

# APPENDIX

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**APPENDIX**

E-mail from Gregg M. Schwind, U.S. Dep’t of Justice, to Vincent J. Colatriano, Cooper & Kirk, PLLC, Mar. 27, 2015 .....	A1
Email from Brian W. Barnes, Cooper & Kirk, PLLC, to Elizabeth M. Hosford, U.S. Dep’t of Justice, Oct. 21, 2015 .....	A6
FHFA00025815 .....	A13
UST00060055 .....	A15
UST00504231 .....	A19
<i>Syron v. Federal Housing Finance Agency</i> , No. 14-mc-359 (D.D.C. Dec. 31, 2014) .....	A21
Declaration of Christopher H. Dickerson, Dec. 15, 2015 .....	A56
Declaration of David R. Pearl, Jan. 20, 2016.....	A68
UST00005740 .....	A87
UST00013402 .....	A92
UST00536438 .....	A93
UST00517853 .....	A95
UST00005853 .....	A104
TREASURY-3896 .....	A108

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**From:** Schwind, Gregg (CIV)  
**To:** ["Vince Colatriano"](#)  
**Cc:** [Hosford, Elizabeth \(CIV\)](#); [Brian Barnes](#); [David Thompson](#)  
**Subject:** RE: Fairholme v. US; Privilege Issues  
**Date:** Friday, March 27, 2015 3:28:00 PM

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Vince:

Thanks for clarifying your understanding of the issues.

With respect to issue (1), at this point, we are prepared to brief the bank examination privilege issue as I framed it in my March 20, 2015 e-mail. The multi-part issue you have proposed, with the possible exception of issue (1)(a), which appears to overlap with the issue we have posed, does not lend itself to advance briefing for the following reasons.

With respect to issue (1)(b), the question you have framed is virtually identical to an issue raised in our motion to dismiss: whether FHFA, acting as conservator, is the United States. If you are suggesting that the court decide the issue raised in our motion to dismiss now, then we would agree, so long as we also jointly ask the court to decide the other issues in our motion that are not the subject of the ongoing jurisdictional discovery. In the interim, we will continue to assert the deliberative process privilege on FHFA's behalf where appropriate.

Issue (1)(c), which addresses subjective motivation in the context of the deliberative process and bank examination privileges, does not lend itself to advance briefing, in our view. Resolution of this issue would require a document-by-document review to determine whether the privilege has been properly asserted.

With respect to issue (1)(d), we generally agree that the deliberative process and bank examination privileges may not be asserted with respect to purely factual documents or the reasonably segregable factual portions of otherwise privileged documents.

Issue (2) is not appropriate for briefing because, like issue (1)(b), it addresses whether FHFA, acting as conservator, is the United States.

With respect to issue (3), our position is that we may assert the deliberative process privilege with respect to communications that post-date a decision date if the communications recount Government employees' views of the proposed decision before the decision was adopted. *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 223 (citing *Citizens for Responsibility and Ethics in Washington v. Dep't of Justice*, 658 F.Supp.2d 217, 233-34 (D.D.C. 2009)). If it is your position that the deliberative process privilege can never be asserted with respect to post-decisional documents, then this issue may be appropriate for advance briefing.

Issue (4), which, like issue (1)(c), addresses subjective motivation in the context of the deliberative process and bank examination privileges, does not lend itself to advance briefing because it would require a document-by-document review.

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With respect to issue (5), as noted above, we generally agree that the deliberative process and bank examination privileges may not be asserted with respect to purely factual documents or the reasonably segregable factual portions of otherwise privileged documents.

We do not agree that issues (6) and (7), which address the status of intra-agency communications for purposes of the presidential communications privilege and the attorney/client privilege, are appropriate for advance briefing. Like issues (1)(c) and (4), resolution of these issues would require a document-by-document review. Indeed, your proposal acknowledges the need for a document-by-document review with respect to the attorney/client privilege.

Let us know if you have any questions.

Gregg

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**From:** Vince Colatriano [mailto:vcolatriano@cooperkirk.com]  
**Sent:** Monday, March 23, 2015 4:53 PM  
**To:** Schwind, Gregg (CIV)  
**Cc:** Hosford, Elizabeth (CIV); Brian Barnes; David Thompson  
**Subject:** RE: Fairholme v. US; Privilege Issues

Gregg –

Thanks for getting back to us on this issue. While your list of issues is largely correct, it does not fully reflect what was discussed at the March 13 meeting. I reproduce your list of “categorical” issues below, with our comments in red.

(1) whether the bank examination privilege may be asserted by the Federal Housing Finance Agency (FHFA). Depending on how your description of this item is read, that description may be incomplete. We understood Liz Hosford to be putting all of the bank examination privilege issues discussed in our February 5 letter on the table, and we agreed with her that that made sense. At a minimum, the categorical issues relating to bank examination privilege include not just (a) whether FHFA may assert that privilege generally with respect to Fannie and Freddie, but also (b) whether the privilege may be asserted with respect to documents that were created during the Fannie and Freddie conservatorships, (c) whether the privilege may be asserted with respect to documents that are relevant to a dispute over the Government’s subjective motivations, and (d) whether the privilege may be asserted with respect to purely factual documents or the segregable factual portions of otherwise privileged documents.

(2) whether the Government may assert the deliberative process privilege with respect to FHFA documents, given the Government’s position that FHFA

acting as conservator is not the United States.

(3) whether documents generated after the decision at issue are protected by the deliberative process privilege.

(4) whether the Government may assert the deliberative process privilege with respect to documents that address the Government's subjective motivations. We would change the description of this issue slightly, to "whether the deliberative process privilege may be asserted with respect to documents that are relevant to a dispute over the Government's subjective motivations".

(5) whether the deliberative process privilege may be asserted with respect to documents that contain factual information. Again, we would slightly change the description of this issue, to "whether the deliberative process privilege may be asserted with respect to purely factual documents or the segregable factual portions of otherwise privileged documents."

(6) whether the presidential communications privilege extends to communications exclusively within Executive branch agencies outside the White House (such as Treasury).

(7) whether Fairholme's objections to the Government's assertions of attorney/client privilege are well-founded. Once again, we would slightly change the wording of this issue, to "whether the Government's assertions of attorney/client privilege are well-founded." Also, as we explained during the March 13 meeting, since the applicability of attorney-client privilege does not depend on the completion of declarations by agency heads or senior agency officials, we believe there should be no obstacle to an effort by the parties to obtain guidance from the Court on this issue by selecting a limited number of documents with respect to which this privilege has been asserted for *in camera* review by the Court. Each side, for example, could select ten or fifteen documents for such *in camera* review.

As tweaked by my comments above, we believe that this list accurately reflects the substance of our discussions on March 13. We look forward to your prompt response to our proposal to brief the above issues (to the extent there remains a dispute over them) sooner rather than later.

Thanks very much

Vince

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**From:** Schwind, Gregg (CIV) [<mailto:Gregg.Schwind@usdoj.gov>]  
**Sent:** Friday, March 20, 2015 7:34 PM  
**To:** Vince Colatriano  
**Cc:** Hosford, Elizabeth (CIV); Brian Barnes; David Thompson  
**Subject:** Fairholme v. US; Privilege Issues

Vince:

I am writing to follow up on the meeting at your office this past Friday, March 13. At the meeting, you identified a number of issues raised by the provisional privilege logs that we have provided thus far that you believe are categorical in nature, and thus ripe for briefing. As we understand it, those issues are as follows:

- (1) whether the bank examination privilege may be asserted by the Federal Housing Finance Agency (FHFA).
- (2) whether the Government may assert the deliberative process privilege with respect to FHFA documents, given the Government's position that FHFA acting as conservator is not the United States.
- (3) whether documents generated after the decision at issue are protected by the deliberative process privilege.
- (4) whether the Government may assert the deliberative process privilege with respect to documents that address the Government's subjective motivations.
- (5) whether the deliberative process privilege may be asserted with respect to documents that contain factual information.
- (6) whether the presidential communications privilege extends to communications exclusively within Executive branch agencies outside the White House (such as Treasury).

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(7) whether Fairholme's objections to the Government's assertions of attorney/client privilege are well-founded.

Please let us know if we have omitted or misstated any of the issues you raised at last Friday's meeting. Thanks.

Gregg

**Gregg M. Schwind**

Senior Trial Counsel

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**From:** [Brian Barnes](#)  
**To:** [Hosford, Elizabeth \(CIV\)](#)  
**Cc:** [Schiavetti, Anthony F. \(CIV\)](#); [Bezak, Reta E. \(CIV\)](#); [David Thompson](#); [Vince Colatiano](#)  
**Subject:** Fairholme Privilege Issues  
**Date:** Wednesday, October 21, 2015 11:58:35 AM  
**Attachments:** [02-05-15 VJC ltr to G Schwind re privilege issues \(00000002\).pdf](#)

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Dear Liz,

Below is a list of approximately 66 documents that appear on the Government's privilege logs or that the Government marked as unresponsive that we think should have been produced. Together with the documents that you addressed in your letter of September 1, 2015, we think that these documents could be used as a sample to tee up for the Court many of the disputed privilege issues raised in Vince's letter of February 5, 2015. In other words, we think that the Court's ruling on whether these documents should have been produced would provide guidance that could be applied to other documents the Government has withheld, thus greatly narrowing the parties' remaining discovery disputes. For your convenience, I've attached Vince's February 5 letter to this note.

In addition to the privilege issues raised in Vince's February 5 letter, there is one additional privilege issue I want to flag for your consideration. A few of the documents listed below, e.g., UST00505494, are attorney-client communications concerning the Third Amendment. We think that the Government waived the attorney-client privilege over those communications by publicly releasing the June 13, 2012 presentation that Treasury had previously given to the Department of Justice (see UST00504818) as well as the substance of the Department of Justice's legal advice to Treasury (see UST00005740, at 3). Both of those documents were included in Treasury's administrative record in the D.D.C. case and are thus in the public domain.

We're of course happy to discuss the Government's privilege assertions and responsiveness determinations and whether there is a way to narrow the parties' disputes.

Brian W. Barnes  
 Cooper & Kirk, PLLC  
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Documents withheld for privilege: UST00384501; UST00061161; UST00502258; UST00550357;  
 UST00061421; UST00385572; UST00061071; UST00536560; UST00385540; UST00503877;  
 UST00398303; UST00539251; UST00407342; UST00384174; UST00503672; UST00505494;  
 UST00472229; UST00472232; UST00426270; UST00407182; UST00384146; UST00536346;  
 UST00490551; UST00389662; UST00389678; UST00544897; UST00504513; UST00548270;  
 UST00490162; UST00500982; UST00473445; UST00457298; UST00513480; UST00518402;  
 UST00384239; UST00480844; UST00492699; UST00506605; FHFA00100594; FHFA00096631;  
 FHFA00096634; FHFA00096636; FHFA00096638; FHFA00031520; FHFA00092209; FHFA00031960;  
 FHFA00031962; FHFA00031964; FHFA00056237; UST00556459; UST00556460; UST00556294;  
 UST00556295; UST00409040; UST00413379; UST00405880; UST00506346; FHFA00093706;  
 UST00475757; UST00521902; UST00515290; UST00550441; UST00418517



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Documents deemed unresponsive: UST00061161, UST00419116, UST00419126.

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February 5, 2015

## BY EMAIL AND FIRST CLASS MAIL

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Commercial Litigation Branch  
Civil Division  
U. S. Department of Justice  
P.O. Box 480 Ben Franklin Station  
Washington, D.C. 20044

Re: *Fairholme Funds, Inc., et al. v. United States* (No. 13-465C) (Fed. Cl)

Dear Gregg:

On January 16, 2015, the Government provided its first log identifying some of the Treasury documents it plans to withhold as privileged. I am writing to raise a number of objections regarding the documents that appear on the Treasury privilege log as well as on the FHFA privilege logs that the Government had previously provided. For ease of reference, I have included with this letter copies of the Government's privilege logs that identify the document-specific objections discussed below, but please note that a number of Plaintiffs' objections apply to broader categories of documents and thus are not specifically identified in the logs. Of course, by raising these objections, Plaintiffs do not waive any others they may have regarding the sufficiency of the Government's privilege logs or its assertions of privilege.

\* \* \* \*

**Insufficient Descriptions.** Some of the logs' document descriptions do not provide enough information to enable us to meaningfully assess the Government's assertions of privilege. For example, the Government asserts the deliberative process privilege with respect to Treasury documents that discuss "policies on a number of economic and housing issues," Treas. Doc. 9, "various Federal responses to the financial crisis," Treas. Doc. 23, and a "variety of policy and budget issues," Treas. Doc. 47. Without more specific descriptions of the policy issues discussed, it is impossible for us to evaluate, among other things, the claim that these documents are predecisional. In the privilege logs that accompany this letter, we have denoted document descriptions that are insufficient with an "I." Please provide more detailed descriptions of those documents.

Relatedly, our review of the privilege logs has been hampered by the Government's failure to provide a list of the positions of the individuals identified on its logs. For example, it is

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Gregg M. Schwind  
Senior Trial Counsel  
February 5, 2015  
Page 2

difficult to assess whether documents withheld under the attorney-client privilege were circulated so broadly within the government as to defeat the privilege without knowing the identities of those who received the documents in question. Similarly, it would be difficult for us to assess whether particular documents are deliberative if we do not know whether the senders and recipients had policymaking positions. Please provide a list of the positions held by the individuals who appear on the Government's privilege logs.

**Deliberative Process Privilege.** A substantial portion of the documents that appear on the privilege logs were withheld under the deliberative process privilege, and we have a number of objections to the withholding of those documents:

First, the Government has maintained throughout this litigation that when FHFA acts as conservator its actions are not attributable to the United States. Yet the Government is withholding numerous FHFA documents under the deliberative process privilege—a privilege that shields only communications *within the Executive Branch*. The Government's litigating position precludes it from asserting the deliberative process privilege with respect to documents produced by or shared with FHFA. For similar reasons, the Government cannot assert the deliberative process privilege for documents produced by or shared with Fannie and Freddie.

Second, the deliberative process privilege cannot be used to shield documents when the Government's subjective motivation is at issue. The Government's subjective motivations are at issue in this case with respect to such matters as whether FHFA acted as the United States when it agreed to the Net Worth Sweep, why the Government allowed the Companies' preexisting capital structure and stockholders to remain in place when it imposed the conservatorships, and when and how the conservatorships will end. Accordingly, documents relevant to such questions as why FHFA agreed to the Net Worth Sweep cannot be withheld on deliberative process privilege grounds.

Third, the deliberative process privilege can only be asserted by a signed affidavit from a senior agency official attesting that he or she reviewed the documents in question and determined that they should be withheld. The Government has not yet provided such affidavits for the documents it is withholding under the deliberative process privilege, and we request that it promptly do so.

Fourth, the Government appears to have withheld on deliberative process privilege grounds a number of documents dated after the relevant policy decisions were made. For example, the Net Worth Sweep was announced on August 17, 2012, yet numerous documents from the following days are described on the Treasury log as "predecisional policy information related to PSPA amendments." *See, e.g.,* Treas. Docs. 126-142. Documents that post-date the Net

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Gregg M. Schwind  
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February 5, 2015  
Page 3

Worth Sweep obviously cannot be predecisional with respect to that policy. Deliberative process privilege documents on the logs that do not appear to be predecisional are identified with a “P.”

Fifth, many of the documents withheld under the deliberative process privilege appear to contain non-deliberative factual information. For example, the Government asserts the privilege with respect to a Treasury document “providing information related to market reaction to changes to the PSPAs.” Treas. Doc. 123. We infer that this document discusses how the financial markets responded to the Net Worth Sweep—non-deliberative factual information not covered by the deliberative process privilege. The Government cannot withhold such information as privileged to the extent that it can be segregated from any deliberative portions of the same document. Documents that should be produced in whole or in part because they contain non-deliberative information are denoted in the accompanying logs with an “F.”

Sixth, the deliberative process privilege is a qualified privilege, meaning that it can be overcome by a showing that Plaintiffs’ need for the document in question outweighs any harm that production might cause to future governmental policy discussions. A number of the documents the Government has withheld on deliberative process grounds appear to be highly relevant to the issues on which the Court authorized discovery, and we do not believe that production of those documents is likely to inhibit future discussions among policymakers. Documents for which we think, based on the information we have been provided thus far, that the qualified privilege is overcome by Plaintiffs’ need are denoted in the accompanying logs by an “N.”

**Bank Examination Privilege.** We also have several objections to the Government’s decision to withhold a significant number of FHFA documents under the bank examination privilege:

First, Fannie and Freddie are not banks, and FHFA is not a bank regulator. Those facts place FHFA documents outside the limited ambit of the bank examination privilege.

Second, even if FHFA could properly invoke the bank examination privilege with respect to documents that predate the imposition of the conservatorships on September 6, 2008, it cannot do so with respect to documents created during the conservatorships. The rationale for the bank examination privilege is that it is necessary to promote frank disclosure of information by an independent bank to its regulator. This rationale is inapposite while the “bank” in question is wholly controlled by its supposed “regulator”.

Third, like the deliberative process privilege, the bank examination privilege cannot be used to shield documents relevant to a dispute over the Government’s subjective motivations. Thus, to the extent the bank examination materials on FHFA’s privilege logs are relevant to such

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Gregg M. Schwind  
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February 5, 2015  
Page 4

matters as whether FHFA acted as the United States when it agreed to the Net Worth Sweep, why the Government allowed the Companies' preexisting capital structure and stockholders to remain in place when it imposed the conservatorships, and when and how the conservatorships will end, they should be produced.

Fourth, also like the deliberative process privilege, the bank examination privilege does not protect factual or other non-deliberative information. Documents that should be disclosed in whole or in part on this ground are identified on the accompanying FHFA privilege logs with an "F."

Finally, the bank examination privilege is a qualified privilege, and Plaintiffs have a sufficient need for some of the documents on FHFA's privilege logs to overcome the privilege. Those documents are identified, based on the information we have been provided thus far, on the accompanying FHFA privilege logs by an "N."

**Presidential Communications Privilege.** We have at least three objections to the Government's withholding of certain documents under the presidential communications privilege:

First, this privilege must be personally invoked by the President of the United States. *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 872-73 (D.D.C. 1973). Please provide affidavits establishing that Presidents Obama and Bush have specifically directed the withholding of the documents in question.

Second, the privilege does not extend to staff outside the White House in executive branch agencies or to White House officials carrying out duties other than advising or preparing to advise the President. Thus, communications exclusively within the Treasury Department are not covered by the presidential privilege, *see, e.g.*, Treas. Doc. 70, and even communications from White House staff will not be covered if not made for purposes of giving the President advice, *see, e.g.*, Treas. Doc. 145. Documents that are not shielded by the presidential communications privilege on these grounds are identified in the privilege logs with an "A."

Third, the presidential communications privilege is a qualified privilege that can be overcome in a civil case by a showing that a document contains important evidence that is not available with due diligence elsewhere. Documents for which we believe that this standard is satisfied, based on the information we have been provided thus far, are identified in the privilege logs with an "E."

**Attorney-Client Privilege.** The attorney-client privilege only protects confidential com-

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Gregg M. Schwind  
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February 5, 2015  
Page 5

munications sent to or received from an attorney for the purpose of obtaining legal advice. Documents widely shared within the government or sent to government employees who do not need them are not confidential and therefore not privileged. The privilege does not apply when a lawyer is asked for or provides advice about policy or other non-legal matters. *E.g.*, FHFA Doc. 58. Similarly, the Government cannot shield under the attorney-client privilege documents that were created for reasons other than to obtain or provide legal advice. *E.g.*, FHFA Doc. 28; FHFA Doc. 381. Documents that appear to have been improperly withheld under the attorney-client privilege are identified in the accompanying privilege logs with an “L.”

\* \* \* \*

We are of course available to discuss the issues raised in this letter in an effort to resolve our objections without court action. *See* RCFC 37(a)(1). Even if the parties cannot completely resolve their differences over the sufficiency of the Government’s privilege logs and its assertions of privilege, it is in everyone’s interest to narrow the set of issues that the Court may ultimately need to resolve. To that end, we would suggest that the parties meet in person, or confer on the phone, to discuss the matters raised in this letter no later than February 13, 2015.

Sincerely,



Vincent J. Colatristano

FHFA00025815

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UST00060055

REDACTED



UST00504231

REDACTED

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**RICHARD F. SYRON, et al.**

**Plaintiffs,**

**v.**

**FEDERAL HOUSING FINANCE AGENCY.**

**Defendant.**

Case No.: 1:14-mc-359 (JEB/JMF)

**MEMORANDUM OPINION**

This case was referred to me by Judge Boasberg for full case management. Currently pending before me is the issue of whether the Federal Housing Finance Agency (“FHFA” or “defendant”) must produce certain documents, claimed to be privileged and submitted for *in camera review*, to Richard F. Syron, Patricia L. Cook, and Donald Bisenius (“plaintiffs”). For the reasons stated herein and in accordance with this Memorandum Opinion, FHFA must produce to plaintiffs several of the documents submitted for *in camera review*.

**I. BACKGROUND**

The present matter arises out of plaintiff’s motion to compel the FHFA to comply with a third-party subpoena for documents that was issued out of this district in connection with SEC v. Syron et al., Civil Action No. 1:11-cv-09201 (S.D.N.Y.) (Sullivan, J.) (“the SEC lawsuit”). The

underlying lawsuit in the Southern District of New York involves allegations by the Securities and Exchange Commission (“SEC”) that certain former executives of the Federal Home Loan Mortgage Corporation (“Freddie Mac” or “The Enterprise”) violated federal securities law by making, or aiding and abetting the making, of false or misleading statements regarding Freddie Mac’s exposure to “subprime loans.” See Memorandum of Law in Support of Motion to Compel the Production of Documents From the Federal Housing Finance Agency [#1-1] at 1. The defendants in the SEC lawsuit, as plaintiffs in this miscellaneous action, seek documents from FHFA, and its predecessor agency, the Office of Federal Housing Enterprise Oversight (“OFHEO”),<sup>1</sup> upon belief that these documents are highly relevant to their defense. Id. Specifically, plaintiffs believe these documents bear on key elements of the SEC’s case, namely the elements of falsity, materiality, and scienter. Id. at 2.

Freddie Mac, along with the Federal National Mortgage Association (“Fannie Mae”), is a Government-Sponsored Enterprise chartered by Congress to “provide stability in the secondary market for residential mortgages” by “increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.” 12 U.S.C. § 1716.<sup>2</sup> Congress charged OFHEO with regulating the Enterprises, including granting the Agency the power to “require financial disclosure” and “conduct examinations” of the Enterprises. 12 U.S.C. § 4501(6). In 2008, the Housing and Economic Recovery Act of 2008 merged OFHEO, the Federal Housing Finance Board, and the Government-Sponsored Enterprise office of the Department of Housing and Urban Development into FHFA. See 12 U.S.C. § 4511. Under the authority granted in the 2008 statute, FHFA placed the Enterprises in conservatorship,

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<sup>1</sup> Given that defendant asserts the privilege on behalf of both FHFA and its predecessor agency, OFHEO, the Court refers to both entities as “the Agency.”

<sup>2</sup> All references to the United States Code or the Code of Federal Regulations are to the electronic versions that appear in Westlaw or Lexis.

giving the Agency the power to “take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.” See 12 U.S.C. § 4617(b)(2)(D).

The Court held a status hearing on plaintiffs’ motion on October 10, 2014. At the status conference, defendant asserted its belief that certain subpoenaed documents were protected from discovery by the attorney-client privilege, the executive privileges, or some combination thereof. After two further status conferences held via telephone on October 20, 2014 and October 27, 2014, the Court ordered defendant to submit for an *in camera* review those documents over which defendant had asserted privilege. Order [#16], as amended by Minute Order dated October 30, 2014. On November 3, 2014, defendant furnished to the Court 183 documents and an accompanying privilege log documenting the specific privilege asserted over each document. The Court now reviews these assertions of privilege.

## II. LEGAL STANDARD

The party asserting privilege bears the burden of presenting sufficient facts to establish the privilege for each document over which privilege is claimed. See In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). The Court will address the legal standard governing each privilege in turn.

### A. The Attorney-Client Privilege

The purpose of the attorney-client privilege is to protect a client’s confidences to his or her attorney, thereby encouraging an open and honest relationship between the client and the attorney. Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). The

public interest in the observance of law and administration is promoted by the “full and frank communications between attorneys and their clients.” Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). The communication from an attorney may be protected if it is based on confidential information provided by the client. Mead Data Cent., Inc. v. U.S. Dep’t of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977). Thus, “when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged.” In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (citing Brinton v. Dep’t of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 451 U.S. 905 (1981)). Further, the communication of the otherwise privileged information to a third party can vitiate the protection created by the privilege. In re Rail Freight Fuel Surcharge Antitrust Litig., 268 F.R.D. 114, 116 (D.D.C. 2010).

#### B. The Work Product Doctrine

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides that materials prepared in anticipation of litigation or for trial by an attorney or a party are protected from disclosure and they may be subject to discovery only upon a showing of substantial need and the inability to obtain the substantial equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3). Attorney mental impressions, conclusions, opinions, and legal theories may be reflected in interviews, statements, memoranda, correspondence and in countless other tangible and intangible ways. Hickman v. Taylor, 329 U.S. 495, 511 (1947). While the work product privilege is defeasible upon a showing of substantial need and an inability to obtain the equivalent of the privileged documents by other means without undue hardship, the court, ordering any disclosure of the otherwise privileged information, must “protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3); see also Tax Analysts v. IRS, 117 F.3d 607, 619 (D.C.

Cir. 1997). I will be faithful to that rule by excising from the documents only the material that meets the requirements just quoted. I can do no more.

### C. The “Executive” Privileges

Under the “executive” privilege heading, defendant asserts two distinct, but related privileges: 1) the deliberative process privilege, and 2) the bank examination privilege.

#### 1. Deliberative Process Privilege

The deliberative process privilege protects “documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated.” Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001). The privilege also extends to other subjective documents that reflect the personal opinions of the writer prior to the agency’s adoption of the policy. Taxation with Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981). The purpose of the privilege is three-fold: first, it “protects candid discussions within an agency”; second, “it prevents public confusion from premature disclosure of agency opinions before the agency established its final policy;” and third, “it protects the integrity of an agency’s decision,” preventing the public from judging officials based on information they may have considered prior to issuing their final decision. Alexander v. F.B.I., 192 F.R.D. 50, 55 (D.D.C. 2000) (citing Judicial Watch v. Clinton, 880 F. Supp. 1, 12 (D.D.C. 1995) aff’d, 76 F.3d 1232 (D.C.Cir. 1996)).

In order for the privilege to apply, the communications must be both 1) pre-decisional and 2) deliberative. NLRB v. Jackson Hosp. Corp., 257 F.R.D. 302, 308 (D.D.C. 2009). To satisfy the “pre-decisional” requirement, the communication must have occurred before any final agency decision on the relevant matter. Nat’l Sec. Archive v. CIA, 752 F.3d 460, 463 (D.C. Cir.

2014). The communication over which the privilege is claimed must have been “prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made.” See Cobell v. Norton, 213 F.R.D. 1, 4 (D.D.C. 2003) (quoting Renegotiation Bd. v. Brumman Aircraft, 421 U.S. 168, 184 (1975)). As the Supreme Court has noted “it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached...as long as prior communications and the ingredients of the decisionmaking process are not disclosed.” NLRB v. Sears, Roebuck & Co., 421 U.S. 131, 151 (1975). Further, to satisfy the predecisional requirement, the court must be able to pinpoint the agency decision or policy to which document contributed. See General Elec. Co. v. Johnson, No. 00-CIV-2855, 2006 WL 2616187, at \*4 (D.D.C. Sept. 12, 2006) (citing Senate of the Commonwealth of P.R. v. U.S. Dep’t of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987)).

As for the requirement that the communication be “deliberative,” the court of appeals has noted that, in this context, the term “deliberative” essentially means that the communication is intended to facilitate or assist development of the agency’s final position on the relevant issue. See Nat’l Sec. Archive v. CIA, 752 F.3d at 463. Further, a communication can be considered “deliberative” if it involves the weighing of arguments for and against various outcomes, or if the communication reflects the give-and-take of the consultative process. See Vento v. IRS, 714 F. Supp. 2d 137, 154 (D.D.C. 2010); Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., 267 F.R.D. 1, 4 (2010). In other words, “the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Therefore, purely factual material is not protected, “unless the material is so inextricably intertwined with the deliberative sections of

documents that its disclosure would inevitably reveal the government's deliberations." N.L.R.B. v. Jackson Hosp. Corp., 257 F.R.D. at 308. Documents will not be protected from discovery in their entirety unless redacting the portions of the document that reveal deliberations is impossible. Id.

Finally, whatever its genesis, the communication may lose its privileged status if it memorializes the policy the agency ultimately adopts, either formally or informally, or because the agency used the document in its dealings with the public. Coastal States Gas Corp., 617 F.2d at 866.

## 2. The Bank Examination Privilege

The bank examination privilege exists to protect open communication between banks and their regulators. In re Subpoena Served Upon Comptroller of Currency, 967 F.2d 630, 633-34 (D.C. Cir. 1992) ("Fleet"). As the court of appeals has explained:

[T]he bank examination privilege is firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and responses by the bank. The success of the supervision therefore depends vitally upon the quality of the communication between the regulated banking firm and the bank regulatory agency.

Id. at 633. Like the deliberative process privilege, the bank examination privilege protects opinions and recommendations but does not protect factual materials. Schreiber v. Soc'y for Sav. Bancorp, Inc., 11 F.3d 217, 220 (D.C. Cir. 1993). Accordingly, the protection extends both to bank examiner's recommendations, opinions, and inquiries, and a bank's response thereto. Fleet, 967 F.2d at 634. Only those bank documents that are in response to the regulator's conclusions, opinions, or inquiries are protected by the privilege. See In re Providian Fin. Corp. Sec. Litig., 222 F.R.D. 22, 27 (D.D.C. 2004).



When reviewing an assertion of bank examination privilege, the reviewing court must first determine whether the documents in question are “primarily factual in nature.” In re Midlantic Corp. S’holder Litig., 92-MC-99, 1994 WL 750664, \*2 (D.D.C. Oct. 24, 1994); Schreiber, 11 F.3d at 220. If the court determines the documents are not primarily factual in nature, the court must then determine whether the factual material can be extricated from any non-factual material surrounding it. Id. at 220. Where such extrication is possible, the evaluative statements must be redacted and the factual material produced. Id.

The bank examination privilege applies to communications between FHFA and the Enterprises (Freddie Mac and Fannie Mae) even though the Enterprises are not banks in the traditional sense. FHFA v. JPMorgan Chase & Co., 978 F. Supp. 2d 267, 273-74 (S.D.N.Y. 2013). FHFA’s regulation of the Enterprises implicates the same concerns present in bank regulators’ regulation of banks: the need for effective day-to-day regulation and the necessity of maintaining public confidence in the financial system. Id.

### 3. Overriding the Executive Privileges

Neither the bank examination privilege nor the deliberative process privilege is absolute; rather they are qualified privileges that can be overcome by a showing of good cause. See First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 n.5; Fleet, 967 F.2d at 634. Each time the privilege is asserted, the reviewing court must consider at least the following factors:

- (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Id. Therefore, the Court is entitled to make a separate determination of good cause for each document in question.

### III. ANALYSIS OF DOCUMENTS

Defendant provides the Court with three categories of documents: 1) documents over which the defendant claims attorney-client privilege or work product doctrine (five documents); 2) documents withheld entirely under the executive privileges (161 documents); and 3) documents partially withheld under the executive privilege, where defendant has produced the documents to plaintiffs in redacted form (seventeen documents).

#### A. Documents Withheld Under the Attorney-Client Privilege or Work Product Doctrine

##### 1. Documents Satisfying the Work Product Doctrine

Document A2, Bates Numbers 271033 through 271054, satisfies the work-product doctrine. Document A2 is a draft statement of facts prepared by Enterprise counsel pursuant to an SEC investigation, then sent to Agency counsel for review. As a preliminary matter, the Agency, as conservator to the Enterprise has succeeded to all privileges held by the Enterprise. See 12 U.S.C. § 4617(b)(2)(A)(i). Therefore, the Court does not find that the Enterprise waived the privilege when Enterprise counsel shared the document with Agency counsel. Cf. In re Am. Cont'l Corp., 741 F. Supp. 1368, 1371-72 (D. Ariz. 1990) (holding that a conservator holds the attorney-client privileges of the entity placed in conservatorship). Further, the document was prepared in order to seek a resolution of a pending SEC investigation against the Enterprise. The Court is of the belief that the phrase “for or in anticipation of litigation” must be construed broadly enough to include documents prepared in the course of a regulatory investigation. See U.S. ex rel. Fago v. M & T Mortg. Corp., 242 F.R.D. 16, 17 (D.D.C. 2007). For the work product doctrine to apply, at the time the document was made or prepared, there must have been “a subjective belief that litigation was a real possibility, and that belief must have been

objectively reasonable.” EEOC v. Lutheran Soc. Serv., 186 F.3d 959, 968 (D.C. Cir. 1999). The Court is satisfied that an entity under investigation by the SEC would satisfy both the subjective and objective prongs of this inquiry.

Finally, the work product doctrine can be overcome “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3). The court must take particular care to protect the “mental impressions, conclusions, opinions, and legal theories of an attorney.” Id. It follows then that there are in effect two forms of work product. Any material prepared by an attorney in anticipation of litigation qualifies as work product, but the protection may yield to a showing of a substantial need and an inability to secure the equivalent without undue hardship. But, if the material constitutes or contains mental impressions, conclusions, opinions, or legal theories of an attorney, it must be protected. See Fed. R. Civ. P. 26(b)(3).

Having reviewed Document A2, the Court is convinced that the document falls into the more stringent category. An attorney’s draft statement of facts is inextricably bound up with the attorney’s theory of the case – decisions regarding the presentation of facts flow from interpretations of law. Further, attorney drafts may reveal legal theories later abandoned, or opinions as to which facts deserve top billing. The Court finds that the privilege shall not yield here because Document A2 is clearly opinion work product.

## 2. Documents Summarizing the Status of Litigation Are Not Privileged

Document A1, Bates Numbers 270952 through 270974, and Document A3, Bates Numbers 250400 through 250407, are summaries of litigation developments. The Court finds

that the documents are not privileged under either the attorney-client privilege or the work product doctrine. First, the documents fail to satisfy the attorney-client privilege because they do not contain confidential communications – the information contained in the documents is publicly available information taken from press releases, disclosure statements, and unsealed court dockets. Second, the documents fail to satisfy the work product doctrine because they lack a clear indication that they were prepared for or in anticipation of litigation. See U.S. v. Deloitte LLP, 610 F.3d 129, 138 (D.C. Cir. 2010) (“[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within 26(b)(3).”). These documents appear to have been prepared by Freddie Mac to update their colleagues on pending litigation, *not* for use in that pending litigation *nor* in anticipation of litigation to occur in the future. Nor do these documents evidence an attorney’s mental impressions, conclusions, opinions, or legal theories concerning the pending litigation that are central to the work product doctrine’s protection. Therefore, in the absence of evidence to the contrary, the Court finds that these summaries would have been prepared in the ordinary course of business and do not satisfy the requirements of the work product doctrine. The two documents must be produced to plaintiffs in full.

B. Documents Withheld Entirely Under the Executive Privileges

1. Documents Properly Withheld Under the Deliberative Process Privilege

a. Documents Pertaining to Third-Party Inquiries

A number of the documents at issue contain agency deliberations regarding how the Agency should respond to an inquiry from a third party such as the media, professional associations, or Congress. In cases where the agency claiming privilege has actually *used* the document in its dealings with third parties, the privilege will be considered waived and the

document must be produced. See Judicial Watch, Inc. v. U.S. Postal Serv., 297 F. Supp. 2d 252, 261 (D.D.C. 2004); Arthur Anderson & Co. v. IRS, 679 F.2d 254, 258 (D.C. Cir. 1982).

However, email chains occurring before the agency's response to the third-party, and pertaining to *how* the agency will respond to the inquiry fall within the protection of the deliberative process privilege. See Judicial Watch, Inc. v. U.S. Dep't of the Treasury, 796 F. Supp. 2d 13, 31 (D.D.C. 2011); see also Citizens for Responsible Ethics in Washington v. U.S. Dep't of Labor, 478 F.Supp.2d 77, 83 (D.D.C. 2011). Here, deliberations among Agency personnel concerning what information to disseminate, and how best to disseminate this information, are clearly the type of policy-making deliberations contemplated by the deliberative process privilege.

Therefore, the following documents are privileged under the deliberative process privilege and may be withheld by defendant in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
2	15571	Email chain regarding a draft response to a Washington Post Media Inquiry.
3	58119-58200	Email chain regarding the Agency's response to questions posed by Risk and Insurance Magazine.
4	58201-58202	Email chain regarding the Agency's response to questions posed by Risk and Insurance Magazine.
5	58203-58204	Email chain regarding the Agency's response to questions posed by Risk and Insurance Magazine.
6	58211-58213	Email chain regarding the Agency's response to questions posed by Risk and Insurance Magazine.
17	88251-88253	Email chain regarding responses to requests from Congressional Oversight Panel into Enterprise subprime loan performance.
35	60424-60425	Email chain regarding review of Agency talking points for Mortgage Bankers Association conference call on subprime mortgage lending.

REDACTED VERSION

37	20054-20055	Email chain reflecting Agency deliberations on inquiries to be posed to Enterprise.
81	63640-63647	Email chain regarding response to inquiry from a trade association.
106	70063-70064	Email chain regarding the Agency's response to questions posed by Risk and Insurance Magazine.
107	70409	Email chain regarding response to LA Times Inquiry.
108	285447-285448	Draft report prepared by Agency regarding the Agency's potential responses to questions from Fannie Mae's counsel regarding a reporter's editorial related to Fannie Mae's credit risk disclosure.
109	215382-215385	Report of potential answers by OFHEO to questionnaires regarding subprime mortgages at Fannie Mae and Freddie Mac.
110	289070-289071	Email chain regarding the Agency's preparations for an upcoming Senate hearing on the Enterprises' subprime and Alt-A loans.
111	25876	Email regarding the Agency's response to the Washington Post's follow-up questions.
112	71182-71183	Email regarding Agency's draft responses to questions from Risk and Insurance Magazine.
113	71195-71197	Email regarding Agency's draft responses to questions from Risk and Insurance Magazine.
123	217234	Email regarding the Agency's rebuttal to a Bloomberg article on the Enterprises' exposure to subprime and Alt-A loans.

b. Documents Reflecting Deliberations on Agency Decisions

The Court finds that the following documents satisfy both the pre-decisional and deliberative requirements of the deliberative process privilege and may be withheld in full.

<b>Privilege Log No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
57	61891	Email chain between Agency personnel discussing proposed methodology for assessing Enterprise rescue programs.
94	64828-64830	Memorandum expressing an opinion as to the Enterprise's future involvement in the subprime sector.
101	5187-5197	Presentation regarding proposal for new strategy for Enterprise.

130	73612-73613	Email chain regarding how Agency will respond to pending legislation.
150	74980	Email chain regarding Enterprise's customer communications related to the Interagency Nontraditional Mortgage Guidance and the Statement on Subprime Mortgage Lending in the purchase of private label securities.
151	74983-74984	Email chain regarding Enterprise's customer communications related to the Interagency Nontraditional Mortgage Guidance and the Statement on Subprime Mortgage Lending in the purchase of private label securities.
155	29298-29302	Report regarding options for extending regulatory guidance to private label securities purchases by Enterprises.

2. Documents Properly Withheld Under the Bank Examination Privilege

a. Agency Opinions, Recommendations, and Inquiries, and Enterprise Responses Thereto

The Court finds that the following documents are well within the bank examination privilege. The following documents reflect Agency opinions, recommendations, and inquiries to the Enterprises relating to banking safety and soundness, or the Enterprises' responses thereto. Bank examination is an iterative process requiring recurring evaluative comments by the regulator and responses to these comments by the regulated entity. See Fleet, 967 F.2d at 633-634. The Court is satisfied that the documents that follow are of the type contemplated by the bank examination privilege. For the following documents, the Court finds that any factual information contained in these documents is inextricably intertwined with the Agency's opinion, recommendation, or inquiry, and therefore, the following documents may be withheld in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
10	259583-259590	Memorandum conveying agency recommendations regarding Enterprise's 10-K disclosure statements.
11	261679-261681	Memorandum containing draft proposed language for Enterprise's 10-K disclosure statements.
13	270131-	Email chain conveying Agency recommendations for

REDACTED VERSION

	270132	Enterprise's 10-K disclosure statements.
16	15922-25982	Letter conveying Enterprise's response to Agency opinions and recommendations.
21	59194-59195	Letter regarding Freddie Mac adopting underwriting practices consistent with the Interagency Guidance on Non-Traditional Mortgage Product Risks.
22	17944-17950	Discussion points regarding Freddie Mac's comments on proposed standards of the Interagency Guidance on Non-Traditional Mortgage Product Risks.
27	60103-60104	Email conveying inquiry from Agency to GSE.
28	60162-60163	Email chain conveying inquiry from Agency to Enterprise.
36	20049-20050	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
44	61240	Email chain conveying inquiry from Agency to Enterprise.
47	61267-61269	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
50	20642-20643	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
51	20937-20939	Enterprise's response to Agency inquiry.
53	21175-21176	Email conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
54	61838-61861	Letter from Enterprise to Agency in response to Agency inquiry letter.
55	61865-61866	Letter from Enterprise to Agency in response to Agency inquiry.
61	62170-62171	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
80	63634-63636	Email chain conveying inquiry from Agency to Enterprise, and Enterprise responses thereto.
85	189489	Email conveying inquiry from Agency to Enterprise.
88	89884-89887	Email chain discussing clarification of Agency's definition of Alt-A in accordance with general industry standards.
96	191761-191763	Email chain conveying inquiry from Agency to Enterprise, and Enterprise's response thereto.
138	27749	Email conveying inquiry from Agency to Enterprise.
143	74886-74889	Letter conveying Enterprise response to Agency inquiry.
157	75116-75117	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's responses thereto.
158	29495-29499	Letter from Agency to Enterprise conveying recommendations.
160	29949-29976	Letter conveying enterprises' response to Agency recommendation and inquires.



161	75434-75436	Email chain conveying inquiry from Agency to Enterprise, and the Enterprise's response thereto.
A4 <sup>3</sup>	104035-104111	Draft portion of Freddie Mac 10-Q for third quarter 2009 prepared by Freddie Mac with comments from Agency staff and legal counsel.
A5	114965-115040	Draft portion of Freddie Mac 10-Q for third quarter 2009 prepared by Freddie Mac with comments from Agency staff and legal counsel.

b. Agency Documents Memorializing Enterprise Statements in Response to Agency Inquiries

Defendant withholds several documents which memorialize statements made by Enterprise personnel during meetings or phone calls with the Agency. The Court finds that these memorials should be protected under the bank examination privilege as Enterprise responses to Agency inquiries. As the court of appeals has noted, “[b]ank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.” Fleet, 967 F.2d at 634 (citing In re Franklin Nat’l Bank Sec. Litig., 478 F. Supp. 577, 586 (E.D.N.Y. 1979)). Although the documents below are not the communications from the Enterprise to the Agency themselves, the Court does not believe the privilege should be waived merely because the Agency memorialized the Enterprises’ responses to Agency inquiries in Agency writings. See Bloomberg, L.P. v. U.S. SEC., 357 F. Supp. 2d 156, 170 (D.D.C. 2004) (holding that summaries of discussions between a bank and its regulator fell within the bank examination privilege). Therefore, the Court finds that the following documents may be withheld in full.

<sup>3</sup> The Court finding that the documents A4 and A5 are privileged under the bank examination privilege, the Court declines to comment on the applicability of the attorney-client privilege to these documents.

Privilege Log No.	Bates Nos.	Description of Document
24	60039-60040	Notes from meeting between Agency and executive from Enterprise regarding Enterprise's new model subprime offering.
25	60042-60043	Notes from meeting between Agency and executive from Enterprise regarding Enterprise's new model subprime offering.
59	61913	Email summarizing matters discussed at meeting between Agency and Enterprise personnel.
60	62168-62169	Notes from meeting between Agency and executive from Enterprise regarding new Enterprise programs.
64	62815	Email summarizing conversation between Enterprise and Agency with commentary and opinion of regulator.
86	189748-189749	Email chain between Agency personnel summarizing a phone conversation with Enterprise personnel and discussing how to respond.

3. Documents Properly Withheld Under Both the Deliberative Process and Bank Examination Privileges

A number of documents pertain to Agency deliberations on how to conduct examination activities. The following documents reflect Agency deliberations on what opinions, recommendations, or inquires the Agency would make towards the Enterprises. As such, the following documents can be understood to fall within *both* the deliberative process privilege and bank examination privilege.<sup>4</sup> For the documents below, the Court finds that any factual material in these documents is inextricably intertwined with deliberative and evaluative material.

Therefore, the documents below may be withheld in full.

Privilege Log. No.	Bates Nos.	Description of Document
7	15872-15876	Chart regarding Freddie Mac and Fannie Mae's response to subprime lending guidance provided by the Agency.
8	86354	Email regarding proposed Agency comments to Freddie Mac's draft SEC 10-K disclosure form.

<sup>4</sup> See In re Midlantic Corp. S'holder Litig., No. 92-MC-99, 1994 WL 750664, at \*2 (D.D.C. Oct. 24, 1994) (noting that there is often substantial overlap between the deliberative process and bank examination privileges).

9	249183-249184	Email regarding Freddie Mac's 2010 revised 10-K Attestation Draft containing deliberations on how Agency should comment on the draft.
12	261682	Email proposing language for Agency's comments on Freddie Mac's SEC 10-K.
14	270135-270136	Memorandum regarding Agency's concerns about Freddie Mac's 10-K drafts containing recommendations on how to respond to these concerns.
15	270146-270159	Email chain discussing proposed recommendations to Enterprises' 10-K disclosure form.
23	59953-59954	Email regarding Freddie Mac's press release, containing opinions and recommendations on how to advise Freddie Mac.
33	19424	Email chain reflecting proposed Enterprise rescue programs.
34	19425	Email chain reflecting proposed Enterprise rescue programs.
40	20436-20445	Report prepared by Agency expressing an opinion as to Freddie Mac's risk exposure. <sup>5</sup>
42	61105-61107	Email chain reflecting deliberations on what recommendations Agency is going to make to Enterprise.
52	20940-20943	Email chain reflecting Agency deliberations on how to pose inquiries to Enterprise, Agency inquiries to Enterprise, and the Enterprises' responses thereto.
58	61911-61912	Email chain regarding meeting to be held with Freddie Mac, deliberations relate to when to proceed with Agency recommendations and what further evaluations may be necessary.
66	62829-62830	Email chain regarding potential Agency recommendations to the Enterprise.
71	63607-63616	Notes prepared by Agency concerning proposed new methodology for analyzing Enterprise risk.
72	63617-63628	Notes prepared by Agency concerning proposed new methodology for analyzing Enterprise risk.
77	22170-22171	Email chain regarding Enterprise meeting on single family sourcing.
78	22172-22173	Email chain reflecting deliberations on what further inquiries the Agency will pose to the Enterprise.
79	22178	Email chain reflecting deliberations on what further inquiries the Agency will pose to the Enterprise.
82	63945-63963	Report prepared by Agency expressing an opinion as to

<sup>5</sup> Agency determinations as to the quantification of risk exposure for the Enterprises are best considered opinion, rather than pure fact, as the determination involves a level of judgment unnecessary for the transmission of purely factual information. Cf. *In re Provident Fin. Corp. Sec. Litig.*, 222 F.R.D. 22, 27 (D.D.C. 2004) (holding that asset quality ratings fell within the bank examination privilege).

REDACTED VERSION

		Freddie Mac's risk exposure.
105	208137-208138	Email chain regarding what questions the Agency should pose to the SEC about Freddie Mac's proposed form 10-K.
114	215660-215672	Chart expressing opinions on the Enterprises' internal credit risks and consequences.
117	71732-71734	Email chain regarding a proposed working definition of subprime and strategies for meeting Enterprise goals.
118	71740-71743	Email chain regarding a proposed working definition of subprime and strategies for meeting Enterprise goals.
119	71772-71774	Email chain regarding a proposed working definition of subprime and strategies for meeting Enterprise goals.
120	112647-112658	Draft memorandum regarding Agency opinions and recommendations on Freddie Mac's draft form 10-K.
122	216936-216937	Report prepared by Agency for Freddie Mac's board reflecting Agency opinions as to Freddie Mac's performance.
126	73300-73303	Email chain regarding Agency strategies for meeting Enterprise goals.
128	73603-73605	Email chain regarding a proposed working definition of subprime and strategies for meeting Enterprise goals.
129	73606-73608	Email chain regarding Agency strategies for meeting Enterprise goals.
131	73654-73659	Email chain regarding Agency strategies for meeting Enterprise goals.
137	27661-27667	Report conveying recommendations as to how Enterprise should implement the nontraditional mortgage guidance.
144	74900-74902	Email chain reflecting deliberations on what standards the Agency will set for the Enterprise.
145	74919-74924	Email chain reflecting deliberations on what standards the Agency will set for the Enterprise.
146	74932-74933	Email chain regarding deliberations on what standards the Agency will set for the Enterprise.
147	74934-74936	Email chain regarding deliberations on what standards the Agency will set for the Enterprise.
148	74940-74942	Email chain regarding deliberations on what standards the Agency will set for the Enterprise.
149	74946-74947	Email chain regarding deliberations on what standards the Agency will set for the Enterprise.
156	29325-29326	Email chain regarding deliberations on topics to address at the next meeting between Agency and Enterprise.

4. Documents Improperly Withheld by Defendant that Must Now Be Produced in Full

a. Documents That Do Not Pertain to Agency Deliberations

Several documents over which defendant claims deliberative process privilege do not, on their face, appear to pertain to deliberations on any particular Agency decision. To withhold documents under the deliberative process privilege, the reviewing Court must be able to “pinpoint” the Agency decision or policy to which the communication contributed. See Senate of the Commonwealth of P.R. v. U.S. Dep’t of Justice, 823 F.2d at 585. With regards to the documents indicated below, the Court is at a loss to find any Agency decision over which these communications deliberate. Emails requesting factual material, communicating factual material, or commenting on factual material are insufficiently deliberative to fall within the privilege’s protection. Therefore, the Court finds that the following documents must be produced to plaintiffs in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
1	182312-182350	Notes from FHFA Director James Lockhart’s anticipated speech regarding the Enterprises’ financial activities to be given at the Annual Conference on Bank Structure and Competition.
38	60951-60955	Report regarding Freddie Mac’s third quarter 2007 credit issues.
45	61243-61244	Email chain regarding discussion of Freddie Mac’s subprime and Alt-A holdings.
62	62185-62186	Email chain regarding correct determination for total amount of subprime loans outstanding at Freddie Mac.
99	66057-66058	Email chain regarding Director’s request to determine the Enterprises’ subprime exposure.
125	70359	Email chain regarding Freddie Mac nontraditional mortgage purchase volume and share.

b. Primarily Factual Documents

The Court finds that the following documents consist of primarily factual information that is insufficiently evaluative or recommendatory in nature to qualify for protection under either the deliberative process or bank examination privileges. See Schreiber v. Soc’y for Sav. Bancorp, Inc., 11 F.3d at 220. For example, several of the documents defendant seeks to withhold are summaries of market activity. While such summaries may influence or underlie Agency decisions, these summaries fall outside the bank examination privilege and must be produced to plaintiffs in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
18	185182-185190	Report prepared by Agency recounting daily mortgage market activities.
63	62233-62250	Presentation created by OFHEO describing Fannie Mae’s products and features.
65	62817-62824	Report prepared by Agency recounting daily mortgage market activities.
97	191838-191840	Agency report conveying factual data relating to the Enterprises.
103	22932-22993	Email chain regarding the similarities and differences between Fannie Mae and Freddie Mac’s non-traditional mortgage products.
127	73570-73577	Report prepared by Agency recounting daily mortgage market activities.
132	73683-73689	Report prepared by Agency recounting daily mortgage market activities.
133	73770-73776	Report prepared by Agency recounting daily mortgage market activities.
134	73827-73834	Report prepared by Agency recounting daily mortgage market activities.
135	73919-73926	Report prepared by Agency recounting daily mortgage market activities.
136	218900-218905	Report prepared by Agency recounting daily mortgage market activities.

c. Documents Memorializing Established Policy

The following documents are not protected under the bank examination privilege because they do not contain Agency opinions, recommendations, or inquiries. Rather, the following documents communicate established policy. Established policy is inherently *not* “predecisional” as required by the deliberative process privilege, nor is it a mere recommendation, opinion, or inquiry, as required by the bank examination privilege. Indeed, circuit precedent is clear that documents memorializing existing policy, or applying existing policy to specific factual scenarios, cannot be shielded from production. Coastal States Gas Corp., 617 F.2d at 868-69. Therefore, the following documents must be produced to plaintiffs in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
19	17343-17354	Letter communicating Agency’s new requirements for Freddie Mac regarding the Interagency Guidance on Non-traditional mortgage risk.
46	61266	Email chain conveying Agency’s confidentiality policy.
139	28754-28755	Letter prepared by Agency regarding Enterprises’ adoption of the Interagency Guidance on Nontraditional Mortgage Product Risks.
140	28756-28757	Letter prepared by Agency regarding Enterprises’ adoption of the Interagency Guidance on Nontraditional Mortgage Product Risks.
142	74880-74881	Letter regarding the Enterprise’s compliance with the Interagency Guidance on Non-Traditional Mortgages.
153	29174-29197	Letter communicating Agency’s final policy on new requirements for Enterprise.

d. Unsolicited Communications from Enterprise to Agency

The bank examination privilege applies to the Agency’s opinion, recommendations, and inquiries, and to the Enterprise’s response thereto. Fleet, 967 F.2d at 634. Communications from the Enterprise to the agency will only be privileged, where the enterprise is responding to a recommendation, opinion, or inquiry from the bank. In re Providian, 222 F.R.D. at 27, n.3. An unsolicited letter from the regulated entity to the regulator falls outside the scope of the privilege.

Id. The following document appears to have been gratuitously provided to the regulator by the regulated entity, and therefore must be produced to plaintiffs in full.

<b>Privilege Log No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
93	93285-93287	Memorandum regarding summary of changes to Freddie Mac's second quarter financial report on form 10-Q.

#### 5. Documents Containing Both Privileged and Not Privileged Material

The Court finds that the following documents, which defendant seeks to withhold in full, contain some factual information. Where factual material may be extricated from the surrounding non-factual material, the factual portions must be produced. Schreiber, 11 F.3d at 221. Therefore, the Court finds that the defendant must produce the following documents with the redactions indicated below.

<b>Privilege Log No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>	<b>Redactions Required</b>
20	17370-17383	Internal Agency paper regarding trends and outlook in the primary market for single-family mortgages.	Section IV may be redacted as opinion and recommendation, but the rest of the document conveys factual information and must be produced.
26	60049-60050	Email chain regarding proposed topics for meeting between Agency and Enterprise	The numbered list of topics to touch on may be redacted as Agency inquires, but the sentence regarding who from the Agency will attend the meeting must be produced as factual information.
29	186270-186274	Report notes regarding Freddie Mac's governance and management of Enterprise-wide Risk.	All material below the heading "Current Risk Concerns" may be redacted as recommendation or opinion; all material above the heading must be produced as factual information.
30	186275-186278	Report notes regarding Freddie Mac's governance and management of	All material below the heading "Current Risk Concerns" may be redacted as recommendation or opinion; all material above the



REDACTED VERSION

		Enterprise-wide Risk.	heading must be produced as factual information.
31	186279-186282	Report notes regarding Freddie Mac's governance and management of Enterprise-wide Risk.	All material below the heading "Current Risk Concerns" may be redacted as recommendation or opinion; all material above the heading must be produced as factual information.
32	186283-186286	Report notes regarding Freddie Mac's governance and management of Enterprise-wide Risk.	All material below the heading "Current Risk Concerns" may be redacted as recommendation or opinion; all material above the heading must be produced as factual information.
39	20264-20272	Notes from meeting between Agency and Enterprise regarding credit risk oversight activities.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
41	61095-61097	Notes from meeting between Agency and Enterprise regarding subprime news, bulletins, and guidelines.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
43	61238-61239	Email chain regarding Agency request for information regarding Enterprises subprime purchases.	The first three emails in the email chain must be produced as conveying factual and logistical information. The fourth and final email in the chain may be redacted as an Agency inquiry under the bank examination privilege.
48	61321-61337	Presentation created by Agency regarding updates from Enterprise on fair value, market shares, and risk management.	Cover page through page 3 must be produced as factual information; pages 4 through 6 may be redacted as opinion/recommendation; on page 7 the statement beginning "Freddie Mac expects..." may be redacted, but the rest of the page must be

REDACTED VERSION

			produced; page 8 may be redacted as opinion/recommendation; pages 9 through 10 must be produced as factual information; on page 11, the statements in bullet point format may be redacted, but the rest of the page must be produced as factual; pages 12 through 17 must be produced as factual.
49	20525-20553	Letter from Enterprise to Agency regarding the proposed implementation of the Interagency Guidance on nontraditional mortgage product risk.	The text up to the heading “Freddie Mac’s Requirements” may be redacted; the text following the heading “Freddie Mac’s Requirements” must be produced as it reflects established policy; the section entitled “Effect of Additional ABS Requirements” through the end of the letter may be redacted as opinion; the attachments following the letter should be redacted as privileged.
56	61890	Email conveying market information obtained from Agency personnel.	The sentence beginning “It appears...” may be redacted as an opinion; the rest of the document must be produced as factual.
67	62947-62953	Meeting notes regarding the Agency’s discussion of Enterprise’s past due “MRAs”	Bates Numbers 62948 through 62949 may be redacted as deliberative material; the rest of the document must be produced as it conveys purely factual material.
68	188972-188973	Letter prepared by Agency regarding the Agency’s monthly publication of statistics on the Enterprises’ borrower assistance efforts.	Paragraph 1 is a summary of events and should be produced; paragraph 2 memorializes established policy and should be produced; paragraph 3 reflects recommendations and may be redacted as privileged; paragraph 4 and the numbered list that follows reflects an Agency inquiry to the Enterprise and should be redacted as privileged.
69	63173-63208	Presentation prepared by Agency regarding Enterprises quarterly market risk assessment for Q1 2007.	Title slide must be produced; slides 2 through 7 and the notes following slide 7 are privileged as deliberative; slide 8 and the notes following slide 8 must be produced as factual; slide 9 may be redacted as deliberative;

REDACTED VERSION

			slides 10 through 11 must be produced as factual; slide 12 may be redacted as deliberative.
70	63382-63435	Presentation prepared by Agency regarding Enterprises quarterly market risk assessment for Q1 2007.	Title slide must be produced; slides 2 through 7 are privileged as deliberative; slide 8 must be produced as factual; slides 9 through the end of the presentation may be redacted as deliberative.
73	63631-63632	Meeting notes prepared by Agency regarding Enterprise's goals.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
74	22137-22141	Memorandum prepared by Agency regarding Enterprise rescue program.	Heading of document should be produced; text until "Comparison of Rescue Programs" may be redacted; text below "Comparison of Rescue Programs" through the end of the document must be produced as factual information. <sup>6</sup>
75	22142-22161	Presentation prepared by Agency entitled "The Subprime Problem and Enterprise 'Rescue' Strategies."	Title page should be produced; page 2 may be redacted as deliberative; pages 3 through 4 should be redacted as factual; page 5 may be redacted as deliberative; page 6 through the end of the presentation must be produced as factual.
76	22163-22165	Meeting notes prepared by Agency regarding a meeting of the nontraditional mortgage guidance working group.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
83	64301-64322	Report prepared by Agency entitled "Freddie Mac 2006 and	Pages 1 through 10 should be produced as factual summaries; pages 11 through 12 are privileged

<sup>6</sup> See *In re Providian Fin. Corp. Sec. Litig.*, 222 F.R.D. at 27 (holding that comparative lists of factual information were not privileged).

REDACTED VERSION

		2007 Single family Mortgage Purchases.”	as deliberative; pages 13 through 22 must be produced as factual.
87	190322-198323	Email chain regarding Freddie Mac’s borrower assistance data.	Beginning with the top of the page on Bates Number 190322, the first email is privileged as deliberative; the second email is privileged as deliberative; the third email is factual and must be produced; the fourth email is factual and must be produced; the fifth email is deliberative and may be redacted; the sixth email is factual and must be produced.
84	64332-64333	Meeting notes prepared by Agency regarding Enterprise’s subprime initiatives and quality controls.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
89	64350-64351	Notes prepared by Agency regarding Freddie Mac status report update for the week of July 30, 2007.	The two introductory paragraphs must be produced as summary; everything else may be redacted as deliberative beginning with the phrase “July financials will be...”.
90	64359-64361	Notes prepared by Agency regarding Freddie Mac status report update for the week of August 19, 2007.	The two introductory paragraphs must be produced as summary; everything else may be redacted as deliberative beginning with the phrase “We began initial discussions of...”.
91	64386-64405	Presentation prepared by Agency entitled “Freddie Mac Update August 23, 2007.”	Cover page must be produced; pages 2 through 3 should be produced as factual; on page 4, the first bullet point should be redacted as opinion, the rest of the page should be produced as factual; on page 5 the bottom 2 bullet points may be redacted as opinion, but the rest of the slide must be produced; page 6 may be redacted as deliberative; page 7 should be produced as factual; on page 8, the bullet points may be redacted as deliberative, but

REDACTED VERSION

			the charts must be produced as factual; pages 9 through 12 should be produced as factual; on page 13, the second bullet point may be redacted as opinion, but the rest of the slide must be produced; pages 14 through 15 should be produced as factual; on page 16, the charts and first bullet point must be produced as factual, while the second bullet point may be redacted as deliberative; page 17 through 18 should be redacted as deliberative; pages 19 through 20 should be produced as factual information.
92	64409-64425	Presentation prepared by Agency regarding updates on Freddie Mac.	Cover page must be produced; pages 2 through 3 should be produced as factual; on page 4, the first bullet point should be redacted as opinion; on page 5 the bottom bullet point may be redacted as opinion, but the rest of the slide must be produced; page 6 may be redacted as deliberative; page 7 should be produced as factual; on page 8, the bullet points may be redacted as deliberative, but the charts must be produced as factual; pages 9 and 10 should be produced as factual; on pages 11, the bullet points may be redacted, but the chart must be produced; page 12 must be produced as factual; pages 13 through 15 may be redacted as deliberative; pages 16 through 17 should be produced as factual information.
95	191761-191763	Email chain regarding Freddie Mac purchases of refinance mortgages with FICO scores below 660.	Page 1 must be produced as a summary of methodology; pages 2 and 3 may be redacted as opinion/recommendation.
98	65694-56707	Report prepared by Agency entitled "Credit Risk at the Enterprises" for the second quarter of 2007.	The title page must be produced; pages 2 through 3 may be redacted as deliberative; page 4 should be produced as factual; page 5 may be redacted as deliberative; pages 6

REDACTED VERSION

			through 7 must be produced as factual; on page 8, the second and third bullet points under “Freddie Mac” may be redacted, the rest of the page must be produced; page 9 may be redacted; on page 10, the third bullet point under “Freddie Mac” may be redacted, the rest of the page must be produced; page 11 may be redacted as deliberative; page 12 must be produced as factual; page 13 may be redacted as deliberative; page 14 must be produced as factual.
100	22441-22451	Presentation, with handwritten notes, entitled “Freddie Mac’s Participation in the Subprime Market: A discussion with OFHEO” regarding strategic direction and modeling for subprime holdings.	Pages 1 through 8 convey factual information and must be produced; pages 9 through 10 are deliberative and must be produced.
102	105872	Memorandum produced by Agency regarding review of Enterprise’s third-quarter 10-Q financial report for 2009.	The heading and bullet points 1 through 4 must be produced as summaries of methodology; the rest of the document may be redacted.
104	105918-105936	Memorandum regarding Agency’s target examination of Enterprise accounting policies, reserve for single-family credit losses.	Heading should be produced; Section II entitled “Objectives and Scope” should be produced; Section IVA through IVD should be produced; the rest of the document may be redacted.
115	26298-26301	Memorandum regarding Freddie Mac’s Subprime T-Deal deal with Ameriquest.	The following sections may be redacted as opinion/recommendation: all text below the bullet point labeled “Credit Risk Factors of the Total Pool (Group 1 and Group 2 Loans)”; all text below the bullet point labeled “Credit Risk Factors”; the rest of the document must be produced as

REDACTED VERSION

			factual summary.
116	71479-71485	Email chain regarding the criteria Freddie Mac uses to review subprime mortgages.	Bates Numbers 71482 through 71485 may be redacted as Agency inquiries and Enterprise responses thereto; the remaining pages must be produced.
121	216054-216082	Memorandum regarding the proposed appointment of Agency as conservator for Freddie Mac.	The heading and the first three paragraphs must be produced as factual summary; the text underneath Heading II "Background" must be produced as historical summary; the rest of the document may be redacted.
124	218745-218749	Memorandum regarding weekly update to Enterprise's accounting policies.	On page 1, paragraphs 1 and 2 are factual and must be produced; paragraph 3 is deliberative and may be redacted; paragraph 4 (beginning with the sentence "On Wednesday...") is factual and must be produced; paragraph 5 is deliberative and may be redacted. On page 2, the carry-over paragraph from the previous page may be redacted, the rest of the page must be produced as factual. On page 3, the first paragraph may be redacted; the second paragraph must be produced; the paragraph under the heading "SEC Registration" may be redacted; the remainder of the page must be produced. On page 4, the asterisked statement beginning "Management judged..." may be redacted; the asterisked statement beginning "Going forward Fannie will..." may be redacted; the rest of the page must be produced. On page 5, the asterisked statement beginning "Freddie Mac again..." may be redacted; the asterisked statement beginning "Freddie will..." may be redacted; the rest of the page must be produced.
141	74795	Email regarding Freddie Mac's proposed subprime model offering	In the body of the email, the first sentence must be produced as factual; the rest of the email may be

REDACTED VERSION

		template.	redacted as the Enterprise response to an Agency inquiry.
152	29087-29090	Meeting notes regarding enterprise private label mortgage related security investments.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.
154	29240-29245	Meeting notes regarding Freddie Mac's quarterly update on single family sourcing issues.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto; page 5 is a press release that has been issued, therefore the privilege is waived and the document must be produced.
159	29933-29976	Meeting notes regarding the structure of Freddie Mac's mortgages from Wells Fargo.	The heading, and the sections entitled SUBJECT, MEETING DATE, PURPOSE, and ATTENDEES must be produced as factual information. The section entitled SUMMARY may be redacted as consisting primarily of Agency inquiries and Enterprise responses thereto.

C. Documents Partially Withheld Under the Executive Privileges and Produced to Plaintiffs in Redacted Form

Of the 183 documents produced for *in camera* review, 17 of the documents were already produced to plaintiffs in redacted form. For purposes of *in camera* review, defendant has provided the Court the documents with semi-transparent gray highlighting so that the Court may observe both the location of the redactions and the text underneath the redactions.



1. Documents Where Defendant Has Properly Performed the Redactions

For the following documents, the Court finds that defendant has properly redacted privileged information and produced all non-privileged information.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
R1	70967-70972	Email chain regarding Fannie Mae's exposure to subprime with a mention of Freddie Mac's exposure to subprime; redacted portions concern Agency deliberations on how the Agency should measure this risk.
R2	66443-66446	Email chain regarding Fannie Mae's exposure to subprime with a mention of Freddie Mac's exposure to subprime; redacted portions concern Agency deliberations on how the Agency should measure the risk.
R3	66069-66073	Email chain regarding Fannie Mae's exposure to subprime with a mention of Freddie Mac's exposure to subprime; redacted portions concern Agency deliberations on how the Agency should measure the risk.
R4	70350-70353	Email chain regarding Fannie Mae's exposure to subprime with a mention of Freddie Mac's exposure to subprime; redacted portions concern Agency deliberations on how the Agency should measure the risk.
R6	63764-63790	Email chain regarding whether or not Enterprise is complying with new model subprime product guidance.
R9	24540-24542	Email chain regarding how to respond to an article published by In man New titled "Debt a growing factor in Freddie's prime loan delinquencies."
R10	24543-24545	Email chain regarding how to respond to an article published by In man New titled "Debt a growing factor in Freddie's prime loan delinquencies."
R11	107287-107288	Email chain regarding Thomson Reuters' inquiry about Enterprises' exposure in the subprime market.
R12	107955	Email chain regarding Thomson Reuter reporter's question about the Enterprises subprime holdings.
R13	215774-215777	Email chain regarding corrections to a Bloomberg article about Enterprises' reported losses through 2008.
R15	106078-106079	Email chain regarding the Agency's response to an inquiry from a reporter from Forbes about Freddie Mac's subprime securities.
R16	215245-215247	Email chain regarding Washington Post's inquiry about Enterprises' exposure in the subprime market.

2. Improperly Redacted Documents

For the following documents, the Court finds that Defendant improperly redacted non-privileged portions of the document. The Court describes the necessary changes below.

<b>Privilege Log No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>	<b>Action Required</b>
R5	63681-63690	Email chain regarding the purchase of Lehman and Countrywide Lo/No Documentation Loans.	The redacted material on Bates Numbers 63683, 63684, and the top of 63685 must be produced as factual information; the second redaction on 63685 may remain redacted as deliberative. On 63686 the redacted material including and below the heading “Low/No Doc Loans” must be produced as factual; the rest of the material may remain redacted. On 63687, the line indicating “Total” must be produced; the rest of the page may remain redacted.
R7	75223-75232	Email chain regarding a media inquiry from the Canonbury Group on Freddie Mac’s price sheet for subprime mortgage products.	The redactions on page 1 are proper. On page 2, everything below the heading “Detailed findings” must be produced as factual. On page 3, the entire page must be produced as factual. On page 4, the entire page must be produced as factual. On page 5, the remainder of the email from Eugenio Draschner must be produced, the rest of the page may remain redacted. On page 6, everything below the heading “Low/No Doc Loans” must be produced as factual, the rest of the page may remain redacted. On page 7, the redactions are proper.
R8	73150-73175	Email regarding Freddie Mac’s purchases of low or no documentation loans.	On page 1, the redactions are proper. On page 2, the first redacted portion must be produced as factual summary.

REDACTED VERSION

			On page 3, everything below the heading “Detailed Findings” must be produced as factual. Pages 4 through 13 must be produced in their entirety as factual summaries. On page 14, the first redacted portion must be produced as factual. On page 15, everything below the heading “Low/No Doc Loans” must be produced. Page 16 must be produced in full. On page 17, the redactions are proper. On page 18, the redaction is proper.
R14	15541-15542	Email chain regarding a Bloomberg article about Enterprises’ reported losses through 2008.	The first redacted portion is deliberative and may remain redacted; the second and third redacted portions are factual information and must be produced.
R17	26556-26561	Letter and report from OFHEO to FDIC regarding the Enterprises’ subprime investments.	Document must be produced in full. The redacted portions are either factual or memorializing an established policy; they are therefore, unprotected and must be produced in full.

#### D. Overriding the Executive Privileges

A finding of executive privilege does not end the Court’s inquiry. Rather the Court must determine whether plaintiffs have shown good cause for overriding the privilege. In this determination, the court is to consider at least the following five factors: (i) the relevance of the evidence sought to be produced; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. Fleet, 967 F.2d at 634.

Weighing these factors now, for the vast majority of documents, the Court does not find “good cause” to override the privilege. Having reviewed the privileged documents, the Court

believes that most of the privileged communications have very limited relevance to plaintiffs' defense in the SEC lawsuit. Except for the ones described in the next section, none of the documents would be admitted into evidence in that lawsuit and are so unrelated to that lawsuit that they are not even likely to lead to relevant evidence. There is no smoking gun in the vast majority of the documents; there is not even a cap pistol.

Further, the underlying litigation is certainly quite serious and the Court finds that the other three factors counsel strongly towards finding privilege in these circumstances. First, the question of the significance of the availability of other evidence is premature since plaintiffs have not yet seen what I am releasing to them. I can say with certainty that they are getting the only documents I have seen that are relevant and I cannot speak as to the significance of the other evidence defendant has already voluntarily made available to them.

Second, FHFA, the governmental agency subject to plaintiffs' subpoena, is not a party to the underlying litigation. Indeed, there have been no allegations of wrongdoing on the part of the government agency. As such, "[t]he policy in favor of overriding the privilege in order to shed light on government malfeasance therefore is not in play." See In re Providian, 222 F.R.D. at 29 (internal quotations omitted). Finally, the Court believes that disclosure of the privileged material is exactly the type of disclosure that would encourage "timidity" from government personnel and impair candor in agency deliberations. In this case we are dealing, after all, with one of the most significant events to occur in the country's economic history where the fate of the American economy was hanging precariously. At such a time, government officials must speak frankly and candidly about the risks involved in the government agencies taking or not taking extraordinary and crucial actions on which so much depended. The whole world is

watching. Therefore, the Court declines to override the privilege for the vast majority of documents found to be privileged.

However, for a few specific documents enumerated below, the Court is compelled to reach a different conclusion. Specifically, the Court will override the executive privilege, and require defendant to produce documents disclosing Agency deliberations on proposed comments to the Enterprise's draft SEC disclosure statements. The Court believes that these documents, unlike the vast majority subject to *in camera* review, might have substantial relevance to plaintiffs' defense in the SEC lawsuit because they bear on falsity, materiality, and scienter. Further, the Court is highly troubled by the notion that the government might be able to simultaneously prosecute an action against plaintiffs with one hand and refuse to turn over potentially exculpatory evidence with the other. The fact that two different executive agencies perform these functions does nothing to assuage the Court's fears. Therefore, for the following documents, the Court finds good cause to override the executive privilege, and finds that the documents must be produced to plaintiffs in full.

<b>Privilege Log. No.</b>	<b>Bates Nos.</b>	<b>Description of Document</b>
8	86354	Email regarding proposed Agency comments to Freddie Mac's draft SEC 10-K disclosure form.
10	259583- 259590	Memorandum conveying agency recommendations regarding Enterprise's 10-K disclosure statements.
11	261679- 261681	Memorandum containing draft proposed language for Enterprise's 10-K disclosure statements.
12	261682	Email proposing language for Agency's comments on Freddie Mac's SEC 10-K.
13	270131- 270132	Email chain conveying Agency recommendations for Enterprise's 10-K disclosure statements.

REDACTED VERSION

14	270135- 270136	Memorandum regarding Agency's concerns about Freddie Mac's 10-K drafts containing recommendations on how to respond to these concerns.
15	270146- 270159	Email chain discussing proposed recommendations to Enterprises' 10-K disclosure form.
105	208137- 208138	Email chain regarding what questions the Agency should pose to the SEC about Freddie Mac's proposed form 10-K.
120	112647- 112658	Draft memorandum regarding Agency opinions and recommendations on Freddie Mac's draft form 10-K.

#### IV. CONCLUSION

In light of the foregoing, plaintiff's motion will be granted in part and denied in part. An Order accompanies this Memorandum Opinion.



Digitally signed by John M. Facciola  
 DN: c=US, st=DC, l=Washington, email=John\_M.\_Facciola@dcd.uscourts.gov, o=United States District Court, cn=John M. Facciola  
 Date: 2014.12.30 15:29:46 -05'00'

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JOHN M. FACCIOLA  
 UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

FAIRHOLME FUNDS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DECLARATION OF CHRISTOPHER H. DICKERSON**

I, Christopher H. Dickerson, hereby declare, based on personal knowledge of the facts, as follows:

1. I am Senior Associate Director of the Division of Enterprise Regulation (“DER”) at the Federal Housing Finance Agency (“FHFA”). I have been employed by FHFA since its inception in 2008. I previously was employed by FHFA’s predecessor, the Office of Federal Housing Enterprise Oversight (“OFHEO”) from July 1997 until my employment automatically transferred to FHFA.

2. FHFA is an independent federal agency with regulatory authority over the Federal National Mortgage Association (“Fannie Mae”), the Federal Home Loan Mortgage Corporation (“Freddie Mac”) (together, the “GSEs” or “the Enterprises”), and the Federal Home Loan Banks.

3. In connection with my responsibilities as Senior Associate Director of DER, I am generally familiar with this litigation.

4. For the purposes of this litigation, I have been delegated the authority by FHFA Director Melvin L. Watt to invoke the deliberative process privilege and the bank examination privilege. I therefore possess delegated authority to assert both the deliberative process privilege

and the bank examination privileges on behalf of FHFA with respect to the documents discussed below. I formally assert both privileges over the following documents:

- a. Document prepared by BlackRock Solutions titled FNM Loss and Capital Projections Overview, dated September 6, 2008 (FHFA00031960);
- b. Document prepared by BlackRock Solutions titled FRE Loss and Capital Projections Overview, dated September 6, 2008 (FHFA00031962);
- c. Document prepared by BlackRock Solutions titled Approach for Agency Loss and Capital Projections, dated September 6, 2008 (FHFA00031964);
- d. Document prepared by BlackRock Solutions titled Freddie Mac Confidential Capital Review: Preliminary Results, dated August 25, 2008 (FHFA00056237).
- e. An FHFA presentation titled "Accounting for Income Taxes: Deferred Tax Assets" (FHFA00092209), dated October 29, 2008;
- f. FHFA Forecast Scenarios As Requested by FHFA, dated September 2011 (FHFA00093706);
- g. FHFA Projections of Remaining Treasury Funding Commitment Under Three Scenarios, September 16, 2011 (FHFA00100594).

5. Pursuant to authority delegated to me as described in Paragraph 4, above, I assert the bank examination privilege on behalf of FHFA with respect to the following documents (referred to herein as the "Risk Assessment Memoranda"):

- a. FHFA Risk Assessment Memorandum Regarding Fannie Mae's Earnings as of March 31, 2012 (FHFA00096631);
- b. FHFA Risk Assessment Memorandum Regarding Fannie Mae's Solvency as of March 31, 2012 (FHFA00096634);



- c. FHFA Risk Assessment Memorandum Regarding Freddie Mac's Earnings as of March 31, 2012 (FHFA00096636);
  - d. FHFA Risk Assessment Memorandum Regarding Freddie Mac's Solvency as of March 31, 2012 (FHFA00096638).
6. In addition, I possess delegated authority to assert the deliberative process privilege on behalf of FHFA with respect to the following document ("DeLeo Email"):
- a. Email sent by Wanda DeLeo to James Lockhart and Edward DeMarco on October 29, 2008 with subject line "RE: bberg question-FNM write down def tax assets."
7. A true and correct copy of the delegation memorandum is attached hereto as Exhibit A.

### **REGULATION OF THE ENTERPRISES**

8. FHFA regulates the GSEs through its Division of Enterprise Regulation ("DER"). The DER is the successor to OFHEO's Office of Supervision, which regulated the GSEs until it was replaced by FHFA in 2008. The DER's regulation of the GSEs is substantially the same as that performed by OFHEO before FHFA was established. OFHEO's Office of Supervision, in turn, was modeled on the best practices of supervisory regimes of financial regulators, including the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the Federal Reserve Board ("FRB"). OFHEO was originally staffed exclusively by former examiners from these agencies.
9. The examination program is the primary means by which FHFA monitors the Enterprises' financial safety and soundness and their compliance with applicable laws, regulations and policies. FHFA's approximately 75 examiners administer the Agency's examination program, through among other things, reviews of Enterprise financial data, periodic

on-site examinations and ongoing contacts with the Enterprise boards of directors. FHFA can take a variety of supervisory actions to require the Enterprises to correct deficiencies identified during the examination process.

10. DER personnel regularly request documents, test internal controls and risk management practices, meet with GSE staff, review transactions and holdings, prepare initial findings, prepare analysis memoranda, issue conclusion and closeout letters, and monitor and evaluate the GSEs' implementation of remedial measures. The DER distills all of this information into high-level analyses that are then reviewed within FHFA.

11. In September 2008, due to the Enterprises' mounting mortgage-related losses, FHFA found they were critically undercapitalized and as authorized by HERA, placed them into conservatorships. To facilitate FHFA's efforts, HERA vested the Agency with all of the powers of the Enterprises' shareholders, directors and officers. 12 U.S.C. §§ 4617(b)(2)(A). Although FHFA has assumed the authority of the management and boards of directors of the Enterprises during the period of conservatorship, it has delegated to the Enterprises' chief executive officers and boards of directors responsibility for much of the day-to-day operations of the companies. As required by HERA, during conservatorship, FHFA continues to supervise and regulate the Enterprises and continues to conduct examinations as part of that supervision.

#### **BANK EXAMINATION PRIVILEGE**

12. When FHFA asserts a formal claim of bank examination privilege, the agency considers whether the document is properly characterized as falling within the scope of FHFA's supervision of the GSEs and whether the document was generated by FHFA or by one of the GSEs in response to a supervision-related request from FHFA. The privilege is claimed only to protect those documents reflecting the supervisory process.

13. FHFA does not seek to protect documents containing factual matters unless such factual matters are so intertwined with advisory opinions, recommendations, conclusions, or reasoning that the factual material cannot be excised from the privileged material, or unless the factual matter itself, through its selection and distillation by the author, would reveal the author's mental process or the agency's deliberations. Documents are withheld in full where there is not a reasonably segregable portion that is not privileged.

**DELIBERATIVE PROCESS PRIVILEGE**

14. When FHFA asserts a formal claim of privilege with respect to pre-decisional, deliberative documents, the agency considers whether the documents are properly characterized as falling within the scope of the deliberative process, that is, whether the documents were generated before the adoption of an agency policy or position and, if so, whether the documents reflect the give-and-take of the intra-agency consultation process leading up to the formulation of an agency policy or position. The privilege also applies in the case of post-decision documents that describe the deliberative process that results in the formulation of the agency policy or position. The privilege is claimed only to protect those documents reflecting advisory opinions, recommendations, and deliberations that comprise part of the process by which agency decisions and policies are formulated.

15. FHFA does not seek to protect documents containing factual matters unless such factual matters are so intertwined with advisory opinions, recommendations, conclusions, or reasoning by government officials that the factual material cannot be excised from the privileged material or unless the factual matter itself, through its selection and distillation by the author, would reveal the author's mental process or agency's deliberations. Documents are withheld in full where there is not a reasonably segregable portion that was not privileged.

**BLACKROCK DOCUMENTS**

16. The BlackRock Documents, over which I assert the bank examination privilege and the deliberative process privilege on behalf of FHFA, contain loss and capital projections prepared by consultant BlackRock Solutions before the establishment of conservatorship for purposes of agency decision-making.

17. Based on my review of the BlackRock Documents, I have determined that they were generated in the course of FHFA's continuous supervision of the Enterprises. The documents are inherently pre-decisional and reflect real-time analyses of the Enterprises operations. The production of these documents would reduce candor and inhibit communications by consultants, and thus would adversely affect the quality of supervision of the GSEs. If employees and consultants believe that their communications regarding supervision of the GSEs could become public in the event of litigation, they are unlikely to feel at liberty to express their candid opinions.

18. In particular, the issues addressed in the BlackRock Documents — projections in September 2008 of Enterprise credit and capital losses — are the subject of significant public interest and would likely be the subject of intense publicity and public scrutiny. Disclosure of that information likely would inhibit the willingness of consultants to provide advice in the future as part during the agency's decision making processes. Consultants could reasonably believe that in a case under intense public scrutiny they could be held up for ridicule if their recommendations and/or advice was rejected, especially where the rejection may be in unflattering terms. Disclosure of such information also could confuse the public by revealing statements about the financial condition of the Enterprises that might be misleading when stripped of context. Further, because the BlackRock Documents reflect the internal deliberations

of FHFA prior to the agency's adoption of an official position, disclosure of the views or opinions of consultants could confuse the public by suggesting rationales for FHFA's actions that may or may not have been relied upon as the basis for those actions.

#### **FHFA PRESENTATION ON DTA**

19. I assert the bank examination and deliberative process privileges over the FHFA presentation titled "Accounting for Income Taxes: Deferred Tax Assets" (FHFA00092209), dated October 29, 2008. This presentation contains pre-decisional and deliberative statements about FHFA's regulatory supervision of how to account for the GSEs deferred tax assets. Review of GSE accounting policies is part of the supervision process. Among other things, the redacted portion of the document includes deliberations over [REDACTED]. [REDACTED]. [REDACTED]. The redacted portion of the document reflects opinions of FHFA personnel, including the Office of the Chief Accountant and Risk Analysis, at a time when FHFA's views and opinions were not fully developed and the issues were still being debated. The preliminary opinions, recommendations, and deliberations in the document may or may not have been considered in developing any of the policy positions that FHFA adopted. The redacted material neither represents a complete and accurate record of all of the information considered nor reflects any statement of agency policy or a final decision.

#### **FORECASTS**

20. The Forecasts, over which I assert the bank examination privilege and the deliberative process privilege, provide analysis of various scenarios using assumptions provided by FHFA. Periodically, as part of the examination process, regulators ask regulated entities to

REDACTED VERSION

prepare stress tests, which are analyses or simulations designed to determine the ability of the regulated entity to deal with an economic crisis. FHFA00093706 consists of [REDACTED]  
[REDACTED]  
[REDACTED]. FHFA in its capacity as regulator makes a policy determination each year as to which stress tests to publish. FHFA00093706 were projections for internal FHFA review and were not published.

21. FHFA also periodically prepares its own forecasts. FHFA00100594 is a document prepared by FHFA that analyzes both Enterprises' projected remaining Treasury funding commitment under scenarios determined by FHFA.

22. The Forecasts contain pre-decisional and deliberative statements about FHFA's supervision of the Enterprises. The preliminary opinions, recommendations, and deliberations in these documents may or may not have been considered in developing any of the policy positions that FHFA adopted in its capacity as regulator of the Enterprises. The withheld material neither represents a complete and accurate record of all of the information considered nor reflects any statement of agency policy or a final decision. Based on my review of the e-mail, I have determined that Production of the forecasts would inhibit the frank and honest opinions and recommendations related to stress tests, and thus would adversely affect the quality of FHFA's decisions and policies.

**RISK ASSESSMENT MEMORANDA**

23. The Risk Assessment Memoranda dated March 31, 2012, over which I assert the bank examination privilege, were prepared by the Office of Financial Analysis, Modeling and Simulations. FHFA00096631 discusses Fannie Mae's earnings; FHFA00096634 discusses

REDACTED VERSION

Fannie Mae's solvency; FHFA00096636 discusses Freddie Mac's earnings; and FHFA00096638 discusses Freddie Mac's solvency. These memoranda contain analyses and opinions regarding the Enterprises' outlook for earnings and solvency as of March 31, 2012. The preparation of risk assessment memoranda is part of the supervisory process to determine the safety and soundness of the GSEs.

**DELEO E-MAIL**

24. The DeLeo Email, over the redacted portions of which I assert the deliberative process privilege on behalf of FHFA, was sent by Wanda DeLeo to James Lockhart and Edward DeMarco on October 29, 2008. The Email contains pre-decisional and deliberative statements about how FHFA should respond to a press inquiry about the treatment of deferred tax assets in October 2008. Based on my review of the e-mail, I have determined that the production of the redacted portions of the Email would inhibit the frank and honest discussion of policy matters, and thus would adversely affect the quality of FHFA's decisions and policies. The reluctance of FHFA personnel to share their candid opinions, and the bases for them, would restrict FHFA's ability to formulate sound policy and diminish the benefits of future efforts to help restore confidence in the Enterprises and avoid the systemic risk that can directly destabilize the national housing finance market. This concern is particularly acute as redacted portions of the Email relate to sensitive discussions regarding FHFA's policies with respect to the ongoing and future operations of the Enterprises.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15<sup>th</sup> day of December 2015 at Washington, D.C.

REDACTED VERSION

By: Christopher H. Dickerson  
CHRISTOPHER H. DICKERSON



**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

FAIRHOLME FUNDS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DECLARATION OF DAVID R. PEARL**

I, David R. Pearl, declare pursuant to 28 U.S.C. § 1746:

1. I am the Executive Secretary of the United States Department of the Treasury. In that capacity, I am responsible for directing the activities and operations of the Executive Secretariat. My responsibilities include ensuring that decisions made by the Secretary and the Deputy Secretary, among others, are properly implemented and that their requests receive appropriate responses; ensuring the quality and appropriate coordination of materials prepared for these principal officials in connection with formulating and implementing policy, including overseeing the preparation of briefing materials for meetings, international conferences, and negotiations; collecting, maintaining, controlling, retrieving, and disseminating policy decisions and papers, staff records, and reports, as well as a wide variety of other correspondence and documents relevant to the information and operational needs of principal officials; assisting in identifying policy problems that require coordination, and coordinating policy issues across different components of the Department; and advising principal officials on the best uses of the Department’s resources. I am also responsible for approving responses to Freedom of Information Act (FOIA) requests directed at Secretarial documents, a task which requires me to evaluate whether responsive records are covered by various exemptions to FOIA’s disclosure requirements, including the deliberative process privilege.

2. By memorandum, Jacob J. Lew delegated to me, as Executive Secretary and for the purposes of this litigation, his authority as Secretary of the Treasury to invoke the deliberative process privilege. I therefore possess delegated authority to assert the deliberative process privilege on behalf of Treasury with respect to documents and information subject to discovery requests in this lawsuit. A true and correct copy of the memorandum is attached hereto as Exhibit A.

3. I am aware of this lawsuit, which Plaintiffs brought against the United States. Plaintiffs contend, among other things, that 2012 amendments to the Preferred Stock Purchase Agreements (PSPAs) between Treasury and Fannie Mae and Freddie Mac (collectively the GSEs), through the Federal Finance Housing Agency (FHFA) as conservator, referred to collectively as the Third Amendment, constituted takings without just compensation under the Fifth Amendment.

4. I am informed by counsel that, on April 7, 2014, Plaintiffs served their First Set of Requests for Production (Plaintiffs' Requests) on the United States, calling for the production of numerous categories of documents.
5. In accordance with standard Treasury procedures, attorneys for Treasury and the Department of Justice (DOJ) reviewed certain documents collected in response to Plaintiffs' Requests to identify responsive documents and determine whether any cognizable privileges apply to them.
6. I am informed by counsel that, on November 23, 2015, Plaintiffs filed a motion to compel the production of documents that have been withheld for privilege. In their motion, Plaintiffs challenged documents withheld pursuant to the deliberative process privilege (among other protections from disclosure).
7. Based upon the review of attorneys from Treasury and DOJ, and upon my personal review of the challenged documents, I have determined to assert the claim of deliberative process privilege with respect to the documents, or portions thereof, described herein and identified in the Appendix to this declaration.
8. When Treasury asserts a formal claim of privilege with respect to predecisional deliberative documents, the agency considers whether the document is properly characterized as falling within the scope of the deliberative process privilege, that is, whether the document predates the adoption of an agency policy or position and whether the document reflects the give-and-take of the consultation process leading up to the formulation of an agency policy or position. The privilege is claimed only to protect those intra-governmental documents reflecting advisory opinions, recommendations, and deliberations that make up part of the process by which agency decisions and policies are formulated. Treasury does not seek to protect documents containing factual matters unless such factual matters are so intertwined with advisory opinions, recommendations, conclusions, or reasoning by officials that the factual material cannot be excised from the privileged material or unless the factual matter itself, through its selection and distillation by the author, would reveal the author's mental processes or the agency's deliberations. Whenever possible, reasonably segregable non-privileged portions are produced. Documents are withheld in full where there is not a reasonably segregable portion that is not privileged. The privilege is not claimed to protect all opinions, conclusions, mental impressions, and thought processes of government officials, but only those whose disclosure would interfere with vital government functions or would cause injury to the quality of agency decisions.
9. Based on my review of the challenged documents over which Treasury asserts the deliberative process privilege, I have determined that disclosing the withheld documents or the redacted portions thereof, described in greater detail below, would inhibit the frank and honest discussion of policy matters, and thus would adversely affect the quality of Treasury's decisions and policies. The withheld material generally reflects sensitive deliberations regarding Treasury's policies with respect to the use of billions of dollars of taxpayer money to support Fannie Mae and Freddie Mac, as well as Treasury's broader role in preserving financial stability and protecting the U.S. economy. These include, among other things, discussions regarding potential housing-finance-reform legislation; deliberations relating to potential administrative

actions regarding housing policy; analyses regarding systemic financial risks, including the nature and extent of Treasury's ability to assist companies, such as Fannie Mae and Freddie Mac, to mitigate the impact of their deteriorating financial conditions on the financial system and the broader economy; and specific communications with other agencies and lawmakers regarding unresolved questions of housing policy.

10. The withheld documents, or portions thereof, reflect opinions of Treasury officials and staff throughout the Department, up to and including the Secretary of the Treasury, at a time when Treasury's views and opinions were not fully developed and the issues were still being debated. None of the withheld information represents a statement of agency policy or a final decision.

11. If these documents were released, it would adversely affect Treasury's ability, among other things, to respond effectively to future financial disruptions, and to craft policies that protect the public from private entities in financial distress. Moreover, their release would make it more difficult for Treasury to carefully consider the various matters of financial and economic policy that arise over the course of an extended period of economic unrest.

12. Release of these documents would have a chilling effect on the free exchange of opinions and ideas of Treasury officials and staff involved in future efforts to formulate policy, including efforts to identify systemic risks, preserve financial stability, and protect the U.S. economy. If Treasury officials and staff believe that such exchanges could become public in the event of litigation, they are unlikely to feel at liberty to offer their candid opinions. The reluctance of Treasury officials and staff to share their candid opinions, and the bases for them, would restrict Treasury's ability to formulate U.S. economic policy, interact with other agencies and lawmakers, fully develop policies and strategies, and effectively respond to future financial crises. This would adversely affect Treasury's ability to devise and execute financial policies that best represent the interests of the U.S. government and U.S. taxpayers.

13. In addition, because these documents represent the internal deliberations of Treasury officials and staff prior to the Department's adoption of an official position, disclosure of the views or opinions of individual Treasury officials and staff could suggest rationales for Treasury's policies and decisions that may or may not have been relied upon as a basis for final policy positions and decisions. The policy decision-making process is iterative. Preliminary opinions and analyses contained in these documents may or may not have been taken into account in developing, or formed the bases for, any of the objectives or strategies that Treasury subsequently adopted. Requiring disclosure of proposed policies could also cause confusion regarding why a certain policy has been adopted or will be adopted when, in fact, it might not be adopted at all.

14. For the reasons described above, it is necessary to protect the confidentiality of predecisional agency deliberations. The Government's need for a properly functioning policy process outweighs Plaintiffs' need for this information.

15. The privileged documents referenced herein are grouped and described below.

### **Deliberations Regarding Housing Finance Reform**

16. Treasury has been actively engaged in efforts to promote comprehensive housing finance reform through legislation that puts a sustainable reformed housing finance system in place. The flawed system of housing finance that contributed to the financial crisis is still substantially in place and continues to put the taxpayer at risk. We believe that comprehensive housing finance reform remains the major unfinished business of financial reform.

17. Since the financial crisis, Treasury officials and staff have been continuously deliberating among themselves and engaging with officials and staff from other government agencies to develop proposals for reforming the housing finance system. For example, Treasury engaged in extensive discussions to prepare a February 2011 report to Congress, titled “Reforming America’s Housing Finance Market: A Report to Congress.” This work marked the beginning of a multi-year policy development process that is ongoing.

18. Treasury has also worked closely with Congressional staff to provide technical assistance during the process of drafting bipartisan legislative proposals for housing finance reform. Senior Treasury officials provided assistance to the Senate Banking Committee and other Congressional staff regarding some of the more complex technical issues surrounding housing finance reform.

19. The draft memoranda, other draft documents, and correspondence in this category relate to discussions and deliberations that took place within Treasury regarding housing finance reform. The documents reflect predecisional deliberations central to the policy-making process and the considerations weighed by Treasury officials and staff in connection with these deliberations.

20. Documents challenged by plaintiffs in this category include:

- a. App’x Rows 1 – 2 (UST00500982 and UST00521902): Drafts of memoranda for the President regarding housing finance reform. Treasury officials and staff participated in preparing the draft memoranda. The documents reflect potential policies to pursue and contain Treasury staff recommendations concerning the options presented. The documents reflect predecisional deliberations regarding such policies.
- b. App’x Row 3 (UST00515290): Correspondence between Treasury staff and a White House advisor regarding housing finance reform. The email chain reflects discussion of potential policies to pursue. The documents reflect predecisional deliberations regarding such policies.
- c. App’x Row 4 (UST00389678): Draft of memorandum for Secretary of the Treasury Timothy Geithner prepared by Treasury officials and staff regarding proposals for housing finance reform. The document articulates principles to be pursued in working on potential reforms of the mortgage finance system. The documents reflect predecisional deliberations regarding such reforms.
- d. App’x Rows 5 – 7 (UST00490551, UST00513480, and UST00544897): Drafts of policy papers prepared by Treasury officials and staff regarding housing finance

reform. The documents contain discussions of a potential comprehensive housing finance reform plan. The documents reflect predecisional deliberations regarding the proposed plan.

- e. App'x Row 8 (UST00518402): Draft of memorandum for the Secretary prepared by Treasury officials and staff regarding policy implications of proposed housing finance legislation. The document contains Treasury staff views on proposed housing finance bills. The documents reflect predecisional deliberations regarding the proposed legislation.

21. Requiring disclosure of these deliberative materials would have a chilling effect on Treasury's housing finance reform work. If Treasury officials and staff know that their deliberations on housing finance reform will be disclosed to litigation adversaries, they are unlikely to feel at liberty to offer their candid opinions and fully engage in the policy development process. Disclosure of the details of this evolving policymaking process would inhibit Treasury's ability to engage in ongoing policy deliberations resulting in a profound negative impact on such deliberations. As Treasury continues its efforts to help bring about comprehensive reform of the housing finance system, it is critical that we preserve the ability to have robust discussions in which we are able to explore sensitive and important policy decisions from multiple angles.

#### **Deliberations Regarding Housing Policies**

22. Treasury is also actively engaged in broader housing policy efforts. This policy work includes not only potential housing-finance reforms, but also affordable-housing initiatives, foreclosure-prevention measures, loan-modification and refinancing programs, and reforms to the mortgage markets. Treasury officials and staff engage on a regular basis with their counterparts at other government agencies to develop housing policy proposals and discuss ongoing housing policy efforts. Treasury's efforts to formulate and execute housing policies are ongoing.

23. The draft memoranda and other draft documents in this category relate to discussions and deliberations regarding housing policies, including but not limited to housing-finance reform, housing affordability, and other mortgage-related reforms. The documents reflect predecisional deliberations central to the policy-making process and the considerations made by Treasury officials and staff in connection with these deliberations.

24. Documents challenged by plaintiffs in this category include:

- a. App'x Row 9 (UST00492699): Draft of speech to be delivered by Michael Stegman, Counselor to the Treasury Secretary for Housing Finance Policy, regarding housing policy reforms. The document reflects discussion of ongoing housing policy efforts and potential housing policies to pursue. The document reflects predecisional deliberations regarding such policies, including standards for short sales, the federal risk retention rule, and housing finance reform. Counsel has informed me that a final copy of the speech will be produced in response to Plaintiffs' Requests.

- b. App'x Row 10 (UST00504514): Draft of memorandum regarding various FHFA housing policy initiatives including refinancing standards and reform of representations and warranties for consumer mortgages. The document reflects discussion of FHFA's progress in various housing policy areas and views and opinions of FHFA's progress. The document reflects predecisional deliberations regarding such policies.
  - c. App'x Row 11 (UST00536346): Draft of memorandum for Secretary Geithner regarding housing policy ideas. The document reflects discussion of housing policy efforts and potential housing policies to pursue including how to increase housing affordability, how to assist communities with high foreclosure rates, how to increase mortgage financing, and how to encourage banks to modify existing loans. The document reflects predecisional deliberations regarding such policies and views and opinions of the proposed policies.
  - d. App'x Row 12 (UST00548270): Draft outline of memorandum for Secretary Geithner regarding housing policy efforts including loan programs, housing finance reform, and other mortgage-related reforms. The document reflects discussion of potential housing policies to pursue. The document reflects predecisional deliberations regarding such policies and views and opinions of the proposed policies.
25. Requiring production of these deliberative materials would have a chilling effect on development of housing policy going forward. If Treasury officials and staff know that their housing policy deliberations will be disclosed to litigation adversaries, they are unlikely to feel at liberty to offer their opinions and fully engage in the housing policy development process. It will immediately become difficult to fully develop housing policies and strategies. Requiring disclosure of the details of these evolving policymaking processes would inhibit Treasury's ability to engage in ongoing housing policy deliberations.

#### **Deliberations Regarding PSPA Modifications**

26. The draft memoranda, draft presentations, and other draft documents in this category relate to the development of the modifications to the PSPAs. The documents reflect predecisional deliberations central to the policy-making process and the considerations weighed by Treasury officials and staff in connection with these deliberations. These documents are predecisional because they were created and shared before the Third Amendment was adopted and contain deliberations concerning rationales for entering into it.
27. These draft documents describe proposed modifications to the PSPAs. They reflect the collective thoughts of certain Treasury staff concerning possible reasons for entering into certain proposed modifications to the PSPAs.
28. Documents challenged by plaintiffs in this category are:
- a. App'x Rows 13 – 17 (UST00061421, UST00384501, UST00478535, UST00502258, and UST00536560): Draft documents discussing potential modifications to the PSPAs. These documents reflect discussions of proposed

modifications to the PSPAs including discussions of potential rationales for the changes under consideration. The documents also reflect opinions and views regarding the proposed modifications. The documents include discussions of proposed modifications that were ultimately not made and the considerations that led to the decision not to pursue such modifications. The documents reflect predecisional deliberations regarding the proposed changes.

- b. App'x Row 18 (UST00384146): Draft of presentation for Secretary Geithner discussing Fannie Mae financial projections. The document reflects analysis and projections regarding Fannie Mae's future financial performance, including estimates of future draws and dividend payments. Such analysis was part of Treasury's decision-making process that resulted in the execution of the Third Amendment. The document reflects predecisional deliberations regarding the proposed modifications. Counsel has informed me that the final version of this document, which was provided to Secretary Geithner, has been produced in response to Plaintiffs' Requests.
- c. App'x Row 19 (UST00389662): Draft of memorandum for Secretary Geithner discussing potential options for restructuring the GSEs and transitioning to a future housing finance system. The document reflects discussions of various policy options under consideration. The document reflects predecisional deliberations regarding such policy options and views and opinions of the proposed policy options.
- d. App'x Rows 20 – 23 (UST00407182, UST00407342, UST00472229, and UST00472232): Draft analyses of GSE financial projections prepared by Treasury officials and staff. These documents reflect draft analyses and projections regarding the GSEs' future financial performance, including estimates of future draws and dividend payments. The assumptions embedded in the analyses reflect Treasury's subjective judgment. Such analytical work regarding potential modifications to the PSPAs was part of Treasury's deliberative process that culminated in the execution of the Third Amendment. The document reflects predecisional deliberations regarding the proposed modifications.
- e. App'x Row 24 (UST00539251): Draft of presentation for Office of Management & Budget ("OMB") discussing potential modifications to the PSPAs. The document reflects draft analyses and projections regarding the GSEs' future financial performance, including estimates of future guarantee fees. Those analyses and projections were part of Treasury's deliberative process that culminated in the execution of the Third Amendment. Counsel has informed me that the final version of this document, which was provided to OMB, is publicly available.

29. Requiring production of these deliberative materials would have a chilling effect on Treasury's ability to develop financial policies. The ability to distribute and receive comments and feedback on draft memoranda, draft presentations, and other draft documents is an essential function of the policy-making process. If Treasury officials and staff believe that such draft

documents will be disclosed to litigation adversaries, they are unlikely to feel at liberty to offer their opinions and fully engage in the policy development process. As a result, Treasury's ability to develop and make policy would be adversely affected.

### **Deliberations Regarding GSE Projections**

30. The draft analyses and draft documents in this category relate to analyses of GSE financial projections provided by Grant Thornton, a Treasury consultant, to Treasury (App'x Rows 25 – 38 (UST00409040, UST00473767, UST00473770, UST00473773, UST00473776, UST00473779, UST00473782, UST00481423, UST00481424, UST00481425, UST00556294, UST00556295, UST00556459, and UST00556460)). Each of the documents in this category contains outputs from Grant Thornton's model in spreadsheet form. Treasury used these projections in considering whether to make modifications to the PSPAs. At Treasury's request, Grant Thornton made modifications to certain assumptions in its model and provided Treasury with the results. The assumptions embedded in the financial projections and the changes to those assumptions reflect the subjective judgments and choices of the agency. The changes to the assumptions requested by Treasury reflect the agency's exercise of discretion and judgment as part of its deliberations regarding potential modifications to the PSPAs.

31. The documents reflect predecisional deliberations central to the policy-making process and the considerations made by Treasury officials and staff in connection with these deliberations. Treasury staff used the data and conclusions from Grant Thornton's financial projections in analyzing and formulating projections of the GSE's financial results. Accordingly, these Grant Thornton projections and the resulting analysis were relied upon during deliberations and the decision-making process concerning the Third Amendment.

32. Requiring production of these deliberative materials would have a chilling effect on the ability of Treasury staff to engage with consultants as they develop and execute financial policies. If Treasury officials and staff believe that such draft documents will be disclosed to litigation adversaries, they are unlikely to feel comfortable making use of expert consultants in the policy development process. As a result, Treasury's ability to devise and execute financial policies would be harmed.

### **Deliberations Regarding Valuation Reports**

33. The draft documents in this category relate to the valuation services provided by Grant Thornton to Treasury in connection with the preparation of Treasury's annual financial statements. The documents reflect predecisional deliberations central to the process of preparing and producing Treasury's financial statements and the considerations weighed by Treasury officials and staff in connection with these deliberations. These documents reflect judgment calls and decisions with respect to the preparation of Grant Thornton's reports that are used by Treasury in preparing its annual financial statements. In addition, Treasury staff involved in housing-finance reform reviewed and provided input on Grant Thornton's valuation reports, and these documents reflect that input.

34. Documents challenged by plaintiffs in this category include:

- a. App'x Row 39 (UST00475757): Draft memorandum prepared by Treasury and



Treasury's auditor discussing Fannie Mae financial projections. The document reflects questions and comments from Treasury and its auditor regarding a draft report prepared by Grant Thornton showing Grant Thornton's calculation of future payments to Fannie Mae under the PSPAs. The final version of that draft Grant Thornton report would be used by Treasury to prepare its financial statements. Counsel has informed me that a final copy of Grant Thornton's report has been produced in response to Plaintiffs' Requests.

- b. App'x Row 40 (UST00506346): Draft document prepared by Grant Thornton reflecting predecisional deliberations regarding PSPA valuation methodology. The document is part of Grant Thornton's workpapers that support the valuation reports Grant Thornton prepared. It is the work product of Grant Thornton's valuation team. Accordingly, the document reflects deliberations central to the process of preparing Treasury's financial statements and considerations weighed by Grant Thornton and Treasury officials and staff in connection with those deliberations.

35. Requiring production of these deliberative materials would have a chilling effect on Treasury staff's ability to engage with consultants as they develop Treasury's financial statements. The ability to circulate and receive comments on draft documents is an essential function of this process. Treasury officials and staff must be able to engage candidly and freely with consultants like Grant Thornton. If Treasury officials, staff, and consultants believe that such draft documents will be disclosed to litigation adversaries, they are unlikely to feel at liberty to offer their opinions and fully engage in the process. Disclosure of such documents could deter consultants from providing advice to Treasury in the future. As a result, Treasury's ability to prepare its financial statements would be adversely affected.

#### **Deliberations Regarding the President's Budget**

36. The document in this category is a draft of a document (App'x Row 41, UST00503672) containing estimates for the President's budget. The document reflects draft analyses and projections regarding estimates of future draws and dividend payments to be made by the GSEs. These numbers were prepared for incorporation into the President's budget. The documents reflect predecisional deliberations regarding such estimates.

37. Requiring production of these deliberative materials would have a chilling effect on Treasury's ability to assist in developing the President's budget. The ability to circulate and receive comments on draft budget documents is an essential aspect of the budget process. If Treasury officials and staff believe that such draft documents will be disclosed to litigation adversaries, they are unlikely to feel at liberty to offer their opinions and fully engage in the budget process. As a result, Treasury's ability to provide input into the preparation of the President's budget would be adversely affected.

#### **Deliberations Regarding the Potential Implications of the Terms of the PSPAs**

38. The correspondence in this category are two emails from the same email chain (App'x Rows 42 – 43, UST0061067, UST00385562) discussing the effect of the terms of the amended

PSPAs on long term housing finance reform plans. The documents reflect considerations weighed by Treasury and White House officials in connection with these predecisional deliberations.

39. Requiring production of these deliberative materials would have a chilling effect on the free exchange of opinions and ideas between Treasury and White House officials as they develop and execute financial policies. Treasury's ability to communicate with the White House is an essential function of the policy-making process. If officials believe that such exchanges will be disclosed to litigation adversaries, they are unlikely to offer their opinions and fully engage in the policy development process. As a result, Treasury's ability to devise and execute financial policies would be adversely affected.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of January, 2016.



DAVID R. PEARL  
Executive Secretary  
United States Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, D.C. 20220

Appendix

Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
<b>Deliberations Regarding Housing Finance Reform</b>							
1	UST00500982	Stegman, Michael; Bowler, Timothy; Parrott, Jim; Deese, Brian C.; Miller, Mary; Valverde, Sam [sam.valverde@treasury. gov]	Stegman, Michael; Bowler, Timothy; Parrott, Jim; Deese, Brian C.; Miller, Mary; Eberly, Janice [janice.eberly@treasury.gov]; ExecSecStaff [execsecstaff@do.treas.gov]	Patterson, Mark [mark.patterson@treasury.gov]; Wolin, Neal; LeCompte, Jenni [jenni.lecompte@treasury.gov]; Parrott, Jim; Miller, Mary; Stegman, Michael	5/2/2012	DPP; PCP	Memorandum reflecting confidential communication from senior White House advisors to the President regarding housing policy ideas and initiatives.
2	UST00521902	Stegman, Michael			6/18/2012	DPP; PCP	Memorandum reflecting confidential communication from senior White House advisors to the President regarding housing policy ideas and initiatives.
3	UST00515290	Parrott, Jim; Foster, Jeff	Foster, Jeff; Parrott, Jim		7/29/2011	DPP; PCP; Redacted	Emails reflecting the exchange of information, views, and advice between Treasury officials and White House staff with broad and significant responsibility for investigating and formulating advice for consideration and direction by the President regarding housing finance issues.
4	UST00389678	Foster, Jeff </o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Valverde, Sam <sam.valverde@treasury.gov>; "Fikre, Million" <million.fikre@treasury.gov>		1/31/2012	DPP	Draft memorandum for Secretary containing predecisional deliberations related to mortgage finance market reform proposals.
5	UST00490551	Miller, Sarah <sarah.miller@treasury.gov>	Mlynarczyk, Beth <beth.mlynarczyk@treasury.gov>; "Stegman, Michael" <michael.stegman@treasury.gov>		7/30/2012	DPP	Draft policy paper prepared by Treasury staff containing predecisional deliberations regarding housing finance reform.
6	UST00513480	Foster, Jeff </o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Foster, Jeff		5/21/2012	DPP	Draft policy document prepared by Treasury staff containing predecisional deliberations regarding housing finance reform.

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Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
7	UST00544897	Foster, Jeff <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Foster, Jeff		6/5/2012	DPP	Draft policy paper containing predecisional deliberations concerning housing finance reform.
8	UST00518402	Hester, Barrett (Bret) <barrett.hester@treasury.gov>	Miller, Mary <mary.miller@treasury.gov>	Lee, Sandra <sandra.lee@treasury.gov>, "Johnson, AlfredDisabled" <alfred.johnson@treasury.gov>	2/21/2012	DPP	Draft memorandum for Secretary containing predecisional deliberations related to policy implications of proposed housing finance legislation.
<b>Deliberations Regarding Housing Policies</b>							
9	UST00492699	Stegman, Michael	Mlynarczyk, Beth <beth.mlynarczyk@treasury.gov>	Stegman, Michael <michael.stegman@treasury.gov>	5/26/2012	DPP	Draft speech containing predecisional deliberations regarding housing policies.
10	UST00504514	Bowler, Timothy <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=bowlert">	Mlynarczyk, Beth <beth.mlynarczyk@treasury.gov>; "Stegman, Michael" <michael.stegman@treasury.gov>		7/27/2012	DPP	Draft memorandum prepared by Treasury staff containing predecisional deliberations related to various FHFA/GSE housing finance initiatives.
11	UST00536346	Bowler, Timothy <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=bowlert">	Graves, Donet (Don) <donet.graves@treasury.gov>, "Caldwell, Phyllis" <phyllis.caldwell@treasury.gov>, "Foster, Jeff" <jeff.foster@treasury.gov>		9/6/2011	DPP	Draft memorandum prepared by Treasury staff containing predecisional deliberations regarding housing policy reform, including the future of the GSEs.
12	UST00548270	Stegman, Michael	Miller, Mary <mary.miller@treasury.gov>	Stegman, Michael <michael.stegman@treasury.gov>	2/4/2012	DPP	Draft memorandum containing predecisional deliberations related to housing policy and housing finance reform.

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Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
<b>Deliberations Regarding PSPA Modifications</b>							
13	UST00061421	Miller, Mary <mary.miller@treasury.gov>	Valverde, Sam <sam.valverde@treasury.gov>; "Adeyemo, Adewale (Wally)" <adewale.adeyemo@treasury.gov>; "Massad, Timothy" <timothy.massad@treasury.gov>; "Stegman, Michael" <michael.stegman@treasury.gov>; "Bowler, Timothy" <timothy.bowler@treasury.gov>; "Deese, Brian C." <brian_c.deese@who.eop.gov>	Woolf, AndrewDisabled <andrew.woolf@treasury.gov>	7/20/2012	DPP	Draft document prepared by Treasury staff containing predecisional deliberations related to potential modification of PSPAs.
14	UST00384501	Foster, Jeff <jeff.foster@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>; "Stegman, Michael" <michael.stegman@treasury.gov>		6/10/2012	DPP	Draft presentation prepared by Treasury staff containing predecisional deliberations related to PSPA amendment considerations.
15	UST00478535	Foster, Jeff </o=ustreasury/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=fosterj">	Stegman, Michael <michael.stegman@treasury.gov>		6/7/2012	DPP	Draft document containing predecisional deliberations concerning potential modifications to PSPAs.
16	UST00502258	Foster, Jeff <jeff.foster@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>; "Mlynarczyk, Beth" <beth.mlynarczyk@treasury.gov>; "Chepenik, Adam" <adam.chepenik@treasury.gov>; "Franchot, NicholasDisabled" <nicholas.franchot@treasury.gov>; "Stegman, Michael" <michael.stegman@treasury.gov>		3/5/2012	DPP	Draft policy document prepared by Treasury staff containing predecisional deliberations regarding proposed PSPA.
17	UST00536560	ExecSecProcessUnit <execsecprocessunit@treasury.gov>	TFG75 <nauset75@treasury.gov>	ExecSecProcessUnit <execsecprocessunit@treasury.gov>, ExecSecStaff <execsecstaff@do.treas.gov>	6/1/2012	DPP	REDACTED VERSION Draft document containing predecisional deliberations concerning potential modification of the PSPAs.
18	UST00384146	Goldblatt, Alan <alan.goldblatt@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>		7/3/2012	DPP	Draft presentation prepared by Treasury staff containing predecisional analysis and information related to financial forecasts for Fannie Mae.

Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
19	UST00389662	Foster, Jeff <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Valverde, Sam <sam.valverde@treasury.gov>; "Fikre, Million" <million.fikre@treasury.gov>		1/31/2012	DPP	Draft memorandum for Secretary containing predecisional deliberations related to GSE restructuring.
20	UST00407182	Goldblatt, Alan <alan.goldblatt@treasury.gov>	Chepenik, Adam <adam.chepenik@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>		7/5/2012	DPP	Predecisional, deliberative, draft analysis of GSE financial projections prepared by Treasury staff.
21	UST00407342	Goldblatt, Alan <alan.goldblatt@treasury.gov>	Chepenik, Adam <adam.chepenik@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>		6/13/2012	DPP	Draft analysis reflecting predecisional deliberations concerning GSE financial projections.
22	UST00472229	Chepenik, Adam <adam.chepenik@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>; "Mlynarczyk, Beth" <beth.mlynarczyk@treasury.gov>		2/26/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury staff.
23	UST00472232	Chepenik, Adam <adam.chepenik@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>; "Mlynarczyk, Beth" <beth.mlynarczyk@treasury.gov>		2/26/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury staff.
24	UST00539251	Chepenik, Adam <adam.chepenik@treasury.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>; "Goldblatt, Alan" <alan.goldblatt@treasury.gov>		6/6/2012	DPP	Draft presentation for OMB containing predecisional deliberations concerning Treasury proposals for modifying the terms of the PSPAs.
<b>Deliberations Regarding GSE Projections</b>							
25	UST00409040	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		3/12/2012	DPP	Draft document prepared for Treasury by consultant containing predecisional deliberations concerning GSE financial projections.
26	UST00473767	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.
27	UST00473770	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.

REDACTED VERSION

A81

Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
28	UST00473773	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.
29	UST00473776	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.
30	UST00473779	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.
31	UST00473782	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Foster, JeffDisabled <jeff.foster@treasury.gov>		12/10/2011	DPP	Predecisional financial analysis prepared by Treasury consultant reflecting Treasury deliberations regarding GSEs.
32	UST00481423	Foster, Jeff <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Chepenik, Adam <adam.chepenik@treasury.gov>		12/13/2011	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
33	UST00481424	Foster, Jeff <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Chepenik, Adam <adam.chepenik@treasury.gov>		12/13/2011	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
34	UST00481425	Foster, Jeff <"/o=ustreasury/ou=exchange administrative group(fydbohf23spdlt)/cn=recipients/cn=fosterj">	Chepenik, Adam <adam.chepenik@treasury.gov>		12/13/2011	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
35	UST00556294	Chepenik, Adam <adam.chepenik@treasury.gov>	Foster, JeffDisabled <jeff.foster@treasury.gov>		1/6/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
36	UST00556295	Chepenik, Adam <adam.chepenik@treasury.gov>	Foster, JeffDisabled <jeff.foster@treasury.gov>		1/6/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
37	UST00556459	Chepenik, Adam <adam.chepenik@treasury.gov>	Foster, JeffDisabled <jeff.foster@treasury.gov>		1/6/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.
38	UST00556460	Chepenik, Adam <adam.chepenik@treasury.gov>	Foster, JeffDisabled <jeff.foster@treasury.gov>	A 82	1/6/2012	DPP	Predecisional deliberative analysis of GSE financial projections prepared by Treasury consultant.

Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
<b>Deliberations Regarding Grant Thornton's Valuation Reports</b>							
39	UST00475757	Rominiecki, Ryan R <rrominiecki@kpmg.com>	<anne.eberhardt@us.gt.com>; <carole.banks@treasury.gov>; <kawan.taylor@treasury.gov>; <shawn.mickey@treasury.gov>; <jeff.foster@treasury.gov>; <beth.mlynarczyk@treasury.gov>; <groverj@oig.treas.gov>; <bankolea@oig.treas.gov>; <fitzgeraldm@oig.treas.gov>; <cumbar@oig.treas.gov>; <bob.faber@treasury.gov>; <brad.wilson@us.gt.com>; <david.dufendach@us.gt.com>; <justin.burchett@us.gt.com>	Tchamourliyski, Yuriy M<ytchamourliyski@kpmg.com>; "Lee, Shana H" <shilee@kpmg.com>	11/1/2011	DPP	Draft memorandum prepared containing predecisional deliberative analysis of financial projections for Fannie Mae.
40	UST00506346	Eberhardt, Anne <anne.eberhardt@us.gt.com>	Banks, Carole <carole.banks@treasury.gov>; "Mickey, Shawn" <shawn.mickey@treasury.gov>; "Taylor, Kawan" <kawan.taylor@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>; "Fitzgerald, Michael P." <fitzgeraldm@oig.treas.gov>; "Rominiecki, Ryan" <rrominiecki@kpmg.com>	Short, John <john.short@us.gt.com>; "Dufendach, David" <david.dufendach@us.gt.com>; "Burchett, Justin" <justin.burchett@us.gt.com>	6/29/2012	DPP	Document prepared by Treasury consultant reflecting predecisional deliberations concerning financial conditions of the GSEs.
<b>Deliberations Regarding the President's Budget</b>							
41	UST00503672	Chepenik, Adam <adam.chepenik@treasury.gov>	Miller, Mary <mary.miller@treasury.gov>	Hester, Barrett (Bret)Disabled <barrett.hester@treasury.gov>; "Bowler, Timothy" <timothy.bowler@treasury.gov>; "Foster, JeffDisabled" <jeff.foster@treasury.gov>; "Johnson, AlfredDisabled" <alfred.johnson@treasury.gov>	1/10/2012	DPP	Draft document prepared by Treasury staff containing predecisional deliberations regarding GSE budget estimates.  <b>REDACTED VERSION</b>
<b>Deliberations Regarding the Potential Implications of the Terms of the PSPAs</b>							
42	UST00061067	Parrott, Jim <james_m_parrott@who.eop.gov>	Bowler, Timothy <timothy.bowler@treasury.gov>		8/18/2012	DPP; Redacted	Email communications between Treasury and White House staff containing predecisional deliberations related to the terms of the PSPAs.



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Row	Starting Bates Number	From	To	CC	Doc Family Date	Privileges	Description
43	UST00385562	Bowler, Timothy <"/o=ustreasury/ou=exchange administrative group(fyidbohmf23spdlt)/cn=recipients/cn=bowlert">	Parrott, Jim <james_m_parrott@who.eop.gov>		8/18/2012	DPP; Redacted	Email communications containing predecisional deliberations related to the budget and the amended PSPAs.

# **Exhibit A**



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

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**MEMORANDUM FOR DAVID R. PEARL, EXECUTIVE SECRETARY**

**FROM:** Jacob J. Lew  
Secretary of the Treasury

**SUBJECT:** Delegation of Authority to Invoke the Deliberative Process Privilege:  
*Fairholme Funds, Inc. v. United States*

This memorandum delegates my authority to invoke the deliberative process privilege to the Executive Secretary with respect to documents and information at issue in *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.).

The Executive Secretary may exercise this delegated authority with respect to agency records or information that are predecisional and deliberative, including advisory opinions, recommendations, and deliberations that make up part of the process by which Treasury Department decisions and policies are formulated, when he determines that the release of such records would cause unacceptable harm to that process.

This authority may not be re-delegated.



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DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

August 15, 2012

**ACTION MEMORANDUM FOR SECRETARY GEITHNER****FROM:** Michael Stegman, Counselor**SUBJECT:** Third Amendments to the Senior Preferred Stock Purchase Agreements with Fannie Mae and Freddie Mac**Recommendation**

That you **approve** and execute the attached Third Amendments to the Amended and Restated Senior Preferred Stock Purchase Agreements (PSPAs) between Treasury and each of Fannie Mae and Freddie Mac (the GSEs). The Federal Housing Finance Agency, as conservator of both Fannie Mae and Freddie Mac, will be executing the Third Amendments on behalf of the GSEs.

           **Approve**..... **Disapprove**..... **Let's Discuss****Background and Amendments**

Section 1117 of the Housing and Economic Recovery Act of 2008 (HERA) authorized Treasury to purchase "obligations and other securities" issued by the GSEs. Under this HERA authority, Treasury entered into the PSPAs and purchased senior preferred stock from each GSE at the same time that the GSEs were put into conservatorship. The purposes of preferred stock purchases and the Treasury funding commitments in the PSPAs were to (i) provide stability to the financial markets, (ii) prevent disruptions in the availability of mortgage finance, and (iii) protect the taxpayers.

The PSPAs initially provided for Treasury to make funding advances up to \$100 billion to each GSE to help them maintain a positive net worth. In February 2009, the \$100 billion cap for each GSE was increased to \$200 billion. In December 2009, the \$200 billion cap for each GSE was replaced with a formula – the cap adjusts upwards in an amount equal to the amount of draws made by the GSEs through 2012. At the end of 2012, the funding caps under the PSPAs will be permanently fixed based on the December 31, 2012 financial results of the GSEs. At that time, Fannie Mae and Freddie Mac will have only \$124.8 billion and \$149.3 billion (less any positive net worth in December 2012), respectively, of funding capacity remaining under the PSPAs. Therefore, we propose that the PSPAs be amended by the following modifications so that the GSEs continue to be able to meet current and legacy obligations after the PSPA caps are fixed at the end of 2012 and so that the GSEs may continue to make mortgage credit available.

- **Replace the fixed 10 percent dividend with a net worth sweep dividend** – Quarterly dividend payments starting in 2013 will equal the positive net worth of the GSEs (i.e., GAAP assets less liabilities at quarter end), less a defined Capital Reserve Amount. The

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Capital Reserve Amount will be \$3.0 billion in 2013 and will be reduced annually on a straight-line basis to zero in 2018.

- ***Accelerate the wind-down of the retained investment portfolios*** – The required reduction rate for the retained investment portfolios will be increased from 10 percent per annum to 15 percent until such time that each GSE's portfolio reaches a target \$250 billion balance (\$250 billion was set in the original PSPAs). The 15 percent reduction rate requirement will result in reaching the \$250 billion target by 2018 (vs. 2022 under the existing 10 percent reduction rate requirement).
- ***Require an annual risk management plan be delivered to Treasury*** – On an annual basis, each GSE will submit to Treasury a plan that details the steps it will take to reduce the financial and operational risk profile associated with both their mortgage guarantee and retained investment portfolio businesses in order to help protect taxpayers from future losses.
- ***Suspend the Periodic Commitment Fee setting process*** – Treasury will suspend setting any Periodic Commitment Fee (PCF), which is intended to compensate taxpayers for the financial support that Treasury provides to the GSEs through the PSPAs, for so long as the net worth sweep dividend feature of the preferred stock remains in effect. No PCF has been paid to date and the GSEs have not generated sufficient earnings to do so.
- ***Allow for asset and property sales less than \$250 million in fair market value without prior written consent from Treasury*** – Currently Treasury must give prior written consent before the GSEs may sell any assets and properties outside of their ordinary course of business. This change allows for small asset sales without written consent in order to facilitate a more rapid wind-down of the GSEs legacy assets.

## **Purpose of Amendments**

### ***Replace the fixed 10 percent dividend with a net worth sweep dividend***

Replacing the fixed 10 percent dividend with a net worth sweep dividend is necessary to avoid the risk of the GSEs potentially exhausting the finite amount of funding capacity that will remain available to them under the PSPAs beginning in 2013 through the payment of dividends back to Treasury. Under the current financial arrangement, the GSEs draw to pay dividends if they are unable to generate enough comprehensive income to meet the fixed 10 percent dividend requirement. This modification will end the circularity of Treasury funding the dividend payments that the GSEs pay back to Treasury so that any future draws on the PSPAs are only used to fund operating losses.

The GSEs are obligated to pay Treasury a 10 percent dividend on the \$189 billion that Treasury has invested in the GSEs. The GSEs need to generate approximately \$19 billion in yearly income in order to pay the 10 percent dividend without drawing on the PSPAs.

Under Treasury's projections (and the projections of certain third-party experts), the GSEs will not generate enough income to meet their dividend requirements in the long term. Absent a modification, the continued draws under the PSPAs to pay the dividends will exhaust the GSEs' finite amount of remaining funding capacity and thereby lead to their insolvency. Investors in mortgage-backed securities guaranteed by the GSEs are focused on this issue, given the long life of the GSEs' guarantees.

By modifying the dividend to a net worth sweep, the GSEs will only make draws under the PSPAs when they incur losses due to business activities, rather than for paying dividend payments. Under the net worth sweep dividend, if their quarterly net worth is positive (i.e., if assets are greater than liabilities), this positive net worth amount, less a defined capital reserve amount, will be paid to Treasury as a dividend. If the quarterly net worth is negative, Treasury will make a funding advance under the PSPAs in the same way that it has been doing to keep the GSE solvent. The economic rationale behind the capital reserve amount – defined as being \$3 billion in 2013 and declining annually on a straight-line basis to zero beginning in 2018 – is to avoid having unnecessary PSPA draws that could result from price volatility in the GSEs' mortgage investment portfolios.

In summary, the modification has the following benefits for the government:

- (1) It eliminates the potential for the circularity of Treasury making payments to the GSEs to fund the dividends that the GSEs pay back to Treasury the following quarter;
- (2) It captures all future net income and asset appreciation at the GSEs for reimbursement to taxpayers; and
- (3) It reduces the risk of potential future payments to the GSEs under the PSPAs as such payments would only be made when needed to fund quarterly net losses.

The modification should also help maintain market stability by preserving Treasury's ability to support the continued solvency of the GSEs over a longer time horizon. As a result of the change, the GSEs will be more financially sound, which should lower their funding costs and improve future profitability. GSE-based mortgage rates should also benefit as investors will likely be more confident in purchasing longer-term GSE mortgage-backed securities.

Because this modification relates to vested contract rights of the government, Treasury staff consulted with representatives of the Justice Department's Commercial Litigation Branch. The Justice Department approved Treasury's request for authority to modify its dividend rights under the PSPAs with the GSEs. The Justice Department agreed that the proposed modification is fiscally prudent and in the best interest of the United States.

#### ***Accelerate wind-down of retained investment portfolios***

The accelerated wind-down of the retained investment portfolios will help reduce the financial and operational risk profile of the GSEs at a faster pace. Faster portfolio reduction could also help encourage non-performing loan sales. These sales will reduce the financial risk profile of

the GSEs as these assets are the most exposed to a fall in home prices, as well as increase the use of alternatives to foreclosure by moving the assets to specialized servicers.

***Require an annual risk management plan to be delivered to Treasury***

An annual risk management plan from each of the GSEs will help protect the taxpayer. Each plan will review in reasonable detail the steps the GSEs will take to reduce their financial and operational risk profile. Treasury and the GSEs' regulator, FHFA, can use these plans to evaluate the progress each GSE is making in reducing the potential need for future taxpayer support. The plans will also serve as an opportunity for Treasury to communicate directly with the GSEs if there are concerns surrounding the then current or potential future risk management practices at each GSE.

***Suspend the Periodic Commitment Fee setting process***

The PSPAs call for Treasury to set a Periodic Commitment Fee (PCF) payable by each GSE that is intended to compensate taxpayers for the financial support that Treasury provides to each GSE through the PSPAs. The PSPAs allow Treasury to waive the Periodic Commitment Fee for up to one year at a time at its sole discretion based on adverse conditions in the mortgage market. Since 2008, Treasury has made the determination to waive PCF for the following reasons: (1) the expected financial draws from Fannie Mae and Freddie Mac were likely to be in excess of dividends those firms pay back to taxpayers under the PSPAs, in other words, setting a PCF would not produce any additional income for taxpayers; and (2) setting the PCF could place greater strains on the housing market recovery, which remains fragile. Since the net worth sweep dividend will capture all future net income and asset appreciation at the GSEs for reimbursement to taxpayers, there is no purpose served by requiring additional compensation to taxpayers, especially when that additional compensation would have to be funded through additional draws under the PSPAs beginning in 2018. Therefore, the amendment will suspend the PCF-setting process for as long as the net worth sweep provision in the preferred stock purchased by Treasury remains in effect.

***Allow non-ordinary course asset and property sales of less than \$250 million in fair market value without prior written consent from Treasury***

Allowing the GSEs to undertake non-ordinary course sales of assets and property of value less than \$250 million will facilitate a more rapid wind-down of their legacy, pre-conservatorship assets as well as better allow the GSEs to manage their risk in a timely and effective manner. Requiring Treasury to approve each individual non-ordinary course asset sale is administratively burdensome for the GSEs and FHFA and results in delays in completing asset dispositions.

**Attachments:**

Counterparts of Third Amendments to PSPAs

- Two copies each of (1) Fannie Mae Third Amendment Counterpart and (2) Freddie Mac Third Amendment Counterpart


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**Action Memorandum Clearance Sheet**

Subject: Amendments to the Senior Preferred Stock Purchase Agreement with Fannie Mae and Freddie Mac

Drafted: Beth Mlynarczyk -- Office of the Counselor to the Secretary on Housing Finance

Approved: Michael Stegman -- Counselor to the Secretary for Housing Finance (8/13)  
Mary J. Miller -- Undersecretary for Domestic Finance (8/13)

Cleared: Tim Bowler -- Capital Markets (8/13)  
Peter Bieger -- Banking and Finance (8/13)  
Alex Krulic -- Office of General Counsel (8/15)  
Sam Valverde -- ExecSec (8/13)  
Rebecca Ewing -- ExecSec (8/15)   
Megan Moore -- Legislative Affairs (8/13)



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**FEDERAL HOUSING FINANCE AGENCY****STATEMENT**

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For Immediate Release  
August 17, 2012

**Contact:** Corinne Russell (202) 649-3032  
Stefanie Johnson (202) 649-3030

**Statement of FHFA Acting Director Edward J. DeMarco On  
Changes to Fannie Mae and Freddie Mac  
Preferred Stock Purchase Agreements**

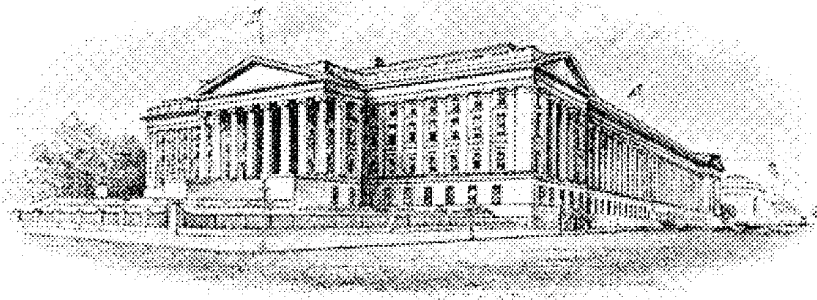
“The steps taken today between the Federal Housing Finance Agency (FHFA), as conservator of Fannie Mae and Freddie Mac, and the U.S. Department of the Treasury to amend the Preferred Stock Purchase Agreements (PSPAs) are important for ensuring stability in the housing finance market. These steps reaffirm our commitment to move forward with the components of the Strategic Plan for the Conservatorships of Fannie Mae and Freddie Mac, which includes building for the future, gradually contracting their operations, and maintaining foreclosure prevention activities and credit availability. Replacing the current fixed dividend in the PSPAs with a variable dividend based on net worth will help to ensure stability, fully capture financial benefits for taxpayers, and eliminate the need for Fannie Mae and Freddie Mac to continue to borrow from the Treasury Department to pay dividends. As Fannie Mae and Freddie Mac shrink, the continued payment of a fixed dividend could have called into question the adequacy of the financial commitment contained in the PSPAs. In addition, the faster reduction in the retained mortgage portfolio will further reduce risk exposure and simplify the operations of Fannie Mae and Freddie Mac.

“These changes provide certainty to Fannie Mae, Freddie Mac and market participants as they continue to perform their critical mission of providing liquidity and stability to the country’s housing market. The steps today are also important as Congress and policymakers contemplate the future of Fannie Mae and Freddie Mac.”

[Link to FHFA Strategic Plan for the Conservatorships of Fannie Mae and Freddie Mac](#)

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*The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than \$5.7 trillion in funding for the U.S. mortgage markets and financial institutions.*



## U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS

**EMBARGOED FOR 8:30AM EDT: August 16, 2012**  
**CONTACT: Treasury Public Affairs (202) 622-2960**

### **TREASURY DEPARTMENT ANNOUNCES FURTHER STEPS TO EXPEDITE WIND DOWN OF FANNIE MAE AND FREDDIE MAC**

*Modifications to Preferred Stock Purchase Agreements Will Make Sure That Every Dollar of Earnings Fannie Mae and Freddie Mac Generate Will Benefit Taxpayers*

*Announcement Will Support the Continued Flow of Mortgage Credit during a Responsible Transition to a Reformed Housing Finance Market*

**WASHINGTON** -- The U.S. Department of the Treasury today announced a set of modifications to the Preferred Stock Purchase Agreements (PSPAs) between the Treasury Department and the Federal Housing Finance Agency (FHFA) as conservator of Fannie Mae and Freddie Mac (the Government Sponsored Enterprises or GSEs) that will help expedite the wind down of Fannie Mae and Freddie Mac, make sure that every dollar of earnings each firm generates is used to benefit taxpayers, and support the continued flow of mortgage credit during a responsible transition to a reformed housing finance market.

“With today’s announcement, we are taking the next step toward responsibly winding down Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market,” said Michael Stegman, Counselor to the Secretary of the Treasury for Housing Finance Policy. “As we continue to work toward bi-partisan housing finance reform, we are committed to putting in place measures right now that support continued access to mortgage credit for American families, promote a responsible transition, and protect taxpayer interests.”

The modifications to the PSPAs announced today are consistent with FHFA’s strategic plan for the conservatorship of Fannie Mae and Freddie Mac that it released in February 2012. The modifications include the following key components:

**Accelerated Wind Down of the Retained Mortgage Investment Portfolios at Fannie Mae and Freddie Mac**

The agreements require an accelerated reduction of Fannie Mae and Freddie Mac's investment portfolios. Those portfolios will now be wound down at an annual rate of 15 percent – an increase from the 10 percent annual reduction required in the previous agreements. As a result of this change, the GSEs' investment portfolios must be reduced to the \$250 billion target set in the previous agreements four years earlier than previously scheduled.

**Annual Taxpayer Protection Plan**

To support a thoughtfully managed wind down, the agreements require that on an annual basis, each GSE will – under the direction of their conservator, the Federal Housing Finance Agency – submit a plan to Treasury on its actions to reduce taxpayer exposure to mortgage credit risk for both its guarantee book of business and retained investment portfolio.

**Full Income Sweep of All Future Fannie Mae and Freddie Mac Earnings to Benefit Taxpayers for Their Investment**

The agreements will replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward.

This will help achieve several important objectives, including:

- Making sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms.
- Ending the circular practice of the Treasury advancing funds to the GSEs simply to pay dividends back to Treasury.
- Acting upon the commitment made in the Administration's 2011 White Paper that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.
- Supporting the continued flow of mortgage credit by providing borrowers, market participants, and taxpayers with additional confidence in the ability of the GSEs to meet their commitments while operating under conservatorship.
- Providing greater market certainty regarding the financial strength of the GSEs.

For a copy of the modification agreements for the PSPAs, please visit, [link](#) and [link](#).

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Treasury's Capital Support For The GSEs  
Summary Review and Key Considerations

August 8, 2012

## Discussion Agenda

Sensitive / Pre-Decisional

***The financial support agreements that Treasury has in place with Fannie Mae and Freddie Mac (the GSEs) are unsustainable and need to be modified.***

1. Review of Treasury's capital support agreements with Fannie Mae and Freddie Mac (the GSEs)
2. Overview of why Treasury needs to modify the current capital support agreements
3. Proposed modification of the agreements
4. Financial impact associated with the proposed modification
  - Taxpayers
  - The GSEs
  - The financial markets
5. Key considerations before moving forward with a modification

2

PRE-DECISIONAL – MARKET SENSITIVE – PLEASE DO NOT DISTRIBUTE

## Treasury's Support of the GSEs

Sensitive / Pre-Decisional

- In 2008, Fannie Mae and Freddie Mac (the GSEs) were put into conservatorship
- Contemporaneous with the conservatorship, Treasury agreed to support the GSEs by providing each GSE with a \$100B stand by capital commitment, the Preferred Stock Purchase Agreements (PSPAs)
  - Treasury agreed to buy *preferred stock* from each GSE any time their liabilities exceeded their assets (i.e. Treasury “backstopped” the GSE solvency so they could continue to operate)
  - Treasury earns a *10% dividend* on the preferred stock it purchases from the GSEs
- In 2009 the PSPAs were modified. The modifications allowed Treasury to provide *unlimited capital support to the GSEs through year end 2012*
  - At year end 2012, the amount of future support for the GSEs is capped (\$125B to Fannie Mae, \$149B to Freddie Mac)
- Treasury's support has been meaningful due to credit losses at the GSEs and the need to fund the dividends the GSEs are required to pay Treasury
  - Preferred investments to date have totaled \$189B (\$117B to Fannie Mae, \$72B to Freddie Mac)
  - \$163B has been used to fund operating losses, \$26B to fund dividend payments to Treasury

3

PRE-DECISIONAL – MARKET SENSITIVE – PLEASE DO NOT DISTRIBUTE

## Need to Change The Preferred Stock Dividend Rate

Sensitive / Pre-Decisional

- Treasury is owed a 10% dividend on the \$189B of preferred stock it has invested in the GSEs
- The GSEs need to generate ~\$19B in yearly income in order to pay the 10% dividend *without drawing on Treasury's backstop line*
- If the enterprises are unable to generate the income necessary to meet the 10% dividend, they will draw on the PSPAs to fund dividend payments back to Treasury (i.e. *circular flows*)
- Longer term, the GSEs will not generate enough income to meet their dividend requirement *due to the enterprises being wound down*
- Absent a change, this will lead to the GSE's insolvency as they will exhaust the finite amount of capital support remaining after 2012 (see next slide for details)
- Investors are focused on this issue given the long life of the GSEs guarantees (i.e. the core function of the GSEs is to guarantee 30 year mortgage backed securities)



## Illustrative Example: Fannie Mae Financial Projections

Sensitive / Pre-Decisional

(\$ billions)	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Net Worth: Start of the Year	0	2	0	0	0	0	0	0	0	0	0	0	0
Projected Income	14	10	8	6	5	4	4	4	4	4	4	4	4
Dividends Paid - 10% Rate	-12	-12	-12	-12	-13	-13	-14	-15	-16	-18	-19	-21	-22
Net Worth: Year End	2	0	-3	-6	-8	-9	-10	-11	-12	-14	-15	-17	-18
Required Capital From Treasury	0	0	3	6	8	9	10	11	12	14	15	17	18
Remaining PSPA Capacity	125	125	122	115	107	98	87	76	64	50	35	18	0

Note: Net Worth is defined as Assets less Liabilities on a GAAP basis  
Source: FHFA and Grant Thornton Projections, Treasury staff estimates

- As the financial projections above highlight, Fannie Mae will be insolvent in 2024 due to the need to pay Treasury the fixed 10% preferred stock dividend
- This will be the case despite expectations for future profitability

## Proposed Solution: Modify the Dividend Requirement

Sensitive / Pre-Decisional

- Modify the GSEs' obligation to pay dividends to Treasury:
  - Replace the current fixed 10% dividend with a “net worth sweep” dividend
    - If quarterly net worth is positive (i.e. assets are greater than liabilities), all of that value will be paid to Treasury as a dividend
    - If quarterly net worth is negative , Treasury will make a capital injection to keep the GSE solvent
- The above will result in Treasury *receiving all future income generated by the GSEs*
- The proposal would also:
  - Eliminate the circularity of Treasury funding dividends paid to Treasury
  - Ensure that future capital draws are only used to protect the solvency of the GSEs

6

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## Economic and Market Impact of the Proposed Modifications

Sensitive / Pre-Decisional

- Taxpayers are in a stronger position as *all* future net income from the GSEs will be paid directly to Treasury
- The GSEs will be more financially sound which should lower their funding cost and improve future profitability
- GSE based mortgage rates should benefit as investors will likely be more confident in purchasing GSE mortgaged backed securities

7

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## Potential Criticisms

Sensitive / Pre-Decisional

- Treasury is “bailing-out” the GSEs again, and did not obtain any help from the GSEs for struggling homeowners
- The dividend modification will allow the GSEs to exist longer in their current form
- Does not demonstrate meaningful progress on housing finance reform

8

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April 13, 2012

**INFORMATION MEMORANDUM FOR SECRETARY GEITHNER****FROM:** Mary John Miller, Under Secretary for Domestic Finance**SUBJECT:** GSE Budgeting and Cost Estimates

This memorandum was prepared in response to your inquiry for an explanation on how Treasury staff developed the \$28 billion net investment cost estimate of the Senior Preferred Stock Purchase Agreements (PSPAs) with Fannie Mae and Freddie Mac (the GSEs).

**BACKGROUND**

As part of the Administration's annual reporting and budgeting requirements, Treasury engaged Grant Thornton to prepare independent, third-party financial projections for the GSEs. Grant Thornton developed their forecasts based upon the Projections of the Enterprises' Financial Performance report published by FHFA in October 2011. Their analysis projects forward the expected net income, PSPA draws, and required dividend payments under an optimistic, base, and downside case. For the purposes of the President's FY 2013 Budget, which requires a 10 year forecast, Treasury and the Office of Management and Budget (OMB) relied upon Grant Thornton's base case scenario to develop a cost estimate using the key assumptions listed on the next page.

As highlighted in the bottom right of Exhibit 1, the President's FY2013 Budget forecast implies cumulative net payments by Treasury to the GSEs of approximately \$28 billion through 2022. This represents the difference between \$226 billion cumulative liquidity payments and \$197 billion cumulative dividends payments from the GSEs. At OMB's request, the figures presented in the FY 2013 budget only show expected liquidity payments and dividend payments separately through 2014; thereafter, expected liquidity payments and dividend payments are netted into the dividend payments line.

**Exhibit 1****2013 Budgetary Cost of Treasury Support for Fannie Mae and Freddie Mac**

(In billions of dollars)

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Totals			
															2013- 2017	2013- 2022	2009 - 2022	
<b>Transactions between Treasury and Fannie Mae/ Freddie Mac:</b>																		
Senior Preferred Liquidity Payments to Fannie/Freddie.....	96	53	21	40	13	4										16.8	16.8	225.5
Senior Preferred Dividend Payments from Fannie/Freddie...	-4	-12	-16	-19	-22	-23	-20	-17	-13	-11	-10	-10	-10	-10		-94.8	-146.4	-197.3
Net Payments.....	91	40	5	21	-9	-18	-20	-17	-13	-11	-10	-10	-10	-10		-78.0	-129.6	28.3

**CRITICAL ASSUMPTIONS**

Key assumptions used in Grant Thornton's analysis include:

1. *Utilized the Federal Housing Finance Agency (FHFA) modeling assumptions* – Grant Thornton applied the same assumptions as those used by FHFA in their report published in October 2011. FHFA forecasted gross draws and dividends at the GSEs through 2014 using a series of assumptions regarding housing prices, interest rates, securities prices, default and recovery rates, and growth of the guarantee and retained portfolio books of business. Importantly, the FHFA base case assumed home price declines of 35 percent from peak-to-trough based on the Case-Shiller National House Price Index and a 15 percent home price increase from the trough in 1Q 2012 through the end of the FHFA forecast period in 2014. FHFA's base case scenario was used by Grant Thornton to calculate their base case 10-year forecast, which corresponds to the \$28 billion cumulative net payment in the President's FY 2013 Budget.
2. *No Guarantee Fee Increases* – Subsequent to the passage of the Temporary Payroll Tax Cut Continuation Act of 2011 (H.R. 3765) passed by Congress in December 2011, the Grant Thornton analysis was adjusted to exclude incremental revenue generated by any increase in guarantee fees. Grant Thornton agreed to use this conservative approach because the timing, magnitude and ability to retain revenue from future guarantee fee increases remains uncertain. The 10 basis point guarantee fee increase to fund the Temporary Payroll Tax Cut Continuation Act is estimated to generate \$35.7 billion in incremental proceeds that will be deposited directly to Treasury. This amount is not taken into account in the \$28 billion cost estimate.
3. *No Change to the Size of the Guarantee Book of Business* – As shown in the attachment, Grant Thornton assumed the average size of the guarantee book of business at both GSEs remains approximately the same through the entire forecast period. Fannie Mae's guarantee book is expected to remain approximately \$2.9 trillion and Freddie Mac's guarantee book is expected to remain approximately \$1.8 trillion. Higher guarantee fees, changes in loan limits or other actions may reduce the number of loans guaranteed by the GSEs – and hence the size of the GSEs guarantee book of business – but these changes are not accounted for in the forecasts.
4. *Retained Portfolio Book of Business Reduced to \$250 billion* – Consistent with Section 5.7 of the PSPAs, Grant Thornton's forecast reduces the retained mortgage book of business at both GSEs by 10 percent a year until each one reaches \$250 billion in notional principal outstanding (which is expected to occur around 2020).
5. *No Discounting* – The \$28 billion figure is not discounted on a present value basis. In present value terms, depending on the discount rate assumed, the overall cost of the PSPAs would be higher.

## CONGRESSIONAL BUDGET OFFICE (CBO) SCORING METHODOLOGY

CBO calculates the net investment cost of the PSPAs differently than OMB.<sup>1</sup> The Administration treats Fannie Mae and Freddie Mac as nongovernmental organizations and records payments between them and Treasury on a cash basis. In contrast, CBO projects the budgetary impact of Fannie Mae's and Freddie Mac's operations as if they were being conducted by a federal agency, because of the degree of management and financial control that the government exercises over the two entities. Therefore, CBO estimates the net subsidy costs of preexisting commitments and new loans and guarantees to be issued by the entities. It counts those costs as "federal outlays" in the year of issuance.

The CBO methodology includes several steps. First, they forecast the new book of guarantee business per annum at the GSEs based on CBO's annual projection of total mortgage loan originations and a constant market share at the GSEs. They then project the net cash flows (fee income less claims paid) for each year's new guarantee book of business through the life of the book. Third, they calculate a net present value (NPV) based upon their projections by discounting the relevant net cash flows using a fair-value estimate that uses a rate a private entity would need to be paid to voluntarily take on the commitments of the GSEs without any federal backing (the adjusted credit reform treatment). A similar approach is required by law to be used in estimating subsidies for the Troubled Assets Relief Program.<sup>2</sup>

This methodology estimates the total future cost of the GSEs from the 2012 through 2022 vintages will be \$43 billion.<sup>3</sup> CBO also assessed a subsidy of \$88 billion for the 2009-2011 vintages<sup>4</sup> and a \$248 billion subsidy on preexisting commitments when the GSEs entered conservatorship. Collectively, these add up to a total aggregate cost of government support of \$379 billion. To reiterate, CBO's methodology is different than the OMB and Grant Thornton approach and therefore the two cost estimates are difficult to compare.

## CONCLUSION

The \$28 billion value was generated by Grant Thornton and used primarily for budgetary purposes. The assumptions that underlie this estimate should be kept in mind when using it. Estimates for the cost of the PSPAs can and will vary given the inherent uncertainty about housing market conditions as well as what happens to the GSEs over the next ten years. Please let us know if you would like to discuss these methodologies, or other cost projections, further.

## ATTACHMENTS

1. FHFA Projections of the Enterprises' Financial Performance, released October 2011
2. CBO's Budgetary Treatment of Fannie Mae and Freddie Mac, dated January 2010

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<sup>1</sup> See Congressional Budget Office reports on CBO's Budgetary Treatment of Fannie Mae and Freddie Mac (Jan. 2010), and Fannie Mae, Freddie Mac, and the Federal Role in the Secondary Mortgage Market (Dec. 2010).

<sup>2</sup> See section 123 of the Emergency Economic Stabilization Act of 2008 (part of Public Law 110- 343) and title IV of the Supplemental Appropriations Act of 2009 (P.L. 111-32).

<sup>3</sup> As estimated by the CBO's updated budget projections for fiscal years 2012 to 2022, dated March 13, 2012.

<sup>4</sup> CBO calculated a subsidy for the GSEs of \$43 billion in 2009, \$40 billion in 2010, and \$5 billion in 2011.

**Information Memorandum Clearance Sheet**

Subject: GSE Budgeting and Cost Estimates  
Drafted: Adam Chepenik, 622-2534  
Approved: Counselor to the Secretary – Michael Stegman (OK 4/12)  
Cleared: Capital Markets – Tim Bowler / Jeff Foster (OK 4/13)  
GC – Peter Bieger (OK 4/12)  
Exec Sec – Sam Valverde (OK 4/12)  
OFS – Timothy Massad (OK 4/13)  
Econ Policy – Jan Eberly / Stephen Shore (OK 4/13)  
Financial Markets – Matt Rutherford (OK 4/13)



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# Treasury's Capital Support For The GSEs Summary Review and Key Considerations

August 8, 2012

A108

# Discussion Agenda

Sensitive / Pre-Decisional

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