalized; (ii) undercapitalized; (iii) significantly undercapitalized; and (iv) critically undercapitalized. ¹⁵ [12 USC § 4613 & 4614]	

¹³ The leverage ratio is computed by adjusting the amount of paid in class B stock and retained earnings. These elements of capital are multiplied by 1.5 when determining if the 5% leverage standard is satisfied. The 4% total capital requirement is determined without scaling up the paid in class stock or retained earnings.

¹⁴ The banking agencies currently define “well capitalized” as having total risk-based capital of at least 10% and leverage ratio capital of at least 5%. Adequately capitalized requires total risk-based capital ratio of at least 8% and a leverage ratio of at least 4% (or if the bank is rated 1 under the CAMELS system, leverage ratio of at least 3%). An undercapitalized bank has a total risk-based capital ratio of not less than 8% or a leverage ratio of not less than 4% (unless CAMELS rate 1, in which case the lower limit is 3%). A significantly undercapitalized bank has a total risk-based capital less than 6% or a leverage ratio that is equal to or less than 3%. A critically undercapitalized bank has a ratio of tangible equity to total assets that is less than 2%. In addition, the regulations specify various minimum ratios of core or tier 1 capital to total assets. See, eg. 12 CFR §6.4.

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
<i>3.4.1. Restriction on payment of dividends.</i>	A bank may not make a capital distribution if it would result in the bank becoming undercapitalized. With the approval of the appropriate agency, the bank may redeem or retire its own shares in connection with the issuance of additional shares.	A FHL Bank may not redeem or repurchase any capital stock, or make any distribution of retained earnings if it would result in the FHL Bank failing to meet minimum capital requirements. If a FHL Bank incurred or is likely to incur losses that will result in a charge against capital, the Bank may not redeem capital stock without the prior approval of FHFH. [12 USC § 1426(f)]	By regulation, an adequately capitalized GSE may not make a capital distribution that would result in the GSE becoming undercapitalized or lower. ¹⁶ By statute, an undercapitalized GSE may not make a distribution that would result in a lower classification. [12 USC § . 4615(b)] By statute, a significantly undercapitalized or critically undercapitalized GSE may not make any distribution without OFHEO approval. [12 USC § 4616(a)(2)]	
<i>3.4.2. Restriction on Management Fees</i>	A bank may not pay a management fee to anyone controlling the bank, if paying the fee results in bank becoming undercapitalized.	No similar provision.	No similar provision.	
<i>3.4.3. Restriction on Brokered Deposits</i>	Banks that are not Awell capitalized ¹⁵ may not accept brokered deposits, or pay rates for deposits significantly higher than market, without a waiver from the FDIC.	No similar restriction on funding.	No similar restriction on funding.	

¹⁵ The statute sets out the requirements for risk-based and non-risk adjusted or core capital. It defines adequately capitalized as meeting both of these requirements. An undercapitalized GSE does not meet the risk-based standard, but meets the core capital standard. A significantly undercapitalized GSE does not meet both the risk-based and core capital standards, but exceeds the “critical capital level.” The critical capital level is defined by statute as the sum of: 1.25% of on-balance sheet assets, plus .25% of unpaid principal balance of outstanding mortgage-based securities or similar instru issued or guaranteed by the GSE, plus .25% of other off-balance sheet obligations, excluding a certain percentage of GSE commitments. 12 USC §§ 4613, 4614.

¹⁶ 12 CFR 777.22; See also 12 USC §§ 1452(b)(2); 1718(c)(2) requiring prior approval for a distribution that would result in a GSE becoming undercapitalized.

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
3.4.4. <i>Restriction on Undercapitalized Institutions</i>	An undercapitalized bank is subject to increased regulatory scrutiny and must file an acceptable capital restoration plan. In addition: (i) Asset growth may be limited (ii) No new acquisitions, branches, or new lines of business without regulatory approval; (iii) No brokered deposits/excessive interest payments on deposits; and (iii) The agency may apply further restrictions as described below for significantly undercapitalized banks.	The FHFB may use its C&D authority and CMP authority to address FHL Banks that are not in compliance with minimum capital requirements. [12 USC§ 1422b(a)(5)]	An undercapitalized GSE must submit an acceptable capital restoration plan. If a plan is rejected, the GSE has 30 days (or such longer time as OFHEO may allow) to resubmit an amended plan. [12 USC §§. 4616(a) & 4622]	The banking agencies are given broad and specific powers to deal with an undercapitalized institution, in addition to mandating a capital restoration plan. Neither FHFB nor OFHEO have a similar range of explicit statutory remedies.

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
<p><i>3.4.5. Restriction on Significantly Undercapitalized Institutions</i></p>	<p>A banking agency <i>must</i> take at least one of the following actions with respect to a bank that is significantly undercapitalized:</p> <ul style="list-style-type: none"> (i) Require the bank to raise capital by selling shares, including voting shares; (ii) Requiring the bank to be acquired or merged if grounds exist for appointment of a receiver; (iii) Restrict transactions with affiliates; (iv) Restricting interest paid on deposits; (v) Limiting asset growth; (vi) Restricting risky activities; (vii) Ordering election of new Board of Directors; (viii) Requiring bank to dismiss directors or officers; (ix) Requiring bank to hire qualified officers and employees; (xi) Prohibiting deposits from correspondent banks; (xii) Prohibiting capital distributions by holding company without regulatory approval; (xiii) Requiring the divestiture of subsidiaries or affiliates; (xiv) Requiring the holding company to sell the bank; (xv) Taking any other action the agency determines appropriate, including actions available for critically undercapitalized institutions. 	<p>The FHFB may use its C&D authority and CMP authority to address FHL Banks that are not in compliance with minimum capital requirements. [12 USC §. 1422b(a)(5)]</p>	<p>A significantly undercapitalized GSE must submit an acceptable capital restoration plan. In addition OFHEO may:</p> <ul style="list-style-type: none"> (i) Limit asset growth or require asset size to be contracted; (ii) Limit or reduce outstanding obligations; (iii) Require new capital; (iv) Restrict activities determined to pose excessive risk; and (v) If the GSE has less than the minimum amount of core capital and alternative remedies are not satisfactory, appoint a conservator. [12 USC § 4616] 	<p>Banking agencies, but not FHFB or OFHEO, are required to take at least of the steps outlined in the PCA law addition, the banking agencies have number of explicit PCA options not available to FHFB or OFHEO.</p>

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
3.4.6. <i>Restriction on Executive Compensation</i>	A significantly undercapitalized bank may not, without the prior written approval of the agency, pay any bonus to any senior executive officer, or provide compensation to such officer at a rate in excess of that paid in the 12 months prior to the bank becoming undercapitalized.	FHL Bank <i>director</i> compensation is limited by statute. [12 USC § 1427(i)]	The Director must prohibit the GSEs from providing compensation to any executive officer or director that is not reasonable and comparable for employment in other similar businesses and duties. However, the Director may not set a specific level or range of compensation. [12 USC §§ 4513(b)(8) & 4518]	Neither FHFB nor OFHEO have the authority to require prior approval before the payment of any bonus or excess compensation based solely on capital level of institution.
3.4.7. <i>Restriction on Critically Undercapitalized Institutions</i>	<p>(i) Within 90 days, the bank's primary regulator must either put the bank into receivership or with the concurrence of the FDIC, into conservatorship, or take some other action after documenting why such other action is more appropriate.</p> <p>(ii) A critically undercapitalized bank may not pay interest or principal on subordinated debt without the permission of the FDIC.</p> <p>(iii) The bank may not, without the approval of the FDIC, enter into any material transaction other than in the usual course of business; extend credit for highly leveraged transactions; change its charter or bylaws; make material changes in accounting methods; engage in certain transactions with affiliates; pay excessive compensation; or pay above-market rates of interest on new liabilities.</p>	FHFB does not have specific conservatorship authority.	<p>The Director must appoint a conservator for a critically undercapitalized GSE unless it determines, and the Secretary of the Treasury concurs, that it would result in serious adverse consequences on national financial markets or in the stability of the housing market, and the public interest would be better served through other measures. [12 USC § 4617]</p> <p>If a conservator is not appointed, the Director may take any action applicable to a significantly undercapitalized GSE. [12 USC § 4617]</p>	The PCA provisions provide the banking agencies with more tools to deal with critically undercapitalized banks than the tools available to either FHFB or OFHEO.

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
3.4.8. <i>Notice of Classification and Enforcement Action</i>	<p>A capital category determination is effective as of the date the bank receives notice. A bank is deemed to have received notice upon the earlier of: (i) date the quarterly call report is required to be filed; (ii) a final report of examination is delivered to the bank; or (iii) written notice is provided to the bank by the agency.</p> <p>If the agency desires to adjust the capital category due to unsafe or unsound practice or condition, the bank is entitled to prior notice and an opportunity for a hearing.</p>	No similar provision.	Before classifying or reclassifying a GSE in a new capital category, and before taking any discretionary action (other than a decision to appoint a conservator), the Director must provide notice to the GSE and a statement of reasons. The GSE has 30 days to submit rebuttal information (or shorter period if Director finds it necessary). The Director must take the rebuttal information into account, make his or her decision in writing, and include a statement of reasons. This document must be sent to the GSE and to the House Committee on Financial Services and Senate Banking Committee. [12 USC § 4618]	<p>Unlike the banking agencies, OFHEO must provide prior notice and opportunity to rebut proposed action on GSEs before taking any discretionary action under its version of PCA, or reclassifying capital category for an reason. OFHEO determinations must be sent to the Hill.</p> <p>Banking agencies must offer banks opportunity for a hearing prior to reclassifying institutions based on safety and soundness grounds.</p>
3.4.9. <i>Failure to Submit Acceptable Capital Plan</i>	An undercapitalized bank that fails to submit an acceptable capital restoration plan, or fails to comply with such a plan is treated as if it is a significantly undercapitalized bank.	No similar provision.	If the GSE fails to submit an acceptable capital restoration plan, or if the Director does not approve the plan, or determines that the GSE failed to make, <i>in good faith, reasonable efforts to comply</i> , the Director may lower the GSE one capital category. [12 USC §§ 4615 & 4616]	Banking agencies may take action based on failure to comply with a capital restoration plan. GSEs, may argue failure to comply is excused because Enterprise made a good faith, reasonable effort to comply.
3.4.10. <i>More Stringent Treatment Based on Other Factors</i>	If the agency determines (after a hearing) that a bank	No similar provision.	If the Director determines in writing	Ability of OFHEO to reclassify bas

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	<p>is in an unsafe or unsound condition, or it received a less than satisfactory rating for asset quality, management, earnings or liquidity, the agency may reclassify a well capitalized bank as adequately capitalized, and may require other banks to comply with the sanctions noted above for undercapitalized or significantly undercapitalized banks.</p>		<p>than a GSE is engaging in conduct <i>not approved by the Director</i> that could result in a <i>rapid depletion of core capital or that the value of mortgaged property held or securitized by the GSE has decreased significantly</i>, the Director may change the capital classification to the next lower category.¹⁷ [12 USC § 4614(b)]</p>	<p>safety or soundness problem is significantly more circumscribed than for banking agencies.</p>
<p><i>3.4.11 Enforcement of Prompt Corrective Action Directive</i></p>	<p>An agency notice or order to comply with a prompt corrective action restriction or mandate may be enforced in the U.S. District Court. A CMP may also be issued against the bank or any IAP who participates in the violation.</p>	<p>No similar provision.</p>	<p>OFHEO must request the AG to enforce orders issued under prompt corrective action in the U.S. District Court. Alternatively, OFHEO may bring the action under the supervision of the A.G. [12 USC § 4635] Failure to comply with an approved capital restoration may also result in C&D or CMP against the GSE or executive officers or directors. OFHEO must request the AG to enforce these orders in the U.S. District Court, or may bring the action under the supervision of the AG [12 USC §§ 4635 & 4636(d)].</p>	<p>Enforcement of prompt corrective action orders by OFHEO in the courts requires the consent of the AG.</p>

¹⁷ Under the OFHEO's regulations, the agency may lower a GSE's capital category based on specified changes in net income, net interest margin, delinquency rates, or any other development that the agency determines presents a safety and soundness risk, or when the OFHEO finds reclassification is necessary to ensure that the GSE holds adequate capital and operates safely. 12 CFR 1777.10, 1777.11, 1777.20(a)(5).

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
4. CONSERVATORSHIP AND RECEIVERSHIP				
<p>4.1. <i>Grounds for Appointment of a Conservator</i></p>	<p>A conservator may be appointed for a national bank if:¹⁸</p> <ul style="list-style-type: none"> (i) Assets are less than obligations; (ii) Substantial dissipation of assets or earnings due to violation of law or unsafe practice; (iii) Unsafe or unsound condition; (iv) Willful violation of a final C&D; (v) Concealment of records; (vi) Bank is likely to be unable to pay its obligations in the normal course; (vii) Bank has or is likely to incur losses that will deplete substantially all of its capital, and no reasonable prospect for recapitalization without Federal aid; (viii) Any violation of law or unsafe or unsound practice that is likely to cause insolvency; a substantial dissipation of assets or earnings; weaken the bank=s condition, or prejudice depositors; (ix) Consent; (x) Loss of FDIC insurance; 	<p>No provision for conservatorship.</p>	<p>A conservator may be appointed for a GSE if alternative remedies available to the Director are not satisfactory, and there is:</p> <ul style="list-style-type: none"> (i) Willful violation of a final C&D; (ii) Concealment of records; (iii) GSE is not likely to pay its obligations in the normal course of business; (iv) GSE has or is <i>reasonably</i> likely to incur losses that would deplete substantially all of its core capital and it is unlikely that it will replenish its core capital within a reasonable period; or (v) Consent. [12 USC § 4619] 	<p>Several grounds for appointment of a conservator for a bank are not available to the OFHEO.</p>

¹⁸ The FDIC may appoint itself conservator for any insured institution if one of these grounds exist, and the FDIC determines that the appointment is necessary to reduce the risk of or amount of loss that the FDIC fund is expected to incur.

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	(xi) Bank is undercapitalized under PCA and has no reasonable prospect of becoming adequately capitalized, or has failed to submit or implement a capital restoration plan; (xii) The bank is critically undercapitalized under PCA; (xiii) The bank is convicted of certain money laundering crimes.	No provision for conservatorship.	(vi) The GSE is <i>significantly</i> undercapitalized, has below minimum core capital, and alternative remedies are not satisfactory. [12 USC §. 4616(b)(6)] (vii) The GSE is critically undercapitalized. [12 USC § 4617]	GSE must be “significantly” undercapitalized while bank need only be “undercapitalized.”
4.1.1. <i>Notice</i>	The OCC may appoint a conservator without prior notice or hearings.	No provision for conservatorship.	Before appointing a conservator, the Director must give notice to the GSE and to the House Committee on Financial Institutions and Senate Banking Committee. [12 USC§ 4619]	No prior notice before appointment of conservator for a bank, but both prior notice and Congressional notification for GSE.
4.1.2. <i>Termination of Conservatorship</i>	OCC may terminate conservatorship when it can be safely done and with the agreement of the FDIC.	No provision for conservatorship.	If conservatorship based on undercapitalization of GSE, mandatory termination of conservatorship is required when core capital is restored. [12 USC § 4619(e)]	No mandatory lifting of conservatorship for banking agencies.
4.1.3. <i>Powers of a Conservator</i>	As conservator, the FDIC succeeds to all rights and powers of the bank and any stockholder, depositor, director, or officer. FDIC has title to all books and records. The FDIC may operate the bank and take steps to preserve and conserve the bank=s assets, and to restore the bank to a safe and sound condition. Legal proceedings may be stayed, and certain contracts may be repudiated.	No provision for conservatorship.	Conservator has all of the powers of the shareholders, directors and officers of the GSE. The conservator is also subject to the same duties, penalties and limitations applicable to GSE directors, officers and employees (unless otherwise specified by OFHEO rules). The conservator may avoid any security interest taken by a creditor with the intent to hinder, delay, or defraud the GSE. Conservator may enforce contracts even if by their terms they expire upon the appointment of a conservator. Conservator may stay judicial actions for up to 45 days. [12 USC § 4620]	

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<i>4.2. Grounds for Appointment of a Receiver</i>	Same as for a conservator.	When the Board finds that the efficient and economical accomplishment of the purposes of the FHB Act will be aided, and in accordance with rules or orders the FHFB may prescribe, any FHL Bank may be liquidated or reorganized. 12 USC § 1446]	No provision for appointment of a receiver.	
<i>4.2.1. Powers of a Receiver</i>	All of the powers of a conservator, and authority to, among other things: (i) liquidate the institution; (ii) make any other disposition of any matter as the FDIC determines in the best interests of the institution, depositors and the FDIC; (iii) organize a new bank or bridge bank; (iv) merge the bank or transfer any asset or liability; and (v) adjudicate claims.	No provision.	No provision for the appointment of a receiver.	

SUBJECT	BANKING AGENCIES	FEDERAL HOUSING FINANCE BOARD	OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT	COMMENTS
5. PRODUCT APPROVAL				
<p><i>5.1. Authority to Approve New Products</i></p>	<p>The OCC model has no specific authority to approve new banking products, but if a bank engages in a new activity that is not authorized by statute, it will be questioned by its examiner and could result in an enforcement action.</p> <p>If a new activity is to be conducted in an operating subsidiary, the activity is subject to prior OCC approval, unless the bank is well capitalized and well managed, and the activity is on a list of pre-approved activities published in the regulations.</p> <p>If a new activity is to be conducted in a financial subsidiary, the bank must provide prior notice and self-certify compliance with conditions. No further action if activity is on a pre-approved list. Activities not on the list are subject to an application process.</p>	<p>A FHL Bank must submit a notice to the Board 60 days prior to engaging in a new activity. Among other information, the notice must include a legal opinion citing the authority for the activity. The FHL Bank may commence the activity unless the Board objects within the 60-day period. [12 CFR 980.1---980.4]</p> <p>A new business activity includes <i>any activity not previously engaged in by the FHL Bank</i>. [Id.]</p> <p>FHL Banks are prohibited from transacting “banking or other business not incidental to the activities” specifically authorized under the FHL Bank Act, e.g., issue debt, make advances to members, accept deposits from members, engage in activities to support affordable housing, etc. [12 USC 1431(e)].</p>	<p>A GSE must obtain the approval of the Secretary of HUD before implementing any “new” program for dealing in <i>conventional mortgages</i>. A “new program” is a program that is <i>significantly different</i> or represents an expansion in dollar volume or number of mortgages above previous limits <i>expressly</i> contained in prior approvals. The Secretary has 60 days to act on the request, and it will be deemed to be approved unless the Secretary finds that program is not authorized by the GSE Organic Acts, or would not be in the public interest. The Secretary must submit to the House Financial Services Committee and Senate Banking Committee an explanation for a denial. If the denial is based on the public interest standard, the Secretary must afford the GSE an opportunity for a hearing on the record. [12 USC §§ 4502(13), 4542]</p> <p>There is no prior approval requirement for a GSE to engage in new program that is different, but not “significantly different” than a prior program, or that involves a significant increase in dollar volume or number of</p>	<p>While national banks are not required to obtain prior approval for new activities conducted directly in the bank, they are limited in that such activities generally must be part of the business of banking, incidental to such business, or specifically authorized by another statute or regulation.</p> <p>The GSE’s must provide notice to HUD before initiating conventional mortgage-related programs that are <i>significantly different</i> from programs that were previously approved programs or that exceed <i>express</i> limitations on value or number of mortgages. New programs that do not meet the “significantly different” test, or that are not subject to “express” quantitative caps, are not subject to the prior notice provision. Further the GSEs may well have sufficient statutory authority to engage in other new programs that do not involve dealing in conventional mortgages, and therefore would not be subject to the prior notice provision.</p> <p>Even if the GSE is required to provide prior notice, unless the Secretary of HUD objects</p>

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			<p>mortgages, if there was no express cap in the prior approval.</p> <p>Further, the GSEs has authority to engage in new programs that do not involve dealing in conventional mortgages, and thus would not be subject to the prior notice provision. Under the FNMA Organic Act, FNMA has the authority to “do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business.” FNMA has the authority to deal in non-conventional mortgages, and to establish trusts and fiduciary relationships as might be appropriate for financing purposes. It may also acquire property, enter into contracts and cooperative agreements with other parties. [12 USC § 1723a(a)]</p>	<p>within 60 days, the GSE may commence the program without an affirmative approval.</p>