



September 8, 2023

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

Attention: Comments on Suspended Counterparty Program/RIN 2590-AB23

Dear General Counsel Jones:

The Housing Policy Council ("HPC")<sup>1</sup> appreciates the opportunity to submit comments on the Federal Housing Finance Agency's ("FHFA") Notice of Proposed Rulemaking (the "NPR") to amend the agency's Suspended Counterparty Program ("SCP") regulation.<sup>2</sup>

In the NPR, FHFA has proposed to expand the categories of covered misconduct on which a suspension could be based to include sanctions arising from certain forms of civil actions, and to establish a procedure for imposing and vacating an immediate suspension following an administrative action taken by another Federal agency.

HPC has serious concerns with the NPR. We find the proposed expansion of the SCP regulation to civil actions to be overbroad, vague, and without limiting principles. As such, the NPR risks arbitrary enforcement by FHFA. We also find that the proposed procedures for imposing and vacating an immediate suspension deprive counterparties of necessary due process. Finally, we believe that the NPR could have unintended negative impacts on the nation's housing finance system. For these reasons, HPC respectfully requests that FHFA withdraw the NPR.

*FHFA has not provided sufficient support for the proposed expansion of the SCP regulation to civil actions.*

The SCP regulation currently authorizes suspension only if a counterparty has committed "covered misconduct." The SCP regulation defines such misconduct as any "conviction" or "administrative sanction" that is based upon fraud, embezzlement, theft,

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<sup>1</sup> The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers, mortgage, property, and title insurers, and technology and data companies. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit [www.housingpolycouncil.org](http://www.housingpolycouncil.org)

<sup>2</sup> 88 Federal Register 47077 (July 21, 2023).

conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense in connection with a mortgage, mortgage business, mortgage securities or other lending product. The SCP regulation defines a “conviction” as a judgment of guilt of criminal offense or the functional equivalent of such a judgment that includes an admission of guilt. An “administrative sanction” is defined as a debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency.

In the NPR, FHFA asserts that the standards reflected in these definitions have allowed FHFA to “significantly reduce” the risks to which the regulated entities are exposed. Nonetheless, the NPR states that FHFA has “determined” that these standards are “too narrow” and should encompass civil judgments.

In response to this determination, the FHFA is proposing to modify the definition of “conviction” to extend the SCP regulation to: (1) civil actions brought by Federal or state authorities, including administrative law judges, and private parties; (2) consent orders; and (3) material breaches of contract. And, unlike the current standard applicable to criminal actions, the NPR would not require that any of these civil actions include an admission of guilt. The NPR also would modify the definition of “covered misconduct” to include actions in connection with “the management or ownership of real property.”

While civil actions and mismanagement of real property may pose risks to the regulated entities, FHFA has not provided sufficient support or clarity for the proposed changes. The NPR does not –

Explain how the current SCP regulation has “significantly reduced” risks to the regulated entities;

Provide statistics on how many proposed suspensions under the current regulation are considered and how many are actually imposed;

Provide examples of risks posed to the regulated entities based upon real or even hypothetical civil actions or misconduct in the management of real property by counterparties to the regulated entities;

Include any assessment of the number of companies or individuals that would be subject to review and suspension as a result of the proposed changes;

Discuss alternatives to the proposed changes, including the extensive existing authorities of the regulated entities to limit or remove counterparties and FHFA’s own authority to take other potential remedial or other corrective actions; or

Address the impact of the expansion on the market for housing finance if more counterparties – perhaps many more – are subject to suspension.

In the NPR, FHFA simply states that such civil judgments and breaches of contract “may” pose significant risks to the regulated entities,<sup>3</sup> and that misconduct in the management or ownership of real property is a “potential” risk to the Enterprises.<sup>4</sup>

In rulemaking proceedings, an agency’s determination may be invalidated if it fails to “examine the relevant data and articulate a satisfactory explanation for [the] action including a ‘rational connection between the facts found and the choice made.’”<sup>5</sup> Without any additional justification and support, the proposed expansion of the SCP regulation to civil actions would appear to be subject to such a challenge.

*The proposed expansion of the SCP regulation to civil actions is vague and provides little guidance or limits on the discretion to be exercised by FHFA as to which actions merit suspension.*

The current SCP regulation provides that both a proposed and a final suspension order may be issued only if the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.<sup>6</sup> The NPR does not address or limit how FHFA would apply these standards to civil actions. What civil action or contractual dispute would rise to the level of significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity is not described or delimited. The NPR provides no guidance other than singular statements as to revisions of its current rule.

The NPR also does not define the term “significant” or the term “reputational harm.” While the lack of definitions or limiting standards for these key terms may not have been problematic in the context of criminal actions, we can easily envision disputes over the scope of these terms when the SCP regulation is extended to civil actions and some suspensions are imposed immediately.

The proposal to modify the definition of “covered misconduct” to include actions in connection with “the management or ownership of real property” similarly lacks any limiting standards. Consider, for example, the impact of the proposal on a lender with multiple branches that is cited for civil violations regarding a property not related to the regulated entities. Further, as written, the civil misconduct could include thousands of civil penalties for building maintenance, disputes with building inspectors or even homeowner’s association

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<sup>3</sup> “Counterparties determined to have committed certain forms of misconduct in the context of civil enforcement actions *may* pose a significant risk to the regulated entities.... a counterparty’s breach of contract, which generally would not be criminally actionable, *may* pose a significant risk to the regulated entities...” (Emphasis added).

<sup>4</sup> “Misconduct in connection with real property management or ownership—e.g., submission of fraudulent reports in connection with real property management service contracts, failure to maintain safe housing in accordance with assisted housing contracts, etc.— demonstrates a *potential* risk to the regulated entities...” (Emphasis added).

<sup>5</sup> *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>6</sup> 12 C.F.R. § 1227.5(b)(2) and 12 C.F.R. § 1227.6(a)(2).

complaints. Arguably, the revised SPC regulation would authorize FHFA to suspend in such instances.

In sum, the NPR provides FHFA increased and unlimited discretion, which could lead to arbitrary and uneven enforcement by the agency of an undefined range of civil actions.

*The NPR deprives counterparties of due process rights.*

The NPR would authorize FHFA to issue an immediate suspension order if a counterparty is subject to an administrative sanction by another Federal agency.<sup>7</sup> As noted above, the current SCP regulation defines an administrative sanction as a debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency. In the NPR, FHFA states administrative sanctions are due such deference because they are of “unique significance.”

Such actions may be of “unique significance” to the issuing agency. However, the NPR does not explain why an administrative sanction is of greater significance and may pose a greater risk to FHFA’s regulated entities than a criminal conviction. Moreover, the basis for the administrative sanction action taken by another Federal agency may have little, if any, connection with a counterparty’s relationship to a regulated entity. The administrative sanction may be based upon facts and circumstances or requirements of the issuing agency that are not relevant to the relationship the counterparty has with an FHFA regulated entity. The NPR also would permit a counterparty subject to immediate suspension a right to petition the FHFA to vacate the suspension but appears to limit such petition to a period only after the administrative sanction is no longer in effect.<sup>8</sup>

Denying a counterparty the opportunity to present such information to the FHFA prior to the issuance of a suspension order and limiting the right to petition under the grounds provided by the NPR would deprive a counterparty of due process rights.

The NPR also would permit a suspension order to be imposed in the case of a civil action that has been resolved without an admission of misconduct by a counterparty. The NPR states that this change is appropriate in the civil context where the stakes for the applicable counterparties may be lower than in a criminal context. Admitted criminal penalties may be severe, but for institutions, particularly, larger national institutions, civil actions can carry significant reputational and business impacts. , The proposal may be anticipated to discourage settlements in civil cases. In sum, the proposed change fails to take such consequences into

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<sup>7</sup> Proposal for immediate suspension and vacation at 12 C.F.R. §1227.11 and §1227.12.

<sup>8</sup> Specifically, proposed § 1227.12(a) provides grounds for vacation following an immediate suspension in the conjunctive as “Request to vacate. (a) Grounds. A respondent subject to an immediate suspension order may petition FHFA for a request to vacate the order if each of the following conditions is met: (1) The covered misconduct on which the order was based does not include a conviction; (2) Each administrative sanction on which the order was based was imposed pursuant to authority that does not guarantee prior notice and a prior opportunity to present an opposition; and (3) Each administrative sanction on which the order was based is no longer in effect.” [Emphasis added.]

consideration, and like the other procedural changes described above, deprives a counterparty of due process rights.

Finally, throughout the NPR, FHFA notes that it does not investigate, nor does it have the capacity to investigate, actions taken by other government actors, Federal or state, or private party determinations. As such, FHFA has no baseline for consideration of an expansion to the multitude of civil actions contemplated by the NPR. Furthermore, the implementation of the NPR may be expected to impose significant administrative and personnel costs on FHFA.

*The NPR could have negative consequences on the national housing finance market.*

The NPR fails to address the broad predictable impact of the NPR on the national housing finance market. The relationships between the regulated entities and their counterparties enable the national housing finance market to function efficiently and effectively. The suspension of key counterparties for civil actions unrelated to business with the regulated entities will create significant adverse consequences for the functioning of that market.

*FHFA should withdraw the NPR.*

In sum, the NPR proposes an undefined and unlimited expansion of the Suspended Counterparty Program, omits consideration of the impact on the Agency's costs, and fails to provide an immediate suspension proposal that would not create significant due process issues. Unfortunately, given the issues outlined above, we respectfully recommend that the best course of action is for FHFA to withdraw the proposal.

Yours truly,

A handwritten signature in dark ink, reading "Edward J. DeMarco". The signature is written in a cursive, slightly slanted style.

Edward J. DeMarco  
President  
Housing Policy Council