

**American Financial Services Association  
Consumer Mortgage Coalition**

October 12, 2010

Mr. Alfred M. Pollard  
General Counsel  
Federal Housing Finance Agency  
1700 G Street, N.W., Fourth Floor  
Washington, D.C. 20552

Re: Proposed Rules of Practice and Procedure  
RIN Number 2590-AA14

Dear Mr. Pollard:

The American Financial Services Association (AFSA), the national trade association for the consumer credit industry, and the Consumer Mortgage Coalition (CMC), a trade association of national mortgage lenders, servicers and service providers, appreciate this opportunity to comment on the Federal Housing Finance Agency (FHFA) proposed Rules of Practice and Procedure. The proposed rule would set out procedures for adjudication of contested FHFA enforcement actions. The proposed rules would not apply to enforcement actions relating to the affordable housing goals for Fannie Mae and Freddie Mac, or to actions to enforce reporting rules that apply to Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (collectively, the GSEs). The rules would apply to enforcement actions related to safety and soundness and to charter compliance.

FHFA's safety and soundness and charter enforcement authority is significantly expanded from the enforcement authority of one of FHFA's predecessors, the Office of Federal Housing Enterprise Oversight (OFHEO). Congress expanded this authority when it enacted the Housing and Economic Recovery Act of 2008.<sup>1</sup> FHFA's enforcement authority is very closely modeled after that of the Federal banking agencies.<sup>2</sup> It is

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<sup>1</sup> Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008). *See* §§ 1151-58, 122 Stat. at 2767-78.

<sup>2</sup> The Federal banking agencies, for purposes of this letter, are the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS). Much of their enforcement authority was enacted in the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028. This authority has been amended over the years, probably most notably in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. FHFA's enforcement authority is very closely modeled after that of the Federal banking agencies.

therefore instructive to look at the Federal banking agencies' enforcement authority when considering FHFA's enforcement authority. As FHFA states in its proposal:

Because this enforcement authority parallels that of the enforcement tools available to bank regulatory agencies, the procedures for pursuing such actions, by design, are similar.<sup>3</sup>

The Federal banking agencies use uniform procedural rules for their enforcement actions (the Uniform Rules),<sup>4</sup> and FHFA's proposed rule is similar to the Uniform Rules.

We note that one sentence in the proposed rule appears misplaced. It is in proposed § 1209.30(h)(2), which would govern requests for document discovery from parties during adjudication of a contested enforcement action. The sentence is:

Notwithstanding any other provision in this part, as provided by section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)), in connection with the enforcement of a subpoena under this part, no district court has jurisdiction to affect by injunction or otherwise the issuance or enforcement of any effective and outstanding notice or order issued under section 1313B, subtitle B, or subtitle C of the Safety and Soundness Act, or to review, modify, suspend, terminate, or set aside any such effective and outstanding notice or order.

This language is similar to a statutory provision designed to ensure adherence to the adjudicatory process Congress spelled out for contested enforcement actions, in which judicial litigation is sometimes restricted, as we discuss below. Including this language in a regulation concerning subpoenas may give the impression that those subpoenas are not judicially reviewable. We explain below why including this language as proposed would be ineffective. Also, the broad wording of the sentence could be read to cover subpoenas beyond those issued to parties to a contested enforcement action, which we believe it should not.

We request clarification about whether the proposed rules apply only to adjudicatory subpoenas and not to investigatory subpoenas. If the final rule were extended to investigatory subpoenas, we recommend changes that would be important because of differences between the two types of subpoenas.

We recommend that a final rule incorporate a reasonable limit on the scope of document discovery, as the Uniform Rules do.

We recommend a small change to serve as a reminder of the important Trade Secrets Act.

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<sup>3</sup> 75 Fed. Reg. 49314, 49316 (August 12, 2010).

<sup>4</sup> See 12 C.F.R. Part 19 for the OCC's Uniform Rules. The Uniform Rules of the other Federal banking agencies are so similar, for matters discussed in this letter, that this letter cites only the OCC's Uniform Rules.

Finally, we request clarification about the authority FHFA would use were it to issue a subpoena relating to affordable housing goals.

### **The Congressional Purpose of the Sentence Limiting Judicial Review Is Unrelated to Subpoenas**

We begin this discussion by describing the reasons Congress limited judicial review of certain enforcement notices and orders. The reasons are related to judicial economy.

FHFA's authority to bring an enforcement action for a cease and desist order, a removal order, a prohibition order, or a civil money penalty assessment is almost identical to the authority of the Federal banking agencies.<sup>5</sup> For both FHFA and the Federal banking agencies, Congress has set out a very specific procedure for adjudication of these enforcement actions when they are contested, as follows.<sup>6</sup>

The agency initiates an enforcement action by issuing a notice of charges against a party (the respondent). The respondent has a right to be heard in an administrative action before a presiding officer. After the administrative hearing, the presiding officer recommends a resolution to the agency that brought the action. The agency makes a final determination on what, if any, enforcement order will issue. If the agency were to issue a final enforcement order, the respondent could appeal that final order to the U.S. Circuit Court of Appeals. In the event of noncompliance with a final order, the agency that issued the order may enforce it by bringing an action in U.S. District Court.

A respondent may appeal a final order to a Court of Appeals rather than to a trial court. This is because by the time an order is final, the respondent has already had an opportunity to be heard on the merits of the final order, at the administrative hearing. There is no need for another fact-finding hearing or trial into the basis for the order.

A fact-finding into the basis for a final order is also unnecessary when an agency enforces a final order. An action to enforce a final order goes to a trial court because whether the respondent has complied with the order is a question of fact for a trial court. However, the respondent may not litigate the basis for the order in this action.

The language that prevents such judicial litigation and relitigation of final orders, for the federal banking agencies, is:

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<sup>5</sup> FHFA's authority to issue cease and desist orders is at 12 U.S.C. § 4631; to issue removal and prohibition orders is at 12 U.S.C. § 4636a; to assess civil money penalties is at 12 U.S.C. § 4636. The parallel authorities of the Federal banking agencies are at 12 U.S.C. §§ 1818(b), 1818(e) – (g), and 1818(i)(2), respectively.

<sup>6</sup> The procedures are set out in the provisions authorizing the enforcement actions, listed in the previous footnote, and in 12 U.S.C. §§ 4633 and 4634 for FHFA, and 12 U.S.C. § 1818(h) and (i)(1) for the Federal banking agencies.

The appropriate Federal banking agency may in its discretion apply to the United States district court . . . for the enforcement of any effective and outstanding notice or order . . . and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 38 or 39 **no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.**<sup>7</sup>

The analogous language for FHFA is:

Except as otherwise provided in this subchapter and sections 1369 and 3639D, **no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order** under section 1371, 1372, 1313B, 1376, or 1377, or Subtitle B, **or to review, modify, suspend, terminate, or set aside any such notice or order.**<sup>8</sup>

The emphasized language, for FHFA and the Federal banking agencies both, is crafted to require adherence to the process Congress requires for adjudication of contested agency enforcement actions.

The language limits the authority of courts to review, modify, suspend, or terminate a “notice” or an “order.” It would not affect a court’s ability to review or affect a subpoena because a subpoena is neither a notice nor an order.

Congress included the word “order” in the statutes to prevent judicial litigation and relitigation of final agency orders, as explained above. Congress included the word “notice” to prevent similar circumvention of the administrative procedure in a felony suspension case, a case in which a “notice” can remove a person from a bank or a GSE.<sup>9</sup>

The statutory language limiting judicial review does not include the word “subpoena” because the language is not designed to prevent litigation regarding subpoenas. Authority to enforce subpoenas is separate authority, as we discuss below, and has no such restriction on judicial review.

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<sup>7</sup> 12 U.S.C. § 1818(i)(1) (emphasis added).

<sup>8</sup> 12 U.S.C. § 4635(b) (emphasis added).

<sup>9</sup> Both the Federal banking agencies and FHFA have authority to immediately suspend a person who has been indicted for certain crimes. The agencies suspend the person “by written notice[.]” 12 U.S.C. § 1818(g)(1)(A); 12 U.S.C. § 4636a(h)(1)(A). The person may appeal that notice to the agency. 12 U.S.C. § 1818(g)(3); 12 U.S.C. § 4636a(h)(4). The person may not circumvent this administrative review by seeking judicial review of the notice, *because* of the limitation on judicial interference with a “notice.”

## Subpoenas Are Judicially Reviewable

The Federal banking agencies' subpoenas are judicially enforceable:

Any such agency or any party to proceedings under this section may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any [subpoena] or [subpoena] duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith.<sup>10</sup>

FHFA's subpoenas are similarly judicially enforceable:

### (1) In general

The Director, or any party to proceedings under this subchapter, may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district of the United States in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any subpoena or subpoena duces tecum issued pursuant to this section.

### (2) Power of court

The courts described under paragraph (1) shall have the jurisdiction and power to order and require compliance with any subpoena issued under paragraph (1).<sup>11</sup>

Courts are expressly given “jurisdiction and power” to enforce subpoenas, and by implication judicial discretion not to enforce them when justice so requires.

Neither the Federal banking agencies' subpoena authority nor FHFA's subpoena authority has any language limiting a court's ability to review the appropriateness of a subpoena before requiring compliance with it. FHFA does not have authority to limit jurisdiction that Congress gave to the federal courts.

Administrative subpoenas do get challenged when an agency tries to enforce them, courts do review the subpoenas, and courts do sometimes decline to enforce them.<sup>12</sup> While a challenge to a Federal agency subpoena is rarely successful, this is because agencies have

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<sup>10</sup> 12 U.S.C. § 1818(n).

<sup>11</sup> 12 U.S.C. § 4641(c).

<sup>12</sup> A case from the D.C. Circuit Court of Appeals is instructive here because it rejected the propriety of certain subpoenas issued under federal banking law that is very similar to FHFA's authority. At the time of the subpoenas in question, the Resolution Trust Corporation had authority (under 12 U.S.C. § 1821(d)(2)(I), which is very similar to FHFA's authority under 12 U.S.C. § 4617(b)(2)(I)) to exercise any power under § 1818(n). Section 1818(n) is very similar to FHFA's authority in § 4641. *RTC v. Walde, et al.*, 18 F. 3d 943 (D.C. Cir. 1994). The opinion is available here: <http://openjurist.org/18/f3d/943>

very broad subpoena authority. The Uniform Rules do not include a provision that would limit judicial review of subpoenas.<sup>13</sup>

For these reasons, we recommend that proposed § 1920.30(h)(2) be amended by striking its final sentence.

### **The Sentence That Would Limit Judicial Review is Overbroad**

The sentence that would limit judicial review is located in the proposed regulation that would govern discovery from parties to a contested enforcement action. The sentence has no counterpart in proposed § 1209.31, which governs discovery from nonparties to an FHFA enforcement action. However, the sentence is not by its terms limited to discovery from parties. It reads:

Notwithstanding any other provision in this part, as provided by section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)), in connection with the enforcement of a subpoena **under this part**, no district court has jurisdiction to affect by injunction or otherwise the issuance or enforcement of any effective and outstanding notice or order issued under section 1313B, subtitle B, or **subtitle C** of the Safety and Soundness Act, or to review, modify, suspend, terminate, or set aside any such effective and outstanding notice or order.<sup>14</sup>

The phrase “under this part” above in bold refers to 12 C.F.R. Part 1209, which includes § 1209.31. Therefore, the language seems to apply to *any* subpoena issued pursuant to Part 1209, including subpoenas to nonparties. It is unclear whether the language would apply to subpoenas to nonparties.

The phrase “Subtitle C” above in bold is also overbroad. In 12 U.S.C. § 4635(b), on which FHFA bases proposed § 1209.30(h)(2), Congress referred to “section 1371, 1372, 1313B, 1376, or 1377, or Subtitle B,” meaning specific enforcement actions FHFA may bring, including cease and desist actions and temporary cease and desist actions, removal and prohibition actions, civil money penalty actions, and actions to enforce prudential management and operations standards. Proposed § 1209.30(h)(2), by including all of subtitle C, would broaden this substantially, to add 12 U.S.C. §§ 4633 (administrative hearings), 4634 (judicial review of specified enforcement orders), 4635 (enforcement of notices and orders), 4636b (criminal penalties for violation of prohibition order), 4637 (notice of charges issued after termination of employment at a GSE), 4638 (no creation of private rights of action), 4639 (public disclosure of final orders), 4640 (notice of service), 4641 (subpoena authority), and 4642 (reporting fraudulent loans).

We recommend removal of this sentence from the proposed regulation because it is overbroad and beyond FHFA’s authority.

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<sup>13</sup> 12 C.F.R. § 19.25(h).

<sup>14</sup> Proposed 12 C.F.R. § 1920.30(h)(2) (emphasis added).

## **A Final Rule Should Be Clear about Whether it Applies to Investigatory Subpoenas**

The Federal Banking agencies and FHFA have authority to issue two types of subpoenas, investigatory and adjudicatory.

Routine agency examinations do not use subpoenas because financial institutions and their examiners generally cooperate. However, FHFA and the Federal banking agencies have very similar authority to issue subpoenas in connection with examinations.<sup>15</sup> When an agency examination uses subpoena authority, it is commonly called a formal investigation. In a formal investigation, an agency may issue subpoenas to outside parties over whom the agency has no authority to bring any enforcement action. A party over whom the agency does have enforcement authority has no right to attend a deposition of an outsider during a formal investigation. There is no requirement, or even expectation, that an agency will bring enforcement charges after it conducts a formal investigation.

Adjudicatory subpoenas, on the other hand, arise only after the agency initiates a formal enforcement action against a party who elects to contest the charges. Adjudicatory subpoenas permit prehearing discovery and permit the required attendance of witnesses at a hearing. A party to a contested hearing may attend an adjudicatory discovery deposition taken by the other party to the contested hearing, and that witness, again, may be a person over whom the agency has no enforcement authority.<sup>16</sup>

FHFA's authority to issue adjudicatory subpoenas, again, mirrors that of the Federal banking agencies.<sup>17</sup>

The present rulemaking appears for the following reasons to apply only to adjudicatory and not to investigatory subpoenas:

- FHFA states “Part 1209 will govern the conduct of FHFA administrative hearings on the record for enforcement proceedings as provided in the Safety and

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<sup>15</sup> FHFA's authority to issue investigative subpoenas is at 12 U.S.C. §§ 4517(g), 4617(b)(2)(I), and 4641. The banking agencies' authority is in several places. The most relevant examples are 12 U.S.C. § 1464(d)(1)(B)(v) (which is similar to FHFA's § 4641 authority), § 1821(d)(2)(I) (which is similar to FHFA's § 4617(b)(2)(I) authority), and § 1820(c) (which is similar to FHFA's § 4517(g) authority).

<sup>16</sup> Congress directed the Federal banking agencies to adopt “uniform rules and procedures for administrative hearings[.]” Financial Institutions Reform, Recovery, and Enforcement Act of 1989 § 916, Pub. L. No. 101-73 codified at 12 U.S.C. § 1818 (note). The Uniform Rules therefore are not required to, and do not, cover formal investigations. The Office of Thrift Supervision (OTS) codifies its formal examination rules separately from the Uniform Rules, and explains that its rules for formal examinations do “not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 509 of this chapter.” 12 C.F.R. § 512.1.

<sup>17</sup> FHFA's authority is at 12 U.S.C. § 4641, and is very similar to the Federal banking agencies' authority at 12 U.S.C. § 1818(n).

Soundness Act.”<sup>18</sup> Formal investigations do not involve “hearings” or “enforcement proceedings,” they involve only investigatory subpoenas.

- The proposed rule sets out the procedures for administrative hearings for cease and desist, temporary cease and desist, removal and prohibition, and civil money penalty proceedings.<sup>19</sup> Each of these proceedings is adjudicatory and not investigative, so again the proposed rule appears to apply only to adjudicatory proceedings and adjudicatory subpoenas.
- The proposed rule distinguishes between subpoenas to parties<sup>20</sup> and subpoenas to nonparties.<sup>21</sup> During a formal investigation, there is no distinction between parties and nonparties because no charges have been initiated and may never be initiated. This rule therefore appears to mean adjudicatory rather than investigative subpoenas.
- The proposed rule would “not in any way limit the general supervisory or regulatory authority granted the Director under section 1311(b) of the Safety and Soundness Act”<sup>22</sup> which incorporates by reference § 1313. Sections 1311(b) and 1313 give FHFA authority to regulate the GSEs. These authorities go well beyond FHFA’s authority to bring a formal enforcement action, so again the proposed rule appears to apply to adjudicatory proceedings and adjudicatory subpoenas alone.
- FHFA states its statutory basis for its proposed rule,<sup>23</sup> and this basis excludes § 4617(b)(2)(I), which authorizes FHFA to issue investigatory subpoenas. FHFA has authority to issue investigatory subpoenas that are not covered by the proposed rule.
- The proposed rule does not contain rules for formal investigations. FHFA’s rule and the Uniform Rules both includes rules for adjudicatory subpoenas, including for document discovery from parties,<sup>24</sup> document discovery from nonparties,<sup>25</sup> pre-hearing depositions of witnesses,<sup>26</sup> and hearing subpoenas.<sup>27</sup>

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<sup>18</sup> 75 Fed. Reg. 49314, 49318 (August 12, 2010).

<sup>19</sup> Proposed 12 C.F.R. §§ 1209.4 – 1209.8.

<sup>20</sup> Proposed 12 C.F.R. § 1209.30(h).

<sup>21</sup> Proposed 12 C.F.R. § 1209.31.

<sup>22</sup> Proposed 12 C.F.R. § 1209.9.

<sup>23</sup> 75 Fed. Reg. 49314, 49329 (August 12, 2010).

<sup>24</sup> Proposed 12 C.F.R. §§ 1209.30; Uniform Rules at 12 C.F.R. §§ 19.24, 19.25.

<sup>25</sup> Proposed 12 C.F.R. § 1209.31; Uniform Rules at 12 C.F.R. § 19.26.

- Separate and apart from the adjudicatory subpoena rules in the Uniform Rules, three of the Federal banking agencies also have rules for formal investigations. These rules provide that formal investigations are confidential, formal investigations are initiated by a formal order or resolution issued by an authorized official, witnesses in formal investigations are entitled to fees and mileage, and witnesses have certain rights.<sup>28</sup> FHFA includes no formal investigation rules in its proposal, apparently because the proposed rule does not cover investigatory subpoenas.

But in one sentence, the proposed rule makes less clear whether it is intended to reach investigatory subpoenas.

Subpart B of this part (Enforcement Proceedings under sections 1371 through 1379D of the Safety and Soundness Act) sets forth the statutory authority for enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641) (Enforcement Proceedings).<sup>29</sup>

This sentence includes all actions under § 4641. Section 4641 authorizes the FHFA Director to enforce subpoenas, but is not limited to adjudicatory subpoenas.

Another reason for uncertainty about whether the rule would apply to investigatory subpoenas is based on the statutory authority FHFA cites for the proposed rule. FHFA cites 12 U.S.C. §§ 4517 and 4641, both of which give FHFA authority to conduct formal investigations. But FHFA does not cite 12 U.S.C. § 4617, which gives FHFA authority to conduct formal investigations in connection with a conservatorship or receivership.<sup>30</sup>

For these reasons, we suggest a clarification that the proposed rulemaking does not relate to investigatory subpoenas.

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<sup>26</sup> Proposed 12 C.F.R. § 1209.32; Uniform Rules at 12 C.F.R. § 19.27.

<sup>27</sup> Proposed 12 C.F.R. § 1209.38; Uniform Rules at 12 C.F.R. § 19.34.

<sup>28</sup> 12 C.F.R. §§ 19.180 – 19.184 (OCC); 12 C.F.R. §§ 308.144 – 308.150 (FDIC); 12 C.F.R. §§ 512.1 – 512.7 (OTS).

<sup>29</sup> Proposed 12 C.F.R. § 1209.1(b).

<sup>30</sup> 12 U.S.C. § 4617(b)(2)(I).

## **If a Final Rule Were to Apply to Investigatory Subpoenas, Changes Would Be Needed Because Investigatory Subpoenas Are Not Issued to the GSEs**

If FHFA were to extend the proposed regulation to investigatory subpoenas, some changes would be advisable.

There is no need for FHFA to issue an investigatory subpoena to a GSE because its examination and reporting authorities permit FHFA to obtain all the information it needs from a GSE simply by asking.<sup>31</sup> That means investigatory subpoenas would only be issued to third parties over whom FHFA likely has no enforcement authority. This is an important distinction, and if a final rule were to cover investigatory subpoenas, we recommend that it recognize this distinction.

It is helpful to look at the formal investigation rules of the Federal banking agencies. The following is in the OCC's rule:

- (a) Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation shall, on request, be shown the order initiating the investigation.
- (b) Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the Comptroller, may be accompanied, represented, and advised by counsel. The right to be accompanied, represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney—
  - (1) Advise the person before, during and after the conclusion of testimony;
  - (2) Question the person briefly at the conclusion of testimony to clarify any of the answers given; and
  - (3) Make summary notes during the testimony solely for the use of the person.
- (c) Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness.
- (d) Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the investigation.
- (e) Any designated representative conducting an investigative proceeding shall report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. The Comptroller may take such

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<sup>31</sup> 12 U.S.C. § 4517 permits broad FHFA examinations of the GSEs. 12 U.S.C. § 4514 additionally permits FHFA to require Fannie Mae, Freddie Mac, and the Federal Home Loan Banks to submit regular or special reports, as long as the requirement does not call for submission of information that is not “reasonably obtainable[.]” No subpoena is required.

action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.<sup>32</sup>

Having such a rule for formal investigations is important because the witnesses are likely parties over whom FHFA has no enforcement authority and who may therefore be unfamiliar with FHFA's operations and authorities.

Investigatory subpoenas would also require procedures that the present proposal does not contain. Formal investigations are confidential, as is any FHFA examination of a GSE.<sup>33</sup> Administrative hearings and enforcement orders are, by statute, presumed to be public.<sup>34</sup> This is a significant difference between adjudicatory and investigatory subpoenas, and any rule that covers investigatory subpoenas should incorporate this difference.

Investigatory subpoenas under 12 U.S.C. § 4617(b) require approval of the Director or the Director's designee.<sup>35</sup> If the final rule were extended to apply to investigatory subpoenas, we recommend that the rule recognize and implement this important protection, as in the OCC's rule.<sup>36</sup> This protection is not necessary for an adjudicatory subpoena because that subpoena is issued by the presiding officer, usually an administrative law judge, trained in the law of adjudicatory subpoenas. The fact that an administrative law judge or other presiding officer issues adjudicatory subpoenas protects against an improper subpoena.

In a formal examination, there is no administrative law judge or presiding officer. Congress therefore required approval of FHFA's § 4617 investigatory subpoenas to ensure that FHFA's broad subpoena authority is used only when appropriate. We believe this protection is important and should be incorporated into a regulation.

For these reasons, we recommend that any rule that covers investigatory subpoenas incorporate provisions as in the OCC's rule to state the rights of witnesses, to protect the confidentiality of investigations, and to permit any subpoenaed party to see the authorization for the investigation.

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<sup>32</sup> 12 C.F.R. § 19.183.

<sup>33</sup> Information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions" is exempt from disclosure under the Freedom of Information Act. 5 U.S.C. § 552(b)(8). For this purpose, FHFA is an agency responsible for the regulation or supervision of financial institutions. 12 U.S.C. § 4525.

<sup>34</sup> 12 U.S.C. § 1818(u) for the Federal banking agencies; 12 U.S.C. § 4639(a) and (b) for FHFA.

<sup>35</sup> 12 U.S.C. § 4617(b)(2)(I)(ii).

<sup>36</sup> 12 C.F.R. § 19.182(a).

## The Scope of Document Discovery Should Be Reasonable

There is one provision in the Uniform Rules that is not present in FHFA's proposed rule:

§ 19.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term "documents" may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with §19.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide. . . .

We believe this Uniform Rule sets out reasonable limits on the scope of discovery, and that FHFA should adopt the same rule. This is especially true when a discovery subpoena is issued to a nonparty to an enforcement action, for whom the burden of producing information may be very heavy.

We believe FHFA's rule should also prohibit discovery of privileged materials, as the Uniform Rules do.<sup>37</sup> This would have no effect on FHFA's ability to subpoena privileged materials, but it would make this clear to those outside of FHFA.<sup>38</sup>

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<sup>37</sup> 12 C.F.R. § 19.24(c).

We believe the proposed rule would be improved by incorporating a reasonable limit on the scope of discovery in an adjudicatory proceeding, as in the OCC's rule.

### **The Trade Secrets Act**

The Trade Secrets Act makes it a criminal offense for federal employees to divulge trade secrets that they come across in the course of their official duties:

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.<sup>39</sup>

FHFA's proposed rules would permit FHFA to subpoena materials from private parties that FHFA does not regulate, but the proposed rules contain no protections for trade secrets.

We are certain that FHFA employees take necessary and reasonable precautions with confidential materials.

The Uniform Rules do not contain a Trade Secrets Act reminder. We believe they should. We do note, though, that the Uniform Rules were written in 1991, before the advent of modern electronic communication. Electronic communication increases the

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<sup>38</sup> See *OTS v. Vinson & Elkins*, 124 F. 3d 1304 (n. 2) (D.C. Cir. 1997), in which OTS sought to enforce a subpoena for attorney work product. The court explained, “[t]he district court properly ignored, despite appellant’s objection, the Regional Enforcement Counsel’s ‘conclusion’ after reviewing the notes in camera. The agency’s internal procedures in this situation simply do not bear on its case in district court. The district court properly treated OTS’ ‘ruling’ on the work-product doctrine as no more than a litigating position.” The opinion is available here: <http://openjurist.org/124/f3d/1304/director-office-of-thrift-supervision-v-vinson-and-elkins-llp>

<sup>39</sup> 18 U.S.C. § 1905.

risk of leaks of information. Further, FHFA regulates three very large financial institutions. It is difficult to imagine a “minor” or “small” FHFA enforcement action. Any FHFA enforcement action could result in the production of *enormous* volumes of data and information, some of which would inevitably be quite sensitive.

In the event of an inappropriate disclosure, potential damages could be severe for all concerned.

For these reasons, we believe the proposed regulations should be explicit that neither FHFA nor a presiding officer may, under any circumstances, divulge any trade secrets. The simple presence of the statement in FHFA’s regulations would serve as a reminder to those involved that the Trade Secrets Act applies. We can imagine no disadvantage to an extra, simple reminder – one sentence would be sufficient – in a matter so important to all involved.

### **Clarification Request about Subpoenas Related to Affordable Housing Goals**

Fannie Mae and Freddie Mac are subject to affordable housing goals.<sup>40</sup> FHFA has authority to enforce the affordable housing goals, through cease and desist orders and civil money penalties,<sup>41</sup> which is separate from its other enforcement authorities. The GSEs are also subject to reporting requirements, and those requirements are enforceable by civil money penalties.<sup>42</sup> The present rulemaking would not apply to enforcement actions relating to the GSEs’ affordable housing goals or to the § 4514 reporting requirements.<sup>43</sup>

However, FHFA states that the proposed provisions relating to hearings could be used in enforcement hearings relating to the affordable housing goals or to the reporting requirements:

The stand alone formal hearing procedures in subpart C of [proposed] Part 1209 also could govern civil money penalty proceedings authorized under section 1345 of the Safety and Soundness Act [civil money penalties related to affordable housing goals] that require a hearing on the record, but that specifically provides for remedies that differ from those under sections 1371 [cease and desist orders unrelated to affordable housing goals] and 1376 [civil money penalties unrelated to affordable housing goals] of the Safety and Soundness Act. See 12 U.S.C.

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<sup>40</sup> 12 U.S.C. §§ 4561, 4562, and 4563.

<sup>41</sup> 12 U.S.C. §§ 4581 and 4585.

<sup>42</sup> 12 U.S.C. § 4514.

<sup>43</sup> Proposed 12 C.F.R. § 1209.1(c) describes the scope of the proposed rule as applying to specified enforcement proceedings, but not including affordable housing goals enforcement proceedings under 12 U.S.C. § 4581 or 4585, and not reporting requirement actions under 12 U.S.C. § 4514.

4582, 4585, 4631(a)(2) and 4636(a). In addition to the housing goals enforcement proceedings under sections 1341 and 1345 of the Safety and Soundness Act, the formal hearing procedures in subpart C of this part could apply to the enforcement of the regulated entities' reporting requirements under section 1314 of the Safety and Soundness Act (12 U.S.C. 4514).<sup>44</sup>

Combining the hearings procedures appears sensible. In the event that FHFA were to use the hearings provisions in proposed Part 1209 for matters relating to the affordable housing goals, we request clarification about which authority it would use if it were to issue a subpoena. FHFA's subpoena authority relating to the affordable housing goals under 12 U.S.C. § 4588 is not the same as its subpoena authority for non-housing goals matters under 12 U.S.C. § 4641.

Congress enacted both § 4588 and § 4641, so it is necessary to attribute meaning to both. Section 4588 is more narrow and specific, because it applies only to administrative proceedings under "this subpart[.]" meaning §§ 4581 through 4588, which includes affordable housing goals enforcement actions but not enforcement actions relating to safety and soundness or to charter compliance.

One difference between FHFA's §§ 4588 and 4641 subpoena authorities concerns witness fees. Section 4588(d) authorizes courts to require Fannie Mae or Freddie Mac to cover a subpoenaed party's costs if Fannie Mae or Freddie Mac (an enterprise) were to initiate a proceeding, such as a proceeding to enforce an adjudicatory subpoena:

Any court having jurisdiction of any proceeding instituted under this section by an enterprise may allow to any such party such reasonable expenses and attorneys fees as the court deems just and proper. Such expenses and fees shall be paid by the enterprise or from its assets.

Section 4641(d) provides courts with similar ability only in proceedings instituted by an entity-affiliated party,<sup>45</sup> not proceedings that a GSE institutes:

Any court having jurisdiction of any proceeding instituted under this section by an regulated entity enterprise-affiliated party [meaning entity-affiliated party] may allow to any such party such reasonable expenses and attorneys fees as the court deems just and proper. Such expenses and fees shall be paid by the regulated entity or from its assets.

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<sup>44</sup> 75 Fed. Reg. 49314, 49317 (August 12, 2010).

<sup>45</sup> An entity-affiliated party is defined in 12 U.S.C. § 4502(11) to include directors, officers, employees, and certain others involved with Fannie Mae, Freddie Mac, or a Federal Home Loan Bank. It does not include the GSE. Its counterpart definition in banking law is institution-affiliated party, at 12 U.S.C. § 1813(u).

Another difference between the two sources of subpoena authority is that only § 4641 provides penalties for willful noncompliance.<sup>46</sup>

We believe FHFA should be clear about which subpoena authority it uses for any subpoena it issues. We suggest that any final rule should make clear that any subpoena related to the affordable housing goals is issued under the more specific § 4588 and not the more general § 4641.

## **Conclusion**

We recommend that FHFA remove the final sentence from proposed § 1920.30(h)(2) because FHFA does not have authority to limit judicial review of its subpoenas. We also recommend clarifying whether the proposed rule covers investigatory subpoenas. We urge that any rule covering investigatory subpoenas include witness rights and other protections related to the nature of investigatory subpoenas. We recommend that FHFA include a reasonable limitation on the scope of discovery in adjudicatory actions as in the Uniform Rules. We recommend that a final rule include a reminder of the Trade Secrets Act. Finally, we recommend that FHFA clarify that subpoenas relating to the affordable housing goals are issued under 12 U.S.C. § 4588 and not 12 U.S.C. § 4641.

Sincerely,



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<sup>46</sup> 12 U.S.C. § 4641(e).