No. 14-5243 (Consolidated with 14-5254, 14-5260, 14-5262)

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, *et al.*,
Plaintiffs-Appellants,

v.

JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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SUPPLEMENTAL BRIEF OF APPELLEES FEDERAL HOUSING FINANCE AGENCY AND MELVIN L. WATT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY

Fannie Mae	Federal National Mortgage Association
FDIC	Federal Deposit Insurance Corporation
Freddie Mac	Federal Home Loan Mortgage Corporation
FHFA	Federal Housing Finance Agency
Enterprises	Fannie Mae and Freddie Mac
HERA	Housing and Economic Recovery Act of 2008
Inst. Br.	Brief of Institutional Plaintiffs
JA	Joint Appendix
OTS	Office of Thrift Supervision
PSPAs	Preferred Stock Purchase Agreements between FHFA and the Department of Treasury
Third Amendment	Third amendment to the Preferred Stock Purchase Agreements
Tr.	Transcript of Oral Argument before the D.C. Circuit (on April 15, 2016)
Treasury	United States Department of the Treasury

Defendants FHFA and Melvin L. Watt appreciate the Court's invitation to submit the following supplemental brief in response to the Court's inquiry concerning "the applicability of 12 U.S.C. § 4623(d)'s jurisdictional provision to these cases." As advanced by FHFA in its prior briefing and at oral argument, Section 4617(f) bars Plaintiffs' injunctive and declaratory claims challenging Conservator actions, including execution of the Third Amendment, and Section 4617(b)(2)(A)(i) bars all of Plaintiffs' claims in light of the Conservator's succession to "all rights" of the Enterprises' stockholders. In addition to Sections 4617(f) and 4617(b)(2)(A)(i), which preclude judicial review of the actions at issue here, Section 4623(d) provides another basis for affirmance of the district court's decision, as set forth below.

FACTUAL AND STATUTORY BACKGROUND

On October 9, 2008, one month into the conservatorships, FHFA's then-Director James B. Lockhart III announced that he had "determined that it is prudent and in the best interests of the market to suspend capital classifications of Fannie Mae and Freddie Mac during the conservatorship, in light of the United States Treasury's Senior Preferred Stock Purchase Agreement." FHFA News Release: *FHFA Announces Suspension of Capital Classifications During Conservatorship* (the "Oct. 2008 Action"), *available at* http://goo.gl/MzpAUH

(included at A1 in Supplemental Addendum);[1] *see also* 12 C.F.R. § 1237.3(c) (authorizing FHFA to suspend capital classifications). In announcing this action taken pursuant to his supervisory powers over the Enterprises, the Director declared: "***the existing statutory and FHFA-directed regulatory capital requirements will not be binding during the conservatorship***." Oct. 2008 Action (emphasis added).[2] The Director also announced that, "[i]n accordance with the Senior Preferred Stock [Purchase] Agreement[s]"—which were designed to prevent the Enterprises from falling to a negative net worth position—the Conservator "has directed the Enterprises to focus on managing to a positive stockholder's equity. Both Enterprises during conservatorship will work to ensure that they fulfill their mission of providing liquidity, stability and affordability to the mortgage market." *Id.*

Section 4623(d), about which the Court has inquired, provides that "no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter (other than appointment of a conservator under section 4616 or 4617 of this title

[1] During oral argument, counsel for FHFA (Mr. Cayne) referred to this October 2008 supervisory action as having been taken in September 2008.

[2] Plaintiffs themselves acknowledge this Director action in their complaints, notwithstanding their attempt to use capital requirements as a basis to review the Conservator's operation of the Enterprises. *See* Fairholme Compl. ¶ 74 (JA124) ("FHFA has announced that, during the conservatorship, existing statutory and FHFA-directed regulatory capital requirements will not be binding on the Companies."); Class Compl. ¶ 97 (JA256) (same).

. . .) or to review, modify, suspend, terminate, or set aside such classification or action." 12 U.S.C. § 4623(d).[3]

ARGUMENT

I. Adjudication of Plaintiffs' Claims Challenging the Third Amendment Would Violate Section 4623(d) Because It Would Require the Review and Nullification of the Director's October 2008 Action

The Director, through the October 2008 Action, set the capital ground rules governing the operations of the Enterprises in conservatorship. Specifically, the pre-existing capital requirements would no longer be binding. Instead, the hundreds of billions of dollars that Treasury had committed to the Enterprises under the PSPAs would serve as the Enterprises' operating capital, and safety and soundness determinations would accordingly consider the adequacy of Treasury's remaining financial commitment.

By challenging the adequacy of the Enterprises' post-Third Amendment capital levels in seeking rescission of the Third Amendment, Plaintiffs seek to have the Court "affect," "review," "modify," "terminate," and/or "set aside" the Director's October 2008 Action, which was intended to allow the Enterprises to

[3] Section 4623(d) is plainly a limitation on subject matter jurisdiction. *See* 12 U.S.C. § 4623(d) (providing "no court shall have jurisdiction . . ."); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) (considering whether statute "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the district courts") (internal quotation marks and citation omitted). "Subject-matter jurisdiction can never be waived or forfeited," and "may be resurrected at any point in the litigation . . . ." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

rely solely on the Treasury commitment for capital. Section 4623(d) thus bars Plaintiffs' claims.[4]

Plaintiffs argue the Conservator acted outside of its statutory powers and functions in agreeing to the Third Amendment because it allegedly does not put the Enterprises in a "sound and solvent" condition. According to Plaintiffs: "[b]y prohibiting the Companies from retaining *any* capital, the Net Worth Sweep renders soundness and solvency impossible, and FHFA therefore exceeded its statutory authority as conservator." Inst. Br. 34; *see also* Perry Compl. ¶ 20 (JA73) (alleging Third Amendment "prohibits the Companies from building capital," and thus "is inherently inconsistent with the FHFA's statutory duties as conservator"). Plaintiffs repeated this refrain at oral argument, asserting the Conservator acted outside of its powers and functions because the Third Amendment allegedly renders the Enterprises "unsound, and insolvent zombies." Tr. 3; *see also* Tr. 13-14 (arguing that, even if the Third Amendment were to "keep things in a stable condition until the policy makers make a decision," then "[t]hat's not sound and solvent. The statute requires keeping institutions sound and solvent."); Tr. 15, 23-25, 33-34 (arguing Conservator must keep the Enterprises "sound and solvent").

[4] FHFA is not claiming the Third Amendment is a regulatory action, contrary to Class Plaintiffs' assumption. *See* Suppl. Class Br. 6 n.9. The Third Amendment was executed by FHFA in its capacity as Conservator. This supplemental brief explains that the remedy sought by Plaintiffs would set aside a supervisory action—the Director's October 2008 Action—and thus is barred by 4623(d)'s jurisdictional withdrawal provision.

Plaintiffs effectively seek to impose capital requirements on the Enterprises in conservatorship, despite the Director's supervisory action in October 2008 suspending all capital requirements. Indeed, Plaintiffs argue that "federal regulators" generally "oblige financial institutions to hold minimum levels of capital," and to have "capitalization adequate to withstand downturns." Inst. Br. 34-35. According to Plaintiffs, the Third Amendment "ensures that the Companies never will have capital sufficient" to meet any such standards; "thus [the Enterprises] never again will be in a 'sound and solvent condition.'" Inst. Reply 16; *see also* Investors Unite Amicus 19 (arguing the Conservator "must return the institution to full compliance with all regulatory capital, liquidity, and other prudential standards" in order to satisfy safety and soundness obligations).

Not only is there no statutory basis for Plaintiffs' argument, acceptance of this central element of Plaintiffs' Third Amendment challenge would require this court to nullify the Director's October 2008 suspension of the Enterprises' "existing statutory and FHFA-directed regulatory capital requirements" for the duration of the conservatorships. This supervisory action reflected the new post-conservatorship reality that the continuing operation of the Enterprises is dependent on the continuing availability of the massive commitment of Treasury funds made available to the Enterprises through the PSPAs. Indeed, as Plaintiffs acknowledge, "Treasury is the Companies' only viable source of capital" (Perry

Compl. ¶ 76 (JA91); *see also* Arrowood Compl. ¶ 116 (JA204) (same)), has provided $187 billion to the Enterprises to date, and remains obligated to provide up to $258 billion more. *See also* 12 C.F.R. § 1234.8(a)(1) (joint financial regulator rule acknowledging that the Enterprises in conservatorship are operating "with capital support from the United States").

In connection with the October 2008 Action, the Conservator simultaneously announced its instruction that the Enterprises "focus on managing to a positive stockholder's equity." Oct. 2008 Action. This meant the Enterprises would seek to avoid losses and draws on the Treasury commitment, rather than "manag[ing] with a strategy to *maximize* common shareholder returns." Fannie Mae, Annual Report (Form 10-K) (2008), at 21, *available at* http://goo.gl/QxqVYi (emphasis added).

Section 4623(d) bars judicial review of the Director's October 2008 Action, and thus bars Plaintiffs' claims challenging the Third Amendment as not consistent with sound and solvent operations and/or the Conservator's purported statutory obligations and duties. In Section 4623(d), Congress specifically precluded judicial review of FHFA's supervisory actions aimed at maintaining the Enterprises' soundness and solvency, including with respect to the Enterprises' capital requirements: "Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of

any classification or action of the Director under this subchapter . . . or to review, modify, suspend, terminate, or set aside such classification or action." 12 U.S.C. § 4623(d) (emphasis added).[5]

The October 2008 Action represents a supervisory determination undertaken during conservatorship that, in light of the Treasury commitment, the Enterprises—and thus the Conservator—would no longer be bound by any pre-existing capital requirements for the duration of the conservatorships.[6] By asking this Court effectively to create and set capital requirements on the Enterprises operating in conservatorship (*see supra* at 4-5)—directly contrary to the Director's October 2008 determination—Plaintiffs' claims ask this Court to "affect" "review," "modify," "terminate," and/or "set aside" the Director's action to

[5] The subchapter in which Section 4623(d) appears addresses "Required Capital Levels For Regulated Entities," FHFA's "Special Enforcement Powers," and various "Supervisory actions" available to FHFA based on the Enterprises' capital levels. *See* 12 U.S.C. §§ 4611-4624. The subchapter also includes, among other things, Section 4617, which outlines the powers and functions of FHFA as Conservator. *See id*. § 4617(a)(2), (b).

[6] In their opening brief, the Institutional Plaintiffs asserted that "HERA itself requires the Companies to retain a minimum amount of 'core capital.'" Inst. Br. 35 (citing 12 U.S.C. § 4502(7); *id*. § 4614(a)(1)). But HERA neither anticipates nor requires the Enterprises to maintain minimum capital levels while in conservatorship. Rather, the statutory scheme defines certain capital thresholds (*see* 12 U.S.C. §§ 4612-4614), and empowers FHFA as regulator to take a variety of supervisory actions based on each of those thresholds (*id*. §§ 4615-4617). In this case, the Director took the most serious supervisory action by appointing itself conservator in September 2008. And in the October 2008 Action, the Director announced his determination that the pre-existing capital requirements will no longer be binding in light of the conservatorships and Treasury commitment. HERA does not compel a different result.

suspend capital requirements.[7]

Plaintiffs' efforts to rescind the Third Amendment necessarily challenge the Director's October 2008 Action as imprudent because it permits the Enterprises in conservatorship to operate at capital levels below where the Plaintiffs believe they should operate. But Congress delegated such judgments concerning the Enterprises' safety and soundness to the FHFA as regulator, and Plaintiffs' claims seek to interfere with FHFA's supervisory process. Thus, Plaintiffs' claims are barred by Section 4623(d).[8]

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[7] Section 4623(d)'s jurisdictional bar is consistent with the well-established principle that courts lack the ability to review supervisory decisions concerning capital requirements, as such decisions are inherently discretionary in nature. *See, e.g.*, *Frontier State Bank Oklahoma City, Okla. v. FDIC*, 702 F.3d 588, 595, 596-97 (10th Cir. 2012) (finding no standard to review FDIC order relating to bank's capital levels, explaining, "[t]his lack of standard is, in large part, a result of the subjectivity inherent in invested capital determinations. . . . The amount of capital a bank needs to weather uncertainty is a subjective judgment dependent on an informed analysis of the magnitude and likelihood of the attendant risks. . . . Reasonable minds will differ as to appropriate capital levels because they reasonably differ on their assessment of the attendant risks.") (internal citation and quotation marks omitted); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1327 (6th Cir. 1993) (finding no jurisdiction to review third party's claim that challenged OTS decision not to enforce an institution's compliance with agreement to maintain certain capital levels); *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1129-30 (5th Cir. 1991) (finding no standard to review the FDIC's exercise of discretion to issue capital directive to bank).

[8] In *California ex rel. Harris v. FHFA*, 894 F. Supp. 2d 1205, 1219 (N.D. Cal. 2012), the court declined to apply Section 4623(d) for reasons not applicable here. In particular, the district court considered whether a directive FHFA issued in 2010 had been promulgated under 12 U.S.C. § 4616(b)(4); if so, section 4623(d) would have barred jurisdiction over the claims. The court ruled that section 4616(b) applies only when an Enterprise is classified as significantly undercapitalized, and that the 2008 Action's suspension of classifications therefore placed the 2010 directive outside the scope of Section 4616(b). Here, by contrast, HERA authorizes FHFA to take a variety of supervisory actions concerning the Enterprises' capital levels, including the October 2008 Action, thereby triggering section 4623(d). *See* 12 U.S.C. §§ 4614-4617; 12 C.F.R. § 1237.3(c) (invoking 12 U.S.C. § 4617 and § 4614 as basis for authority to suspend capital classifications).

(footnote continued on next page)

CONCLUSION

For the foregoing reasons—in addition to the bar against challenges to Conservator actions set forth in Section 4617(f), and the succession to all shareholder rights set forth in Section 4617(b)(2)(A)(i)—this Court should affirm the judgment below because Plaintiffs' challenge to the Director's capital determination is precluded by Section 4623(d).

(footnote continued from previous page)
In all events, the Ninth Circuit vacated the district court's decision in *California ex. rel. Harris*, on the ground that Section 4617(f) barred the plaintiffs' claims. *See Cnty. of Sonoma v. FHFA*, 710 F.3d 987 (9th Cir. 2013). The Ninth Circuit did not address Section 4623(d).

Dated: April 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Court's oral order provided during the April 15, 2016 oral argument, because this supplemental brief does not exceed 10 pages in length, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

Dated: April 22, 2016

/s/ Howard N. Cayne
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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SUPPLEMENTAL ADDENDUM OF PERTINENT AUTHORITIES

TABLE OF CONTENTS

News Release

FHFA Announces Suspension of Capital Classifications During Conservatorship

Discloses Minimum And Risk-Based Capital Classifications As Undercapitalized For The Second Quarter 2008 For Fannie Mae And Freddie Mac

FOR IMMEDIATE RELEASE

10/9/2008

Washington, D.C. – James B. Lockhart III, Director of the Federal Housing Finance Agency (FHFA), the safety and soundness regulator for Fannie Mae and Freddie Mac and the Federal Home Loan Banks, placed Fannie Mae and Freddie Mac into conservatorship on September 7, 2008. The capital requirements and classification process articulated in statute are established as part of a prompt corrective action framework that requires supervisory actions to be taken promptly and in a graduated manner that culminates, in the most serious cases, in the appointment of a conservator or receiver. While in conservatorship status, the Enterprises will not be subject to other prompt corrective action requirements. The Treasury Department, in conjunction with the conservatorship, provided two facilities to support the Enterprises. The GSE Credit Facility is available to provide liquidity through secured loans as needed. The Senior Preferred Stock Purchase Agreement ensures that for the very long-term that both entities will have positive net worth. The Director is, therefore, announcing several capital-related decisions impacting future reporting processes.

Suspension of Capital Classifications During Conservatorship

The Director has determined that it is prudent and in the best interests of the market to suspend capital classifications of Fannie Mae and Freddie Mac during the conservatorship, in light of the United States Treasury's Senior Preferred Stock Purchase Agreement. FHFA will continue to closely monitor capital levels, but the existing statutory and FHFA-directed regulatory capital requirements will not be binding during the conservatorship.

Management During Conservatorship

In accordance with the Senior Preferred Stock Agreement FHFA, as conservator, has directed the Enterprises to focus on managing to a positive stockholder's equity. Both Enterprises during conservatorship will work to ensure that they fulfill their mission of providing liquidity, stability and affordability to the mortgage market.

Disclosure of Capital Positions During Conservatorship

During the conservatorship, FHFA will not issue a quarterly capital classification. The Enterprises will continue to submit capital reports to FHFA during the conservatorship. Relevant capital figures (minimum capital requirement, core capital, and GAAP net worth) will be available in the Enterprises' quarterly 10-Q filings, as well as on FHFA's website to ensure market transparency. FHFA does not intend to publish critical capital, risk-based capital, or subordinated debt levels

during the conservatorship. In light of its new authority under the Housing and Economic Recovery Act, FHFA will be revising minimum capital and risk-based capital requirements.

Second Quarter Capital Classification

Director Lockhart is classifying Fannie Mae and Freddie Mac as of June 30, 2008, prior to the conservatorship, as undercapitalized using FHFA's discretionary authority provided in the statute. Both Fannie Mae and Freddie Mac have publicly released financial results for the second quarter 2008. Although both Enterprises' capital calculations for June 30, 2008 reflect that they met the FHFA and statutory requirements for capital, the continued market downturn during late July and August raised significant questions about the sufficiency of capital. The following factors, which led to the need for conservatorship, support the Director's decision to downgrade the classification to undercapitalized:

- Accelerating safety and soundness weaknesses, especially with regard to credit risk, earnings outlook, and capitalization;
- Continued and substantial deterioration in equity, debt, and MBS market conditions;
- The current and projected financial performance and condition of each company as reflected in its second quarter financial reports and our ongoing examinations;
- The inability of the companies to raise capital or to issue debt according to normal practices and prices;
- The critical importance of each company in supporting the country's residential mortgage market; and
- Concerns that a growing proportion of their respective statutory core capital consisted of intangible assets.

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Federal Housing Finance and Regulatory Reform Act, Division A of the Housing and Economic Recovery Act, Public Law No. 111-289, Stat. 2654 (2008) requires the FHFA Director to determine the capital level and classification of the Enterprises not less than quarterly, and to report the results to Congress. FHFA classifies the Enterprises as adequately capitalized, undercapitalized, significantly undercapitalized or critically undercapitalized. The Enterprises are required by federal statute to meet both minimum and risk-based capital standards to be classified as adequately capitalized. The Director has the authority to make a discretionary downgrade of the capital adequacy classification should certain safety and soundness conditions arise that could impact future capital adequacy. This classification requirement serves no purpose once an Enterprise has been placed into conservatorship.

SECOND QUARTER CAPITAL RESULTS

Minimum Capital

Fannie Mae's FHFA-directed capital requirement on June 30, 2008 was $37.5 billion and its statutory minimum capital requirement was $32.6 billion. Fannie Mae's core capital of $47.0 billion exceeded the FHFA-directed capital requirement by $9.4 billion.

Freddie Mac's FHFA-directed capital requirement on June 30, 2008 was $34.5 billion and its statutory minimum capital requirement was $28.7 billion. Freddie Mac's core capital of $37.1 billion exceeded the FHFA-directed minimum capital

requirement by $2.7 billion.

Enterprise Minimum Capital Requirement (Billions of Dollars) (a,b)				
	Fannie Mae		**Freddie Mac**	
	30-Jun-08	31-Mar-08	30-Jun-08	31-Mar-08
Minimum Capital – Statutory Requirement	32.631	31.335	28.709	26.937
Minimum Capital – FHFA Directed Requirement	37.525	37.602	24.451	32.324
Core Capital	46.964	42.676	37.128	38.319
Surplus (Deficit) (based on FHFA Directed Requirement)	9.439	5.074	2.676	5.995
Surplus as a Percent of FHFA Directed Requirement	25.2%	13.5%	7.8%	18.5%

a. Numbers may not add due to rounding.

b. FHFA has directed both Fannie Mae and Freddie Mac to maintain additional capital in excess of the statutory minimum capital requirement. The excess capital requirement has been in place since January 28, 2004, for Freddie Mac and since September 30, 2005, for Fannie Mae. For both Enterprises the requirement was reduced from 30% to 20% on March 19, 2008. On May 19, 2008 the requirement was further reduced for Fannie Mae to 15%. The FHFA-directed minimum capital requirements and capital surplus numbers stated in these charts reflect the inclusion of the additional FHFA-directed capital requirements of 15% for Fannie Mae and 20% for Freddie Mac for the quarter-end June 30, 2008.

Risk-Based Capital

As of June 30, 2008, Fannie Mae's risk-based capital requirement was $36.3 billion. Fannie Mae's total capital of $55.6 billion on that date exceeded the requirement by $19.3 billion.

As of June 30, 2008, Freddie Mac's risk-based capital requirement was $20.1 billion. Freddie Mac's total capital of $42.9 billion on that date exceeded the requirement by $22.8 billion.

Enterprise Risk-Based Capital Requirement (Billions of Dollars) (a)								
Interest Rate Scenario	**Fannie Mae**				**Freddie Mac**			
	30-Jun-08		31-Mar-08		30-Jun-08		31-Mar-08	
	Up	Down	Up	Down	Up	Down	Up	Down
Risk Based Capital Requirement	6.196	36.288	14.344	23.099	0.237	20.139	5.127	26.060
Total Capital		55.568		47.666		42.916		42.173
Surplus (Deficit)		19.280		24.567		22.777		16.113

a. Numbers may not add due to rounding.

DEFINITION OF CAPITAL STANDARDS

Core Capital is the sum of outstanding common stock, perpetual, noncumulative preferred stock, paid-in capital, and retained earnings. Core capital does not include Accumulated Other Comprehensive Income (AOCI), which is captured as part of stockholder's equity.

Total Capital is the sum of Core Capital plus the allowance for loan losses.

Minimum Capital represents an essential amount of capital needed to protect an Enterprise against broad categories of business risk. For purposes of minimum capital, an Enterprise is considered by law adequately capitalized if core capital —common stock; perpetual noncumulative preferred stock; paid in capital; and retained earnings—equals or exceeds minimum capital. The minimum capital standard is 2.5 percent of assets plus 0.45 percent of adjusted off-balance-sheet obligations, including guaranteed mortgage securities.

The FHFA-directed capital requirement is the amount of capital the Enterprise is required to maintain to compensate for increased operational risks including systems, accounting, and internal control risks. The level is prescribed by the Director of FHFA. This requirement is calculated by multiplying the statutory minimum capital requirement by 1.x times, where x equals the percentage requirement in effect for the time period. On March 19, 2008, FHFA announced an agreement with the Enterprises to reduce the FHFA-directed capital requirement from 30 percent to 20 percent in recognition of the significant remediation efforts and the commitments by the Enterprises to raise significant new capital and to retain substantial surpluses over the FHFA-directed requirement. The FHFA-directed requirement as of June 30, 2008 was 1.20 times the statutory minimum capital requirement for Freddie Mac and 1.15 times the statutory minimum capital requirement for Fannie Mae.

FHFA's risk-based capital requirement is the amount of total capital—core capital plus a general allowance for loan losses less specific reserves—that an Enterprise must hold to absorb projected losses flowing from future adverse interest-rate and credit-risk conditions specified by statute, plus 30 percent mandated by statute to cover management and operations risk. The risk-based capital standard is based on stress test results calculated for the two statutorily prescribed interest rate scenarios, one in which 10-year Treasury yields rise 75 percent (up-rate scenario) and another in which they fall 50 percent (down-rate scenario). Changes in both scenarios are generally capped at 600 basis points. The risk-based capital level for an Enterprise is the amount of total capital that would enable it to survive the stress test in whichever scenario is more adverse for that Enterprise, plus 30 percent of that amount to cover management and operations risk.

The **critical capital** level is the amount of core capital below which an Enterprise must be classified as critically undercapitalized and generally must be placed in conservatorship. Critical capital levels are computed consistent with the Federal Housing Enterprises Safety and Soundness Act of 1992 as follows: One-half of the portion of minimum capital requirement associated with on-balance-sheet assets plus five-ninths of the portion of the minimum capital requirement associated with off-balance-sheet obligations. The critical capital trigger is irrelevant during the conservatorship period.

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SUPPLEMENTAL ADDENDUM OF PERTINENT AUTHORITIES

12 U.S.C. § 4611. Risk-based capital levels for regulated entities

(a) In general

(1) Enterprises

The Director shall, by regulation, establish risk-based capital requirements for the enterprises to ensure that the enterprises operate in a safe and sound manner, maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises.

. . .

(b) No limitation

Nothing in this section shall limit the authority of the Director to require other reports or undertakings, or take other action, in furtherance of the responsibilities of the Director under this Act.

12 U.S.C. § 4612. Minimum capital levels

(a) Enterprises

For purposes of this subchapter, the minimum capital level for each enterprise shall be the sum of--

(1) 2.50 percent of the aggregate on-balance sheet assets of the enterprise, as determined in accordance with generally accepted accounting principles;

(2) 0.45 percent of the unpaid principal balance of outstanding mortgage-backed securities and substantially equivalent instruments issued or guaranteed by the enterprise that are not included in paragraph (1); and

(3) 0.45 percent of other off-balance sheet obligations of the enterprise not included in paragraph (2) (excluding commitments in excess of 50 percent of

the average dollar amount of the commitments outstanding each quarter over the preceding 4 quarters), except that the Director shall adjust such percentage to reflect differences in the credit risk of such obligations in relation to the instruments included in paragraph (2).

. . .

(c) Establishment of revised minimum capital levels

Notwithstanding subsections (a) and (b) and notwithstanding the capital classifications of the regulated entities, the Director may, by regulations issued under section 4526 of this title, establish a minimum capital level for the enterprises, for the Federal Home Loan Banks, or for both the enterprises and the banks, that is higher than the level specified in subsection (a) for the enterprises or the level specified in subsection (b) for the Federal Home Loan Banks, to the extent needed to ensure that the regulated entities operate in a safe and sound manner.

(d) Authority to require temporary increase

(1) In general

Notwithstanding subsections (a) and (b) and any minimum capital level established pursuant to subsection (c), the Director may, by order, increase the minimum capital level for a regulated entity on a temporary basis, when the Director determines that such an increase is necessary and consistent with the prudential regulation and the safe and sound operations of a regulated entity.

(2) Rescission

The Director shall rescind any temporary minimum capital level established under paragraph (1) when the Director determines that the circumstances or facts no longer justify the temporary minimum capital level.

(3) Regulations required

The Director shall issue regulations establishing--

(A) standards for the imposition of a temporary increase in minimum capital under paragraph (1);

(B) the standards and procedures that the Director will use to make the determination referred to in paragraph (2); and

(C) a reasonable time frame for periodic review of any temporary increase in minimum capital for the purpose of making the determination referred to in paragraph (2).

(e) Authority to establish additional capital and reserve requirements for particular purposes

The Director may, at any time by order or regulation, establish such capital or reserve requirements with respect to any product or activity of a regulated entity, as the Director considers appropriate to ensure that the regulated entity operates in a safe and sound manner, with sufficient capital and reserves to support the risks that arise in the operations and management of the regulated entity.

(f) Periodic review

The Director shall periodically review the amount of core capital maintained by the enterprises, the amount of capital retained by the Federal Home Loan Banks, and the minimum capital levels established for such regulated entities pursuant to this section.

12 U.S.C. § 4613. Critical capital levels

(a) Enterprises

For purposes of this subchapter, the critical capital level for each enterprise shall be the sum of--

> (1) 1.25 percent of the aggregate on-balance sheet assets of the enterprise, as determined in accordance with generally accepted accounting principles;
>
> (2) 0.25 percent of the unpaid principal balance of outstanding mortgage-backed securities and substantially equivalent instruments issued or guaranteed by the enterprise that are not included in paragraph (1); and
>
> (3) 0.25 percent of other off-balance sheet obligations of the enterprise not included in paragraph (2) (excluding commitments in excess of 50 percent of the average dollar amount of the commitments outstanding each quarter over the preceding 4 quarters), except that the Director shall adjust such percentage to reflect differences in the credit risk of such obligations in relation to the instruments included in paragraph (2).

. . .

12 U.S.C. § 4614. Capital classifications

(a) Enterprises

For purposes of this subchapter, the Director shall classify the enterprises according to the following capital classifications:

> (1) Adequately capitalized
>
> An enterprise shall be classified as adequately capitalized if the enterprise--
>
> > (A) maintains an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise under section 4611 of this title; and

(B) maintains an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise under section 4612 of this title.

(2) Undercapitalized

An enterprise shall be classified as undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise; and

(ii) maintains an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise; or

(B) the enterprise is otherwise classified as undercapitalized under subsection (b)(1) of this section.

(3) Significantly undercapitalized

An enterprise shall be classified as significantly undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise;

(ii) does not maintain an amount of core capital that is equal to or exceeds the minimum capital level established for the enterprise; and

(iii) maintains an amount of core capital that is equal to or exceeds the critical capital level established for the enterprise under section 4613 of this title; or

(B) the enterprise is otherwise classified as significantly undercapitalized under subsection (b)(2) of this section or section 4615(b) of this title.

(4) Critically undercapitalized

An enterprise shall be classified as critically undercapitalized if--

(A) the enterprise--

(i) does not maintain an amount of total capital that is equal to or exceeds the risk-based capital level established for the enterprise; and

(ii) does not maintain an amount of core capital that is equal to or exceeds the critical capital level for the enterprise; or

(B) is otherwise classified as critically undercapitalized under subsection (b)(3) of this section or section 4616(b)(5) of this title.

. . .

(c) Discretionary classification

(1) Grounds for reclassification

The Director may reclassify a regulated entity under paragraph (2) if--

(A) at any time, the Director determines in writing that the regulated entity is engaging in conduct that could result in a rapid depletion of core or total capital or the value of collateral pledged as security has decreased significantly or that the value of the property subject to mortgages held by the regulated entity (or securitized in the case of an

enterprise) has decreased significantly;

(B) after notice and an opportunity for hearing, the Director determines that the regulated entity is in an unsafe or unsound condition; or

(C) pursuant to section 4631(b) of this title, the Director deems the regulated entity to be engaging in an unsafe or unsound practice.

(2) Reclassification

In addition to any other action authorized under this chapter, including the reclassification of a regulated entity for any reason not specified in this subsection, if the Director takes any action described in paragraph (1), the Director may classify a regulated entity--

(A) as undercapitalized, if the regulated entity is otherwise classified as adequately capitalized;

(B) as significantly undercapitalized, if the regulated entity is otherwise classified as undercapitalized; and

(C) as critically undercapitalized, if the regulated entity is otherwise classified as significantly undercapitalized.

(d) Quarterly determination

The Director shall determine the capital classification of the regulated entities for purposes of this subchapter on not less than a quarterly basis (and as appropriate under subsection (c) of this section).

(e) Restriction on capital distributions

(1) In general

A regulated entity shall make no capital distribution if, after making the

distribution, the regulated entity would be undercapitalized.

(2) Exception

Notwithstanding paragraph (1), the Director may permit a regulated entity, to the extent appropriate or applicable, to repurchase, redeem, retire, or otherwise acquire shares or ownership interests if the repurchase, redemption, retirement, or other acquisition--

(A) is made in connection with the issuance of additional shares or obligations of the regulated entity in at least an equivalent amount; and

(B) will reduce the financial obligations of the regulated entity or otherwise improve the financial condition of the entity.

(f) Implementation

Notwithstanding any other provision of this section, during the period beginning on October 28, 1992, and ending upon the effective date of section 4615 of this title (as provided in section 4615(c) of this title), an enterprise shall be classified as adequately capitalized if the enterprise maintains an amount of core capital that is equal to or exceeds the minimum capital level for the enterprise under section 4612 of this title.

12 U.S.C. § 4615. Supervisory actions applicable to undercapitalized regulated entities

(a) Mandatory actions

(1) Required monitoring

The Director shall--

(A) closely monitor the condition of any undercapitalized regulated entity;

(B) closely monitor compliance with the capital restoration plan, restrictions, and requirements imposed on an undercapitalized regulated entity under this section; and

(C) periodically review the plan, restrictions, and requirements applicable to an undercapitalized regulated entity to determine whether the plan, restrictions, and requirements are achieving the purpose of this section.

(2) Capital restoration plan

A regulated entity that is classified as undercapitalized shall, within the time period provided in section 4622(b) and (d) of this title, submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(3) Restriction on capital distributions

A regulated entity that is classified as undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as significantly undercapitalized or critically undercapitalized.

(4) Restriction of asset growth

An undercapitalized regulated entity shall not permit its average total assets during any calendar quarter to exceed its average total assets during the preceding calendar quarter, unless--

(A) the Director has accepted the capital restoration plan of the regulated entity;

(B) any increase in total assets is consistent with the capital restoration plan; and

(C) the ratio of tangible equity to assets of the regulated entity

increases during the calendar quarter at a rate sufficient to enable the regulated entity to become adequately capitalized within a reasonable time.

(5) Prior approval of acquisitions and new activities

An undercapitalized regulated entity shall not, directly or indirectly, acquire any interest in any entity or engage in any new activity, unless--

(A) the Director has accepted the capital restoration plan of the regulated entity, the regulated entity is implementing the plan, and the Director determines that the
proposed action is consistent with and will further the achievement of the plan; or

(B) the Director determines that the proposed action will further the purpose of this subchapter.

(b) Reclassification from undercapitalized to significantly undercapitalized

The Director shall reclassify as significantly undercapitalized a regulated entity that is classified as undercapitalized (and the regulated entity shall be subject to the provisions of section 4616 of this title) if--

(1) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(2) the Director determines that the regulated entity has failed to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director in any material respect.

(c) Other discretionary safeguards

The Director may take, with respect to an undercapitalized regulated entity, any of

the actions authorized to be taken under section 4616 of this title with respect to a significantly undercapitalized regulated entity, if the Director determines that such actions are necessary to carry out the purpose of this subchapter.

12 U.S.C. § 4616. Supervisory actions applicable to significantly undercapitalized regulated entities

(a) Mandatory supervisory actions

(1) Capital restoration plan

A regulated entity that is classified as significantly undercapitalized shall, within the time period under section 4622(b) and (d) of this title, submit to the Director a capital restoration plan that complies with section 4622 of this title and carry out the plan after approval.

(2) Restrictions on capital distributions

(A) Prior approval

A regulated entity that is classified as significantly undercapitalized may not make any capital distribution that would result in the regulated entity being reclassified as critically undercapitalized. A regulated entity that is classified as significantly undercapitalized may not make any other capital distribution unless the Director approves the distribution.

(B) Standard for approval

The Director may approve a capital distribution by a regulated entity classified as significantly undercapitalized only if the Director determines that the distribution (i) will enhance the ability of the regulated entity to meet the risk-based capital level and the minimum capital level for the regulated entity promptly, (ii) will contribute to the long-term financial safety and soundness of the regulated entity, or (iii) is otherwise in the public interest.

(b) Specific actions

In addition to any other actions taken by the Director (including actions under subsection (a) of this section), the Director shall carry out this section by taking, at any time, 1 or more of the following actions with respect to a regulated entity that is classified as significantly undercapitalized:

(1) Limitation on increase in obligations

Limit any increase in, or order the reduction of, any obligations of the regulated entity, including off-balance sheet obligations.

(2) Limitation on growth

Limit or prohibit the growth of the assets of the regulated entity or require contraction of the assets of the regulated entity.

(3) Acquisition of new capital

Require the regulated entity to acquire new capital in a form and amount determined by the Director.

(4) Restriction of activities

Require the regulated entity to terminate, reduce, or modify any activity that the Director determines creates excessive risk to the regulated entity.

(5) Improvement of management

Take 1 or more of the following actions:

(A) New election of board

Order a new election for the board of directors of the regulated entity.

(B) Dismissal of directors or executive officers

Require the regulated entity to dismiss from office any director or executive officer who had held office for more than 180 days immediately before the date on which the regulated entity became undercapitalized. Dismissal under this subparagraph shall not be construed to be a removal pursuant to the enforcement powers of the Director under section 4636a of this title.

(C) Employ qualified executive officers

Require the regulated entity to employ qualified executive officers (who, if the Director so specifies, shall be subject to approval by the Director).

(6) Reclassification from significantly to critically undercapitalized

The Director may reclassify as critically undercapitalized a regulated entity that is classified as significantly undercapitalized (and the regulated entity shall be subject to the provisions of section 4617 of this title) if--

(A) the regulated entity does not submit a capital restoration plan that is substantially in compliance with section 4622 of this title within the applicable period or the Director does not approve the capital restoration plan submitted by the regulated entity; or

(B) the Director determines that the regulated entity has failed to make, in good faith, reasonable efforts necessary to comply with the capital restoration plan and fulfill the schedule for the plan approved by the Director.

(7) Other action

Require the regulated entity to take any other action that the Director determines will better carry out the purpose of this section than any of the other actions specified in this subsection.

(c) Restriction on compensation of executive officers

A regulated entity that is classified as significantly undercapitalized in accordance with section 4614 of this title may not, without prior written approval by the Director--

(1) pay any bonus to any executive officer; or

(2) provide compensation to any executive officer at a rate exceeding the average rate of compensation of that officer (excluding bonuses, stock options, and profit sharing) during the 12 calendar months preceding the calendar month in which the regulated entity became significantly undercapitalized.

12 U.S.C. § 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

(3) Grounds for discretionary appointment of conservator or receiver

The grounds for appointing conservator or receiver for any regulated entity

under paragraph (2) are as follows:

(A) Assets insufficient for obligations

The assets of the regulated entity are less than the obligations of the regulated entity to its creditors and others.

(B) Substantial dissipation

Substantial dissipation of assets or earnings due to--

(i) any violation of any provision of Federal or State law; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition

An unsafe or unsound condition to transact business.

(D) Cease and desist orders

Any willful violation of a cease and desist order that has become final.

(E) Concealment

Any concealment of the books, papers, records, or assets of the regulated entity, or any refusal to submit the books, papers, records, or affairs of the regulated entity, for inspection to any examiner or to any lawful agent of the Director.

(F) Inability to meet obligations

The regulated entity is likely to be unable to pay its obligations or meet the demands of its creditors in the normal course of business.

(G) Losses

The regulated entity has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the regulated entity to become adequately capitalized (as defined in section 4614(a)(1) of this title).

(H) Violations of law

Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to--

(i) cause insolvency or substantial dissipation of assets or earnings; or

(ii) weaken the condition of the regulated entity.

(I) Consent

The regulated entity, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Undercapitalization

The regulated entity is undercapitalized or significantly undercapitalized (as defined in section 4614(a)(3) of this title), and--

(i) has no reasonable prospect of becoming adequately capitalized;

(ii) fails to become adequately capitalized, as required by--

(I) section 4615(a)(1) of this title with respect to a regulated entity; or

(II) section 4616(a)(1) of this title with respect to a significantly undercapitalized regulated entity;

(iii) fails to submit a capital restoration plan acceptable to the Agency within the time prescribed under section 4622 of this title; or

(iv) materially fails to implement a capital restoration plan submitted and accepted under section 4622 of this title.

(K) Critical undercapitalization

The regulated entity is critically undercapitalized, as defined in section 4614(a)(4) of this title.

(L) Money laundering

The Attorney General notifies the Director in writing that the regulated entity has been found guilty of a criminal offense under section 1956 or 1957 of Title 18 or section 5322 or 5324 of Title 31.

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

(B) Periodic determination required for critically undercapitalized regulated entity

If a regulated entity is critically undercapitalized, the Director shall make a determination, in writing, as to whether the regulated entity meets the criteria specified in clause (i) or (ii) of subparagraph (A)--

(i) not later than 30 calendar days after the regulated entity initially becomes critically undercapitalized; and

(ii) at least once during each succeeding 30-calendar day period.

(C) Determination not required if receivership already in place

Subparagraph (B) does not apply with respect to a regulated entity in any period during which the Agency serves as receiver for the regulated entity.

(D) Receivership terminates conservatorship

The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter.

(5) Judicial review

(A) In general

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

(B) Review

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

(6) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of directors of a regulated entity shall not be liable to the shareholders or creditors of the regulated entity for acquiescing in or consenting in good faith to the appointment of the Agency as conservator or receiver for that regulated entity.

(7) Agency not subject to any other Federal agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

. . . .

12 U.S.C. § 4618. Notice of classification and enforcement action

(a) Notice

Before taking any action referred to in subsection (b) of this section, the Director shall provide to the regulated entity written notice of the proposed action, which states the reasons for the proposed action and the information on which the proposed action is based.

(b) Applicability

The requirements of subsection (a) of this section shall apply to the following actions:

(1) Classification or reclassification of a regulated entity within a particular capital classification under section 4614 of this title.

(2) Any discretionary supervisory action pursuant to section 4615 of this title.

(3) Any discretionary supervisory action pursuant to section 4616 of this title except a decision to appoint a conservator under section 4616(b)(6) of this title.

Notice of classification under paragraph (1) and notice of supervisory actions under paragraph (2) or (3) may be provided together in a single notice under subsection (a) of this section.

(c) Response period

(1) In general

During the 30-day period beginning on the date that a regulated entity is provided notice under subsection (a) of this section of a proposed action, the regulated entity may submit to the Director any information relevant to the action that the regulated entity considers appropriate for consideration by the Director in determining whether to take such action. The Director may, at the discretion of the Director, hold an informal administrative hearing to receive and discuss such information and the proposed determination.

(2) Extended period

The Director may extend the period under paragraph (1) for good cause for not more than 30 additional days.

(3) Shortened period

The Director may shorten the period under paragraph (1) if the Director determines that the condition of the regulated entity so requires or the regulated entity consents.

(4) Failure to respond

The failure of a regulated entity to provide information during the response period under this subsection (as extended or shortened) shall waive any right of the regulated entity to comment on the proposed action of the Director.

(d) Consideration of information and determination

After the expiration of the response period under subsection (c) of this section or upon receipt of information provided during such period by the regulated entity, whichever occurs earlier, the Director shall determine whether to take the action proposed, taking into consideration any relevant information submitted by the regulated entity during the response period. The Director shall provide written notice of a determination to take action and the reasons for such determination to the regulated entity, the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate. Such notice shall respond to any information submitted during the response period.

(e) Effective date of actions

An action referred to in subsection (b) of this section shall take effect upon receipt by the regulated entity of notice of the determination of the Director under subsection (d) of this section, unless otherwise provided in such notice.

12 U.S.C. § 4622. Capital restoration plans

(a) Contents

Each capital restoration plan submitted under this subchapter shall set forth a feasible plan for restoring the core capital of the regulated entity subject to the plan to an amount not less than the minimum capital level for the regulated entity and for restoring the total capital of the regulated entity to an amount not less than the risk-based capital level for the regulated entity. Each capital restoration plan shall--

(1) specify the level of capital the regulated entity will achieve and maintain;

(2) describe the actions that the regulated entity will take to become classified as adequately capitalized;

(3) establish a schedule for completing the actions set forth in the plan;

(4) specify the types and levels of activities (including existing and new programs) in which the regulated entity will engage during the term of the plan; and

(5) describe the actions that the regulated entity will take to comply with any mandatory and discretionary requirements imposed under this subchapter.

(b) Deadlines for submission

The Director shall, by regulation, establish a deadline for submission of a capital restoration plan, which may not be more than 45 days after the regulated entity is notified in writing that a plan is required. The regulations shall provide that the Director may extend the deadline to the extent that the Director determines it necessary. Any extension of the deadline shall be in writing and for a time certain.

(c) Approval

The Director shall review each capital restoration plan submitted under this section and, not later than 30 days after submission of the plan, approve or disapprove the plan. The Director may extend the period for approval or disapproval for any plan for a single additional 30-day period if the Director determines it necessary. The Director shall provide written notice to any regulated entity submitting a plan of the approval or disapproval of the plan (which shall include the reasons for any disapproval of the plan) and of any extension of the period for approval or disapproval.

(d) Resubmission

If the Director disapproves the initial capital restoration plan submitted by the

regulated entity, the regulated entity shall submit an amended plan acceptable to the Director within 30 days or such longer period that the Director determines is in the public interest.

12 U.S.C. § 4623. Judicial review of Director action

(a) Jurisdiction

(1) Filing of petition

A regulated entity that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside.

(2) Place for filing

A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit.

(b) Scope of review

The Court may modify, terminate, or set aside an action taken by the Director and reviewed by the Court pursuant to this section only if the court finds, on the record on which the Director acted, that the action of the Director was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable laws.

(c) Unavailability of stay

The commencement of proceedings for judicial review pursuant to this section

shall not operate as a stay of any action taken by the Director. Pending judicial review of the action, the court shall not have jurisdiction to stay, enjoin, or otherwise delay any supervisory action taken by the Director with respect to a regulated entity that is classified as significantly or critically undercapitalized or any action of the Director that results in the classification of a regulated entity as significantly or critically undercapitalized.

(d) Limitation on jurisdiction

Except as provided in this section, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter (other than appointment of a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) or to review, modify, suspend, terminate, or set aside such classification or action.

12 U.S.C. § 4624. Reviews of enterprise assets and liabilities

(a) In general

The Director shall, by regulation, establish criteria governing the portfolio holdings of the enterprises, to ensure that the holdings are backed by sufficient capital and consistent with the mission and the safe and sound operations of the enterprises. In establishing such criteria, the Director shall consider the ability of the enterprises to provide a liquid secondary market through securitization activities, the portfolio holdings in relation to the overall mortgage market, and adherence to the standards specified in section 4513b of this title.

(b) Temporary adjustments

The Director may, by order, make temporary adjustments to the established standards for an enterprise or both enterprises, such as during times of economic distress or market disruption.

(c) Authority to require disposition or acquisition

The Director shall monitor the portfolio of each enterprise. Pursuant to subsection (a) and notwithstanding the capital classifications of the enterprises, the Director may, by order, require an enterprise, under such terms and conditions as the Director determines to be appropriate, to dispose of or acquire any asset, if the Director determines that such action is consistent with the purposes of this Act or any of the authorizing statutes.

12 C.F.R. § 1234.8. Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ABS.

(a) In general. A sponsor satisfies its risk retention requirement under this part if the sponsor fully guarantees the timely payment of principal and interest on all ABS interests issued by the issuing entity in the securitization transaction and is:

> (1) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. § 4617) with capital support from the United States . . .

. . .

12 C.F.R. § 1237.3. Powers of the Agency as conservator or receiver.

. . .

(c) Powers as conservator or receiver. The Agency, as conservator or receiver, shall have all powers and authorities specifically provided by section 1367 of the Safety and Soundness Act and paragraph (a) of this section, including incidental powers, which include the authority to suspend capital classifications under section 1364(e)(1) of the Safety and Soundness Act during the duration of the conservatorship or receivership of that regulated entity.

. . .