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United States General Accounting Office
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September 18, 2001

The Honorable Paul S. Sarbanes
Chairman
The Honorable Phil Gramm
Ranking Minority Member
Committee on Banking, Housing, and Urban Affairs
United States Senate

The Honorable Michael G. Oxley
Chairman
The Honorable John J. LaFalce
Ranking Minority Member
Committee on Financial Services
House of Representatives

Subject: Department of Housing and Urban Development, Office of Federal Housing Enterprise Oversight: Risk-Based Capital

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Housing and Urban Development, Office of Federal Housing Enterprise Oversight (OFHEO), entitled "Risk-Based Capital" (RIN: 2550-AA02). We received the rule on July 18, 2001. It was published in the Federal Register as a final rule on September 13, 2001. 66 Fed. Reg. 47730.

The final rule implements the requirement of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 that OFHEO issue a risk-based capital regulation for the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association (collectively, the Enterprises). The final rule specifies the risk-based capital stress test that will be used to determine each Enterprise's risk-based capital requirement and, along with the minimum capital requirement, to determine each Enterprise's capital classification for purposes of possible supervisory action.

The final rule has an announced effective date of September 13, 2001, the date of publication in the Federal Register. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the Federal Register or receipt of the rule by Congress, whichever is later. 5 U.S.C. 801(a)(3)(A). Therefore, the final rule does not have the required 60-day delay in the effective date to allow for congressional review.

OFHEO recognized this problem in drafting the final rule and discusses the effective date in the preamble to the final rule. The above-noted 1992 Act provides for the final rule to take effect upon publication. 12 U.S.C. 4611(e)(1). It also provides for a 1-year delay in enforcement of the final rule. 12 U.S.C. 4615(c). OFHEO advances the position that the 60-day delay can run concurrently with the 1-year delay in enforcement of the final rule. This gives Congress adequate time for review of the final rule and avoids delaying the 1-year time period that Congress deemed adequate before enforcement of the final rule. Finally, OFHEO states that it has found good cause under the CRA exception to the 60-day delay. 5 U.S.C. 808(2).

We note that the CRA does not discuss enforcement of a major rule but only the effective date in determining the 60-day delay period. 5 U.S.C. 801(a)(3)(A). Also, regarding the publication and effective date requirements of the 1992 Act, the provisions of the CRA apply notwithstanding any other provision of law. 5 U.S.C. 806(a). Finally, since the final rule was the result of the notice and comment procedures found at 5 U.S.C. 553, the exception to the 60-day delay found at section 808(2) is not available.

Enclosed is our assessment of the OFHEO's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the OFHEO, with the exception of the above effective date discussion, complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is Thomas McCool, Managing Director, Financial Markets and Community Investments. Mr. McCool can be reached at (202) 512-8678.

signed

Kathleen E. Wannisky
Managing Associate General Counsel

Enclosure

cc: Mr. Armando Falcon, Jr.
Director, Office of Federal
Housing Enterprise Oversight
Department of Housing and
Urban Development

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT
ENTITLED
"RISK-BASED CAPITAL"
(RIN: 2550-AA02)

(i) Cost-benefit analysis

OFHEO conducted an economic analysis of the final rule that describes the costs and benefits of the rule in qualitative, rather than quantitative, terms. The analysis concludes that while there will be costs to the Enterprises for reporting and personnel, there should not be an increase in the cost of housing generally or other costs to the housing market or the larger economy. The benefits of the rule include a reduced risk of failure of the Enterprises that could lead to disruption of the housing and financial markets. The analysis concludes that the benefits outweigh the costs of the final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The General Counsel of the OFHEO has certified that the final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rule does not contain either an intergovernmental or private sector mandate, as defined in title II, of more than \$100 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The final rule was issued using the notice and comment procedures found at 5 U.S.C. 553. On February 8, 1995, OFHEO issued an Advance Notice of Proposed Rulemaking (60 Fed. Reg. 7468) that was followed on June 11, 1996, by a Notice of Proposed Rulemaking (NPR) (61 Fed. Reg. 29616). On April 13, 1999, OFHEO issued a second NPR (64 Fed. Reg. 18084). A total of 59 comments were received in response to the two NPR's and the comments are discussed in the preamble to the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule does not contain any information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is promulgated under the authority contained at 12 U.S.C. 4513, 4514, 4611, 4612, 4614, 4615, and 4618.

Executive Order No. 12866

The final rule was reviewed by the OMB and found to be an “economically significant” regulatory action under the order.

Executive Order No. 13132 (Federalism)

OFHEO has determined that the final rule does not contain sufficient federalism implications to warrant the preparation of a federalism assessment.