

Memorandum

To: Federal Home Loan Corporation (“Freddie Mac”)

From: Cadwalader, Wickersham & Taft LLP

Date: April 5, 2019

Re: Exchange Offer – Status of Eligible Securities Under a Freddie Mac Conservatorship or Receivership

I. Question Presented

Whether Eligible Securities (as defined below) delivered by a dealer or holder to Freddie Mac and held in trust and as custodian by Freddie Mac for the exclusive benefit of the holder in connection with the Exchange Offer (as defined below) have been put presumptively beyond the reach of Freddie Mac, Freddie Mac’s creditors and any conservator or receiver appointed by the Director of Federal Housing Finance Agency (“FHFA”) acting pursuant to Section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (the “Safety and Soundness Act”).¹

II. Facts

Through an exchange offer (the “Exchange Offer”), Freddie Mac will be offering holders of 45-day TBA eligible and non-TBA-eligible Freddie Mac Gold PCs and Giant PCs (the “Eligible Securities”) an option to exchange their Eligible Securities for corresponding 55-day Freddie Mac “Mirror Certificates” and “Float Compensation.”² For TBA-eligible securities, the Mirror Certificates will be Freddie Mac Mirror UMBS and Mirror Supers, and for non-TBA-eligible securities, the Mirror Certificates will be Freddie Mac Mirror MBS and Mirror Giant MBS.

¹ 12 U.S.C. § 4617.

² The Float Compensation is a one-time payment to compensate the holders of Eligible Securities for the difference in payment delay between the delivered Eligible Securities and the related Mirror Certificates.

C A D W A L A D E R

The Eligible Securities that are Freddie Mac Gold PCs are pass-through securities representing an undivided interest in a pool of residential mortgages. The Eligible Securities that are Freddie Mac Giant PCs are single-class pass-through securities that enable investors to manage their portfolios more efficiently by consolidating Gold PCs into larger Giant PCs. The Mirror Certificates created by Freddie Mac for the Exchange Offer are backed by the related Eligible Securities and are pass-through certificates that represent interests in such Eligible Securities.

To execute an exchange pursuant to an Exchange Offer, holders of Eligible Securities may choose between two exchange paths, (1) the Dealer-Facilitated Path and (2) the Direct-to-Freddie Mac Path.

The terms and conditions of the Exchange Offer are set forth in (i) Freddie Mac's Exchange Offer Circular and (ii) (a) with respect to an exchange pursuant to the Dealer-Facilitated Path, in the Dealer Exchange Agreement, which will be executed by Freddie Mac and each dealer in connection with the Exchange Offer and (b) with respect to an exchange pursuant to the Direct to Freddie Mac Path, in the Investor Exchange Agreement, which will be executed by Freddie Mac and each dealer or holder in connection with the Exchange Offer. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Exchange Offer Circular.

Under the Dealer-Facilitated Path, the holder will deliver Eligible Securities that it wishes to exchange to a dealer, typically on a delivery-versus-payment basis, and the dealer will submit the Eligible Securities for exchange using Freddie Mac's Dealer Direct Portal. The dealer's submission involves uploading a file with the pool numbers, CUSIP numbers and par amounts of the Eligible Securities and selecting a settlement date. Once the exchange has been submitted by the dealer, Freddie Mac will provide the dealer with the terms of the exchange, including the Float Compensation payable with respect to the Eligible Securities. If the dealer accepts the terms in the Dealer Direct Portal, Freddie Mac will send an exchange confirmation to the dealer via email. On the settlement date for the exchange, the dealer will wire the Eligible Securities via Fedwire to Freddie Mac's holding account (FHLMC WASH/2BD7 – ABA#021033205) (the "Holding Account"). Freddie Mac will confirm that the Eligible Securities received match the securities specified in the exchange confirmation, and will then deliver the corresponding Mirror Certificates via Fedwire from its Holding Account to the dealer. Freddie Mac will transfer the related Float Compensation to the dealer. The dealer will deliver the applicable Mirror Certificates and Float Compensation to the holder in accordance with the arrangement between the dealer and the holder. If a dealer delivers Eligible Securities to Freddie Mac on the settlement date for an exchange, and Freddie Mac is unable to complete the exchange on that date, Freddie Mac will use commercially reasonable efforts to return the Eligible Securities to the dealer on the same business day.

Under the Direct-to-Freddie-Mac Path, a holder that has been approved by Freddie Mac to use the Direct-to-Freddie Mac Path may submit the Eligible Securities for exchange through Tradeweb or, if applicable, the holder's order management system. The holder will submit the CUSIP numbers and par amounts of the Eligible Securities and will select a settlement date. Once the exchange has been submitted by the holder, Freddie Mac will provide the holder with the terms of the exchange, including the Float Compensation payable with respect to the Eligible Securities, through Tradeweb or the order management system. If the holder accepts the terms, Freddie Mac will send an exchange confirmation to the holder via Tradeweb or the order management system. On the settlement date, the holder's custodian will wire the Eligible Securities via Fedwire to Freddie Mac's Holding Account. Freddie Mac will confirm that the Eligible Securities received match the securities specified in the exchange confirmation, and will then deliver the corresponding Mirror Certificates via Fedwire from its Holding Account to the holder's custodian. A paying agent will transfer the related Float Compensation to the holder. If a holder delivers Eligible Securities to Freddie Mac on the settlement date for an exchange, and Freddie Mac is unable to complete the exchange on that date, Freddie Mac will use commercially reasonable efforts to return the Eligible Securities to the holder on the same business day.

Pursuant to the Exchange Offer Circular, the Dealer Exchange Agreement and the Investor Exchange Agreement, Freddie Mac will hold any Eligible Security delivered to it by a dealer or a holder (or the holder's custodian) to the Holding Account in trust and as custodian for the exclusive benefit of such dealer or holder in accordance with Section 1367(b)(19)(B) of the Safety and Soundness Act and the terms and conditions of the Exchange Offer Circular and the related Dealer Exchange Agreement or Investor Exchange Agreement, until such time as such Eligible Securities are exchanged for the corresponding Mirror Certificates and applicable Float Compensation, or returned to the dealer or the holder (or the holder's custodian).

III. Legal Analysis

Division A of the Housing and Economic Recovery Act of 2008 Recovery and Reform Act of 2008, known as the Federal Housing Finance Regulatory Reform Act of 2008 ("FHFRRRA"), amended various aspects of the Safety and Soundness Act to create a comprehensive regime for the administration of Freddie Mac in the event of financial distress.

Under amended Section 1367(a) of the Safety and Soundness Act, the Director of the FHFA may appoint the FHFA as conservator or receiver of a "regulated entity" under certain statutorily specified circumstances and must appoint the FHFA as receiver of a regulated entity under circumstances where the obligations of the regulated entity exceed its assets or where a regulated entity is not generally paying its debts as such debts become due.³ A "regulated

³ 12 U.S.C. § 4617(a).

entity” is defined to include Freddie Mac.⁴ Pursuant to Section 1367(a)(7) of the Safety and Soundness Act, an FHFA appointed conservator or receiver is the exclusive means of addressing the financial distress of Freddie Mac or any other regulated entity.⁵

Section 1367(b) of the Safety and Soundness Act sets forth the powers and duties of the FHFA when acting as conservator or receiver of a regulated entity,⁶ and includes Sections 1367(b)(19)(B)(i) and (ii), which specify that certain mortgage-related assets held in trust or custodial capacity by Freddie Mac are isolated from the claims of Freddie Mac’s general creditors and are instead held by the conservator or receiver in accordance with the terms of the agreement creating such trust or custodial relationship for the beneficial owners:

MORTGAGES HELD IN TRUST.—

(i) IN GENERAL.—Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.

(ii) HOLDING OF MORTGAGES.—Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other agency arrangement.⁷

⁴ A “regulated entity” for purposes of the Safety and Soundness Act is defined as Freddie Mac, the Federal National Mortgage Association or any Federal Home Loan Bank. 12 U.S.C. § 4502(20).

⁵ See 12 U.S.C. § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any other State in the exercise of the rights, powers and privileges of the [FHFA]”).

⁶ Section 1367(b)(1) of the Safety and Soundness Act authorizes the FHFA to prescribe rules and regulations regarding the conduct of conservatorships and receiverships. 12 U.S.C. § 4617(b)(1). The FHFA adopted final rules, effective July 20, 2011, dealing with specified aspects of the conservatorship and possible receivership of Freddie Mac and Fannie Mae. See *Conservatorship and Receivership*, 76 Fed. Reg. 35724 (June 20, 2011) (codified at 12 C.F.R. pt. 1237). The rules address the priority of certain claims of equityholders against Freddie Mac and Fannie Mae and are not applicable to the conclusion reached in this memo.

⁷ 12 U.S.C. § 4617(b)(19)(B).

C A D W A L A D E R

The Eligible Securities fit precisely into the statutory parameters of Subsections 1367(b)(19)(B)(i) and 1367(b)(19)(B)(ii) of the Safety and Soundness Act because they are interests in pools of mortgage loans that are held in trust and as custodian by Freddie Mac for the exclusive benefit of the holder. The Eligible Securities that are Freddie Mac Gold PCs are pass-through securities representing an undivided interest in a pool of residential mortgages, and the Eligible Securities that are Freddie Mac Giant PCs are single-class pass-through securities that consolidate Freddie Mac Gold PCs into larger Giant PCs. The governing documents of the Exchange Offer, the Exchange Offer Circular, the Dealer Exchange Agreement and the Investor Exchange Agreement, each provide that Freddie Mac will hold any Eligible Securities delivered by a dealer or a holder (or the holder's custodian) to its Holding Account in trust and as custodian for the exclusive benefit of the dealer or holder in accordance with Section 1367(b)(19)(B) of the Safety and Soundness Act and the terms and conditions of the Exchange Offer Circular and the related Dealer Exchange Agreement or Investor Exchange Agreement, until such time as the Eligible Securities are exchanged for the corresponding Mirror Securities and applicable Float Compensation or returned to the dealer or holder (or the holder's custodian).

Accordingly, in the event of a conservatorship or receivership of Freddie Mac, the Eligible Securities will not be available to satisfy the claims of general creditors and will instead be held by any conservator or receiver for the beneficial holders of the Eligible Securities in accordance with the Exchange Offer Circular, the Dealer Exchange Agreement and the Investor Agreement. Therefore, the Eligible Securities will be beyond the reach of the powers of Freddie Mac, any conservator or receiver of Freddie Mac and any general creditors of Freddie Mac.

IV. Conclusion

The Eligible Securities delivered by a dealer or holder (or a holder's custodian) to Freddie Mac's Holding Account in connection with the Exchange Offer will be presumptively beyond the reach of Freddie Mac, Freddie Mac's creditors and any conservator or receiver appointed by the Director of FHFA until such time as such Eligible Securities are exchanged for the corresponding Mirror Certificates and Float Compensation, or returned to the dealer or holder (or the holder's custodian).

V. Limitations

We note that on September 6, 2008, the FHFA was appointed to act as conservator for Freddie Mac. The FHFA acting as conservator has not taken any action which is inconsistent with the conclusion expressed in this memo. The fact that Freddie Mac is now in conservatorship does not in any way change our analysis of the status of the Eligible Securities in the event of Freddie Mac's conservatorship or receivership.

C A D W A L A D E R

While we believe our conclusion to be supported by a sound analysis of the Eligible Securities in the context of the Safety and Soundness Act, we note that there is no reported controlling judicial authority addressing the subject of this memo. Freddie Mac's status as a government-sponsored enterprise and the existence of a bespoke statutory scheme to deal with its financial distress present unique factors which render the prediction of the outcome of unlitigated questions in the insolvency area particularly difficult.

The foregoing conclusion is expressly subject to there being no material change in the law and there being no additional facts that would materially affect the validity of the conclusion set forth in this memo. The foregoing conclusion is not a guaranty as to what an FHFA conservator or receiver or a reviewing court would actually decide, but our view as to the decision it should reach if the issues were properly presented to it and it followed the applicable legal principles with respect to the facts as described herein.