



## Decision

**Matter of:** Federal Housing Finance Agency—Applicability of the Congressional Review Act to FHFA Updates to the Enterprises’ Single-Family Pricing Framework, FHFA Targeted Increases to Enterprise Pricing Framework, and FHFA Targeted Pricing Changes to Enterprise Pricing Framework

**File:** B-335424

**Date:** March 7, 2024

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### DIGEST

The Federal Housing Finance Agency (FHFA) published three news releases titled *FHFA Announces Updates to the Enterprises’ Single-Family Pricing Framework*, *FHFA Announces Targeted Increases to Enterprise Pricing Framework*, and *FHFA Announces Targeted Pricing Changes to Enterprise Pricing Framework* (collectively, the Updates and Announcements). GAO received a request for a decision as to whether FHFA’s Updates and Announcements are a rule for purposes of the Congressional Review Act (CRA). CRA incorporates the Administrative Procedure Act’s (APA) definition of a rule and requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate, as well as to the Comptroller General. FHFA did not submit a CRA report to Congress or the Comptroller General on the Updates and Announcements.

The Updates and Announcements described adjustments to “upfront” fees charged by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises). FHFA directed the Enterprises to make these adjustments in its conservator role under the Housing and Economic Recovery Act of 2008. We conclude that the Updates and Announcements are not a rule because the Enterprises are not agencies, for purposes of the APA, and because FHFA’s direction of the Enterprises’ actions as their conservator did not convert them into agency actions. Therefore, the Updates and Announcements are not subject to CRA’s submission requirement.

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## DECISION

On January 19, 2023, the Federal Housing Finance Agency (FHFA) published a news release titled *FHFA Announces Updates to the Enterprises' Single-Family Pricing Framework* (Updates).<sup>1</sup> We received a congressional request for decision concerning FHFA's Updates, as well as two prior FHFA news releases—one, from January 5, 2022, titled *FHFA Announces Targeted Increases to Enterprise Pricing Framework* (January 2022 Announcement), and a second, from October 24, 2022, titled *FHFA Announces Targeted Pricing Changes to Enterprise Pricing Framework* (October 2022 Announcement).<sup>2</sup> The congressional request asked for GAO's determination as to whether these documents (collectively, the Updates and Announcements) together are a rule under CRA. Letter from Senators Thom Tillis, Mike Crapo, Jim Risch, Jerry Moran, John Hoeven, Marco Rubio, Ron Johnson, Bill Cassidy, M.D., James Lankford, Steve Daines, M. Michael Rounds, Kevin Cramer, Mitt Romney, Cynthia Lummis, Roger Marshall, M.D., Ted Budd, Eric Schmitt, and Katie Boyd Britt to the Comptroller General (May 1, 2023).<sup>3</sup> As discussed below, we conclude that the Updates and Announcements are not a rule subject to CRA's submission requirement.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to FHFA to obtain the agency's legal views. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, FHFA (July 18, 2023). We received FHFA's response on August 18, 2023. Letter from General Counsel, FHFA to Assistant General Counsel, GAO (August 18, 2023) (Response Letter).

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<sup>1</sup> The Updates are available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Updates-to-Enterprises-SF-Pricing-Framework.aspx> (last visited February 13, 2024).

<sup>2</sup> The January 2022 Announcement is available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Targeted-Increases-to-Enterprise-Pricing-Framework.aspx> (last visited February 13, 2024).

The October 2022 Announcement is available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Targeted-Pricing-Changes-to-Enterprise-Pricing-Framework.aspx> (last visited February 13, 2024).

<sup>3</sup> We also received a supplement to this letter. Supplement to Congressional Request Letter from Senator Thom Tillis to the Comptroller General (May 1, 2023).

## BACKGROUND

### The FHFA and its Conservatorship Authority

Pursuant to the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008), FHFA is responsible for “supervis[ing] and regulat[ing]” the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises), as well as the Federal Home Loan Banks. *Id.*, division A, title I, subtitle A, § 1101, 1102, 122 Stat. 2654, 2661-63 (July 30, 2008). The Enterprises are shareholder-owned companies created by Congress. FHFA, About Fannie Mae & Freddie Mac, available at <https://www.fhfa.gov/about-fannie-mae-freddie-mac> (last visited February 13, 2024). Their purpose is to improve the “liquidity, stability and affordability” of the market for home mortgages, and they aim to do this by, among other things, purchasing mortgages from lenders and repackaging and selling them to investors as mortgage-backed securities. *Id.*

FHFA may designate itself as “conservator” for the Enterprises if their assets are insufficient to meet obligations or for other reasons as specified in HERA. HERA at division A, title I, subtitle C, § 1145(a). Once designated a conservator, FHFA may “take such action” as it deems necessary to put the Enterprises in a “sound and solvent condition” and to “preserve and conserve [their] assets and property.” *Id.* at § 1145(b). For example, FHFA may “operate” the Enterprises “with all the powers of the[ir] shareholders, [] directors, and [] officers,” and may “conduct all business” of the Enterprises—including by “transfer[ring] or sell[ing] any asset[s] or liabilit[ies]” and “perform[ing] all functions” of the Enterprises “in the name of” the Enterprises, so long as it is consistent with the duties of conservatorship. *Id.* Additionally, “by regulation or order,” FHFA may “provide for the exercise of any function by any stockholder, director, or officer” of the Enterprises. *Id.*

On September 6, 2008, FHFA designated itself as the Enterprises’ conservator based on its determination that a deterioration of the housing market had damaged their financial condition and left them unable to fulfill their missions. Response Letter at 2; see also FHFA, History of Fannie Mae and Freddie Mac Conservatorships, available at <https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx> (last visited February 13, 2024). The Enterprises have remained under FHFA’s conservatorship through the present. *Id.*

### The Updates and Announcements

FHFA’s Updates and Announcements concerned adjustments to “upfront” fees charged by the Enterprises in connection with loans to single families. Upfront fees

are “payments made by [loan] sellers upon loan delivery to an Enterprise.”<sup>4</sup> See 2021 Report at 4.<sup>5</sup> First, in the January 2022 Announcement, FHFA stated that, effective April 1, 2022, the Enterprises were increasing “upfront fees for certain high balance loans and second home loans.” January 2022 Announcement. Second, in the October 2022 Announcement, FHFA announced that, effective February 1, 2023, the Enterprises were “eliminating upfront fees for [loans provided to] certain first-time homebuyers, low-income borrowers, and underserved communities.” October 2022 Announcement. Third, and finally, in the Updates of January 19, 2023, FHFA announced that, effective May 1, 2023, the Enterprises were “introducing redesigned and recalibrated upfront fee matrices for purchase, rate-term refinance, and cash-out refinance loans.” Updates.

In conjunction with the Updates of January 19, 2023, the Enterprises issued a lender bulletin (Freddie Mac) and lender letter (Fannie Mae). See Freddie Mac, Bulletin 2023-1, Update to Credit Fees and Exhibit 19 Redesign (Lender Bulletin), available at <https://guide.freddiemac.com/app/guide/bulletin/2023-1> (last visited February 13, 2024); Fannie Mae Lender Letter LL-2023-01 (Lender Letter), available at <https://singlefamily.fanniemae.com/media/33241/display> (last visited February 13,

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<sup>4</sup> These upfront fees are not imposed by the Enterprises directly upon borrowers. See FHFA, Fannie Mae and Freddie Mac Single-Family Guarantee Fees in 2021 (2021 Report) at 5, available at <https://www.fhfa.gov/AboutUs/Reports/Pages/Fannie-Mae-and-Freddie-Mac-Single-Family-Guarantee-Fees-in-2021.aspx> (last visited February 13, 2024) (explaining that upfront fees are imposed upon lenders selling loans to the Enterprises); see also Fannie Mae, Loan-Level Price Adjustment Matrix (LLPA Matrix), available at <https://singlefamily.fanniemae.com/media/document/pdf/llpa-matrix-pdf> (referencing prices “applicable to loans sold to Fannie Mae”). However, FHFA has acknowledged as a general matter that lenders pass upfront fees on to borrowers. See 2021 Report at 5 (explaining that upfront fees “are [] factored into the interest rate paid by the borrower and thus recouped by the seller” of a loan to the Enterprises). FHFA’s understanding that adjustments to upfront fees will affect borrowers is also evident in the Updates and Announcements. See January 2022 Announcement (“Today’s action represents another step FHFA is taking to . . . ensure access to credit for first-time home buyers and low- and moderate-income borrowers”); Updates (“FHFA is taking another step to ensure that the Enterprises advance their mission of facilitating equitable and sustainable access to homeownership”).

<sup>5</sup> By contrast, “ongoing fees” are factored into each’s loan’s interest rate and collected each month over the life of a loan. 2021 Report at 4. Upfront and ongoing fees are the two types of “guarantee fees” that the Enterprises charge in exchange for guaranteeing that investors in the Enterprise’s mortgage-backed securities will receive scheduled principal and interest payments on the underlying mortgages. *Id.*

2024).<sup>6</sup> In these documents, the Enterprises explained that they were adjusting upfront fees “at the direction of FHFA.” Lender Letter; see also Lender Bulletin (describing changes “in response to FHFA’s news release on January 19, 2023). FHFA also confirmed in its Response to GAO that it mandated the at-issue changes to the Enterprises’ upfront fees through “conservatorship directives.” Response Letter, at 3.

### The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A).<sup>7</sup> The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove federal agency rules for a period of 60 days using special procedures. See 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). However, CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

FHFA did not submit a CRA report to Congress or the Comptroller General on the Updates and Announcements. In its response to us, FHFA stated that the Updates and Announcements are not a rule because FHFA was acting in a conservatorship role when it directed the Enterprises’ actions, and because the actions of a conservator are not federal agency actions under the APA. Response Letter at 1.

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<sup>6</sup> The Lender Letter and Lender Bulletin were statements issued by the Enterprises, not FHFA, which explained the Enterprises’ actions resulting from FHFA’s Updates and Announcements. As such, these documents were not, themselves, part of FHFA’s Updates and Announcements.

<sup>7</sup> Alternatively, an agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2).

## DISCUSSION

CRA only applies to rules promulgated by a “Federal agency.” 5 U.S.C. § 801. Thus, we must determine as an initial matter whether the Enterprises’ actions as described in the Updates and Announcements were those of a “Federal agency.”

For CRA purposes, the term “Federal agency” means “any agency as that term is defined in section 551(1)” of title 5 of the United States Code. *Id.* at § 804(1). According to section 551(1), “agency” means “each authority of the Government of the United States” excluding Congress, the courts, and other specified entities. See *id.* at § 551(1).

The Enterprises are private entities, not authorities of the government within the meaning of section 551(1). See, e.g., *United States. ex rel. Adams v. Aurora Loan Services, Inc.*, 813 F.3d 1259, 1260 (9th Cir. 2016) (explaining that Fannie Mae and Freddie Mac are “private companies” and not “agents” of the government); *Meridian Investments, Inc. v. Federal Home Loan Mortgage Corporation*, 855 F.3d 573, 575 (4th Cir. 2017) (same); 12 U.S.C. § 1716b (partitioning Fannie Mae, which is a “Government-sponsored private corporation,” from the Government National Mortgage Association); 12 U.S.C. § 1452(a)(1) (establishing Freddie Mac as “a body corporate under the direction of a Board of Directors”). Thus, in general, Enterprise actions are not agency rules subject to CRA.

However, the Enterprises took the actions described in the Updates and Announcements at the direction of FHFA, which is their “conservator” pursuant to HERA. Response Letter at 3. FHFA is unquestionably an agency covered by CRA. See, e.g., B-334887, Jan. 6, 2023 (providing GAO’s report, pursuant to CRA, on a major rule promulgated by FHFA). Thus, the relevant question is whether the actions of a non-agency directed by a federal “conservator” are agency actions under CRA. As discussed below, we find that they are not.

Federal courts have overwhelmingly found that when FHFA acts as a conservator, it “step[s] into the [Enterprises’] private shoes” and “shed[s] its government character.” *Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017).<sup>8</sup> Thus, in *County of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013), the Ninth Circuit rejected a claim that FHFA engaged in “backdoor rulemaking” when it issued a conservatorship directive requiring the Enterprises to cease purchasing certain mortgages. As the court explained, given the nature of conservatorship under HERA, FHFA conservatorship directives are not agency actions subject to APA requirements but are instead “insulated from judicial review.” *Id.* at 993–94; see also *Town of Babylon v. FHFA*, 699 F.3d 221 (2nd Cir. 2012) (finding that HERA precluded a claim that FHFA conservatorship directives failed to comply with the APA); *Leon County*,

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<sup>8</sup> See also, e.g., *Meridian Investments, Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017) (finding that FHFA, acting as a conservator, “become[s] a private party”); *Montilla v. Fannie Mae*, 999 F.3d 751, 757 (1st Cir. 2021).

*Florida v. FHFA*, 700 F.3d 1273 (11th Cir. 2012) (same).

Here, FHFA acted as a conservator when it directed the Enterprises' actions described in the Updates and Announcements. Response Letter at 3. Thus, by reference to the above cases, it "step[ped] into" the Enterprises' "private shoes" and ceased operating as a federal agency. *Herron*, 861 F.3d at 169. FHFA's directives for the Enterprises to adjust "upfront" fees were not agency actions and did not constitute "rulemaking" for the same reasons that the directives in *County of Sonoma* did not—namely, because HERA converts those actions into Enterprise actions and exempts them from the APA's (and thus CRA's) coverage. *County of Sonoma*, 710 F.3d at 994. Additionally, the motive for FHFA's actions, which FHFA described as furthering its own goals and aiming to "ensure access to credit" for low- and moderate-income buyers, did not have bearing on their private nature. January 2022 Announcement. As the Supreme Court has clarified, FHFA may act as a conservator in a way that it believes beneficial to itself and "the public," it does not have to act with only the Enterprises' interests in mind. *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021).

## CONCLUSION

The Updates and Announcements are not a rule for CRA purposes because the Enterprises are not agencies and because the FHFA's direction of the Enterprises' actions described in the Updates and Announcements did not convert them into agency actions. Therefore, the Updates and Announcements are not subject to CRA's requirement that they be submitted to Congress before they can take effect.



Edda Emmanuelli Perez  
General Counsel