Federal Housing Finance Agency
Constitution Center, 400 7th Street, SW, Washington, DC 20024
Telephone: (202) 414-3800
Facsimile: (202) 414-3823
www.fhfa.gov

February 2, 2012

Edward H. Smith
Principal
PMB 296 at 816 Elm Street
Manchester, NH 03010

RE: Regulatory Petition

Dear Mr. Smith:

Thank you for your letter and concern for protecting the interests of homeowners. This letter responds to your request for both legislative and regulatory action to reform certain foreclosure practices.

Legislative Proposals

You suggested that "***Congress*** should (a) require mortgage holders to ***negotiate equitable settlements*** with defaulted borrowers who can sustain a ***reduced payment*** with a ***clean slate***… and (b) make sure any homeowner who has ***lost home equity*** in the housing crisis is ***compensated*** in some reasonable fashion (tax break, cash, or other appropriate benefit)."

As an independent regulatory agency, the Federal Housing Finance Agency (FHFA) cannot create legislative remedies. Nonetheless, on October 1, 2008 Congress passed the Emergency Economic Stabilization Act of 2008 (EESA).[1] Section 109 of EESA authorized the Department of Treasury (Treasury), in coordination with FHFA, to improve the loan modification and restructuring process and sought to "maximize assistance for homeowners…and encourage the servicers of the underlying mortgages, to take advantage of the HOPE for Homeowners Program and other available programs to minimize foreclosures." Finally, section 109 required Treasury "to consent to reasonable requests for loss mitigation measures, including term extensions, rate reductions, principal write downs, increases in the proportion of loans within a trust or other structure allowed to be modified, or removal of other limitation on modifications [for loans Treasury purchased with Troubled Asset Relief Program (TARP) funds]."

As a result of Congress passing EESA, in 2008, FHFA worked to develop the Streamlined Modification Program for Fannie Mae and Freddie Mac (referred to herein as the "GSEs") loans, which created a fast-track method of getting troubled borrowers to affordable monthly payments. In 2009, FHFA worked with Treasury to develop the Home Affordable Modification Program (HAMP) for both GSE and non-GSE loans, which uses Troubled Asset Relief Program (TARP) funds to incentivize both borrowers and servicers to enter into loan modifications that reduce borrower payments. FHFA also worked with Treasury to develop the Home Affordable Refinance Program (HARP) which facilitates refinances of GSE mortgages that lower current borrower interest rates, thereby reducing their monthly payments. Additionally, Congress passed the Housing and Economic Recovery Act of 2008, which amended the

[1] EESA was enacted on October 3, 2008.

1992 Federal Housing Enterprises Financial Safety and Soundness Act, established FHFA, and vested FHFA with greater conservatorship powers. Since putting the GSEs into conservatorship in 2008, FHFA has used its powers to direct the GSEs to assist borrowers (*e.g.*, see the discussion of the Servicing Alignment Initiative (SAI) below). The GSEs, in turn, have undertaken programs comparable to Treasury's Making Home Affordable (MHA) programs that are not TARP-funded.

From January 1, 2011 to November 30, 2011, the GSEs completed 612,637 foreclosure prevention workouts. The preventions in that time period outpaced foreclosure sales (272,448) by 2.25 to 1.[2] In 2011 over 80 percent of workouts were home retention actions, intended to help borrowers stay in their homes. Home retention actions include loan modifications, repayment plans, and forbearance plans. The remaining workouts are foreclosure alternatives, such as short sales and deeds-in-lieu of foreclosure. These alternatives are intended to minimize the impact of foreclosures on borrowers, communities, and neighborhoods while reducing the severity of GSE losses resulting from borrower defaults. The GSEs focus on loan modifications as a primary workout solution for distressed homeowners.

Congress has acted with respect to your request for "negotiating equitable settlements" and "reduced payment," and efforts to implement those legislative policies are ongoing. With respect to a "clean slate" for "defaulted borrowers," that may imply that borrowers' credit scores should be unaffected by delinquent payments or defaults. Generally, credit scores are generated by private companies and reflect the creditworthiness assessments of those companies. FHFA does not regulate credit score companies. In general, mandating that private companies assessing credit worthiness disregard certain factors in scoring should be left to legislators or agencies directly regulating such activities. Similarly, the second part of your request for congressional action to "make sure any homeowner who has lost home equity in the housing crisis is compensated in some reasonable fashion (tax break, cash, or other appropriate benefit)" is a wide-scale proposal best directed to your Representative and Senators.

Regulatory Proposals

There is no generally applicable federal foreclosure law. Laws on foreclosures generally are governed by the states in which the property is located rather than by federal law or regulation.

You expressed several concerns about the foreclosure process and proposed three new regulations to address those concerns: (1) a 30-day document disclosure requirement; (2) a 30-day debt validation requirement; and (3) a no conflict of interest requirement.

Your first proposed regulation seems to address "mortgages allegedly held and assigned by Mortgage Electronic Registration Systems Inc. (MERS)." The validity of assignments and other actions by MERS on behalf of the owners of mortgages presently is being addressed in litigation involving specific facts under relevant state law.[3] FHFA is monitoring that litigation and is participating in a joint federal agency enforcement proceeding involving MERS, and believes that these vehicles sufficiently address issues raised by the participation of MERS in the mortgage industry.[4]

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[2] http://www.fhfa.gov/webfiles/23071/Nov_2011_Foreclosure_Prev_Rpt.pdf

[3] *See e.g., Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, July 14, 2011.

[4] *See, In Re MERSCORP, and the Mortgage Electronic Registration System, Inc., Reston, Virginia*, FHFA No. EAP-11-01; and *Interagency Review of Foreclosure Policies and Practices* (http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf) (April 2011), p.10-11.

With respect to the second of your proposed regulations, FHFA does not directly regulate servicers. However, FHFA does have the authority to direct Fannie Mae and Freddie Mac in their dealings with servicers. On February 18, 2010, FHFA directed the GSEs

> *to discuss and, wherever feasible, develop consistent requirements, policies and processes for the servicing of nonperforming loans. The discussions should include, but are not limited to, the following topics: the communication, interaction and outreach between servicers and borrowers with respect to delinquency and loss mitigation activity, including timelines, reporting, procedures, workout waterfall hierarchy, notifications, documentation, case escalation, and appeals with respect to both HAMP and non-HAMP loans.*

As a result of that and other FHFA directives, the GSEs have undertaken the "Servicing Alignment Initiative" (SAI). The SAI addresses "Servicing Guidelines," which are guidelines that are incorporated by reference in the contracts the GSEs form with servicers and set forth requirements the GSEs impose upon servicers with whom they do business. As part of SAI, the GSEs have amended their servicing guidelines to address many of the concerns outlined in your letter and are continuing to improve upon the relationship between servicers and borrowers. For instance, rather than "leading a borrower to believe there is no legitimate legal defense to a foreclosure after having missed mortgage payments," the new servicing guidelines require that servicers provide written notice to the borrower that the borrower may apply for a modification long after the first missed payment. *See e.g.,* Freddie Mac Servicing Guide Exhibit 1131, Borrower Solicitation Letter. [5] Also, rather than "obtaining personal financial information about a borrower under the guise of offering a mortgage modification when no such modification is possible," under SAI the GSEs require servicers to solicit delinquent borrowers to alert them to the possibility that they may qualify for a loan modification, and when the servicers receive the borrower response package, the servicers must use the information provided by the borrower to ascertain whether the borrowers qualify for a modification under strict guidelines Treasury and the GSEs set for qualification.

One of your specific requests is that FHFA require "a complete accounting of the subject mortgage loan account including all charges, payments, credits, debits, adjustments, together with running balances of mortgage loan principal balances and escrow account balances, from the inception of the mortgage loan to the commencement of a foreclosure proceeding" 30 days prior to a foreclosure sale or "render any such foreclosure sale to be invalid." A provision that closely mirrors your suggestion has existed in the Fannie Mae servicing guideline since January 31, 2003.[6] Section 104, which addresses mortgage account statements, provides that:

> *At the beginning of each year, the servicer must send the borrower a statement of activity in his or her mortgage account during the past year. This statement can be used to satisfy the IRS requirement for notifying borrowers of the total interest received from them and reported to the IRS for the preceding year. This annual statement must be furnished to the borrower by January 31. The information included in the statement will vary depending on whether the mortgage is a regularly amortizing mortgage or a reverse mortgage.* ***The***

[5] http://www.freddiemac.com/singlefamily/service/docs/Guide_Exhibit_1131.doc.

[6] https://www.efanniemae.com/sf/guides/ssg/svcg/svc061011.pdf; p.301-12

> ***servicer also must provide a detailed analysis of all transactions relating to a borrower's payments or escrow deposit account whenever the borrower requests it.*** *The servicer cannot charge the borrower for the annual statement or the detailed analysis.* [Emphasis added.]

Additionally, 12 C.F.R. 226 ("Reg Z") which implements the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., requires lenders to notify borrowers in writing when lenders transfer the rights to borrowers' mortgages. The Federal Reserve Board administered TILA until July 21, 2011. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010), TILA's general rule making authority transferred to the Consumer Financial Protection Bureau (CFPB).

FHFA is not statutorily authorized to address the second part of your proposed regulation, that a foreclosure sale should be invalid for failure to provide a "complete accounting." Again, laws on foreclosures generally are governed by the states in which the property is located rather than federal law or regulation.

Your third proposed regulation would "invalidate foreclosure sales conducted by or through an attorney or law firm on behalf of a mortgagee or mortgage servicer" if they "are shown to be representing the interests of any other party, or parties, with separate legal and/or financial interests in the foreclosure sale." Again, FHFA generally does not have the statutory authority to invalidate a foreclosure sale. However, FHFA has taken steps to insure that the attorneys representing the GSEs interests are properly screened for conflicts of interest. FHFA has instructed the GSEs to discontinue their preferred attorney programs. They will in the future rely on servicers to select and directly oversee counsel. FHFA, together with the GSEs, is actively developing the qualification standards for counsel that servicers hire to represent the GSEs interests. I have referred your suggestion to the working group that is developing those standards.

More broadly, FHFA appreciates your concerns and recognizes the desirability of more uniform standards among state foreclosure laws. FHFA encourages you to contact state representatives on that point.

Please contact me or James Jordan with any questions at (202) 649-3075.

With all best wishes, I am

Sincerely,

Alfred M. Pollard
General Counsel