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## **Regulation of Fannie Mae and Freddie Mac Under the Federal Housing Enterprises Financial Safety and Soundness Act: A Legal Analysis**

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## **Summary**

In 2002, an auditor found inaccuracies in Freddie Mac's financial statements, which ultimately led to the enterprise restating three years of earnings. In the wake of the resulting scandal, Congress has expressed an interest in tightening the oversight of Fannie Mae and Freddie Mac. Currently, federal oversight of Fannie Mae and Freddie Mac is governed by the Federal Housing Enterprises Safety and Soundness Act of 1992. The purpose of this report is to analyze the oversight provisions of this Act.

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# Regulation of Fannie Mae and Freddie Mac Under the Federal Housing Enterprises Financial Safety and Soundness Act: A Legal Analysis

## Introduction

In an effort to strengthen oversight of the Federal National Mortgage Association (Fannie Mae) and the Federal National Home Loan Corporation (Freddie Mac),<sup>1</sup> Congress passed the Federal Housing Enterprises Financial Safety and Soundness Act (the Safety and Soundness Act) in 1992.<sup>2</sup> This report analyzes current federal regulation of the enterprises under the Safety and Soundness Act, as amended.

## Supervision and Regulation of Fannie Mae and Freddie Mac

**The Office of Federal Housing Enterprise Oversight.** Responsibility for financial safety and soundness regulation resides with the Office of Federal Housing Enterprise Oversight (OFHEO) within the Department of Housing and Urban Development (HUD).<sup>3</sup> The Office is headed by a Director who is appointed by the President, with the advice and consent of the Senate, to a term of five years.<sup>4</sup> The Director cannot have served as an executive officer or director of an enterprise in the three years previous to that Director's appointment to office.<sup>5</sup>

The Director's primary duty is to ensure that Fannie Mae, Freddie Mac, and their affiliates (hereinafter "the enterprises") are "adequately capitalized and

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<sup>1</sup> For further information on Fannie Mae, Freddie Mac, and government-sponsored enterprises in general, see CRS Report RS21663, *Government-Sponsored Enterprises: An Institutional Overview*, by (name redacted) and (name redacted); CRS Report RS21724, *GSE Regulatory Reform: Frequently Asked Questions*, by Loretta Nott and Barbara Miles; and CRS Report RL32069, *Improving the Effectiveness of GSE Oversight: Legislative Proposals*, by Loretta Nott and (name redacted).

<sup>2</sup> Title XIII of P.L. 102-550 (codified, as amended, at 12 U.S.C. § 4501 et seq.). The charters of Fannie Mae and Freddie Mac are codified at 12 U.S.C. § 1716 et seq. and 12 U.S.C. § 1451 et seq., respectively.

<sup>3</sup> 12 U.S.C. § 4511.

<sup>4</sup> *Id.*, at § 4512(b).

<sup>5</sup> *Id.*, at § 4512(a). In addition, the Director (or any other former OFHEO officers or employees making more money than a GS-15 level federal employee) may not accept compensation from an enterprise for two years after leaving OFHEO. *Id.*, at § 4523.

operating safely.”<sup>6</sup> In order to fulfill these duties, the Director is authorized to - without interference from the HUD Secretary - take actions regarding examination of enterprises, the capital levels of the enterprises, decisions to appoint conservators for the enterprises, administrative and enforcement actions, approval of payments of capital distributions by the enterprises, reporting requirements for the enterprises, prohibiting excessive payments to the enterprises’ executive officers, management of the OFHEO, conducting research and financial analysis, and submitting reports to Congress.<sup>7</sup> In addition, the Director must issue regulations necessary to fulfill these duties.<sup>8</sup> The Director must also appoint a Deputy Director to perform such duties as the Director prescribes and to serve as acting Director in the Director’s absence.<sup>9</sup> The Director may require an enterprise to submit financial reports,<sup>10</sup> reports on capital distributions,<sup>11</sup> or other special reports as the Director deems necessary.<sup>12</sup>

The Director may appoint officers and employees for OFHEO without regard to the classifications and statutory pay scales for most federal employees.<sup>13</sup> The Director may also appoint and compensate outside experts as the Director deems necessary.<sup>14</sup>

The Safety and Soundness Act empowers the Director to establish and collect from the enterprises annual assessments to provide for the reasonable expenses of OFHEO.<sup>15</sup> These assessments represent OFHEO’s primary source of income, subject to appropriation by Congress. The payment amounts must be in proportion to each enterprise’s share of the combined asset total of both enterprises.<sup>16</sup> Also, the Director must appoint examiners to conduct annual on-site safety and soundness examinations

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<sup>6</sup> *Id.*, at § 4513(a).

<sup>7</sup> *Id.*, at § 4513(b).

<sup>8</sup> *Id.*, at § 4526.

<sup>9</sup> *Id.*, at § 4512(e).

<sup>10</sup> *Id.*, at § 4514(a)(1).

<sup>11</sup> *Id.*, at § 4514(b).

<sup>12</sup> *Id.*, at § 4514(a)(2).

<sup>13</sup> *Id.*, at § 4515(a). The Act commands the Director to maintain pay rates comparable to those of the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. *Id.*, at § 4515(b). The Director must also look to other organizations as benchmarks to prevent the enterprises from excessively compensating their executive officers. *Id.*, at § 4518.

<sup>14</sup> *Id.*, at § 4515(e).

<sup>15</sup> *Id.*, at § 4516(a). Assessments are deposited in the Treasury’s Federal Housing Enterprise Oversight Fund. *Id.*, at § 4516(f).

<sup>16</sup> *Id.*, at § 4516(b)(1).

of the enterprises,<sup>17</sup> and the Director may conduct other such examinations when the Director deems it necessary.<sup>18</sup>

The Director must submit annual reports to the House Committee on Banking, Finance and Urban Affairs and the Senate Banking Committee. These reports must include, among other things, a description of the safety and soundness of each enterprise and recommendations for legislation to enhance the safety and soundness of each enterprise.<sup>19</sup> The Director must also report annually to those same committees on requests for enforcement actions,<sup>20</sup> and certain information on enforcement actions must be made open to the public.<sup>21</sup>

**The HUD Secretary's Authority.** Besides the financial safety and soundness authority delegated to OFHEO, the HUD Secretary is granted all general regulatory authority over Fannie Mae and Freddie Mac.<sup>22</sup> Both enterprises must obtain the HUD Secretary's approval before implementing any new programs.<sup>23</sup> The Secretary must approve a requested new program unless it is not authorized by the enterprise's charter or the Secretary determines that the new program is not in the public interest.<sup>24</sup> The HUD Secretary must ensure compliance with the Fair Housing Act and the Equal Credit Opportunity Act and promulgate regulations prohibiting the enterprises from discriminating on the basis of race, color, religion, sex, handicap, familial status, age, or national origin.<sup>25</sup> The HUD Secretary may also publish regulations to prohibit the public disclosure of proprietary information.<sup>26</sup>

The HUD Secretary must submit annual reports to the House and Senate Banking Committees on the activities of the enterprises<sup>27</sup> and their success in

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<sup>17</sup> *Id.*, at § 4517(a). Conversely, the Comptroller General may audit the OFHEO's operations in accordance with accepted government auditing standards. *Id.*, at § 4524.

<sup>18</sup> *Id.*, at § 4517(b). The Director may also contract with rating organizations recognized by the Securities and Exchange Commission's Division of Market Regulation to conduct a review of an enterprise. *Id.*, at § 4519.

<sup>19</sup> *Id.*, at § 4521(a).

<sup>20</sup> *Id.*, at § 4521(b).

<sup>21</sup> *Id.*, at § 4522.

<sup>22</sup> *Id.*, at § 4541.

<sup>23</sup> *Id.*, at § 4542(a). "New program" is defined as any program for the purchasing, servicing, selling, lending on the security of, or otherwise dealing in conventional mortgages that either is significantly different from previously approved programs or represents an expansion (in terms of dollar volume or number of mortgages or securities involved) of programs above limits expressly contained in any prior approval. *Id.*, at § 4502(13).

<sup>24</sup> *Id.*, at § 4542(b)(1).

<sup>25</sup> *Id.*, at § 4545.

<sup>26</sup> *Id.*, at § 4546.

<sup>27</sup> *Id.*, at § 4548.

achieving their housing goals.<sup>28</sup> The Secretary must establish such goals for each enterprise, and must include a low and moderate income housing goal, a special affordable housing goal, and a central cities, rural areas, and other underserved areas housing goal.<sup>29</sup> The enterprises must design programs to facilitate the achievement of these goals and take a number of other steps in this direction, including developing relationships with non-profits and state and local governments, assisting primary lenders in making housing credit available in areas with concentrations of low-income and minority families, and developing the institutional capacity to help finance low and moderate income housing.<sup>30</sup>

In establishing the low and moderate income housing goal, the HUD Secretary must consider national housing needs, economic, housing, and demographic conditions, the enterprises' success in meeting this goal in the past, the size of the low and moderate income mortgage market relative to the overall mortgage market, the ability of the enterprises to lead the industry in the low and moderate income mortgage market, and the enterprises' financial safety and soundness.<sup>31</sup> The HUD Secretary must monitor each enterprise's efforts in reaching this goal based on the mortgagor's income when the mortgage originates (in the case of an owner-occupied dwelling)<sup>32</sup> or either the income of the property's tenants or the affordable rent levels for low and moderate income families (in the case of a rental dwelling).<sup>33</sup>

**Housing Goals.** The HUD Secretary must establish for each enterprise a special affordable housing goal which can not be less than one percent of the dollar amount of the enterprise's mortgage purchases the previous year.<sup>34</sup> In establishing this special affordable housing goal, the HUD Secretary must consider a variety of factors ranging from national housing needs to the enterprise's financial safety and soundness.<sup>35</sup> Each enterprise gets full credit toward achievement of the special affordable housing goal for the following activities, if they contribute to the availability of affordable housing: purchasing or securitizing certain federally-insured or guaranteed mortgages; purchasing or refinancing certain existing, seasoned

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<sup>28</sup> *Id.*, at § 4544.

<sup>29</sup> *Id.*, at § 4561. "Low income" is defined as, for owner-occupied units, income not in excess of 80 percent of area median income (i.e., the adjustable median income for the area, as determined and published annually by the HUD Secretary). For rental units, "low income" is defined as income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by the HUD Secretary. *Id.*, at § 4502(8). "Moderate income" is defined as, for owner-occupied units, income not in excess of the area median income, while for rental units, "moderate income" means income not in excess of area median income, with adjustments for smaller and larger families, as determined by the Secretary. *Id.*, at § 4502(10).

<sup>30</sup> *Id.*, at § 4565.

<sup>31</sup> *Id.*, at § 4562(b).

<sup>32</sup> *Id.*, at § 4562(c)(1)(A).

<sup>33</sup> *Id.*, at § 4562(c)(1)(B).

<sup>34</sup> *Id.*, at § 4563(a)(1).

<sup>35</sup> *Id.*, at § 4563(a)(2).

portfolios; and purchasing certain direct loans made by the Resolution Trust Corporation (RTC) or the Federal Deposit Insurance Corporation (FDIC).<sup>36</sup> The HUD Secretary must monitor each enterprise's efforts in reaching this goal based on the mortgagor's income when the mortgage originates (in the case of an owner-occupied dwelling)<sup>37</sup> or either the income of the property's tenants or the affordable rent levels for low and moderate income families (in the case of a rental dwelling).<sup>38</sup>

The HUD Secretary must also establish for each enterprise a goal for the purchase by each enterprise of mortgages on housing located in central cities, rural areas, and other underserved areas.<sup>39</sup> In establishing this goal, the HUD Secretary must take into account several factors, including the urban, rural, and underserved area housing needs, and the financial safety and soundness of each enterprise.<sup>40</sup> The HUD Secretary must monitor each enterprise's efforts in reaching this goal based on the location of the properties subject to mortgages purchased by each enterprise.<sup>41</sup>

The HUD Secretary must set guidelines to measure the extent of compliance with the aforementioned housing goals,<sup>42</sup> and if the Secretary determines that an enterprise has failed or is substantially likely to fail to meet one of those goals, the Secretary must provide notice to the enterprise of that determination and the reasons behind it, and give the enterprise a chance to respond.<sup>43</sup> The Secretary must then require the enterprise to submit a housing plan to either achieve the next year's goal or to make improvements necessary for the remaining year.<sup>44</sup>

**Enforcement of Housing Goals.** The HUD Secretary is empowered to initiate cease-and-desist proceedings if the Secretary determines that the enterprise has failed to submit a housing plan as mentioned above, the enterprise has failed to make a good faith effort to comply with such a housing plan, or the enterprise fails to submit required information to the Secretary.<sup>45</sup> The HUD Secretary may also impose civil money penalties for the same transgressions (at different levels according to the severity of the transgression),<sup>46</sup> and is required to establish standards governing the process for imposing such penalties.<sup>47</sup> An enterprise has the right to

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<sup>36</sup> *Id.*, at § 4563(b).

<sup>37</sup> *Id.*, at § 4562(c)(1)(A).

<sup>38</sup> *Id.*, at § 4563(c)(1)(B).

<sup>39</sup> *Id.*, at § 4564(a).

<sup>40</sup> *Id.*, at § 4564(b).

<sup>41</sup> *Id.*, at § 4564(c).

<sup>42</sup> *Id.*, at § 4566(a)(2).

<sup>43</sup> *Id.*, at § 4566(b).

<sup>44</sup> *Id.*, at § 4566(c).

<sup>45</sup> *Id.*, at § 4581(a).

<sup>46</sup> *Id.*, at § 4585(a).

<sup>47</sup> *Id.*, at § 4585(c). The Secretary also has subpoena authority in the course of any  
(continued...)



petition the United States Court of Appeals for the D.C. Circuit for review of a cease-and-desist order or a civil money penalty,<sup>48</sup> and the enterprise is empowered to request the U.S. Attorney General (U.S.A.G.) to bring an action in that same court for enforcement of a cease-and-desist order or a civil money penalty.<sup>49</sup> The HUD Secretary must make available to the public any final cease-and-desist order or civil money penalty, any written agreement regarding a violation of a housing goal, or modification or termination of a final order or written agreement.<sup>50</sup>

## Required Capital Levels and Special Enforcement Powers

The OFHEO Director is required to establish for each enterprise a risk-based capital level, which is the amount of total capital<sup>51</sup> sufficient for the enterprise to maintain positive capital throughout a hypothetical ten year “stress period,” during which the following would occur: credit risk, interest rate risk, new business, and losses or gains on other activities.<sup>52</sup> The Safety and Soundness Act’s risk-based capital test contains a component for each of these risks.

The credit risk component of the stress period assumes that losses occur throughout the U.S. at a rate of default and severity reasonably related to the rate and severity at which it occurred in contiguous areas of the country with a population of at least five percent of the U.S. population that for at least two years experienced the highest rates of default and severity of mortgage losses in comparison with such rates in similar areas for the same duration period.<sup>53</sup>

The interest rate risk component assumes that one of two interest rate fluctuations will occur during the stress period, and the enterprise must have enough capital to withstand either. The first fluctuation is a decrease of the ten-year constant maturity Treasury yield during the first year of the stress period that will remain throughout the remainder of the stress period. The yield decreases to the lesser of 600 basis points below the average yield during the preceding nine months, or sixty

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<sup>47</sup> (...continued)

administrative proceeding regarding a violation of a housing goal. *Id.*, at § 4588.

<sup>48</sup> *Id.*, at § 4583.

<sup>49</sup> *Id.*, at § 4584.

<sup>50</sup> *Id.*, at § 4586. The HUD Secretary also has discretion to keep such information from the public if the Secretary determines that it is in the public interest to do so. *Id.*

<sup>51</sup> “Total capital” is determined by adding the enterprise’s core capital, a general allowance for foreclosures, and any other amounts from sources of funds available to absorb losses incurred by the enterprise (as determined by the Director). *Id.*, at § 4502(18). “Core capital” is determined by combining the par or stated value of outstanding common stock, the par or stated value of outstanding perpetual, noncumulative preferred stock, paid-in capital, and retained earnings. Core capital does not include, however, any amounts that the enterprise could be required to pay, at the option of investors, to retire capital instruments. *Id.*, at § 4502(4).

<sup>52</sup> *Id.*, at § 4611(a).

<sup>53</sup> *Id.*, at § 4611(a)(1).

percent of the average yield during the preceding three years. The yield in no case, however, decreases to a yield less than 50 percent of the average yield during the preceding nine months.<sup>54</sup> The second fluctuation is an increase in the ten-year constant maturity Treasury yield during the first year of the stress period that will remain throughout the remainder of the stress period. The yield increases to the greater of 600 basis points above the average yield during the preceding nine months, or 160 percent of the average yield during the preceding three years. The yield in no case, however, rises to greater than 175 percent of the average yield during the preceding nine months.<sup>55</sup>

The new business component of the stress period assumes that the enterprise will meet all of its contractual commitments, and will make sure that all of the resulting mortgage purchases, securities issued, and other financing will be consistent with the terms of those commitments, recent experience, and the economic characteristics of the stress period. The Director may assume that the enterprise conducts additional new business during the stress period consistent with the reasonableness of the mortgage product types and amounts, losses, pricing, interest rate risk, and adequate reserves.<sup>56</sup> The Director must use available information to determine the losses or gains on other activities during the stress period.<sup>57</sup>

The Director must establish the risk-based capital level for an enterprise by adding the total capital determined by applying the aforementioned risk-based capital test, plus (to provide for management and operations risk) an additional 30% of that total.<sup>58</sup> Using that figure, the OFHEO Director is required quarterly to classify each enterprise as adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized.<sup>59</sup>

An enterprise is adequately capitalized if it maintains an amount of total capital at least equal to its risk-based capital level established as mentioned above and an amount of core capital at least equal to the “minimum capital level.”<sup>60</sup> This minimum capital level is the sum of three calculations; 2.5% of its aggregate on-balance sheet assets; plus .45% of the unpaid principal balance of other outstanding mortgage-backed securities (and substantially similar instruments) issued or guaranteed by the enterprise; plus .45% of other off-balance sheet obligations,

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<sup>54</sup> *Id.*, at § 4611(a)(2)(B).

<sup>55</sup> *Id.*, at § 4611(a)(2)(C).

<sup>56</sup> *Id.*, at § 4611(a)(3)(B). In making this assumption, the Director must consider studies done by the Congressional Budget Office and the Comptroller General. *Id.*, at § 4611(a)(3)(C).

<sup>57</sup> *Id.*, at § 4611(a)(4).

<sup>58</sup> *Id.*, at § 4611(c).

<sup>59</sup> *Id.*, at § 4614(a). An enterprise can appeal its classification, unless it is classified as critically undercapitalized, with the United States Court of Appeals for the D.C. Circuit. *Id.*, at § 4623.

<sup>60</sup> *Id.*, at § 4614(a)(1).

excluding commitments over 50% of the average dollar amount of the commitments outstanding each quarter over the preceding four quarters.<sup>61</sup>

An enterprise is undercapitalized if it fails to maintain an amount of total capital at least equal to its risk-based capital level established as mentioned above and maintains an amount of core capital at least equal to the minimum capital level.<sup>62</sup> The Director also has the some discretion to declare an otherwise adequately capitalized enterprise to be undercapitalized if it is engaging in activity not approved by the Director that could be harmful to the enterprise.<sup>63</sup> An undercapitalized enterprise must submit a capital restoration plan<sup>64</sup> to the OFHEO Director and comply with that plan, and the enterprise may not make any capital distribution that would make the enterprise significantly undercapitalized or critically undercapitalized.<sup>65</sup>

An enterprise is significantly undercapitalized if it fails to maintain an amount of total capital at least equal to its risk-based capital level established as mentioned above, fails to maintain an amount of core capital at least equal to the minimum capital level, and maintains an amount of core capital at least equal to the “critical capital level.”<sup>66</sup> This level is the sum of three calculations; 1.25% of its aggregate on-balance sheet assets; plus .25% of the unpaid principal balance of other outstanding mortgage-backed securities (and substantially similar instruments) issued or guaranteed by the enterprise; plus .25% of other off-balance sheet obligations, excluding commitments over 50% of the average dollar amount of the commitments outstanding each quarter over the preceding four quarters.<sup>67</sup> The Director also has some discretion to declare an otherwise undercapitalized enterprise as significantly undercapitalized if it is engaging in activity not approved by the Director that could be harmful to the enterprise.<sup>68</sup> A significantly undercapitalized enterprise must submit to the OFHEO Director a capital restoration plan and carry out that plan.<sup>69</sup> Such an enterprise may not make a capital distribution without the OFHEO Director’s approval, and cannot make any capital distribution that would result in the enterprise being reclassified as critically undercapitalized.<sup>70</sup> With respect to a significantly undercapitalized enterprise, the OFHEO Director has broad discretion

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<sup>61</sup> *Id.*, at § 4612.

<sup>62</sup> *Id.*, at § 4612(a)(2)(A).

<sup>63</sup> *Id.*, at § 4614(a)(2)(B).

<sup>64</sup> A capital restoration plan under the Safety and Soundness Act must set forth a feasible plan for restoring (1) the core capital of the enterprise to at least the minimum capital level and (2) the total capital of the enterprise to at least the risk-based capital level. *Id.*, at § 4622.

<sup>65</sup> *Id.*, at § 4615.

<sup>66</sup> *Id.*, at § 4614(a)(3)(A).

<sup>67</sup> *Id.*, at § 4613.

<sup>68</sup> *Id.*, at § 4614(a)(3)(B).

<sup>69</sup> *Id.*, at § 4616(a)(1).

<sup>70</sup> *Id.*, at § 4616(a)(2)(A).

to limit the enterprise from increasing its obligations, limit growth, require new acquisition of capital, otherwise restrict activities, or in certain cases appoint a conservator.<sup>71</sup>

An enterprise is critically undercapitalized if it fails to maintain an amount of total capital at least equal to its risk-based capital level and an amount of core capital at least equal to the critical capital level.<sup>72</sup> The Director also has some discretion to declare an otherwise significantly undercapitalized enterprise as critically undercapitalized if it is engaging in activity not approved by the Director that could be harmful to the enterprise.<sup>73</sup> Upon classifying an enterprise as critically undercapitalized, the OFHEO Director must appoint a conservator, with some limited exceptions.<sup>74</sup> In addition, the Director has the discretion to limit the enterprise from increasing its obligations, limit growth, require new acquisition of capital, or otherwise restrict activities.<sup>75</sup>

Regardless of the capital classification of an enterprise, the OFHEO Director may appoint a conservator for the enterprise upon a determination that alternative remedies will not work, and that the enterprise is either not likely to pay its obligations, has incurred or likely will incur losses that will substantially deplete its core capital, has concealed information material to the discharge of the Director's duties, or has violated a final cease-and-desist order.<sup>76</sup>

## Enforcement Provisions

Generally, the OFHEO Director may request the U.S.A.G. to bring an action in the U.S. District Court for the District of Columbia for the enforcement of an effective order or notice, or may bring such an action under the A.G.'s guidance.<sup>77</sup> In addition, the Director may impose a civil money penalty on an enterprise or its executive officers or directors<sup>78</sup> for any violation of the enterprise's charter, a violation of the Safety and Soundness Act, or any rule or regulation under that Act, except that the Director may not use this authority to enforce compliance with

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<sup>71</sup> *Id.*, at § 4616(b). A conservator appointed by the OFHEO Director pursuant to the Safety and Soundness Act possesses all the powers of the shareholders, directors, and officers of the enterprise and may act in the enterprise's name unless the Director provides otherwise. *Id.*, at § 4620.

<sup>72</sup> *Id.*, at § 4614(a)(4)(A).

<sup>73</sup> *Id.*, at § 4614(a)(4)(B).

<sup>74</sup> *Id.*, at § 4617(a). The Director must appoint a conservator for a critically undercapitalized enterprise unless the Director finds, with the concurrence of the Treasury Secretary, that to do so would have serious adverse economic effects on national finance or housing markets, and that the public interest would be better served by taking a different enforcement action.

<sup>75</sup> *Id.*, at § 4617(b).

<sup>76</sup> *Id.*, at § 4619(a)(1).

<sup>77</sup> *Id.*, at § 4635(a).

<sup>78</sup> The enterprise may not reimburse or indemnify any person for paying any such penalty. *Id.*, at § 4636(g).

housing goals.<sup>79</sup> The Director may also impose civil money penalties for violations of temporary orders, written agreements with the Director, and any conduct likely to cause a loss to the enterprise.<sup>80</sup> The Director may request the A.G. to bring an action to collect payment of the penalty or, under the direction and control of the A.G., the Director may bring such an action.<sup>81</sup>

The OFHEO Director may initiate cease-and-desist proceedings against an adequately capitalized enterprise (or any executive officer of director) upon the OFHEO Director's determination that the enterprise - or a executive officer or director - is engaging in or about to engage in one or more of the following: conduct that threatens to *significantly deplete* the core capital of the enterprise; violations leading to unjust enrichment or that could result in a civil penalty; or conduct that violates the Safety and Soundness Act (as amended), the enterprise's charter, or any other law, written agreement with the Director, rule, or regulation, except that the Director may not enforce compliance with a housing goal.<sup>82</sup>

The OFHEO Director may initiate cease-and-desist proceedings against undercapitalized, significantly undercapitalized, and critically undercapitalized enterprises (or an executive officer of director thereof) if the Director determines that the enterprise - or an executive officer or director - is engaging in or about to engage in one or more of the following: conduct that threatens to cause a *material depletion* of the core capital of the enterprise; violations leading to unjust enrichment or that could result in a civil penalty; or conduct that violates the Safety and Soundness Act (as amended), the enterprise's charter, or any other law, written agreement with the Director, rule, or regulation, except that the Director may not use this authority to enforce compliance with a housing goal.<sup>83</sup>

If the Director determines that an enterprise's conduct is likely to cause (*prior to* completion of the cease-and-desist proceedings) insolvency, a significant depletion of the enterprise's core capital, or other irreparable harm to the enterprise, then the Director may issue a temporary cease-and-desist order.<sup>84</sup> In addition, if in the course of initiating cease-and-desist proceedings, the Director determines that the enterprise's records are so incomplete and inaccurate that the Director is unable to determine the financial condition of the enterprise, then the Director can issue a temporary cease-and-desist order requiring the cessation of whatever activity gave

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<sup>79</sup> *Id.*, at § 4636(a)(1).

<sup>80</sup> *Id.*, at § 4636(a)(2), (3), (4). The Director must classify the civil money penalty imposed in one of three tiers based on the severity of the conduct. *Id.*, at § 4636(b).

<sup>81</sup> *Id.*, at § 4636(d).

<sup>82</sup> *Id.*, at § 4631(a).

<sup>83</sup> *Id.*, at § 4631(b).

<sup>84</sup> *Id.*, at § 4632(a). The enterprise has the right to appeal a temporary cease-and-desist order to the United States District Court for the District of Columbia. *Id.*, at § 4632(d). Conversely, the Director may request the U.S. Attorney General to bring an action in that same court for a failure to obey a temporary cease-and-desist order. *Id.*, at § 4632(e).

rise to the incomplete records and affirmative action to restore the records to a complete and accurate state.<sup>85</sup>

When the OFHEO Director finds that an enterprise is engaging in conduct that necessitates the initiation of cease and desist proceedings or the issuance of a temporary cease-and-desist order, the Director can take a variety of affirmative actions to correct the situation. First, the Director can require an enterprise's executive officer or director to reimburse or indemnify the enterprise for violations that led to unjust enrichment or violations that led to a civil penalty, and the Director can require the enterprise to seek indemnification, restitution, or reimbursement for losses. The OFHEO Director can also restrict an enterprise's growth; require the enterprise to dispose of assets involved in the offending conduct; require the enterprise to rescind agreements or contracts; require the Director's approval for new hires; and require the enterprise to take such steps as the Directors deems appropriate.<sup>86</sup>

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<sup>85</sup> *Id.*, at § 4632(c).

<sup>86</sup> *Id.*, at § 4631(d).

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