



March 15, 2024

Director Sandra Thompson
Federal Housing Finance Agency
Constitution Center
400 7th Street, SW
Washington, D.C. 20219

Re: Title Acceptance Pilot

Dear Director Thompson:

I read with interest your recent announcement of a “Title Acceptance Pilot.” I am writing to ask that FHFA approach this issue with caution and a sensitivity to the role title insurers and title insurance plays in lowering risk for lenders and consumers alike. Removing a risk-mitigating mechanism from real estate finance requires careful study. Therefore, we call on FHFA to utilize its recently finalized new products and activities rule and put this industry-altering pilot out for public comment.

The Risk Management Functions of Title Insurance and Title Insurers

Title insurers play two important risk management roles in a mortgage transaction.

First, title insurers protect the integrity of the transaction by confirming the parties at settlement are who they say they are, that the transaction documents are valid and satisfy foundational real estate law requirements, and that the property being conveyed or mortgaged is free of encumbrances. In an age when mortgage fraud remains a serious concern, the need to protect the integrity of the closing is essential. Title insurers also provide protection to lenders for the funds disbursed for closing through a closing protection letter, and lenders may be without this coverage if there is no title insurance being issued.

Second, title insurers provide borrowers and lenders, and any subsequent owner of the mortgage, including Fannie Mae and Freddie Mac, insurance against any subsequent legal dispute over property ownership and mortgage priority. Such disputes may emerge from many sources, ranging from trade liens for unpaid work on a property to disputes over ownership (say, from a family disagreement over inherited property), to fraudulent transactions meant to launder money or fleece buyers, to a range of other normal and unusual claims against the property.

Indeed, the success of title insurers in protecting the interests of mortgage owners and borrowers is not measured only in claims paid but in claims not occurring in the first place. In other words, fewer claims reflect the extensive work and expense incurred by title companies to resolve and remove encumbrances identified during the title search process. While title records are maintained by local government recording offices, the officials responsible for the recordation are not validating the accuracy or absence of fraud in the filings. For this reason, title insurers have the business imperative to help those offices maintain clean and accurate title records and to resolve issues *before* a transaction settles. Title insurance premiums support substantial pre-closing research and work to resolve potential

title issues. Removing title insurers from this critical curative and quality control function risks a degradation in the quality and accuracy of title records, which over time could add significant risk to the housing finance ecosystem.

As a result of these risk mitigating activities of title insurers, title insurance claims are rare. But, when they occur, the costs can be substantial. Simply put, purchasing a home with a faulty title can wipe out both the home buyer's and the lender's interest in the property. Eliminating title insurance could transition title risk from today's low frequency, but high severity outcome to a higher frequency and high severity outcome. Surely, as the largest two holders of mortgage credit risk in the country, and being backed by taxpayers, Fannie Mae and Freddie Mac should be careful to avoid increasing title risk.

The Pilot is a New Activity and Likely a New Product Covered by FHFA Regulation

We understand the recently announced pilot is intended to be quite limited. However, our reading of FHFA's new products and activities rule¹, is that this pilot is certainly a new activity, as it meets virtually every definition of a new activity, including that it a) "requires a new resource, type of data, process, infrastructure, policy, or modification to an existing policy;" b) "expands the scope or increases the level of credit risk, market risk, or operational risk to the Enterprise;" c) "involves a new category of borrower, investor, counterparty, or collateral;" and d) is "a pilot or modification to the duration or volume of a pilot."² Your announcement describes this as a "pilot." With little doubt that this proposal is a new activity, it is the responsibility of the FHFA Director to determine if the new activity is a new product that merits public notice and comment.

As demonstrated by Congressional interest, newspaper coverage, and the fact that it was in the President's State of the Union, we think FHFA would be hard pressed to find a topic that more clearly merits the need for public notice and comment. There should be open dialogue and debate about whether this new activity/product: "might advance any of the purposes of the Enterprise under its authorizing statute;" "is being or could be supplied by other market participants;" "promotes or stifles competition in the marketplace;" and/or "raises or mitigates risks to the mortgage finance or financial system."³ Stakeholders might disagree about the answers to these questions, but the transparency provided by the process should not be short-circuited by skipping a public comment process.

One immediate question to be answered results from the conflict between the pilot objective, to reduce costs to assist lower-income households, and the target population, low-risk refinance transactions. Further, it appears that cost savings projections were not based on the reduced fees that already apply to refinance transactions. Providing stakeholders the opportunity to present this type of factual information for consideration is critical for the policy to be appropriately designed. And while your recent statement described the pilot as limited to "certain low-risk refinance transactions," the presumptive alternative provider of title services subsequently declared "that it's likely over time that the majority of the refinance universe should qualify for our more innovative approach to quantifying and helping the GSEs assess and underwrite title risk..."

¹ 12 CFR § 1253.

² The pilot also doesn't seemingly qualify for any of the regulation's exceptions.

³ 12 CFR § 1253.4(b) (public interest factors that may be considered by the FHFA Director).

If provided the opportunity to comment, we hope to be provided with more details about how the pilot will work including: what entities would be eligible to participate, the specific transactions covered, the capital / reserve requirements for any alternative provider, the pilot's duration, what risk mitigants the Enterprises will employ, and how success will be measured. If we had that information, we could have a constructive discussion about whether waiving title insurance in *any* mortgage transaction effectively makes Fannie Mae and Freddie Mac self-insurers of title risk, which puts these GSEs directly in a primary market function that is already well-served. We would also discuss whether targeting pilot waivers on "low-risk" transactions would increase title costs for all other borrowers.

We could discuss our concerns that the GSEs are neither chartered as insurance companies nor required to hold reserves for the resulting exposure as regulated insurance companies must do. We could note that using third parties to circumvent this insurance feature creates uncertain financial risks for lenders and for Treasury's ongoing financial support of the GSEs. After all, waiving traditional title insurance coverage does not make the risk go away. Someone is holding it. Lenders are the least appropriate holders of the risk – they have no processes or data to do so. But any non-insurance company taking on this risk should be required to demonstrate the operational, risk-management, and financial capacity to do so.

We could also discuss our concerns about how this proposal potentially violates the GSE charter and sets up a situation where the GSEs assume additional risk that they are ill-equipped to manage and adds to the risk of loss that their taxpayer-backed capital must absorb. Furthermore, FHFA's regulatory rules for the GSEs do not encompass insurance products like title insurance.

In sum, without additional details, this sort of critical policy making process is superficial at best. And it may mean that we are unaware of or are misunderstanding key elements of the proposal.

Finally, while we understand that the pilot is focused on waiving *lender* title policies for certain refinance loans, it is important to point out that under the GSEs' uniform security instruments borrowers make warranties of title in favor of their lenders. The absence of a lender's title insurance policy could therefore increase the financial risk for borrowers who face an uninsured title defect. In addition, even in the context of refinance transactions borrowers sometimes also acquire title insurance to protect *their* interest. Consumer title policies benefit from the work done to supply lender title insurance, so the incremental cost is small. Waiving lender title shifts more of that cost onto the consumer policy. Moreover, FHFA should consider the extent to which consumers will also waive title insurance under the belief that if the lender does not need it, why do I need it? Yet, it is one thing for Fannie Mae or Freddie Mac to end up absorbing a total loss on a loan because of bad title, it is entirely another thing for a family to do so. If this pilot is to proceed, we recommend that it be designed to track this potential outcome and develop borrower communications to prevent this foreseeable unintended consequence.

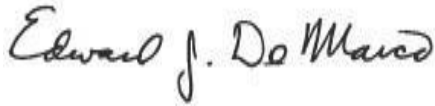
Conclusion: A Request for Greater Transparency and Focus on Risk Management

We ask that FHFA engage stakeholders in a transparent process with constructive dialogue before proceeding with this new pilot. We also ask that FHFA retain a regulatory focus on the role of title insurance as a critical risk management practice and how that risk management will be accomplished in the pilot. A thoughtful process that includes public comment, focused on risk management, that encourages a competitive market environment to control costs, would serve as a productive path for informed and effective policymaking.

A fair comparison of the current marketplace for title insurance with any alternative regime should include an assessment of both cost and of value. The value is the risk mitigation, including a true assessment of the financial strength of the party mitigating the risk. As explained above, the current title insurance process includes the curative role title insurers play in maintaining accurate records, the integrity they bring to the closing process, and the financial strength they bring to the underlying insurance product. Ignoring the implication of title waivers for risk in an individual transaction and in the degradation of title records over time puts borrowers, lenders, and Fannie Mae and Freddie Mac at greater risk of loss.

Thank you for considering these concerns. We would be glad to meet with you and your staff to discuss these issues further.

Yours truly,

A handwritten signature in dark ink, reading "Edward J. DeMarco". The signature is written in a cursive, slightly stylized font. The first name "Edward" is written with a large, prominent "E". The middle initial "J." is small and follows the first name. The last name "DeMarco" is written with a large, prominent "D" and "M".

Edward J. DeMarco
President
Housing Policy Council