616 Fifth Avenue, Unit 106
Belmar, NJ 07719
732-201-4133
CHIEF EXECUTIVE OFFICER: Thomas B. Considine



May 9, 2024

The Honorable Sandra Thompson
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20219

Dear Director Thompson:

I write to you today regarding the Federal Housing Finance Agency's (FHFA) announcement of a "Title Acceptance Pilot" (Pilot) which would permit title insurance obtainment requirements to be waived in certain transactions. The National Council of Insurance Legislators (NCOIL) is deeply concerned by this proposal as it represents yet another example of unnecessary and unauthorized federal encroachment on the States' authority to regulate the business of insurance pursuant to the McCarran-Ferguson Doctrine (15 U.S.C.A. § 1011 et seq.). Accordingly, we oppose implementation of the Pilot.

NCOIL is a national legislative organization with the nation's 50 states as members, represented principally by legislators serving on their states' insurance and financial institutions committees. NCOIL writes Model Laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act over seventy years ago, and to serve as an educational forum for public policymakers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and longstanding insurance issues.

To begin with, the Pilot comes at a time when federal encroachment onto the state-based system of insurance regulation is reaching arguably unprecedented heights. In recent years, the state-based system of insurance has encountered encroachment in areas such as:

- the Department of Labor's new Fiduciary Rule
- the Federal Trade Commission's proposals regarding service contracts and non-compete agreements;

- the tri-agency proposed rule regarding matters such as short-term limited duration insurance; and
- the Internal Revenue Service's proposed rule regarding captive insurers

Accordingly, against that backdrop, I write with a strong level of frustration regarding the FHFA's Pilot which arguably surpasses each of the abovementioned examples of federal encroachment by leaps and bounds.

Putting aside the jurisdictional issues with the Pilot, there are also several other troubling matters. First, title insurance is an important part of the proven state-based system of insurance, a system that has effectively protected consumers and helped create the largest, most competitive and innovative insurance market in the world. For decades, title insurance has helped protect property owners and lenders against future claims for any title defects in the title to the property. Claims can arise as a result of fraud, forgery, unpaid real property taxes, judgments, liens, or other encumbrances that were not discovered during a search of the property's title history conducted before the sale. Rather than recognizing and embracing this strong record of consumer protections at the state level, the Pilot seeks to insert a Government Sponsored Enterprise (GSE), Fannie Mae, that has no experience in the title insurance area into critically important consumer financial transactions[1].

Next, the Pilot does not appear to have followed the proper procedures as set forth in the rule which the Pilot stems from - the "Prior Approval for Enterprise Products" final rule. Said rule was created so that Pilots such as this one could be discussed in an open forum and allow for a notice and comment period. We see no evidence of compliance with that process.

The Pilot also appears to seriously jeopardize the small business community. According to the American Land Title Association (ALTA), over 90% of the title industry is comprised of small businesses. I know in my home state of Texas, title insurance absolutely aligns with the theme of small business empowerment. Having a GSE that is currently under federal conservatorship interfere with such an important component of the small business community is very troubling.

Returning to the jurisdictional concerns from the beginning of the letter, I note that Congress established the FHFA via the Housing and Economic Recovery Act of 2008 (HERA), as is its right. While Congress gave to the States the authority to regulate the "business of insurance" in the McCarran-Ferguson Act of 1945, Congress did reserve for itself the right to pass laws

[1] I note that the inexperience and inadequateness of the GSEs in the title insurance arena was acknowledged by former Acting FHFA Director during the Obama Administration and current President of the Housing Policy Council, Ed DeMarco, during a May 17, 2023 hearing "It certainly is disturbing to think that Fannie Mae or Freddie Mac might displace title insurance by taking on this insurance itself…Frankly, the GSEs simply do not belong in the primary market." - https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408776

relating to insurance. However, HERA is silent on insurance which signifies that Congress, in passing HERA, had no intention to step in and regulate the "business of insurance."[2]

Accordingly, while Congress could have, either through HERA or another law, decided to enact legislation concerning title insurance, it ultimately left that aspect of insurance regulation untouched and remaining under the state's regulatory authority. It is therefore such an extreme affront to the state-based system of insurance regulation that the "Pilot" comes from a federal regulatory agency, following no intent from Congress to regulate the "business of insurance."

The FHFA has concerns with the rising costs of homeownership, and I applaud the FHFA for recognizing that problem. However, the FHFA goes too far in its attempt to deal with its concerns with the Pilot. It seeks to assert itself into the title insurance marketplace, which it cannot do. The title insurance marketplace constitutes the very heart and core of the "business of insurance" and as such shall be "regulated by the States." Congress did not give the FHFA the authority to issue the Pilot with the force of law that "specifically relates to the business of insurance," but rather saved such authority for itself via its legislative prerogative.

We at NCOIL urge the FHFA to retract the Pilot and return to the drawing board to address its stated concerns with our nation's housing affordability crisis in a way that is narrow, tailored, and most importantly does not violate the McCarran-Ferguson Doctrine by infringing on the Congressionally-delegated rights of the States to regulate the business of insurance.

Very truly yours,

Tom Oliverson, M.D.
Texas State Representative
NCOIL President

[2] "Silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States"; 15 U.S.C. § 1012(a); "The business of insurance…shall be subject to the laws of the several States which relate to the regulation…of such business."; 15 U.S.C. § 1012(b); "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."