

June 24, 2015

Via Electronic Mail to [reg-comm@fca.gov](mailto:reg-comm@fca.gov)

Laurie A. Rea  
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Re: Proposed Rule: “Federal Agricultural Mortgage Corporation General Provisions; Federal Agricultural Mortgage Corporation Governance; Federal Agricultural Mortgage Corporation Risk Management; Federal Agricultural Mortgage Corporation Disclosure and Reporting; Farmer Mac Corporate Governance and Standards of Conduct”  
12 C.F.R. Parts 650, 651, 653, and 655  
RIN 3052-AC89, March 26, 2015

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Dear Ms. Rea:

The Federal Agricultural Mortgage Corporation (“Farmer Mac,” “we,” or “our”) appreciates the opportunity to comment on the proposed rule (the “Proposal”) published by the Farm Credit Administration (the “FCA”) related to Farmer Mac’s Board governance, standards of conduct, and disclosure and reporting requirements.<sup>1</sup> This response was approved by the Board of Directors of Farmer Mac (the “Farmer Mac Board”) and also reflects the views of the members of Farmer Mac’s management.

Farmer Mac supports the FCA’s role in overseeing the safety and soundness of Farmer Mac, and we are committed to governing Farmer Mac in a manner that is consistent with strong governance practices and our public policy mission in support of rural America. However, Farmer Mac has questions about the need for the proposed rule changes, as well as significant concerns about the scope and likely impact of the Proposal as currently formulated. Farmer Mac believes that some aspects of the Proposal are overly prescriptive, do not appropriately recognize Farmer Mac’s status as a public company, and will have harmful unintended consequences. For example, Farmer Mac believes that some aspects of the Proposal will limit Farmer Mac’s ability to attract individuals with the desired background and skills to serve as Farmer Mac directors, will conflict with other regulatory regimes to which Farmer Mac is subject, and will present compliance challenges for Farmer Mac and increase third party litigation risk resulting from new and undefined standards. For all of these reasons, and as discussed further in this letter, we urge the FCA to withdraw the Proposal. Should the FCA decide to move forward with a scaled-back

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<sup>1</sup> 80 Fed. Reg. 15931 (March 26, 2015).



version of this rulemaking, we believe it should be re-proposed with substantial modifications to address the issues described in this letter.

This letter is presented in four parts, plus two Appendices. The first part provides an Executive Summary of our views about the Proposal. The second part provides background information about Farmer Mac and its unique status among other government-sponsored enterprises (“GSEs”) and public companies. The third part describes Farmer Mac’s commitment to strong corporate governance and comments generally on whether there is a need for some of the proposed rule changes. The fourth part provides Farmer Mac’s perspective on key concepts and concerns that flow throughout the Proposal. The attached Appendix A includes a separate discussion of Farmer Mac’s interpretation of what it means to be a “representative” director. The attached Appendix B provides a section-by-section discussion of the Proposal, which details Farmer Mac’s specific concerns about the Proposal, identifies potential adverse effects on Farmer Mac if the Proposal were adopted without revision, and suggests needed changes to the Proposal, as appropriate.

## **I. Executive Summary**

As explained throughout this letter, Farmer Mac believes that the Proposal should not be adopted because of the potential for material harm to Farmer Mac and, consequently, the constituencies served by Farmer Mac. Rather than enhancing Farmer Mac’s safety and soundness, many aspects of the Proposal could unintentionally have the opposite effect. Our purpose in providing this response is to seek a better understanding of the goals of the proposed rule changes and to provide constructive feedback on those areas of the Proposal that Farmer Mac believes could be improved, clarified, or more narrowly tailored to Farmer Mac’s unique circumstances. Notwithstanding these suggestions, Farmer Mac believes that many aspects of the Proposal miss the mark in their approach to certain issues and are inconsistent with corporate governance best practices and would require major revision if the FCA decides to proceed with adopting regulations encompassing the topics addressed in the Proposal.

In summary, Farmer Mac’s principal concerns with the Proposal include the following:

### **Need for the Proposal**

Notwithstanding Farmer Mac’s strong record of success in fulfilling its mission and the FCA’s record of effective oversight of Farmer Mac’s safety and soundness, the Proposal offers little explanation of the current concerns the FCA has with Farmer Mac’s governance and, consequently, why the proposed changes are needed. As noted throughout this letter, if adopted, many of the proposed changes would have serious adverse effects on Farmer Mac and its ability to fulfill its mission. Before such potentially disruptive measures are implemented, Farmer Mac believes that a more detailed rationale should be provided for why the changes are needed. At a minimum, such an explanation might allow Farmer Mac and other commenters to suggest other

less intrusive means to address any significant concerns the FCA may have about Farmer Mac's governance.

#### Approach to "Representative" Directors

The Proposal includes many provisions that involve the concept of a "representative" director, including new requirements for director nominations and elections, changes to the approach to conflicts of interest for directors with affiliations with stockholders, and director confidentiality obligations. Farmer Mac is concerned that the approach to "representative" directors that flows throughout the Proposal could have unintended consequences that could cause material harm. We believe that this approach is not required by the plain meaning of the text of Farmer Mac's statutory charter or supported by any statement of Congressional intent in the legislative history of the Act. The FCA's approach to "representative" directors raises a number of risks, including:

- Factionalization of directors in a manner that could threaten the effective functioning of the Farmer Mac Board;
- Disqualification of many current board members from service on the Farmer Mac Board;
- Interests of stockholders within a "representative" group not being adequately represented by the "representative" director because interests within the groups may not be aligned;
- Unnecessary limitations on Farmer Mac's ability to identify directors with the necessary experience, skillsets, diversity, and other attributes desired by Farmer Mac for its Board and Board committees;
- Confusion about a director's confidentiality obligations to Farmer Mac;
- The possibility that only three of Farmer Mac's fifteen directors (or a small number of holders of Farmer Mac voting common stock with the power to elect at least three directors) could in effect control the entire Board nomination process for *all* director nominees to be elected by a class of voting stockholders; and
- Transactions with entities affiliated with "representative" directors that will no longer be subject to even rudimentary conflict of interest governance oversight.

#### Changes to Conflicts of Interest Framework and Rules

The Proposal would overhaul Farmer Mac's conflict-of-interest regulatory regime that has been in place since 1994, even though Farmer Mac has not experienced any significant conflict of interest issues. The changes range from prescriptive rules for standards of conduct

that likely would prove unworkable and the introduction of undefined and ambiguous terms that would increase uncertainty for those subject to the rules, to categorical exceptions from conflict of interest review for some transactions that clearly raise conflict of interest concerns and could threaten the perceived legitimacy of Farmer Mac's governance and business practices. The Proposal does not provide reasons for these changes though they could have potentially serious negative effects on Farmer Mac and its stakeholders.

#### Changes to Board Governance

The Proposal would establish several new governance requirements for Farmer Mac that could have serious unintended consequences, including:

- Director nomination and election provisions that could result in factionalization of the Farmer Mac Board and the possibility that a small minority of Farmer Mac's directors (or a small number of holders of Farmer Mac voting common stock) could in effect control the entire Board nomination process;
- Director fiduciary duty provisions that would create uncertainty for directors through the use of vague terms and the creation of new duties not anchored in any generally-accepted principles of corporate law; and
- Micromanagement of the Farmer Mac Board's activities, including limitations on the number of committees for which an individual may serve as chairman, prescriptive requirements for the membership of committees that do not relate to relevant experience or skills, and record-keeping requirements, all of which restrictions are inconsistent with the roles traditionally played by boards of directors of corporations.

Rather than delving into Farmer Mac's corporate governance in this fashion, with the potential for unintended consequences that could be harmful to Farmer Mac, we request that the FCA allow Farmer Mac to select a body of governing principles of corporate governance and fiduciary duties (as Fannie Mae and Freddie Mac are authorized to do by regulation) such as those applicable to Delaware corporations, those found in the Model Business Corporation Act, or those applicable to entities incorporated in Farmer Mac's jurisdiction.

#### Approach to Regulation of "Excessive Risks"

Under the Proposal, the FCA would have enforcement authority any time it determines that Farmer Mac is "taking excessive risks that adversely impact capital," and would empower the FCA to restrict Farmer Mac's activities that the FCA has determined "create excessive risk." Because essentially all of Farmer Mac's activities, by definition, involve taking on some amount of risk, this approach would, effectively, allow the FCA to substitute its judgment for that of Farmer Mac's management on how to run the business. Farmer Mac fully complies with the FCA's capital and other requirements, which set forth objective standards. Allowing the FCA to

decouple its authority from these objective standards would inject significant uncertainty into Farmer Mac's day-to-day operations. We believe that the proposed approach to the regulation of risk-taking is both unworkable (*e.g.*, how would Farmer Mac's management be able to make business decisions while the FCA has authority to restrict the activity after the fact?) and unnecessary based on Farmer Mac's recent record of strong risk management with effective oversight by the FCA under the current regulatory framework.

#### Application to "Agents"

The Proposal would extend many of its new requirements to "agents" of Farmer Mac, including, among others, requirements to make its agents available to the Office of Secondary Market Oversight ("OSMO") during an examination and new standards applicable to the statements and conduct of agents. The definition of "agent" in the Proposal is so broad that many entities with which Farmer Mac does business but are not otherwise within the FCA's jurisdiction would be covered, and these entities would almost certainly object to becoming subject to these requirements. Farmer Mac's day-to-day operations and financial performance could be adversely affected if it is not able to obtain necessary services or if the costs to obtain those services are significantly higher to account for the added legal liability risk and regulatory burden that would be imposed on Farmer Mac's business partners.

#### New and Undefined Concepts and Terms

The Proposal includes many new concepts and terms that introduce significant uncertainty into Farmer Mac's regulatory regime. These include, for example, "societal requirements for the protection of the general interest," "benchmarks for professional integrity, competence, and respect," "business-like manner," "non-private or non-privileged corporate business and related matters," and "intended or having the effect of reducing public confidence in [Farmer Mac]." We are not aware of these new concepts and terms being used in any established body of law. These terms do not appear to be necessary for effective regulation and could expose those subject to regulation to significant risks and uncertainties.

#### Regulation of Farmer Mac in Areas Not Closely Related to Safety and Soundness

Farmer Mac supports the FCA's role in overseeing the safety and soundness of Farmer Mac, but also believes it is important to recognize that Congress placed some limits on the FCA's regulatory authority. We do not believe that Congress intended for the FCA to categorize every aspect of Farmer Mac's day-to-day business as involving Farmer Mac's safety and soundness and thereby override any limits on the FCA's authority to regulate in areas that do not involve Farmer Mac's safety and soundness. Farmer Mac believes that some aspects of the Proposal venture into areas, in the name of safety and soundness, that Congress did not intend the FCA to regulate. Examples of proposed regulations in this category include:

- Proposed Board governance changes related to new requirements for the composition of Board committees, Board voting on director nominations, and Board record-keeping, as well as new limitations on the number of committees for which an individual can serve as chairman; and
- Extensive new regulation of the statements and conduct of Farmer Mac’s “agents,” which are extremely broadly defined and would entail the FCA regulating numerous entities that do business with Farmer Mac but fall outside of the Farm Credit System (the “FCS”).

### Exposure to Private Rights of Action

Another unintended harmful consequence of the Proposal, if enacted, is that Farmer Mac’s safety and soundness could be threatened by potential private lawsuits for violations of new, untested, and uncertain standards created by the Proposal. Indeed, we have significant concerns about how a third-party plaintiff could use these proposed regulations offensively against Farmer Mac because many aspects of the Proposal use undefined, ambiguous, and new terms whose lack of precision may make it easy to allege that Farmer Mac is not literally complying with the regulations. Farmer Mac’s directors, officers, and agents, likewise, would inevitably be subject to similar risks based on the current language of the Proposal. As a consequence, Farmer Mac’s costs could escalate and Farmer Mac may not be able to attract qualified directors, officers, and agents. Given these risks, if the FCA proceeds with the Proposal, any final regulation should make clear that it does not create private rights of action for third parties.

## **II. Background**

Farmer Mac was created by the Agricultural Credit Act of 1987, which incorporated a new Title VIII into the Farm Credit Act of 1971 (the “Act”). Farmer Mac is a stockholder-owned GSE that combines private capital and public sponsorship to serve a public purpose through the operation of a secondary market for a variety of loans made to borrowers in rural America. Farmer Mac’s secondary market is designed to improve the availability of long-term credit at stable interest rates to America’s rural communities and to provide rural borrowers with the benefits of capital markets pricing and product innovation. Farmer Mac is a unique entity by virtue of its status as a stockholder-owned, publicly-traded, federally-chartered corporation that is an institution of the FCS subject to regulation by both the FCA and the U.S. Securities and Exchange Commission (the “SEC”).

Farmer Mac’s statutory charter provides that Farmer Mac’s Board of Directors consists of fifteen members and specifies the sources of election or appointment to the Board. Five of the directors are elected by the holders of Farmer Mac’s Class A voting common stock, which may be held only by banks, insurance companies, and other financial institutions that are not FCS institutions. Five directors are elected by the holders of Farmer Mac’s Class B voting common

stock, which may be held only by FCS institutions. The remaining five members are appointed by the President of the United States with the advice and consent of the U.S. Senate. The members of the Farmer Mac Board work together as an alliance unique in rural finance to accomplish Farmer Mac's important mission.

In the twenty-eight years that Farmer Mac has served rural America, Farmer Mac has proactively and successfully adapted its governing principles to meet corporate governance best practices as they have evolved among public companies. Indeed, a large part of Farmer Mac's success is due to the governance model that Congress chose for Farmer Mac, which has supported Farmer Mac in fulfilling its statutory mission. In chartering Farmer Mac as a corporation, Congress intended that Farmer Mac's governance model should mirror that of other corporations, including the established principles of fiduciary duties of care and loyalty to stockholders that have been well-established for over a century. Formed as a corporation, it was also Congress's intent that Farmer Mac be governed by and operated under the direction of a board of directors with the powers that most other corporate boards have, including the power to prescribe by-laws not inconsistent with law, which in Farmer Mac's case also includes the Act. Consistent with this intent, the Farmer Mac Board has established by-laws, a Code of Business Conduct and Ethics that addresses conflicts of interest and other ethical issues, Corporate Governance Guidelines, written charters for selected Board committees, and numerous written policies with which directors, officers, and employees of Farmer Mac must comply. SEC and New York Stock Exchange (the "NYSE") rules require many of these, including the by-laws, Code of Business Conduct and Ethics, and written charters for selected Board committees, to be publicly disclosed. All of these instruments provide for the effective oversight and governance of Farmer Mac by the Farmer Mac Board and are consistent with the best practices for public companies.

### **III. General Comments on the Need for the Proposal**

Farmer Mac has a record of success in fulfilling its mission, while at the same time operating a profitable business that generates value for its stockholders and proactively adopting best practices in corporate governance. Similarly, the FCA has a demonstrated record of strong oversight as a regulator of Farmer Mac's safety and soundness. In light of this history, Farmer Mac does not believe that the record supports the need for the proposed overhaul of its corporate governance, disclosure, and reporting system. This is particularly true because the proposed new model would likely create significant uncertainty, more conflict-of-interest and director independence issues, questions about director fiduciary duties and liability, regulatory overlap, and an unnecessary diversion of resources and attention from achieving our core mission.

In discussing the proposed new regulatory regime for Farmer Mac, the Proposal does not provide much detail to answer the fundamental question of why it is needed. The Proposal offers very few specific reasons for most of the proposed requirements contained in the Proposal, and points to no specific events or corporate governance failures involving Farmer Mac to justify why the FCA is no longer comfortable deferring to the oversight that the SEC and the NYSE

provide over Farmer Mac's corporate governance, disclosure, and reporting. The FCA does not elaborate on why the SEC, which is charged with investor protection as part of its mission, and the NYSE have not adequately overseen Farmer Mac's corporate governance, disclosure, and reporting, and should be displaced in large part by the FCA, whose primary mission is to ensure a dependable source of credit for agriculture and rural America through its examination and regulation of the safety and soundness of the institutions of the FCS, including Farmer Mac. It therefore remains unclear how Farmer Mac's unique structure lends itself to dual regulation in some of the areas contemplated by the Proposal. The Proposal also does not explain the rationale for proposing new governance standards and terms that are not based in well-established corporate governance jurisprudence.

In recognition of Farmer Mac's unique status discussed previously, Farmer Mac believes that it is important to keep all stakeholders informed and to emphasize the expectation that Farmer Mac's directors, officers, and employees adhere to the highest standards of corporate governance and ethics and business conduct in connection with their service to Farmer Mac. In carrying out its governance responsibilities, rather than waiting for a corporate governance best practice to be mandated by the SEC, NYSE, or other regulatory authority, the Farmer Mac Board historically has been proactive and voluntarily adopted best practices in corporate governance. As described in more detail below, Farmer Mac believes that it has already achieved this goal by having implemented many best practices in corporate governance that effectively address many of the areas contemplated by the Proposal.

In December 2013, the Farmer Mac Board completed a year-long comprehensive process of reviewing its by-laws and other corporate governance documents with the assistance of outside corporate governance counsel reporting directly to the Farmer Mac Board, which resulted in Farmer Mac modernizing these documents to bring them into conformity with corporate governance best practices. Some of those enhancements included:

- Strengthening an already-robust process to manage conflicts of interest;
- Providing for a more open process for nominating and electing directors that prevents any stockholder from being disenfranchised;
- Clarifying directors' fiduciary duties to Farmer Mac; and
- Adopting safeguards to protect Farmer Mac against any director's potential competing allegiances to other constituencies.

In addition, Farmer Mac has for several years complied with enhanced SEC disclosure requirements for corporate governance and compensation matters, as well as the SEC's "say-on-pay" rules, by submitting its executive compensation program each year to an advisory stockholder vote for approval. Unlike many public companies that have management representation on their boards, the Farmer Mac Board is composed entirely of non-employee

directors. The Farmer Mac Board has also adopted independence standards that are stricter than the minimum standards prescribed by the NYSE, and the Audit, Compensation, and Corporate Governance (Nominating) Committees of the Farmer Mac Board include only independent directors in accordance with NYSE requirements.

Farmer Mac has also been proactive in thinking about how best to address emerging issues such as those related to diversity and risk governance. The Farmer Mac Board formed a Diversity Committee in December 2013 to gather information, raise awareness, and make recommendations on issues related to diversity to formalize the process for bringing these issues before the Board. In addition, in June 2014, the Farmer Mac Board formed a separate Risk Committee that has a separate charter with provisions consistent with best practices implemented by other public companies and financial institutions. That Committee is comprised entirely of independent directors.

Farmer Mac believes that the corporate governance enhancements it has implemented have improved the way the Farmer Mac Board functions and the Board's ability to oversee Farmer Mac's fulfillment of its statutory mission of serving rural America. These practices demonstrate Farmer Mac's unwavering commitment to maintaining the highest standards of corporate governance and argue against the need for new requirements and oversight.<sup>2</sup> Farmer Mac acknowledges the importance of effective governance to ensure Farmer Mac's safety and soundness. However, any regulatory action to support this goal should have a sound basis for the regulatory change, should result in more rather than less certainty, should not result in Farmer Mac being forced to navigate duplicative or conflicting regulatory regimes, and should complement rather than undermine the efforts that Farmer Mac has already undertaken to strengthen its corporate governance. In this instance, however, Farmer Mac has significant concerns about the Proposal and believes it fails each of these important tests – in particular in connection with its focus on areas such as Farmer Mac's director nomination and election process, conflicts of interest, and other related governance issues.

Farmer Mac appreciates the fact that the FCA has a history of respecting the unique position of Farmer Mac, not only as the only FCS institution established to operate a secondary market but also as the only entity regulated by the FCA organized as a public company that is also subject to regulation by the SEC and the NYSE. Farmer Mac requests the FCA to be mindful of this history and not to change its previous approach to regulating Farmer Mac in certain areas related to corporate governance, reporting, and disclosure.

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<sup>2</sup> As a public company, Farmer Mac's governance practices are reviewed annually by the major proxy advisory firms such as ISS Governance Services, Inc. and Glass, Lewis & Co., each of which prepares an annual report recommending to stockholders how they should vote at Farmer Mac's annual meeting. Although these firms are non-governmental entities and do not have any official regulatory authority, their views on a public company's corporate governance are influential and followed by many stockholders. These firms generally recommend "withhold" votes for directors when a firm believes there are significant governance issues that are not being addressed, but Farmer Mac has no recent history of any such "withhold" votes being recommended.

#### **IV. Key Concepts and Concerns**

As discussed, Farmer Mac believes the Proposal should be withdrawn and reconsidered in its entirety. To the extent the FCA chooses to move forward with the Proposal, we believe there are a number of key concepts and issues that would need to be addressed in connection with the rulemaking. Some of these flow throughout and affect many aspects of the Proposal, as described in this Part IV.

##### The Meaning of “Representative” Directors

The Proposal contains many provisions that implicate a Farmer Mac director’s “representative” relationship with the entities that hold Farmer Mac’s voting common stock:

- Proposed section 651.30 would impose voting requirements for director nominations related to directors “representing the same class of stockholders as the candidate” and would require Farmer Mac’s director election process to acknowledge and respect “the elected director representational affiliations required by the Act” and would require candidates to have “a recognized affiliation or relationship with their respective class of voting stockholders at the time of nomination and election”;
- As discussed in more detail below, proposed section 651.22 would require Farmer Mac’s conflict-of-interest policy to “respect the representational affiliations required by the Act for elected directors” and would create an exception for imputing interests to an entity for purposes of determining conflicts if the entity is “directly connected to the representational affiliations required by the Act for elected directors”; and
- The commentary related to proposed section 651.40(d) appears to justify an exception to confidentiality requirements for Farmer Mac directors in the name of protecting “the ability of directors to be accountable to the shareholders that elected them” and in the context of “the duty of the elected directors to possess a representational relationship with certain groups of shareholders.”<sup>3</sup>

These provisions are central to the Proposal and become problematic in light of the FCA’s interpretation that a “representative”<sup>4</sup> relationship between a Farmer Mac director and a

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<sup>3</sup> 80 Fed. Reg. at 15938 (March 26, 2015).

<sup>4</sup> Farmer Mac’s charter provides that if a director “elected to the permanent board from among persons who are representatives of banks, other financial institutions or entities, insurance companies, or Farm Credit System institutions ceases to be such a representative,” the director may continue as a member of the board for not longer than 45 days beginning on the date the director “ceases to be such a representative.” 12 U.S.C. § 2279aa-2(b)(5).

voting stockholder is required to be “close” at the time of nomination and election and that there must be an “official affiliation” at the time of nomination and election that constitutes a “substantial and visible connection” to the class of stockholders.<sup>5</sup> This interpretation of “representative” is inconsistent with Farmer Mac’s longstanding approach to director eligibility in practice (to which the FCA has not objected) and could have many significant negative effects on Farmer Mac’s corporate governance. One striking example of this is that the enactment of the Proposal, coupled with the interpretation of “representative” presented in the Supplementary Information related to the Proposal, would likely result in the disqualification of at least five of Farmer Mac’s ten current elected directors in the absence of those members entering into new “official” relationships with holders of Farmer Mac voting common stock. The five directors who would likely be disqualified include Farmer Mac’s Audit Committee financial expert and Farmer Mac’s only African American director, both of whom have served on the Farmer Mac Board for many years after being recommended for nomination by voting stockholders but neither of whom have ever had any “official affiliation” with a voting stockholder. We are concerned that the interpretation of “representative” presented in the Supplementary Information, although mostly consistent with the background information provided at the time of the promulgation of Farmer Mac’s current conflict-of-interest regulations,<sup>6</sup> involves a new approach in practice and could be detrimental to Farmer Mac’s corporate governance. Farmer Mac’s approach to director nominations has always been that any required “recognized affiliation or relationship” between a director nominee and the related class of voting stockholders can be evidenced by the simple fact that an individual has been recommended for election by a voting stockholder and does not require any “official” ongoing relationship with that stockholder.

Implementation of the Proposal, coupled with the FCA’s interpretation of “representative” presented in the Supplementary Information related to the Proposal, could also potentially limit Farmer Mac’s ability to attract required skillsets and diversity to its Board, institutionalize factionalism on the Board, and encourage directors and nominees to enter into contractual arrangements with Farmer Mac stockholders where none previously existed. These types of arrangements could result in Farmer Mac directors being held to different standards of conduct if the arrangement includes separate indemnification provisions and would also likely adversely affect the independence of Farmer Mac’s directors and muddle the conflict-of-interest

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<sup>5</sup> See 80 Fed. Reg. at 15935 n.15 & 15937 (March 26, 2015). This interpretation of “representative” appears to be closely related to the statutory provisions in the Federal Home Loan Bank Act for directors of Federal Home Loan Banks, which are structured as cooperatives, that require a majority of each board to be comprised of officers or directors of the bank’s members. However, it is noteworthy that Congress intentionally chose a public company structure rather than a cooperative structure for Farmer Mac, and Congress did not include in the text of the Act any mandatory requirements for Farmer Mac directors to be officers or directors of Farmer Mac stockholders.

<sup>6</sup> We believe that the Proposal is the first time that the FCA has expressed the view that relationships between Farmer Mac directors and the stockholders who elect them as their representatives must be “close.” Cf. 59 Fed Reg. 9622 at 9624 (March 1, 1994), where the FCA first discussed its view of the representative relationship of Farmer Mac directors as involving an “official affiliation” and “substantial and visible connection” with a voting stockholder.

analysis for directors and their confidentiality duties to Farmer Mac. Such a consequence would deviate markedly from the legislative intent of the Act.<sup>7</sup>

Farmer Mac believes that the FCA's interpretation of "representative" in the Supplementary Information related to the Proposal is not required by the plain meaning of the text or supported by any statement of Congressional intent in the legislative history of the Act. The legislative history surrounding the passage of the Agricultural Credit Act of 1987 reveals that the 15-member Board of Farmer Mac was intended to represent a cross-section of the parties interested in the creation and management of Farmer Mac. However, Congress chose not to provide more formal criteria for election to the Board. The "representative" nature of the Board was to be achieved by the ability of each of the constituent groups to choose and elect its own five members to the Board, creating a governing body comprised of individuals bringing varied perspectives and knowledge that would enable the Board to act for the benefit of all of Farmer Mac's stockholders.

Farmer Mac believes the "representative" relationship contemplated in Section 8.2(b) of the Act (12 U.S.C. § 2279aa-2) simply requires that a director be elected by the applicable class of voting stockholders to serve the specified one-year term without requiring any "official affiliation" or "close" or "substantial and visible" connection with a voting stockholder, as the term has been interpreted by the FCA. As described in more detail in Appendix A, we believe that Farmer Mac's alternative interpretation of "representative" is reasonable and consistent with the legislative history of the Act, which shows that Congress chose to remove rather than add qualifications for Farmer Mac's directors in finalizing the language in Farmer Mac's charter during the conference process.<sup>8</sup> Accordingly, we request that the FCA reconsider its interpretation of "representative" in light of the information provided in this letter and the accompanying Appendices, including the important policy considerations at issue.

In addition to being inconsistent with legislative history, as a practical matter, the interpretation of "representative" that underlies the Proposal seems to be premised on the questionable assumption that the presence of an "official affiliation" with just one voting stockholder makes a director "representative" of the entire *class* of stockholders and that the interests of the individual holders of each class of voting common stock will be aligned. In fact, there is a great deal of diversity among the holders of each class of Farmer Mac voting stock, including among the holders of Class B stock that is primarily concentrated in the hands of four holders. Some of these differences among stockholders within each class include asset size,

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<sup>7</sup> See, e.g., 59 Fed. Reg. 9622 at 9624 (March 1, 1994) (The FCA noted that the legislative history indicates, "There is to be no distinction between the three categories of directors in terms of their duties and responsibilities as directors to [Farmer Mac] and all stockholders." (citing Senate Report 100-230, p. 52 (November 20, 1987))).

<sup>8</sup> We note that even if the use of "representative" in the Act was intended to create some kind of eligibility criterion for election to the Farmer Mac Board, we are not aware of any statutory language or legislative history that would suggest that this concept should then impose separate voting requirements for director nominations or create exemptions to conflict-of-interest analysis and director confidentiality requirements, which the Proposal appears to believe are "required by the Act" in relation to the concept of representative directors.

customer base, geographic reach, business interests, objectives in using Farmer Mac's programs (if the stockholder even does business with Farmer Mac at all), and view of the appropriate role of Farmer Mac in the rural finance system. Farmer Mac believes that Congress designed the "representative" nature of the Board with different sources of election or appointment for directors not to require official affiliations with particular stockholders, but rather to ensure that the directors' backgrounds and relationships would bring varied perspectives and knowledge that would enable the Board to act for the benefit of all of Farmer Mac's stockholders. Although the Supplementary Information accompanying the Proposal contains some helpful guidance on this issue,<sup>9</sup> we believe that the FCA's interpretation of and overall approach to "representative" throughout the Proposal actually encourages Farmer Mac directors to think first about the interests of the single stockholder with which they hold a "close, substantial, and visible relationship" or "official affiliation" rather than for the broader good of Farmer Mac and all of its stockholders.

Throughout its history, Farmer Mac has implemented robust policies and procedures to effectively manage situations where Farmer Mac directors have had existing relationships and "official affiliations" with Farmer Mac stockholders. However, Farmer Mac believes that the lack of "official affiliations" with particular stockholders is in many cases preferable because it allows Farmer Mac's directors to seek the perspectives of all stockholders without feeling pressure to advocate the unique perspective of the one stockholder with whom a director is affiliated. Contrary to Farmer Mac's experience on this issue, the FCA's interpretation of "representative" seems to encourage prospective directors to artificially create "official affiliations" and "close, substantial and visible relationships" with voting stockholders that could create fiduciary, confidentiality, and conflict issues. Indeed, the FCA's interpretation will likely lead prospective directors to seek written employment agreements with voting stockholders that exacerbate the conflicts inherent in multi-constituency directorships. These written employment agreements may create conflicting duties of loyalty by having Farmer Mac directors voluntarily assume a set of fiduciary duties to a particular stockholder in addition to the duties they already owe to Farmer Mac and all of its stockholders. The terms of these employment agreements could also increase the risk that Farmer Mac directors may be indemnified by their employers for acts that would not be indemnifiable under Farmer Mac's by-laws and, as a consequence, effectively subject those directors to a different standard of conduct than the other directors. We believe that these types of arrangements between Farmer Mac directors and voting stockholders in some cases could weaken rather than strengthen Farmer Mac's corporate governance. Accordingly, these types of relationships should not be *required* by force of federal regulation or otherwise encouraged by the FCA, especially in cases where no "official affiliation," "close" relationship, or "substantial and visible connection" previously existed but stockholders still voted the directors to serve on Farmer Mac's Board as their representatives.

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<sup>9</sup> See, e.g., 80 Fed. Reg. at 15938 ("[T]he required elected director affiliations should not be interpreted to mean an elected director serves solely to further the viewpoints of the electing class without regard to the impact on Farmer Mac and all its shareholders. Such an interpretation would be inconsistent with the established corporate common law principles of a director's fiduciary duties, as well as with Congressional intent.").

The commentary in the Proposal about a “representative” director’s duty to share information as part of being “accountable” to the sponsoring stockholder creates ambiguity about a director’s duties to *all* stockholders and may result in other directors being unwilling to engage in open and honest dialogue due to concern that the substance of that dialogue will be shared outside of Farmer Mac. This is not a productive or workable outcome. Rather, we believe that “representative” should be interpreted in a way that does not cause prospective directors to purposefully create potentially conflicting duties of loyalty between Farmer Mac and another entity when no potential conflicts previously existed. We believe it is important to emphasize that Farmer Mac’s directors must be “accountable” to all of Farmer Mac’s stockholders and not just the particular stockholder or class of stockholders that elected a director to Farmer Mac’s Board. This is not only what Congress intended, but also something the FCA has explicitly recognized.<sup>10</sup> We note that holders of Farmer Mac’s Class C non-voting common stock represent the vast majority of the economic interest held by holders of all of Farmer Mac’s classes of common stock (approximately 9.4 million shares out of 10.9 million total shares) but have no ability or mechanism through which they can elect directors. Therefore, it is even more critical that Farmer Mac’s elected directors represent the interests of all common stockholders and not just those of a particular stockholder within a particular class of voting stockholders.

The interpretation that “representative” requires special relationships with specific voting stockholders, along with the accompanying emphasis on the potential varying interests of specific stockholders instead of the best interests of Farmer Mac and all of its stockholders, could also result in factionalization within the Farmer Mac Board. By highlighting the differences between the sources of election or appointment to the Farmer Mac Board and institutionalizing these differences through requirements related to voting for director nominations and committee composition, the Proposal encourages Farmer Mac directors to think of themselves first as a director selected to serve a certain institution or specific viewpoint rather than serving Farmer Mac as a whole and all of its stockholders. Farmer Mac believes that its Board has made great strides over the years in moving beyond the notion that directors solely represent the interests of the class of stockholders that elected them, which has helped the Board achieve a healthy sense of cohesion and collegiality. The Board has no desire to revisit the factionalism on the Board that existed at times in Farmer Mac’s early years, which is exactly what the Proposal would promote if enacted. A return to such factionalism would, in fact, represent a significant threat to the safety and soundness of Farmer Mac by undermining the effective functioning of the Farmer Mac Board of Directors.

For the reasons discussed above and in Appendix A, Farmer Mac requests the FCA to revise the Proposal to remove all of the identified portions that implicate the concept of “representative” directors. If the FCA decides to retain these portions of the Proposal, we request that the FCA clarify that a director’s “representative” relationship does not require an

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<sup>10</sup> See, e.g., 80 Fed. Reg. at 15938 (“[A]ll directors, regardless of how they acquired their seats on the board of directors, . . . are bound by their fiduciary duty to Farmer Mac and, as a result, act for the betterment of Farmer Mac overall and not any particular group of shareholders or investors.”).

“official affiliation,” a “substantial and visible connection,” or “close” relationship with a voting stockholder. To the extent that the FCA believes that the Act requires director nominees to have a “recognized affiliation or relationship” to the applicable class of stockholders, we request that the FCA clarify that a voting stockholder’s recommendation of an individual to be nominated as a director fulfills this requirement and does not require any “official” ongoing relationship with that stockholder. This would be consistent with Farmer Mac’s longstanding approach to director eligibility in practice, to which the FCA has not objected.

#### Unwarranted Changes to Existing Approach to Conflicts-of-Interest and Responsibilities

The Proposal would overhaul Farmer Mac’s existing conflict-of-interest regulatory regime that has been in place since 1994,<sup>11</sup> under which Farmer Mac has had no significant conflict-of-interest issues arise. Although the Supplementary Information in the Proposal describes in detail the content of all the proposed changes to the current regulatory regime, it does not articulate a clear reason *why* all the changes are being proposed, nor does it identify any specific failures in Farmer Mac’s implementation of its existing conflict-of-interest policies that would warrant such a dramatic departure from the FCA’s historical regulatory approach. Farmer Mac believes that the more prescriptive approach taken in the proposed new subpart on standards of conduct<sup>12</sup> would have many unintended and/or undesirable consequences, including: (i) conflicting regulatory requirements for Farmer Mac’s Code of Conduct, (ii) categorical exceptions to conflict-of-interest analysis that are not intuitive and could cast doubt on the effectiveness of Farmer Mac’s ability to effectively manage conflicts-of-interest, (iii) increased uncertainty related to the introduction of new undefined terms, (iv) impractical procedural requirements related to prior notice and opportunity to respond to conflict-of-interest determinations, (v) burdensome reporting requirements for Farmer Mac’s business partners, and (vi) new responsibilities that are not clearly defined or conflict with existing standards. These potential adverse effects are discussed in more detail in this section below and in the related sections of Appendix B.

Since 1994, the FCA has consistently recognized that Farmer Mac’s directors owe fiduciary duties to Farmer Mac and all of its stockholders rather than to the electing class of stockholders, and that directors should share the perspectives of electing stockholders with the full Board so that each director can act in the best interests of Farmer Mac and all of its stockholders.<sup>13</sup> The FCA has observed that although the Farmer Mac Board is representative in nature, Congress chose a corporate structure to govern Farmer Mac’s operations, and common law corporate principles affirm the fiduciary duty of directors to act in the best interests of Farmer Mac and all of its stockholders, with the representative character of the Farmer Mac

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<sup>11</sup> 12 C.F.R. §651.1 - § 651.4.

<sup>12</sup> Proposed 12 C.F.R. § 651.21 - § 651.24.

<sup>13</sup> *See, e.g.*, 59 Fed. Reg. 9622 at 9624 (March 1, 1994).

Board not altering this fiduciary duty of directors.<sup>14</sup> The FCA concluded in 1994 that “irrespective of the manner of appointment or election, each director has a duty to act in the best interests of [Farmer Mac] and all of its shareholders.”<sup>15</sup> Any fiduciary duties that a director may owe to a Class A or Class B stockholder does not modify or excuse a director from fully complying with the fiduciary duties the director owes to Farmer Mac and all of its stockholders. If a director cannot comply with his or her fiduciary duties to Farmer Mac on a particular matter, the director is required to recuse himself or herself from consideration of that matter.

Despite Farmer Mac’s distinctive corporate governance and stock ownership structure, the Farmer Mac Board has consistently demonstrated that it is fully capable of addressing conflicts of interest since the current regulations were enacted over twenty years ago. At that time, the FCA recognized the limitations of regulation regarding conflicts of interest, noting that the appropriateness of a director’s action in a potential conflict situation should be evaluated in light of the specific factual circumstances, that recusal is just one possible way in which a conflict of interest can be resolved, and that procedures for conflict resolution were better left to be specified and implemented by Farmer Mac.<sup>16</sup>

The Farmer Mac Board has shown itself to be very thoughtful and proactive in addressing the potential for conflicting fiduciary duties by adopting relevant Board policies. These include adopting a robust Code of Business Conduct and Ethics that addresses actual and potential conflicts of interest and requiring director candidates to confirm in advance of their nomination that they have no conflicts that could prevent them from complying with their fiduciary duties. During the last several years, the Farmer Mac Board proactively amended this Code of Business Conduct and Ethics to strengthen already-existing and substantial provisions governing conflicts of interest, including several provisions in December 2013 following constructive discussions with the FCA on the topic. Because some Farmer Mac directors may have relationships with Farmer Mac’s business partners due to the unique structure of the Farmer Mac Board, Farmer Mac’s directors must be particularly sensitive to those instances where a potential conflict of interest may become material. Therefore, Farmer Mac’s Code of Business Conduct and Ethics includes robust provisions regarding the identification of both potential and actual conflicts of interest, the procedures to be followed when a conflict of interest is deemed to exist, and the consequences associated with a violation of the Code or related corporate policies. Farmer Mac has always solicited detailed disclosures each year from each of its directors to elicit any information that would suggest a potential or actual conflict of interest. In December 2012, Farmer Mac amended its by-laws to require enhanced disclosures from Farmer Mac’s directors

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<sup>14</sup> *Id.* The FCA noted that although some public companies have boards with representative features analogous to Farmer Mac’s, the fiduciary responsibilities of directors are unchanged by the representational aspects of these boards, and each director owes fiduciary duties to Farmer Mac and its stockholders collectively.

<sup>15</sup> *Id.* The FCA noted that the legislative history supported this interpretation by indicating that “There is to be no distinction between the three categories of directors in terms of their duties and responsibilities as directors to [Farmer Mac] and all stockholders.” (citing Senate Report 100-230, p. 52 (November 20, 1987)).

<sup>16</sup> *See* 59 Fed. Reg. 9622 at 9626 (March 1, 1994).

and director nominees in an effort to obtain additional disclosures of possible conflicts of interest.

Farmer Mac's Code of Business Conduct and Ethics provides that a director may not participate in any discussion or deliberation of, or any vote on, any question, issue, decision, or transaction in which it has been determined that the director has or appears to have a material conflict of interest. The Code of Business Conduct and Ethics provides guidance that whenever there is the slightest doubt as to the existence of a material conflict of interest, directors should disclose all facts material to their interests, unless disclosure would violate the confidence of the person from whom the information that would be the subject of the disclosure was obtained. If disclosure would breach that confidence, the director is required to recuse himself or herself from the discussion, the deliberation, and the vote, but need not disclose the confidence.

Farmer Mac also has adopted strict independence standards for directors beyond those required by the NYSE. We also have successfully implemented policies on related-party transactions to assure that any transactions with director-related institutions are conducted at arms-length and on the same terms and conditions as transactions with our other customers and vendors, and we provide detailed disclosures about related-party transactions in our SEC filings. Farmer Mac's stricter independence standards provide, among other things, that a director would not be considered independent if he or she serves as an officer or employee of an entity that does *any* business with Farmer Mac or that owns five percent or more of Farmer Mac's voting common stock. In general, Farmer Mac has received positive feedback from third parties for adopting stricter independence standards than required. Implementation of the Proposal as a final rule, however, would likely require Farmer Mac to modify its independence standards because otherwise the Farmer Mac Board likely would not be comprised of a majority of independent directors, as required by NYSE, if "close" and "substantial and visible" relationships are required between elected directors and Farmer Mac's voting stockholders, many of whom also do business with Farmer Mac. If Farmer Mac did not modify its independence standards in the face of the proposed requirements and related commentary about "representative" directors, the Farmer Mac Board would likely be put in the precarious position of either not having enough independent directors to fill the NYSE-required independent committees or having all of its appointed directors fill most of the seats on the independent committees for which they may not have the required expertise. It is unclear why the FCA would want Farmer Mac to deviate from following the strict independence standards that it currently has in place in favor of more diluted standards while professing its intention to strengthen Farmer Mac's governance.

In view of these provisions, together with the other safeguards that the Farmer Mac Board has adopted, Farmer Mac believes that its existing process to manage conflicts of interest is robust and effective and, therefore, does not believe that any revisions to existing regulations are warranted. To the extent the FCA nonetheless determines to adopt revisions in this area, Farmer Mac believes significant changes to the Proposal would be required, as well as guidance as to what problems the rule changes are seeking to solve.

In particular, proposed section 651.22 raises significant policy concerns through its treatment of representational affiliations of Farmer Mac directors. The Proposal would not only require Farmer-Mac's conflict-of-interest policy to "acknowledge and respect the representational affiliations required by the Act for elected directors," it also would exclude from the analysis of potential conflicts-of-interest those interests where "the organization or entity is directly connected to the representational affiliations required by the Act for elected directors." As addressed more generally in our discussion of representative directors in the section above, the Proposal indicates that the required representational affiliations between elected directors and stockholders must be "close," "substantial and visible," or involve an "official affiliation."<sup>17</sup> The FCA's view that any "representative" relationship between elected Farmer Mac directors and voting stockholders should automatically be treated as not presenting a conflict-of-interest is a significant departure from the approach currently taken by Farmer Mac. It also is inconsistent with any other approach to conflicts-of-interest known to Farmer Mac and would likely result in situations where Farmer Mac directors participate in deliberations and decisions affecting entities in which the directors have a material financial interest. For example, under the FCA's approach to excluding "representational affiliations" from imputed interests, a Farmer Mac director who is also the chief executive officer of one of Farmer Mac's largest business partners would not be prevented from participating in Farmer Mac Board deliberations and decisions that directly affect that business partner if the director's role as CEO is viewed as forming the basis for the required "representational affiliation" with a Farmer Mac stockholder. It seems clear that this scenario would involve a material conflict of interest and that the director should recuse himself or herself from all Farmer Mac Board deliberations and decisions affecting the business partner. Any rule that the FCA issues on conflicts-of-interest for Farmer Mac should not seek to protect these types of relationships from conflict-of-interest analysis.

Proposed section 651.23(b)(2) would require that, where a real or potential conflict-of-interest is identified as material, Farmer Mac must, within three business days of identification, notify the relevant director, officer, or employee of the material conflict-of-interest determination and provide that individual with a reasonable opportunity to respond. Farmer Mac understands and appreciates the need to provide an affected individual timely notice with an opportunity to respond to determinations about either a real or potential conflict-of-interest. However, it is not practical to define in advance the entire universe of transactions and relationships that could reasonably be expected to give rise to an actual conflict of interest. Indeed, there may be instances where it will not be possible to gather the necessary detail required to provide the proposed notice within a three-day timeframe in part because Farmer Mac's knowledge of potential conflicts of interest is based on each director's disclosure of relevant interests and

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<sup>17</sup> We note that NYSE views conflicts of interests expansively, stating, "a 'conflict of interest' occurs when an individual's private interest interferes in any way – or even appears to interfere – with the interests of the corporation as a whole," and also, "[a] conflict situation can arise when an employee, officer or director takes actions or has interests that may make it difficult to perform his or her company work objectively and effectively." This definition recognizes no carve-out for the types of "representative" relationships contemplated in the Proposal. *See* Section 303A.10 of NYSE Listed Company Manual.

relationships. This reliance on another party to provide the needed information may lead to delays that would cause Farmer Mac to need more than three days to provide the required notice.

Because business conditions constantly evolve for Farmer Mac and for Farmer Mac's directors, Farmer Mac often does not receive advance notice of when a potential conflict of interest becomes an actual conflict of interest. In many cases, an actual conflict of interest may be raised at a meeting of the Farmer Mac Board. In those instances, directors with an actual conflict of interest arising in response to a matter for Board consideration are advised to recuse themselves from the discussion. In those situations, Farmer Mac discusses the potential conflict of interest with the director as expeditiously as possible. In almost all cases, Farmer Mac directors take the initiative to recuse themselves from a discussion or vote if a question is raised about a potential conflict-of-interest, and Farmer Mac is not aware of any instance where the Farmer Mac Board, the Board Corporate Governance Committee, or Farmer Mac's General Counsel has recommended recusal and the director at issue has opposed the recommendation and requested prior notice and an opportunity to respond. Considering this reality, we suggest that the FCA clarify that the notice can be general in nature about *potential* conflicts-of-interest to accommodate situations when Farmer Mac cannot gather the requisite information to make a determination about *actual* conflicts-of-interest within three business days or when Farmer Mac must receive an immediate response from a director and cannot afford to provide a "reasonable" amount of time for a response.

We would also like to express our concern about the requirement of proposed section 651.23(g) for conflict-of-interest disclosures from Farmer Mac's "agents" as currently defined. As discussed in more detail below, we believe it would impose an unnecessary and unduly burdensome requirement on all third parties who provide professional services to Farmer Mac without any significant corresponding benefit and creates a strong disincentive for third parties to provide professional services to Farmer Mac.

### Board Governance

Proposed sections 651.30 to 651.50 would establish new regulatory requirements for Farmer Mac related to director elections, director removals, director fiduciary duties, and Board Committees. Farmer Mac has several concerns with these proposed new provisions, as described in more detail in Appendix B. Briefly, Farmer Mac believes that (i) the proposed director election provisions suffer from imprecise terminology as well as a misplaced emphasis on what Farmer Mac believes is an incorrect interpretation of the elected director representational affiliations required by the Act (as described above and in Appendix A), (ii) the proposed director removal provisions appear to establish contradictory goals in attempting to protect the rights of voting stockholders during actions involving the removal of the very directors who were voted into office by those stockholders, (iii) the proposed provisions on director fiduciary duties would create uncertainty for directors through the use of vague terms and creation of new duties not anchored in any generally-accepted principles of corporate law, and (iv) the proposed provisions on Board Committees are unduly prescriptive and do not afford Farmer Mac the

necessary flexibility to tailor Board committee structure and composition to best meet Farmer Mac's needs.

In light of our robust policies and procedures currently in place related to these issues, which are described in more detail in Appendix B, we do not believe that the Proposal has offered a convincing rationale for additional regulation in the areas of Board Governance. However, assuming the FCA determines that new rules are needed, we have provided suggested changes in Appendix B. In addition, we would like to note that some of our concerns with the Proposal could be mitigated were Farmer Mac able, as are Fannie Mae and Freddie Mac, to select a body of governing principles of corporate governance and fiduciary duties applicable to Farmer Mac. Fannie Mae and Freddie Mac are able to choose among the state where they have their principal place of business, the Delaware General Corporation Law, or the Revised Model Business Corporation Act, as amended.<sup>18</sup> This approach provides access to a specific body of governing law that directly applies to the conduct of the entity's directors, officers, and employees. Such an approach would provide some flexibility in structuring appropriate corporate governance practices and procedures while also providing certainty to stockholders and other stakeholders as to the body of corporate law applicable to Farmer Mac. Accordingly, we request that the FCA revise the Proposal to provide Farmer Mac with the option to select from an existing body of corporate governance principles, similar to the approach taken by the Federal Housing Finance Agency's approach to regulating Fannie Mae and Freddie Mac.

#### Regulation of "Excessive Risks"

Proposed section 650.3(b) would provide the FCA with enforcement authority any time the FCA determines that Farmer Mac is "taking excessive risks that adversely impact capital," and would specifically enable the FCA to restrict activities that the FCA has determined "create excessive risk." Nearly all of Farmer Mac's business activities could, at least theoretically, have the potential to "adversely impact" capital in some way because Farmer Mac's business involves the assumption of risk that could lead to losses. Accordingly, Farmer Mac believes that this aspect of the Proposal could have the effect of granting the FCA the authority to substitute its own judgment for the judgment of Farmer Mac about day-to-day business decisions in a manner that could broadly exceed the existing objective, quantifiable standards that already provide the FCA with the tools to effectively regulate Farmer Mac's safety and soundness. While we acknowledge the FCA's role as Farmer Mac's safety and soundness regulator, we believe any FCA concerns about the risk assumed by Farmer Mac is more appropriately regulated through the use of more objective, quantifiable measures, like the standards for Farmer Mac's capital levels contained in its statutory charter and existing regulations on investment management, liquidity management, and capital planning. Although most safety and soundness regulators are broadly authorized to exercise some degree of discretion in determining the activities that could

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<sup>18</sup> See 12 C.F.R. § 1710.10. Even though a "choice of law" option for corporate governance was not specifically authorized in the statutory charters of Fannie Mae and Freddie Mac, their regulator (OFHEO at the time) issued the rule under its supervisory authority over corporate behavior from a safety and soundness perspective.

adversely affect the safety and soundness of their regulated institutions, we are not aware of any other federal regulators of financial institutions who have issued a rule that imposes regulatory consequences related to a regulator's determination that a regulated institution has taken "excessive risk." It is also noteworthy that Section 8.37 of the Act (12 U.S.C. § 2279bb-6(b)(5)) authorizes the Director of OSMO to make determinations about activities that create "excessive risk" to Farmer Mac *only after* Farmer Mac has failed to meet objective measures related to its statutory capital requirements and has been classified as within "level III" for purposes of regulatory compliance (*i.e.*, has fallen below the statutory minimum capital requirement or has fallen below the risk-based capital requirement and engages in actions that could result in a rapid depletion of core capital).

If the FCA decides to adopt some version of the proposed provision, we urge the FCA to clarify the standard for determining at what point the adverse impact on capital would indicate that the risk is "excessive." This clarification could be accomplished either by reference to the capital standards set forth in Farmer Mac's statutory charter or some other objective criterion. Absent such clarification, Farmer Mac would have no way to know what activities could be deemed excessively risky, which would impair its ability to make day-to-day business decisions and create uncertainty about the extent to which the FCA would need to approve Farmer Mac's day-to-day activities.

#### Application of Proposed Rule Changes to "Agents" of Farmer Mac

The Proposal rewords and reorganizes, but maintains the substance of, existing requirements contained in Farmer Mac's current conflict-of-interest regulations that require Farmer Mac to have a policy reasonably designed to assure the ability of Farmer Mac's agents to discharge their duties and responsibilities on behalf of Farmer Mac with integrity and in an ethical manner.<sup>19</sup> Farmer Mac has always had some concern that the definition of "agent" was overbroad as defined in the current conflict-of-interest regulation,<sup>20</sup> but the potential negative implications of such a broad definition were not always obvious because the only actual regulatory requirement related to agents was for Farmer Mac to have a policy designed to assure the integrity and ethical conduct of its agents. The Proposal, however, contains several new provisions applicable to the broadly-defined "agents" of Farmer Mac that raise serious questions about the breadth of the definition as well as the authority of the FCA to regulate entities outside the FCS. In fact, the broad use of "agent" and the imposition of specific responsibilities across the various new proposed provisions now renders the existing definition unworkable. These new provisions include:

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<sup>19</sup> See 12 C.F.R. § 651.2 and § 651.4.

<sup>20</sup> "Agent" is currently defined in the FCA regulations applicable to Farmer Mac as any person "who represents [Farmer Mac] in contacts with third parties or who provides professional services such as legal, accounting, or appraisal services to [Farmer Mac]" (12 C.F.R. § 651.1). The Proposal does not change this definition but expands the breadth of regulatory provisions to which the term applies.

- Proposed section 650.4(b), which would require Farmer Mac to make its agents available to OSMO during the course of an examination or supervisory action;
- Proposed section 651.21, which would require Farmer Mac to develop a code of conduct reasonably designed to ensure Farmer Mac’s agents satisfy certain “ethical benchmarks”;
- Proposed section 651.23(g), which would require Farmer Mac to establish procedures for obtaining conflict-of-interest disclosures from its agents;
- Proposed section 651.24, which would impose new regulatory duties on Farmer Mac’s agents related to agents’ statements and agents’ use of Farmer Mac property and information; and
- Proposed section 655.2, which would create a new regulatory prohibition against incomplete, inaccurate, or misleading reports and disclosures by Farmer Mac’s agents.

As a threshold matter, Farmer Mac does not think it is clear that the FCA has the authority to regulate non-FCS individuals and entities solely on the basis that they do business with Farmer Mac and therefore could fall within the broad definition of “agent.” Section 8.11 of the Act (12 U.S.C. § 2279aa-11) only authorizes the FCA to examine and regulate Farmer Mac and any Farmer Mac “affiliate,” defined as an entity effectively controlled or owned by Farmer Mac. The universe of Farmer Mac affiliates is much smaller than the universe of Farmer Mac’s agents as defined in the Proposal, which is so broad as to encompass (i) any entity that represents Farmer Mac in contacts with third parties, such as dealers in Farmer Mac debt securities, employment recruiters, insurance brokers, proxy solicitors, and Farmer Mac’s central servicers and originators who continue to serve as field servicers in contacts with borrowers for loans sold to Farmer Mac and (ii) any entity that provides professional services to Farmer Mac, such as professional and educational training providers, information technology vendors, and consultants in areas such as executive compensation, diversity, and internal audit. Farmer Mac does not believe that the Act authorizes the FCA to regulate all these types of entities, particularly in the ways contemplated in the Proposal. Accordingly, Farmer Mac requests that the FCA revise the Proposal to exclude agents from application of the proposed code of conduct and director, officer, employee and agent responsibilities.

As the FCA acknowledged in the explanatory release accompanying the final rule applicable to Farmer Mac on conflicts of interest, Section 514 of the Farm Credit Banks and Associations Safety and Soundness Act of 1992 (the statutory authority for promulgating conflict-of-interest regulations for FCS institutions including Farmer Mac) did not require the

regulation to address conflicts of interest of agents.<sup>21</sup> Indeed, the applicability of the final rule seemed more focused on its applicability to officers, directors, and employees of Farmer Mac's affiliates rather than agents. At the time, the FCA observed "with respect to agents that are not affiliates, the final regulation would require [Farmer Mac's] policy to address potential conflicts of interest by agents. The FCA recognizes that [Farmer Mac] has less control over agents that are not affiliates. The FCA believes the regulation is sufficiently flexible to permit [Farmer Mac] to make reasonable distinctions."<sup>22</sup> Farmer Mac believes that the requirements contained in the Proposal applicable to Farmer Mac's agents do not provide for similar flexibility as the existing conflict-of-interest regulation and should be eliminated altogether. Indeed, the Proposal would create an inflexible system for Farmer Mac's "agents" over whom Farmer Mac generally has little control. For context, we note that regulations governing Freddie Mac and Fannie Mae do not extend compliance with the entity's code of conduct to "agents" and that conflict-of-interest policy regulations governing the Federal Home Loan Banks do not include "agents."

In addition, the imposition of certain responsibilities upon agents, such as the express requirement not to make "any untrue or misleading statement of a material fact intended or having the effect of reducing public confidence in [Farmer Mac]," deviates from the approach taken by other federal regulators of financial institutions. If the FCA proceeds with the Proposal, some of Farmer Mac's business partners who may be categorized as "agents" may terminate their relationships with Farmer Mac rather than agree to what they believe is an improper intrusion into their business operations and/or personal activities. Similarly, service providers like external auditors, which are required by SEC rules to be independent and are already subject to extensive external and independent oversight, could view their designation as an "agent" of Farmer Mac and the accompanying regulatory oversight by FCA contemplated by the Proposal as impinging on their independence. Farmer Mac also may have difficulty in locating business partners willing to provide services because of a potential conflict between Farmer Mac's code of conduct and the counterparty's code of conduct or conflict of interest policy. Overall, Farmer Mac acknowledges the need to exercise safe and sound business practices in its relationships with its business partners, but we believe the FCA should not directly regulate the conduct of nor proscribe particular activities of those entities. Farmer Mac believes the proper approach would be to impose an obligation on Farmer Mac to monitor the activities of its business partners and to take appropriate corrective actions when that conduct deviates from the conduct required to ensure safe and sound business practices.

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<sup>21</sup> See 59 Fed. Reg. 9622 at 9625-26 (March 1, 1994).

<sup>22</sup> *Id.* at 9626.

### New and Undefined Concepts and Terms

The Proposal includes a number of new concepts and terms that introduce significant uncertainty into the regulatory regime applicable to Farmer Mac. In particular, many key concepts in the Proposal are not clearly defined and do not refer to any other established body of law (*e.g.*, state corporate law) to help clarify. Examples include:

- “excessive risks”;
- “over-indemnification”;
- “societal requirements for the protection of the general interest”;
- “benchmarks for professional integrity, competence, and respect”;
- “intended or having the effect of reducing public confidence in [Farmer Mac]”;
- “business-like manner”;
- “safety and soundness standards”;
- “non-private or non-privileged corporate business and related matters”; and
- “adversely affect the rights of voting shareholders.”

If the FCA decides to move forward with the Proposal, we believe it should revise the Proposal to avoid the use of new terms and concepts such as the above-identified examples, and instead rely on terms and concepts already understood within corporate law. To do otherwise is both unnecessary and risks significant unintended consequences. Farmer Mac’s concerns about the use of the concept “excessive risk” in the Proposal without further definition or clarity is discussed above. The other identified undefined key concepts are discussed in more detail in the section-by-section discussion of the Proposal in Appendix B. To the extent these new terms and concepts are used, we believe the FCA should clearly define new terms and provide additional clarity around new concepts.

### Regulation of Farmer Mac in Areas Not Closely Related to Safety and Soundness

Congress organized Farmer Mac as an institution of the FCS, but intended for Farmer Mac to be “unique” in terms of its “powers, corporate structure, ownership, operations, and relations with other FCS entities and [FCA].”<sup>23</sup> Farmer Mac, as the operator of a secondary market, is very different from primary lenders that hold portfolios of loans, most of which were originated by those lenders, such as FCS lending institutions, commercial banks, and insurance companies.<sup>24</sup> Farmer Mac’s statutory charter, contained in Title VIII of the Act, assigns to the FCA, acting through the separate OSMO, the responsibility for the examination of, and the

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<sup>23</sup> S. Rep. No. 100-230, 100th Cong., 1st Sess. 48 (1987).

<sup>24</sup> Congress was aware that Farmer Mac’s regulator would need to give special considerations to Farmer Mac’s unique position, instructing FCA, in exercising its regulatory authority over Farmer Mac, to consider the purposes for which Farmer Mac was created, the practices appropriate to Farmer Mac’s conduct of a secondary market in agricultural loans, and the reduced levels of risk associated with secondary market transactions. *See* 12 U.S.C. § 2279aa-11(a)(2).

general supervision of the safe and sound performance of the powers, functions, and duties vested in Farmer Mac by the charter and also authorizes FCA, acting through OSMO, to apply its general enforcement powers to Farmer Mac.<sup>25</sup> In particular, Subtitle B of the Charter Act (12 U.S.C. §§ 2279bb through 2279bb-7) prescribes the primary manner by which Congress intended the FCA to fulfill its role as the safety and soundness regulator of Farmer Mac – through the regulation of Farmer Mac’s required capital levels. The FCA also conducts an annual examination of various aspects of Farmer Mac’s business practices, culminating in a report of examination that is reviewed with the Farmer Mac Board at a regularly scheduled meeting.

Farmer Mac supports the FCA’s role in overseeing the safety and soundness of Farmer Mac, but also believes it is important to recognize that Congress placed some limits on the FCA’s regulatory authority. We believe that Congress intended that areas that do not relate to Farmer Mac’s safety and soundness should be left to Farmer Mac’s Board of Directors and management to implement appropriate strategies rather than prescribed by federal regulation. Farmer Mac believes that some aspects of the Proposal do not relate to Farmer Mac’s safety and soundness and therefore should not be within the scope of any proposed rulemaking by the FCA, such as:

- Proposed sections 651.30, 651.40, and 651.50 that provide for sweeping changes in Farmer Mac’s Board governance that include new requirements for the composition of Board committees, Board voting on director nominations, and Board record-keeping as well as new limitations on the number of committees for which an individual can serve as chairman.<sup>26</sup>

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<sup>25</sup> See 12 U.S.C. § 2279aa-11(a)(1).

<sup>26</sup> In chartering Farmer Mac as a corporation, Congress intended that Farmer Mac be governed by and operated under the direction of a board of directors with the powers that most other corporate boards have, including the power to prescribe bylaws not inconsistent with law, which in Farmer Mac’s case also includes the Charter Act. In Section 8.3(c) of the Charter Act, Congress specifically provided that Farmer Mac shall operate under the direction of the Farmer Mac Board of Directors. Congress also specifically provided that the Farmer Mac Board shall have the power to prescribe bylaws, not inconsistent with law, that shall provide for (a) the classes of stock of Farmer Mac; and (b) the manner in which (i) Farmer Mac’s stock shall be issued, transferred, and retired; (ii) the officers, employees, and agents of Farmer Mac are selected; (iii) the property of Farmer Mac is acquired, held, and transferred; (iv) the commitments and other financial assistance of Farmer Mac are made; (v) the general business of Farmer Mac is conducted; and (vi) the privileges granted by law to Farmer Mac are exercised and enjoyed. See 12 U.S.C. 2279aa-3(c). It is noteworthy that the language Congress chose to authorize the Farmer Mac Board to prescribe bylaws “not inconsistent with law” is less limiting in scope than a similar provision for the Federal National Mortgage Association, which authorizes bylaws “[w]ithin the limitations of law *and regulation*.” 12 U.S.C. § 1723(b) (emphasis added).

- Multiple proposed provisions would provide for extensive new regulation of Farmer Mac’s “agents,” which are extremely broadly defined and would entail the FCA regulating numerous entities that do business with Farmer Mac but are outside the FCS.

It is also noteworthy that Congress specifically mandated that FCA eliminate regulations that are unnecessary, unduly burdensome or costly, or not based on law.<sup>27</sup> As described throughout this letter, we believe that many aspects of the Proposal are unnecessary and that adopting the Proposal as written would not be consistent with this Congressional mandate.

#### Exposure to Private Rights of Action

One unintended but likely effect of enactment of the Proposal could be Farmer Mac being forced to defend many private actions due to the numerous ambiguities in the text of the Proposal, as discussed in more detail above and in Appendix B. Such uncertainty likely would cause some director nominees to be hesitant about becoming a public company director forced to comply with the framework contemplated by the Proposal, and would create significant and unwarranted risk for Farmer Mac. Accordingly, Farmer Mac believes that the FCA should revise the Proposal to provide that it is not creating additional rights in third parties. Without such an express provision, the Proposal leaves open the possible interpretation that the proposed rules, particularly those imposing additional duties on Farmer Mac directors, officers, and agents, confer a private right of action on any holder of a class of Farmer Mac stock. For example, proposed section 653.3 would require the risk program to “ensure” that Farmer Mac’s activities are exercised in a “safe and sound” manner without defining that term. Given the importance of this matter, Farmer Mac believes the FCA should expressly affirm within the text of the regulation itself that the regulation does not create additional rights in third parties.

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<sup>27</sup> See 12 U.S.C. § 2252 note (“The Farm Credit Administration shall continue the comprehensive review of regulations governing the Farm Credit System to identify and eliminate, consistent with law, safety, and soundness, all regulations that are unnecessary, unduly burdensome or costly, or not based on law.”).

Farmer Mac has implemented an effective corporate governance framework that is consistent with current best practices, including procedures for resolving conflicts of interest, nominating and electing directors, and providing guidance about the fiduciary duties of directors. This existing framework, coupled with the more recent actions of the Farmer Mac Board that proactively address risk governance, argue strongly for the proposition that there is no current need for the FCA to extend its regulatory purview to these areas in a way that increases rather than decreases uncertainty and the potential to adversely affect Farmer Mac's day-to-day operations. This is particularly true because Farmer Mac is also subject to regulation by the SEC and the NYSE, within whose purview issues of corporate governance, disclosure, and financial reporting more naturally fall. For the reasons discussed throughout this correspondence, Farmer Mac believes the Proposal should be withdrawn and reconsidered. If the FCA decides to move forward with rulemaking in the contemplated areas, Farmer Mac believes that the Proposal should be significantly revised and re-proposed to address the many concerns identified in this letter and that the FCA should more clearly articulate its views as to why additional regulation is warranted under the circumstances.

Farmer Mac appreciates the opportunity to comment on the Proposal and would be pleased to discuss the concerns set out in this letter with members of the FCA Board and/or Staff.

Very truly yours,



Lowell L. Junkins  
Chairman of the Board



Timothy L. Buzby  
President and CEO

cc: Farmer Mac Board of Directors  
Stephen P. Mullery, Senior Vice President – General Counsel and Secretary

**Enclosures**

## Appendix A

### Discussion of “Representative” Directors

As described in the accompanying letter (the “Comment Letter”), Farmer Mac believes that the FCA’s interpretation of “representative” in the Supplementary Information related to the Proposal is not required by the plain meaning of the text or supported by any statement of Congressional intent in the legislative history of the Act. Farmer Mac believes the “representative” relationship contemplated in Section 8.2(b) of the Act (12 U.S.C. § 2279aa-2) simply requires that a director be elected by the applicable class of voting stockholders to serve the specified one year. It does not, as the Proposal would interpret it, require an “official affiliation” or “close” or “substantial and visible” connection with a voting stockholder. As described below, Farmer Mac’s interpretation is consistent with the legislative history of the Act, which shows that Congress chose to remove rather than add qualifications for Farmer Mac’s directors in finalizing the language in Farmer Mac’s charter during the conference process.

#### *Legislative History*

Congress’s Conference Committee (the “Conference”) report in connection with the Agricultural Credit Act of 1987 shows that, for Class A elected Board members, the Senate proposed that the members “be elected by holders of common stock that are insurance companies, banks and other financial institutions.” The House suggested similar language regarding the election process but with an additional requirement that “at least 1 or more members must be actively engaged in the production of 1 or more agricultural commodities at the time of appointment.” The Conference adopted the less restrictive Senate provision.

For Class B elected Board members, the Senate proposed that the members “be elected by holders of common stock that are System institutions.” The House proffered similar language to that of the Senate, but with an additional requirement that “at least 1 or more members must be actively engaged in the production of 1 or more agricultural commodities at the time of appointment.” Again, the Conference adopted the less restrictive Senate provision. In both instances, even when the Conference had the option to impose more restrictive requirements for elected Board members, it chose not to do so.

For the five Board members appointed by the President, the Conference enumerated certain eligibility qualifications. Notwithstanding, the Conference still opted to eliminate further restrictive prerequisites such as having at least one of the appointees be “specially qualified to serve on the [B]oard by virtue of their education, training or experience in secondary financial markets,” as proposed by the House, or that all appointed members be “experienced in financial matters,” as proposed by the Senate.

The Conference’s purposeful actions to expressly limit statutorily required eligibility qualifications supports our view that the term “representative,” as used in Section 8.2 of the Act, should be construed in a broad manner, and the Conference Report definitively evidences that Congress did not intend to impose eligibility criteria for the elected Board members and that Congress sought to minimize such criteria for the appointed Board members.

### *Statutory Language*

The word “representative(s)” is used four times in Section 8.2(b). The term is first used in referring to those Board members appointed by the President and confirmed by the Senate, “which members shall be representatives of the general public.” The other three usages are found in Section 8.2(b)(5) in the “Continuation of membership” provision. This provision provides that if:

Any member of the permanent board who was appointed or elected to the permanent board from among persons *who are representatives of* banks, other financial institutions or entities, insurance companies, or Farm Credit System institutions *ceases to be such a representative*; . . . such member may continue as a member for not longer than the 45-day period beginning on the date such member *ceases to be such a representative*, officer, or employee or becomes such a director or officer, as the case may be. (emphasis added)

In Farmer Mac’s view, an elected director would only “cease to be representative” of a class of stockholders in very limited circumstances such as mental incapacity or ethical violations that cast doubt on a director’s ability to fulfill his or her fiduciary duties and not simply by ceasing to have an “official affiliation” or “close” or “substantial and visible” relationship with a holder of Farmer Mac voting stock. Farmer Mac believes that a statutory interpretation of “representative” as a person who becomes an elected director solely by virtue of being elected by the respective stockholder class whether or not an “official affiliation” with a stockholder exists at the time of election, comports with the applicable legislative history and furthers Congress’s intent. This view is consistent with Farmer Mac’s understanding of the position the FCA took in 2012 when opining in response to a stockholder inquiry that there was no reason why two director nominees who had retired or were in the process of retiring as executives of Farmer Mac stockholders could not serve as “representative” directors even though no current relationship or affiliation was contemplated with the stockholders at the time of nomination and election to Farmer Mac’s Board. It is also consistent with the absence over the years of any objection by the FCA about other Farmer Mac directors who did not have an “official affiliation” with a holder of Class A or Class B voting common stock.

### *Clarification of Meaning of “persons eligible for election”*

In discussing vacancies on the Board, the Act refers to “persons eligible for election.”<sup>28</sup> While this language could be seen as imposing a requirement that “some objective eligibility criterion exists other than being elected by the shareholder class,”<sup>29</sup> Farmer Mac reads the Act, as supported by the legislative history, as giving Farmer Mac’s Board the discretionary authority to adopt director eligibility criteria. Although Farmer Mac did not use that authority for most of its history, it revised its by-laws in 2012 to adopt director eligibility criteria that included age, citizenship, financial literacy, and ethical conduct requirements for directors to be nominated for election.

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<sup>28</sup> 12 U.S.C. § 2279aa-2(b)(4)(A).

<sup>29</sup> See 59 Fed. Reg. 9622 at 9624 (March 1, 1994).

We do not believe that Congress intended that the Act mandate any eligibility criteria for elected directors. Accordingly, we believe that the phrase “from among persons eligible for election to the position”<sup>30</sup> refers to a person who could have been elected by the Class A holders or Class B holders as appropriate, which person could include, but is not limited by the Act to, an officer, director or employee of a Class A or Class B institution. In other words, if a vacancy arose for a Class A director, the vacancy would be filled by the Board with a person who could have been elected by the Class A holders so as to maintain the requirement that the Class A holders be represented by five directors. This view is supported by the Conference Report as discussed in “Legislative History” above.

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<sup>30</sup> The phrase “from among persons eligible for election to the position” appears to be a vestigial reference to the original House proposal to have at least one Board member elected by each class be actively engaged in the production of agricultural commodities. As previously explained, the additional eligibility requirement was eliminated when the Conference adopted the Senate version, which did not include any reference to further qualifications, aside from election.

## Appendix B

### Farmer Mac's Section-by-Section Discussion of the Proposal

In addition to the more significant and pervasive issues discussed in our Comment Letter, the Proposal also includes a number of other provisions that raise concerns for Farmer Mac. This Appendix describes Farmer Mac's particular concerns about each part of the Proposal (in the order that the provisions are presented in the Proposal) and proposes changes to specific language included in the Proposal to address these concerns if the FCA decides to retain the identified provisions in concept rather than deleting them altogether (as is recommended for many provisions).

#### A. Part 650 – Federal Agricultural Mortgage Corporation General Provisions (12 C.F.R. Part 650)

##### Subpart A – Regulation, Examination and Enforcement

##### 1. Regulatory Authority (12 C.F.R. § 650.2)

Proposed section 650.2 includes certain technical and substantive issues that we believe require correction in any rule that the FCA issues.

Proposed section 650.2(a) provides that Farmer Mac is a “for-profit Government-sponsored enterprise developed to provide a secondary market for agricultural and rural utility loans with public policy objectives included in its statutory charter.” Farmer Mac also provides a secondary market for the guaranteed portions of loans guaranteed by the United States Department of Agriculture (the “USDA”), which is not reflected in the language of proposed section 650.2(a). We request that the FCA revise the language of proposed section 650.2(a) to reflect this aspect of Farmer Mac's business. In addition, proposed section 650.2(a) notes that Farmer Mac is “subject to certain SEC listing and disclosure requirements” as a result of being listed on the NYSE. We are not certain what “listing requirements” the Proposal might be referring to, and we suggest that for clarity that this section be revised to more clearly describe the SEC regulations to which the FCA is referring.

Proposed section 650.2(b) asserts the FCA's primary regulatory authority with language that differs from Farmer Mac's statutory charter. The Proposal uses the language “general supervision of the safe and sound exercise of [Farmer Mac]'s powers, functions, and duties and compliance with laws and regulations,” whereas Section 8.11 of Farmer Mac's statutory charter (12 U.S.C. § 2279aa-11(a)) provides the FCA with “authority to provide [acting through OSMO] for the examination of [Farmer Mac] and its affiliates and for the general supervision of the safe and sound performance of the powers, functions, and duties vested in [Farmer Mac] and its affiliates by [Title VIII of the Farm Credit Act of 1971, as amended].” Farmer Mac is concerned that the addition of “compliance with laws and regulations” in the Proposal may suggest an expansion of the FCA's authority from that provided for in Farmer Mac's charter. Such an expansion does not otherwise appear to be contemplated by the Proposal, and we are not aware of any justification to expand the authority beyond that provided in the charter. Accordingly, we suggest that the FCA revise proposed section 650.2(b) to mirror the language in Farmer Mac's charter to avoid unnecessary confusion about the

scope of the FCA's authority. Should the FCA determine not to revise the proposed language as suggested, we ask that the FCA provide guidance explaining the change and, in particular, what it is intended to capture.

Proposed section 650.2(c) provides that Farmer Mac is "required by its authorizing statute to comply with certain SEC reporting requirements and must register offerings of Farmer Mac Guaranteed Securities under the Securities Act of 1933 and related regulations." This statement does not reflect the nuances of Farmer Mac's regulation by the SEC and does not appear to be necessary for any of the proposed regulatory requirements contained in other parts of the Proposal, so we suggest that it be stricken from any final rule. Farmer Mac's charter does not specifically *require* it to comply with SEC reporting requirements. Rather, it is the *absence* of certain language in Farmer Mac's charter – a specific exemption from federal securities laws that had been included in the charters of some other GSEs – that led Farmer Mac to register its common stock under the Securities Exchange Act of 1934 and thereby become subject to certain SEC reporting requirements. Farmer Mac's charter also does not *require* Farmer Mac to register offerings of Farmer Mac Guaranteed Securities with the SEC. Although the charter does not permit Farmer Mac to rely on the exemption within Section 3(a)(2) of the Securities Act of 1933 for its asset-backed securities, Farmer Mac can and has used other, more generally applicable exemptions from registration, such as Section 4(a)(2) of the Securities Act (with resales pursuant to Rule 144A), in connection with its issuance of unregistered Farmer Mac Guaranteed Securities.

## 2. Supervision and Enforcement (Proposed 12 C.F.R. § 650.3)

Proposed section 650.3 sets forth the FCA's supervisory and enforcement authority over Farmer Mac. Proposed section 650.3(a) specifies a non-exhaustive list of the FCA's enforcement authority. Statutes governing the FCA provide the FCA with certain enforcement authority over Farm Credit System entities, which includes Farmer Mac.<sup>1</sup> Proposed section 650.3(a) suggests that the FCA possesses plenary power to exercise its enforcement authority whenever it determines that Farmer Mac has "violated a law, rule, or regulation or is engaging in an unsafe or unsound condition or practice." Under the Act, the FCA can issue a cease and desist order<sup>2</sup> against Farmer Mac if it has reasonable cause to believe that Farmer Mac has violated, is violating, or is about to violate "a law, rule, or regulation, or any condition imposed in writing by the Farm Credit Administration in connection with the granting of any application or other request by the institution or any written agreement entered into with the Farm Credit Administration." The FCA's ability to enforce monetary penalties arises only if Farmer Mac subsequently breaches a cease and desist order or if such violation involved a statute or regulation relating to or promulgated under the Act.<sup>3</sup> Therefore, for violations of laws outside the Act, the FCA's enforcement authority is limited to an order to cease and desist. Accordingly, Farmer Mac requests that proposed section 650.2 be removed in its entirety from any rule or be amended to insert the exact description of the FCA's regulatory authority as provided in the Act. Otherwise, the Proposal would subject Farmer Mac to unwarranted dual regulation by both the FCA and whatever other regulatory authority has jurisdiction over the non-FCA laws, rules, and regulations applicable to Farmer Mac in its day-to-

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<sup>1</sup> See 12 U.S.C. §§ 2261-2271.

<sup>2</sup> 12 U.S.C. §§ 2261-2262.

<sup>3</sup> *Id.* § 2268.

day business such as the SEC, the Internal Revenue Service, the Department of Labor, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, and other state and local regulatory agencies in the locations where Farmer Mac maintains offices.

Proposed section 650.3(b) specifies that when the FCA determines that Farmer Mac is “taking excessive risks that adversely impact capital,” the FCA has “authority to address that risk.” The Proposal provides a non-exclusive list of means by which the FCA may “address” the risk, including by restricting those Farmer Mac activities determined to create excessive risk. “Excessive risk” is not defined within the Proposal. For the reasons described in Part III of the Comment Letter, Farmer Mac believes that this aspect of the Proposal could have the effect of granting the FCA the authority to substitute its own judgment about day-to-day business decisions for Farmer Mac’s existing decision-making process regarding business activities. Therefore, we believe that proposed section 650.3(b) should be deleted in its entirety in any rule. If the FCA determines to preserve the provision in concept in any rule, we believe it would be more appropriate for the FCA to address any concerns in this area by clarifying the standard for determining “excessive” risk either by reference to the capital standards set forth in Farmer Mac’s statutory charter or some other objective criterion.

### 3. Access to Corporation Records and Personnel (Proposed 12 C.F.R. § 650.4)

Proposed section 650.4 provides that Farmer Mac must promptly make its records available upon a request by OSMO. In addition, the proposed rule would require Farmer Mac to “make directors, officers, employees and agents available to OSMO during the course of an examination or supervisory action when OSMO determines it necessary to facilitate an examination or supervisory action.” Farmer Mac requests that any rule recognize certain limits on records to be provided, such that Farmer Mac would not be required to produce records protected by attorney-client privilege (in addition to recognizing confidentiality in the context of transactions not publicly announced and confidential discussions with other regulators). As a practical matter, Farmer Mac also requests that any rule recognize a limit on the basis of materiality and age of the records.

Aside from the records to be made available, Farmer Mac requests that any rule clarify the scope of “agents” to be made available upon request. Under the current and proposed definition of “agent,” this would include all service providers to Farmer Mac, such as its accountants, attorneys, and other advisors. Farmer Mac does not control all of the individuals and entities that could be construed as “agents” under this broad definition and likely would find itself in violation of the proposed rule if and when Farmer Mac is unable to make such agents available upon OSMO’s request.

## B. Part 651 – Federal Agricultural Mortgage Corporation Governance (12 C.F.R. Part 651)

### Subpart A – General

#### 1. Definitions (Proposed 12 C.F.R. § 651.1)

Proposed section 651.1 provides definitions for a number of terms used throughout the Proposal. Farmer Mac has concerns with three of these proposed definitions.

First, “agent” is defined to mean “any person (other than a director, officer, or employee of [Farmer Mac] who represents [Farmer Mac] in contacts with third parties or who provides professional services such as legal, accounting, or appraisal services to [Farmer Mac].” For the reasons described in Part III of the Comment Letter, Farmer Mac believes that all of the aspects of the Proposal related to “agents” should be deleted in their entirety in any final rule.

Second, proposed section 651.1 would define “material” to mean “conflicting interests of sufficient magnitude or significance that a reasonable person with knowledge of the relevant facts would question the ability of the person having such interest to discharge official duties in an objective and impartial manner in furtherance of the interests and statutory purposes of [Farmer Mac].” This definition is substantively the same as the definition of “material” in Farmer Mac’s current conflict-of-interest regulation (12 C.F.R. § 651.1), and Farmer Mac believes that the definition is appropriate for determining the materiality of conflicts-of-interest as contemplated in proposed sections 651.22 and 651.23. However, the definition of “material” in proposed section 651.1 also applies to proposed section 651.24(a) (prohibiting “any untrue or misleading statement of a *material* fact”). We note that “materiality” is a commonly understood concept under the federal securities laws, the test for which has been established through many years of case law and market application,<sup>4</sup> and it would add significant confusion and uncertainty to the regulatory regime applicable to Farmer Mac to provide an alternative definition for purposes of proposed section 651.24. Therefore, for purposes of evaluating untrue or misleading statements of a material fact, we believe that the FCA should not redefine “material” but instead rely on the existing and well-understood test for materiality.<sup>5</sup> If the FCA decides to retain some form of proposed section 651.1 in any rule, we suggest that the FCA clarify that the proposed definition of “material” apply only to conflict-of-interest determinations and that a traditional definition of “material” apply for proposed section 651.24(a).

Third, proposed section 651.1 would define “reasonable person” to mean “a person under similar circumstances exercising the average level of care, skill, and judgment in his or her conduct based on societal requirements for the protection of the general interest.” It is unclear what an “average” level of care, skill, and judgment entails, and Farmer Mac believes that a more appropriate standard would be one that is more established and widely-recognized and has been interpreted by courts so as to provide a level of certainty and predictability. One example of such a standard would be a requirement for a director to exercise the care that a person in a like position would reasonably believe appropriate under similar circumstances, as required by the Model Business Corporation Act that has been adopted by many states. The Proposal also provides no rationale for the use of the concept “based on societal requirements for the protection of the general interest,” which qualifies the characteristics of a “reasonable person” in the proposed definition. This concept is, to our knowledge, unfounded in any established body of law and is inconsistent with commonly-understood definitions used by private- and public-sector entities. In the absence of any rationale or other explanation, this definition would create ambiguity across the proposed rules. Accordingly, Farmer Mac suggests that this definition be revised for consistency with an established body of law.

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<sup>4</sup> See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

<sup>5</sup> We also have concerns (described below) about the definition of “material” in proposed section 655.1 pertaining to proposed disclosure and reporting requirements.

## 2. Indemnification (Proposed 12 C.F.R. § 651.2)

Proposed section 651.2(a) provides, among other things, that Farmer Mac “is not required to offer indemnification insurance” and must have “policies and procedures in place before it may offer indemnification insurance to its directors, officers, or employees.” Based on the language used later in proposed section 651.2, it appears that the focus of the section is indemnification broadly and not just indemnification *insurance* that Farmer Mac may purchase to insure against the indemnification obligations it may assume. Therefore, Farmer Mac suggests that the term “insurance” be deleted in the two places it appears in proposed section 651.21(a).

Farmer Mac appreciates the discretion that the Proposal provides to Farmer Mac in developing its indemnification policies and procedures and believes that its existing approach to indemnification described in Article VIII of its by-laws satisfies the requirements of proposed section 651.2(a)(1). However, Farmer Mac believes that the requirement in proposed section 651.2(a)(2) that it “must consider all sources of potential indemnification to protect [Farmer Mac] against over-indemnification of an individual director or officer” would benefit from clarification. “Over-indemnification” is a vague term that might mean different things to different people, and we would be interested in FCA’s guidance for determining what constitutes “over-indemnification” of an officer or director to help Farmer Mac meaningfully implement this aspect of the required indemnification policies and procedures. Also, it is unclear what the reference to considering “all sources of potential indemnification” would mean in practical application (*e.g.*, would it mean that Farmer Mac could or should deny indemnification to a director who is also indemnified by a third party?). Farmer Mac’s by-laws currently do not prohibit indemnification of directors by third parties, but simply require disclosure of any such arrangement before nomination and an agreement not to modify such arrangement without Farmer Mac’s consent once in place. We believe it would be appropriate for any proposed regulation in this area to recognize the Farmer Mac Board’s ability to prohibit third-party indemnification in certain circumstances, such as when a third-party indemnification arrangement promotes a different standard of care for Farmer Mac directors by indemnifying for acts that would not be indemnified by Farmer Mac (*e.g.*, a breach of the duty of loyalty to Farmer Mac).

Farmer Mac notes that the requirement in proposed section 651.2(b) to notify OSMO at least 10 business days before Farmer Mac issues an indemnification payment could be unworkable in some scenarios, particularly if advancement of expenses such as attorneys’ fees are considered to be “indemnification payments.” Farmer Mac requests that the FCA consider a dollar amount threshold for indemnification payments below which Farmer Mac would not be required to provide any notice to OSMO of a payment and also consider changing the 10-business day notice requirement to a 3-business day notice requirement for larger indemnification payments.

### Subpart B – Standards of Conduct

## 3. Code of Conduct (Proposed 12 C.F.R. § 651.21)

Proposed section 651.21 would require that Farmer Mac develop a code of conduct that establishes “ethical benchmarks for professional integrity, competence, and respect” and that is “reasonably designed to assure the ability of board members, officers, employees, and agents of [Farmer Mac] to discharge their duties and responsibilities ... in an ethical and business-like

manner.” The Proposal does not provide a supporting rationale for imposition of this new standard or any guidance about how it is intended to be implemented, including about the meaning of “ethical benchmarks,” which seems to suggest a quantitative measure rather than general policy guideline, or about what it means to discharge duties in a “business-like manner,” which has no commonly-understood meaning under generally accepted principles of corporate law. We also note that we are not aware of any other federal regulators who have used these two terms in any existing or proposed rules about codes of conduct. The inclusion of these terms seems to expand the regulatory duties of Farmer Mac’s directors beyond regulatory duties imposed on directors of other relevant entities, including Freddie Mac, Fannie Mae, and the Federal Home Loan Banks.

Farmer Mac is already subject to the requirements of Section 406 of the Sarbanes-Oxley Act, which sets out requirements for codes of conduct for senior financial officers. Farmer Mac is also subject to, and complies with, NYSE requirements for listed companies, including the requirement to “adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.”<sup>6</sup> Such a code must address conflicts of interest, corporate opportunity, confidentiality, fair dealing, protection and proper use of company assets, compliance with laws (including insider trading laws), and encouragement of the reporting of unethical conduct. In light of the existing regulatory regime applicable to Farmer Mac, we suggest that new regulation is unnecessary in this area. However, should the FCA determine to adopt new rules relating to Farmer Mac’s code of conduct, we suggest that the FCA revise the proposed language to eliminate “ethical benchmarks” and “business-like manner,” and in its place provide that SEC and NYSE requirements would govern.

#### 4. Conflict-of-Interest Policy (Proposed 12 C.F.R. § 651.22)

Proposed section 651.22 would require Farmer-Mac’s conflict-of-interest policy to “acknowledge and respect the representational affiliations required by the Act for elected directors,” and also would exclude from the analysis of potential conflicts-of-interest those interests where “the organization or entity is directly connected to the representational affiliations required by the Act for elected directors.” As discussed more fully in Part III of the Comment Letter, we request the FCA to reconsider the treatment of representational affiliations for purposes of Farmer Mac’s application of governing conflict-of-interest principles. Particularly, we believe it is imperative that the FCA eliminate the carve-out from conflict-of-interest rules for directors’ representational affiliations. We also request the FCA to remove the phrase “business-like manner” from any rule, or at a minimum, provide guidance about the phrase’s meaning because it is not a commonly-defined concept under generally accepted principles of corporate law.

#### 5. Conflict-of-Interest Disclosure and Reporting (Proposed 12 C.F.R. § 651.23)

Proposed section 651.23(b)(2) would require that where a real or potential conflict-of-interest is identified as material, Farmer Mac must, within three business days of identification, notify the relevant director, officer, or employee of the material conflict-of-interest determination and provide that individual with a reasonable opportunity to respond. As discussed more fully in Part III of the Comment Letter, we request that the FCA reconsider this requirement. From a practical perspective, due to the way in which conflicts of interest can arise and need to be resolved,

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<sup>6</sup> Section 303A.10 of NYSE Listed Company Manual.

providing notice within three days of identification may be difficult if Farmer Mac needs to examine additional facts to establish whether an identified conflict exists and is material. To require prior notice and time for the potentially conflicted director to respond could be unworkable in situations where Farmer Mac learns of the conflict immediately prior to or during a meeting of the Board and the conflict must be resolved with a director as expeditiously as possible.

Proposed section 651.23(g) would require Farmer Mac to obtain conflict-of-interest disclosures from Farmer Mac's "agents" as currently defined. As discussed more fully in Part III of the Comment Letter, we believe that this would impose an unnecessary and unduly burdensome requirement on all third parties who provide professional services to Farmer Mac and should be removed.

Proposed section 651.23(d) would require Farmer Mac to disclose unresolved material conflicts of interest to stockholders through annual reports and proxy statements, to investors and potential investors through disclosure documents, and to the FCA through procedures established by OSMO. Although these requirements track the language of regulations currently applicable to Farmer Mac (12 C.F.R. § 651.3), Farmer Mac notes that the separate categories for stockholders and investors and potential investors seems unnecessary (all should be able to be informed through disclosure documents supplied to them, including Current Reports on Form 8-K filed with the SEC) and that NYSE and SEC rules permit Farmer Mac to disclose any amendment or waiver of a code of ethics through disclosure on the company's website.

#### 6. Director, Officer, Employee, and Agent Responsibilities (Proposed 12 C.F.R. § 651.24)

Proposed section 651.24 replaces the requirement for directors, officers, employees, and agents to maintain high standards of behavior with specifically enumerated prohibitions on conduct. As proposed, section 651.24 would prohibit any director, officer, employee, or agent of Farmer Mac from making "any untrue or misleading statement of material fact intended or having the effect of reducing public confidence in [Farmer Mac]" and making "improper use of official [Farmer Mac] property or information." The proposed section would also prohibit any director from divulging or using, outside the performance of official duties, "any fact, information, or document that is acquired by virtue of serving on the board of [Farmer Mac] and not generally available to the public."

Proposed section 651.24 departs from standard practices found in regulations governing Fannie Mae, Freddie Mac, Federal Home Loan Banks, and entities regulated by the Office of the Comptroller of the Currency (national banks, federal savings associations, and federal branches and agencies of foreign banks), which each have prescribed fiduciary duties for their boards of directors, but includes no specific prohibitions on conduct as contemplated by proposed section 651.24. The Proposal provides no supporting rationale to depart from the standard practice of other relevant entities, and Farmer Mac sees no reason for this additional regulatory provision.

Aside from the departure from the regulatory approach taken by other federal regulators of financial institutions, this section of the Proposal contains ambiguities that should be clarified. For example, proposed section 651.24(a) would prohibit directors, officers, employees, and agents from making any untrue or misleading statement of material fact "intended or having the effect of

reducing public confidence” in Farmer Mac.<sup>7</sup> Adding this new clause to a well-established and well-understood securities law standard governing liability for material misstatements or omissions could expose Farmer Mac’s directors, officers, employees, and agents to uncertain risks and have significant unintended consequences. Not only is the basis and meaning of this standard unclear, the standard also raises a question as to how the rule would apply to Farmer Mac’s “agents,” as currently defined.

Similarly, the phrase “improper use of official Corporation property or information” in proposed section 651.24(b) is unclear. The phrase could be broadly interpreted by the FCA to include uses that Farmer Mac has approved as a matter of internal policy such as the limited use of Farmer Mac’s phones, computers, facilities, and e-mail capabilities for personal matters, thereby subjecting the covered individuals to the FCA’s enforcement powers for activities approved by Farmer Mac. Farmer Mac believes this broad phrasing results in unnecessary uncertainty and does not know how it would apply practically. We believe that the specific example included in proposed section 651.24(b) was an attempt to provide a clear example of what “improper use” of Farmer Mac’s property or information might look like (“purchase or retirement of any stock in advance of the public release of material non-public information concerning” Farmer Mac), but we note that there are even recognized exceptions to trading in advance of the public release of material non-public information such as through 10b5-1 trading plans previously established during “open window” periods for trading in Farmer Mac securities.

Proposed section 651.24(c) provides an exception to the prohibition on directors divulging or using any fact, information, or document acquired by virtue of serving on the Farmer Mac Board for “performance of official duties.” This proposed provision is confusing, and its relationship to the securities law standards and fiduciary duties in general is uncertain. For example, the requirements of the SEC’s Regulation FD covers disclosures of *material* non-public information to third parties. Farmer Mac questions whether the proposed “official duties” caveat could be interpreted to encompass conversations between “representative” directors and their sponsoring stockholders, meaning that directors could convey confidential information about Farmer Mac to their sponsoring stockholders without violating the prohibitions in proposed section 651.24(c).

At a minimum, Farmer Mac believes the Proposal should be revised to clarify the abovementioned ambiguities in regulatory standards of conduct. Farmer Mac requests the FCA to consider language that would prohibit a director from sharing non-public information about Farmer Mac except as otherwise required by law, during the course of a regulatory examination, or as authorized by Farmer Mac’s Board of Directors or Code of Conduct. As an alternative, the FCA could consider adopting a provision allowing Farmer Mac to apply established standards of conduct under state law, which would eliminate any theoretical need for the FCA to develop a new set of provisions consistent with existing regulations to which Farmer Mac is already subject.

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<sup>7</sup> Our above-described concerns with the proposed definition of materiality in section 655.1 further compounds this issue. We note that existing regulations governing Farm Credit System banks require such banks to establish policies and procedures with requirements and prohibitions “necessary to promote *public confidence* in the institution and the System . . . .” 12 C.F.R. § 612.2165 (emphasis added); however, this is the only similar regulatory use of the term that we are aware of, and we believe it is inappropriate in the context in which used in the Proposal.

## Subpart C – Board Governance

### 7. Director Elections (Proposed 12 C.F.R. § 651.30)

Proposed section 651.30 establishes a regulatory requirement for Farmer Mac to establish specific election policies and procedures and to implement them in a “fair and impartial manner,” with many requirements within the proposed rule focusing on the representational relationships of directors. We request the FCA to reconsider its proposed rule on director elections in light of requirements within Farmer Mac’s charter, its unique corporate structure, and its existing robust policies and procedures in this area.

Farmer Mac’s policies and procedures for director nominations and elections, which we describe in detail below, have been significantly modernized and improved over the last three years. These enhancements, including the adoption of advance notice provisions and director eligibility provisions, have been effective in promoting dialogue with Farmer Mac’s stockholders, identifying qualified candidates to serve as directors, and improving transparency for all stockholders. Farmer Mac also already complies with SEC rules for disclosures to stockholders in connection with the solicitation of proxies to elect directors and the NYSE’s rules relating to nominating committees.

In identifying potential director candidates, the Corporate Governance Committee encourages the input and recommendations of other Farmer Mac Board members, management, stockholders, and other stakeholders. The Committee often receives multiple recommendations for potential director candidates in any one year and considers the criteria set forth in Farmer Mac’s by-laws and Corporate Governance Guidelines, as well as a policy statement on directors adopted by the Farmer Mac Board that expresses the general principles that should govern director selection and conduct, in evaluating all potential candidates. In conjunction with its review of these criteria, the Corporate Governance Committee reviews, on an annual basis, the appropriate qualifications, skills, and characteristics required of Farmer Mac Board members in the context of the composition of the Farmer Mac Board as a whole at that point in time. The Corporate Governance Committee’s assessment includes Farmer Mac Board members’ qualifications as to issues of judgment, skills, independence, and financial expertise, all in the context of an assessment of the perceived needs related to the effective operation of the Farmer Mac Board and its committees at that point in time.

Another avenue available to voting stockholders is through the submission of proposals or director nominations following the procedural requirements set forth in Farmer Mac’s by-laws that have been in place since 2012. The Farmer Mac Board believes that all voting stockholders should have the right to participate in the corporate governance process, which includes the right to nominate, and solicit proxies in support of the election of, directors in opposition to the directors nominated by the Farmer Mac Board. Through the nomination process described in Farmer Mac’s by-laws, voting stockholders can make the Farmer Mac Board and other stockholders aware of competing candidates for election to the Farmer Mac Board, as well as the reasons for proposing competing candidates and the qualifications of each such candidate. This procedural safeguard prevents any holder of Farmer Mac voting common stock from being disenfranchised from the director election process because each voting stockholder has an equal opportunity to nominate a candidate for election to the Board regardless of which candidates are identified by Farmer Mac’s

Corporate Governance Committee and recommended for election by the Farmer Mac Board.<sup>8</sup> The advance notice provisions are a key component of Farmer Mac’s nomination process and are intended to ensure that the nomination process is as fair and open as possible by facilitating the ability of Farmer Mac stockholders to be properly informed of those seeking election to the Farmer Mac Board. These provisions also ensure that the Farmer Mac Board has sufficient time to evaluate these proposals and nominations and provide stockholders with the Farmer Mac Board’s recommendations and other information necessary for stockholders to make informed voting decisions. One indication of stockholders’ comfort with Farmer Mac’s director nomination process is that no voting stockholder has used the advance notice option for proposing director nominees during the last two years.

In light of our robust director nomination and election process, we do not believe that there is an identified need for additional regulation in this area. However, if the FCA nonetheless determines to issue a rule related to director elections, Farmer Mac believes that certain aspects of the proposed rules require revision, and has provided comments to assist in this regard.

While Farmer Mac believes that its current procedures for director elections are both fair and consistent with best practices, these procedures also contemplate the Board making a recommendation to the voting stockholders to elect the Board’s recommended slate of candidates. It is not clear how this generally accepted aspect of director elections in public companies would be able to comply with the requirement in proposed section 651.30(a) that Farmer Mac’s director election procedures be “impartial.” Accordingly, we suggest that the FCA revise this aspect of the Proposal to make clear that the procedures must be followed in a fair manner and consistent with the requirements of Farmer Mac’s statutory charter.

Proposed section 651.30(b)(1) would allow “any holder of an equity interest” in Farmer Mac to submit candidates for nomination.<sup>9</sup> This provision appears to be inconsistent with Farmer Mac’s statutory charter, which provides that only the two voting classes of common stock may elect directors. “Equity interest” is undefined in the Proposal, but common parlance would suggest that it includes the two voting classes of common stock in addition to all other classes or series of Farmer Mac’s common and preferred stock, which is non-voting. We do not believe it makes sense to provide holders of non-voting stock a regulatory right to submit candidates for nomination consideration when those holders cannot vote for their nominees, and the Proposal provides no justification for this change. We request that the FCA revise the Proposal to clarify that any holder

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<sup>8</sup> We note that one of the justifications expressed in the Proposal for the regulation of Farmer Mac’s director nominations and elections is that “the voting stockholders are only presented with one director candidate per board vacancy.” 80 Fed. Reg. at 15937. This statement does not recognize the ability of voting stockholders to nominate competing candidates for election as directors that is currently provided for in Farmer Mac’s by-laws.

<sup>9</sup> In connection with this proposed requirement, we note that footnote 18 to the Proposal contains a reference to proxy access and the Dodd-Frank Act. This reference confuses the issue and misstates the impact of Section 971, Subtitle G of the Dodd-Frank Act. Stockholders were not provided the right to nominate directors in the Dodd-Frank Act. This is a right that exists under state law. Rather, the Dodd-Frank Act confirmed the SEC’s authority to adopt rules to enable stockholders to have their nominees included in company proxy materials (“proxy access” rules). The SEC adopted such rules, which were struck down by the D.C. Circuit Court of Appeals. *Facilitating Shareholder Director Nominations*, SEC Rel. 33-9136 (Aug. 25, 2010), available at <http://www.sec.gov/rules/final/2010/33-9136.pdf> (Rule 14a-11), vacated, *Business Roundtable and Chamber of Commerce of the United States v. Securities and Exchange Commission*, 647 F.3d 1144 (D.C. Cir. 2011).

of a “voting” equity interest would have the right to submit candidates for nomination, which is consistent with the procedures Farmer Mac currently has in place in its by-laws.

Proposed section 651.30(b)(3) would require that “a director-candidate must receive affirmative votes for nomination from a majority of those representing the same class of stockholders as the candidate.” In addition, the proposed rule requires Farmer Mac to “acknowledge and respect the voting rights of Class A and Class B stockholders, as well as the elected director representational affiliations required by the Act.” The proposed rule requires each elected director candidate to have “a recognized affiliation or relationship with their respective class of voting stockholders at the time of nomination and election to [Farmer Mac’s] board of directors.” As a part of this requirement, Farmer Mac must “maintain documentation supporting the affiliation or relationship of each elected director until 3 years after the director’s service on the board ends.”

Farmer Mac believes the requirement in proposed section 651.30(b)(3) that “during the director nomination process, a director-candidate must receive affirmative votes for nomination from a majority of those representing the same class of stockholders as the candidate” suffers from a number of deficiencies. It is unclear, undermines the role of the full Board to recommend director nominees, places too much emphasis on the differences between directors based on their source of election, and could result in effective veto power over all director nominations from one class to be vested in a small minority of Farmer Mac directors or a small number of large voting stockholders. The Supplementary Information to the Proposal uses the phrase “those involved in [Farmer Mac]’s nomination process,” which, in addition to “during the director nomination process,” should be clarified in the Proposal. Currently, the full Board ultimately considers and acts on the recommendations of the Corporate Governance Committee regarding director nominations. Farmer Mac’s Corporate Governance Committee, which functions as Farmer Mac’s nominating committee, facilitates the selection of director nominees for recommendation to the full Board. The Farmer Mac Board, in turn, considers the Corporate Governance Committee’s recommendations and approves a recommended slate of nominees for consideration by Farmer Mac’s voting stockholders at the annual meeting of stockholders. Farmer Mac requests that the FCA clarify whether its proposed rule would require the affirmative vote of a majority of Class A or Class B directors on the Farmer Mac Board, a majority of Class A or Class B directors on the Corporate Governance Committee, or both.

Farmer Mac believes that the director nomination and election provisions in the Proposal undermine the role of the full Board to recommend director nominees for election by the voting stockholders, which is an essential function of a board in most corporations. It is unclear why a majority of the directors elected by a certain class of voting stockholders should control the Board’s recommended nominations for that class when Farmer Mac’s existing advance notice of director nomination provisions do not in any substantive manner interfere with the ability of the holders of Class A and Class B common stock to propose and vote for alternative nominees. The factional approach to director nominations and elections espoused by the Proposal also appears to be at odds with the intent of the Act, which envisions the participation of the entire Board to fill a Board vacancy for an elected member rather than the vacancy being filled by just the class of directors for which a vacancy exists.<sup>10</sup> Farmer Mac also requests the

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<sup>10</sup> See 12 U.S.C. § 2279aa-2(b)(4)(A). The Conference Report for the Agricultural Credit Act of 1987 shows that the House draft provided that a vacancy among elected members be “filled by the Board from among persons eligible for election to the position.” The Senate version sought to have the vacant seat be “filled by members of the [B]oard from

FCA to consider possible unintended adverse consequences of the proposed affirmative vote requirement. For example, consider the very real possibility, based on the current allocation of Farmer Mac's Class B stock and the lack of a limit on the holdings of that stock by an individual FCS institution, that just one merger of banks within the FCS could give one holder control of 60% of Class B stock and the resulting ability to elect three Farmer Mac directors, which could effectively give that one institution veto power over all future Class B nominees.

The proposed new provisions in section 651.30(c) regarding representational directors also raise a number of concerns by providing that director elections must "acknowledge and respect the voting rights of Class A and Class B stockholders, as well as the elected director representational affiliations required by the Act" and that "[e]lected director candidates must have a recognized affiliation or relationship with their respective class of voting stockholders at the time of nomination and election." As discussed in more detail in the Comment Letter and Appendix A, this language read in light of FCA's interpretation of the close relationships needed to satisfy the "representational affiliations" requirement could disqualify several current members of the Farmer Mac Board, which, in turn, could significantly affect the expertise, diversity, and independence of the members of Farmer Mac's Board. Accordingly, any revised rule should be considered in light of Farmer Mac's current Board composition and the independence requirements imposed by the NYSE. Also, the requirement for the relationship with the class of voting stock to be in place "at the time of nomination and election" could mean that retired individuals with long employment histories in the industry would not qualify absent a separate "official" arrangement with a voting stockholder, which Farmer Mac believes should not be encouraged solely as a prerequisite to serve on Farmer Mac's Board.

#### 8. Director Removal (Proposed 12 C.F.R. § 651.35)

Proposed section 651.35(b) provides that director removals initiated by Farmer Mac may not "adversely affect the rights of voting shareholders." It is not clear from either the rule text or the release discussion what it would mean to "adversely affect the rights of voting shareholders" through a director removal, or how the provision would work as a practical matter. It seems that an argument could be made that *any* removal of an elected director could adversely affect the rights of stockholders. In light of this ambiguity and the resulting practical considerations, we ask that the FCA either revise the Proposal to delete this provision, or clarify what circumstances this provision is intended to address. Proposed section 651.35(b) also provides that "[a]ppointed directors may only be removed as authorized by the President of the United States," which seems to contradict the charter provision providing that appointed directors who become an officer or director of any financial institution or entity may only stay on Farmer Mac's Board for up to 45 days after that change in status under 12 U.S.C. § 2279aa-2(b)(5).

During the last several years, the Farmer Mac Board enhanced the provisions regarding the accountability of directors for any violations of the Code of Business Conduct and Ethics or other corporate policies such as those relating to insider trading. Specifically, Farmer Mac now requires each elected director and director nominee to execute a prospective director agreement that, if a

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the same category of directors." The main distinction between the two proposals was who would make the decision on filling the vacant seat – the Board as a whole (as proposed by the House) or the segment of the Board from which a vacancy occurred (as suggested by the Senate). The Conference chose the House language to have a vacancy filled by the whole Board.

court determines a director has breached in a material way, would require a director's irrevocable resignation. The Farmer Mac Board has also implemented a mechanism for the Board to request the President of the United States to remove an appointed member. Accordingly, Farmer Mac requests that the FCA revise its Proposal to clarify the requirements for director removal consistent with Farmer Mac's existing director removal policies.

Proposed section 651.35(c) provides that Farmer Mac must notify OSMO at least 14 days before any director removal is initiated by Farmer Mac. We believe that there may be circumstances where this timeframe would inappropriately delay Farmer Mac's ability to act quickly to remove a director who is causing harm to Farmer Mac. As it is, there generally will be some delay in the removal process for removals initiated by Farmer Mac due to the provision in the required prospective director agreement that requires resignation only where the director is found by a court to have breached the agreement in any material respect. It is likely that the initiation of the required court proceedings to remove a director would be considered to be the initiation of the removal of a director. In that case, Farmer Mac does not believe that it should have to wait an additional 14 days before initiating the court proceedings that themselves will likely take months to resolve. In most scenarios where director removal is sought, any additional delays in the process could have the potential for reputational and business harm, particularly in egregious cases of misconduct. For example, a director may have apparent authority notwithstanding the initiation of removal proceedings and exclusion from Board meetings, and thereby be able to bind Farmer Mac or appear on behalf of Farmer Mac. For this reason, Farmer Mac believes a shorter notice period would be more appropriate, such as 3 business days.

#### 9. Director Fiduciary Duties (Proposed 12 C.F.R. § 651.40)

Proposed section 651.40 sets out the general responsibilities of the Farmer Mac Board, including individual director duties. The Proposal provides that each director must carry out his or her duties "in good faith, in a manner such director believes to be in the best interests of [Farmer Mac], and with such care, including reasonable inquiry, as a reasonable person in a similar position would use under similar circumstances." Among other responsibilities, the proposed rule requires the Farmer Mac Board to "remain reasonably informed of the condition, activities, and operations of [Farmer Mac] in order to fulfill its duties." As to "independence," the FCA would not allow "confidentiality agreements or [Farmer Mac] policies and procedures" to prevent directors from "publicly or privately commenting orally or in writing on non-private or non-privileged corporate business and related matters."

Farmer Mac strives to ensure that the activities of its Board fulfill Farmer Mac's public mission,<sup>11</sup> but the Proposal raises a number of concerns related to our ability to continue to do so.

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<sup>11</sup> Farmer Mac acknowledges the Proposal's comment: "Unlike corporations incorporated under State statutes of incorporation, statutorily chartered GSEs are not free to alter their purposes or powers, even when such alteration may be in the best interest of the investing stockholders. For GSEs, such changes can only be made by law. Thus, it is the responsibility of Farmer Mac directors to lead [Farmer Mac] in the manner that best effectuates the public policy it was designed to serve." 80 Fed. Reg. at 15938. This language, which was first used in 1994 conflict-of-interest regulation discussions, has been cited by some to argue that Farmer Mac's Board is not empowered to ever seek charter changes from Congress. However, Farmer Mac believes that the mere fact that the Board cannot itself unilaterally amend its statutory charter does not absolve the Board from its responsibility to propose and recommend charter amendments if doing so is in the best interest of Farmer Mac and all of its stockholders. Like the Farmer Mac Board, boards of

Proposed section 651.40(c)(1) provides for fiduciary standards of good faith and due care, but bases these upon a “reasonable person” standard that does not follow any commonly-understood meaning of this concept. Rather, the proposed definition of “reasonable person” refers to conduct “based on societal requirements for the protection of the general interest.” This is a new standard, and not one that lends itself to obvious interpretation or predictable application. We believe this standard needs to be clarified, at a minimum, by replacing the proposed “reasonable person” standard with a commonly-understood standard. State laws governing corporate directors’ fiduciary duties often prescribe a more certain standard that examines a director’s good faith business judgment as amplified by a well-developed body of case law that includes analysis of the process followed by directors in making decisions on behalf of their corporations. For example, Section 8.30 of the Model Business Corporation Act provides that directors should discharge their duties “(1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.” The Model Business Corporation Act also requires directors to “discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.” The Model Business Corporation Act standard represents the general common law and state statutory law governing director fiduciary duties, and Farmer Mac believes that such an approach would be a more appropriate standard than that proposed — “based on societal requirements for the protection of the general interest.”

Farmer Mac does not believe that imposing a subjective standard “based on societal requirements for the protection of the general interest” furthers any policy or regulatory objective. Similarly, the FCA’s requirement in proposed section 651.40(c)(3) for directors to “direct the operations of [Farmer Mac] in conformity with safety and soundness standards” creates additional ambiguity because “safety and soundness standards” is undefined and could implicate any number of regulatory metrics for financial institutions. This ambiguous language of the Proposal could subject Farmer Mac’s directors to increased private litigation risk, and Farmer Mac is cognizant that an expansion of the duties of the Board may impact our ability to recruit and retain qualified Board members. Eligible individuals might be concerned about the consequences of an administrative enforcement action should they fail to fulfill the expanded, and somewhat undefined, duties required in the proposed rule. Farmer Mac also believes that the concept of a director’s duty to perform a “reasonable inquiry” in proposed section 651.40(c)(1) should be clarified if the FCA intends that this would entail more than the requirement (included in proposed section 651.40(b)) to remain reasonably informed of the condition, activities, and operations of Farmer Mac. If so, Farmer Mac is concerned that the interpretation of this duty could lead to directors seeking to have Board minutes reflect each question asked by each director by name during the course of a meeting, which is not common practice.

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directors of corporations organized under state law generally do not have the authority to unilaterally amend their respective corporations’ certificates or articles of incorporation. Rather, a stockholder vote is required to approve such amendments. Such a limitation on the authority of a board of directors to unilaterally amend its certificate or articles of incorporation does not mean that such a board is limited in its authority to propose, and recommend to the corporation’s stockholders, an amendment to its certificate or articles of incorporation. Thus, the fact that Farmer Mac’s Board cannot itself unilaterally effectuate a given amendment to the statutory charter does not absolve the Board, as the body charged with managing Farmer Mac in the manner that best effectuates the public policy it was designed to serve, from the responsibility to comply with its fiduciary duties with respect to all items brought before it, including proposed charter amendments.

Proposed section 651.40(c)(2) would require directors to “administer the affairs of [Farmer Mac] fairly and impartially and without discrimination in favor of or against any investor, stockholder, or class of stockholders.” We believe that the phrase “administer the affairs” would inappropriately shift to the Farmer Mac Board a responsibility that should be exercised by management. We believe that “oversee the affairs” would be a more appropriate description of the duties of directors. In addition, the phrase “fairly and impartially” is neither a meaningful nor appropriate standard to apply to corporate directors, and it could cause confusion concerning, or conflict with, our directors’ existing obligations to advance the interests of corporate stockholders, as well as a variety of ethical standards imposed by statute, regulation, rule, and common law and by Farmer Mac’s Code of Business Conduct and Ethics. The language in this section of the proposed rule appears to be derived from rules governing the Federal Home Loan Banks, which are organizations structured as cooperatives that exist to provide services to their members, and the requirement does not seem tailored to Farmer Mac’s structure as a public company with many stockholders with whom it does not transact business. Farmer Mac directors currently comply with a robust Code of Business Conduct and Ethics policy that governs conflicts of interest. In addition, Farmer Mac follows NYSE guidelines for independence. Adding new requirements that may be interpreted in a manner inconsistent with our Code of Business Conduct and Ethics policy and NYSE requirements would create unnecessary ambiguity and inconsistency in an area where there is well-established regulation and compliance.

We are also concerned that the “fairly and impartially without discrimination” language in the Proposal could be read to implicate Farmer Mac’s development of business products that are tailored to one segment of its stakeholders. Farmer Mac’s business partners use Farmer Mac’s programs and products for many different reasons. Some of the different benefits a counterparty might seek to obtain include increased liquidity, access to unique loan products, advantageous funding, and the ability to help manage requirements related to capital, maximum loan exposures, and loan concentrations. The ability to obtain these benefits depends on a counterparty’s unique business objectives and strategies as well as the counterparty’s applicable regulatory regime, if any. Farmer Mac envisions itself first and foremost as a “problem solver” for the lenders that serve rural America and believes that it should have maximum flexibility to tailor products that serve the needs of particular customers even if those products would not be valued by the entire universe of potential customers who are Farmer Mac stockholders. Arguably, under the proposed requirement, Farmer Mac’s development of certain business products could be deemed to discriminate in favor of (or against) a particular class. For example, Farmer Mac’s AgVantage product could be deemed to be “discriminatory” because it is targeted at lenders who would like to access advantageous funding through the capital markets by pledging qualified loans to secure general obligations, but many of Farmer Mac’s stockholders who participate in Farmer Mac’s other programs have no need for the AgVantage product. Also, compliance with these proposed fiduciary duties of “non-discrimination” could undermine Farmer Mac’s ability to maintain sound credit standards in the situation where stockholders/participants who cater to less creditworthy borrowers assert that Farmer Mac’s underwriting standards “discriminate” against them. Furthermore, expanding the list so broadly to include “any investor, stockholder, or class of stockholders” in the “without discrimination” requirement could lead to uncertainty about making any distinctions at all. Such an extensive list raises the issue of whether Farmer Mac may be deemed to “discriminate” against different types of investors, such as holders of debt securities, common stock, and preferred stock, based solely on the terms of those securities. It also raises the question of whether the Farmer Mac Board would be

“discriminating” against some stockholders by agreeing to meet with some but not all who request a meeting.

The Proposal contemplates a role for the FCA in prescribing the fiduciary duties of directors of Farmer Mac on the basis that Farmer Mac’s public mission may require its fiduciary duties to be different from the fiduciary duties required of directors of other public corporations. Farmer Mac does have a public mission to fulfill, but the fiduciary duties of its directors are substantially the same as those of any other public company – the twin duties of care and loyalty. Any alteration of the nature of fiduciary duties of members of the Farmer Mac Board would represent a significant departure from the corporate governance model that Congress chose for Farmer Mac and could create inconsistencies with the approaches of other regulators. Congress chose to create Farmer Mac as a corporation even though it chose to structure some other GSEs, specifically other FCS institutions and the Federal Home Loan Banks, as cooperatives owned exclusively by member institutions and established to provide services exclusively to its members. Farmer Mac, as a publicly-traded corporation, has a broader base of stockholders than these GSEs structured as cooperatives, including many stockholders who do not directly participate in the secondary market provided by Farmer Mac. Therefore, Farmer Mac seeks to fulfill its mission of serving the financing needs of rural America in a manner that is consistent with providing a return on the investment of its stockholders. Farmer Mac believes that these two goals are not in conflict, but rather closely related. Indeed, Farmer Mac believes that its ability to fulfill its mission of providing a secondary market to increase the availability of credit in rural America is positively correlated with its ability to provide a return on the investment of its stockholders because each dollar of incremental business in furtherance of Farmer Mac’s mission is expected to generate earnings that enhance the operating results, financial condition, and safety and soundness of Farmer Mac.

Congress made clear its willingness to legislate on issues of corporate governance through the passage of the Sarbanes-Oxley Act and the Dodd-Frank Act, but in neither of these actions has Congress demonstrated a willingness to develop federal law regulating the fiduciary duties of directors.<sup>12</sup> Indeed, Congress has not directed the SEC to adopt regulations to prescribe the fiduciary duties of directors of public companies, and Farmer Mac requests that the FCA respect Farmer Mac’s existing system of corporate governance in the absence of clear directive from Congress to do so. As discussed in the Comment Letter, Farmer Mac believes that a better solution would be for the FCA to issue a regulation that authorizes Farmer Mac to designate a recognized, fully-developed body of governing law for corporate governance matters that would directly apply to the conduct of Farmer Mac’s directors, officers, and employees.

#### 10. Director “Independence” (Proposed 12 C.F.R. § 651.40(d))

Proposed section 651.40(d) would expressly allow directors to publicly or privately comment orally or in writing on “non-private” or “non-privileged” corporate business and related matters, but does not provide a definition of “non-private” or “non-privileged.” The Proposal suggests that the FCA believes such a provision was needed to uphold the “representational”

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<sup>12</sup> Although the Federal Housing Finance Board has proposed regulations, including corporate governance regulations, to replace OFHEO and Finance Board regulations pursuant to the Housing and Economic Recovery Act of 2008, Pub. L. 110-29, 122 Stat. 2654 (*see* Responsibilities of Board of Directors, Corporate Practices and Corporate Governance Matters, 79 Fed. Reg. 4414 (January 28, 2014)), the Housing and Economic Recovery Act of 2008 was arguably not focused primarily on developing a federal law regulating the fiduciary duties of directors.

relationships of directors who need to be “accountable” to their sponsoring stockholders. The Supplementary Information section of the Proposal indicates that the FCA added this proposed section to “strike[] the appropriate balance between a director’s representational duties required by the Act and his or her corporate fiduciary duties.” However, without a definition or other form of guidance, we are concerned that the use of these broad, undefined terms could undermine Farmer Mac’s confidentiality agreements. For example, “non-private” could potentially encompass information discussed during a Board meeting such that it is known by more than one person, but is not information Farmer Mac wishes to be disseminated to stockholders. “Privileged,” on the other hand, suggests a narrow concept, such as the attorney-client privilege.

As a policy matter, Farmer Mac recognizes existing regulations on the maintenance and restrictions on disclosure of confidential information. The NYSE views the term “confidential information” broadly, stating that it “includes all non-public information that might be of use to competitors, or harmful to the company or its customers, if disclosed.”<sup>13</sup> Similarly, Article IX of Farmer Mac’s current Code of Conduct defines confidential information as “any information entrusted to or obtained by a director, officer, employee, or agent of Farmer Mac by reason of his or her position as a director, officer, employee, or agent of Farmer Mac that is not available on the public portion of Farmer Mac’s website or in Farmer Mac’s filings with the SEC. It includes, but is not limited to, any non-public information that might be of use to competitors (or those who would seek to limit the ability of Farmer Mac to compete with others) or harmful to [Farmer Mac] or its customers if disclosed.” As a matter of good corporate practice, directors should maintain the confidentiality of information entrusted to them except when disclosure is authorized or legally mandated. Accordingly, Farmer Mac’s Code of Conduct provides clarity about a director’s confidentiality obligations and permits a director to divulge confidential information to a third party only if the specific disclosure is pre-approved in writing by the Board Corporate Governance Committee. The Code of Conduct also recognizes exceptions to this pre-approval requirement for disclosures to (i) Farmer Mac’s officers, directors, accountants, and legal counsel, (ii) a director’s personal attorneys who need to know the information to advise on issues relating to legal compliance, and (iii) the FCA or any other governmental entity having regulatory, legislative, or investigative oversight over Farmer Mac. The relationship that a multi-constituency director may have with his or her designating constituent stockholder does not fall within one of these recognized exceptions and therefore does not permit the director to share confidential information of Farmer Mac with that stockholder unless pre-approved by the Corporate Governance Committee. Rather, a director’s ability to consult and share information with a given stockholder is circumscribed by the director’s fiduciary duty to Farmer Mac, Farmer Mac’s Code of Business Conduct and Ethics, insider trading laws, and rules applicable to Farmer Mac as a NYSE-listed company, all of which provide that preserving the confidentiality of such information is paramount.

Although the Proposal indicates that it does not prohibit Farmer Mac from “protecting proprietary, privileged, and non-public information,” the FCA’s creation of a new category of permitted disclosures by Farmer Mac’s directors through the use of undefined terms subject to more than one meaning introduces uncertainty to an area where Farmer Mac’s directors have heretofore had clarity. Uncertainty about what constitutes “private” or “privileged” information could potentially limit the willingness of directors to engage in open dialogue in Farmer Mac Board meetings for fear that such conversations on non-private, non-privileged corporate business or

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<sup>13</sup> Section 303A.10 of NYSE Listed Company Manual.

“related matters” may be publicly disclosed or disclosed to selected stockholders. One motivation for the FCA’s creation of this new category of permissible disclosure appears to be concern about freeing up Farmer Mac directors to engage with stockholders as a means of gathering information and gaining insights into stockholder concerns and views. However, these types of conversations to inform directors about stockholder perspectives can already occur within the bounds of the existing confidentiality requirements of Farmer Mac’s Code of Conduct as long as a director does not disclose non-public information about Farmer Mac. Stockholders can already remain well-informed about Farmer Mac and can discuss with their representational directors information made available through public filings with the SEC in addition to robust disclosures on Farmer Mac’s website. Stockholders should not need access to any information about Farmer Mac that is not public to share their concerns and perspectives with the directors elected to the Farmer Mac Board. A director who shares material non-public information with a stockholder while believing that the information is permissible disclosure of “non-private” or “non-privileged” information could inadvertently expose both the director and the stockholder to legal liability under insider trading laws. Accordingly, we suggest that the FCA should not adopt this provision as currently formulated. Rather, we believe that this provision should be reconsidered in its entirety. Should the FCA determine to adopt this provision, however, we request that the FCA provide clear definitions of “non-private” and “non-privileged,” and consider a title other than “independence” to more accurately capture the scope of this provision.

Notably, Farmer Mac does not prevent its directors from being a party to an agreement with either a Class A or Class B stockholder, although Farmer Mac’s by-laws appropriately place some restrictions on the types of agreements that may be made. The by-laws restrict a Farmer Mac director from being a party to any agreement or arrangement that, in general, would be inconsistent with the director’s compliance with his or her fiduciary duties as a director to Farmer Mac. Some of the prohibited agreements include:

- Any agreement about the positions to be taken on issues or questions discussed in Farmer Mac’s boardroom;
- Any agreement concerning how the director will act or vote in his or her capacity as a director of Farmer Mac on any issue or question presented for consideration;
- Any agreement intended to limit or interfere with a director’s ability to comply with the director’s fiduciary duties to Farmer Mac;
- Any agreement that requires a director to consider the interests of a person or entity other than Farmer Mac and its stockholders in complying with the director’s fiduciary duties as a director of Farmer Mac; and
- Any undisclosed agreements with a third party related to compensation, reimbursement, or indemnification in connection with service as a Farmer Mac director.

Farmer Mac believes that these restrictions are reasonable, consistent with sound principles of corporate law on the fiduciary duties of directors, and do not interfere with an elected director’s ability to be “representative” of the class of stockholders that elected him or her.

In light of Farmer Mac’s past and present corporate governance practices and existing regulations governing director fiduciary duties, Farmer Mac requests the FCA to give deference to

Farmer Mac’s existing governance structure as it pertains to the fiduciary duties of directors, and particularly in connection with the treatment of confidential information.

11. Committees of the Corporation’s Board of Directors (Proposed 12 C.F.R. § 651.50)

Proposed section 651.50 (i) addresses the relationship between the Farmer Mac Board and its committees, (ii) places membership requirements on committees, and (iii) establishes minimum operational requirements for committees, such as charters and meeting minutes. The Proposal states that “[n]o committee of the board of directors shall relieve the board of directors or any board member of a responsibility imposed by law or regulation” and requires the Farmer Mac Board to “have committees, however styled, that address risk management, audit, compensation, and corporate governance,” and specifies that each committee must adopt a formal written charter and have “at least one elected director from each class of voting stock and one appointed director.” In addition, no director may serve as chairman of more than one Board committee. As a procedural matter, each committee must maintain, for each meeting (i) minutes, (ii) the meeting agenda, (iii) a summary of the relevant discussions held by the committee during the meeting, and (iv) any resulting recommendations to the Board.

As a threshold matter, we believe that Farmer Mac’s Board should have the responsibility for, and broad discretion in, designing a governance structure to take into account the different structures and risks of Farmer Mac and that some aspects of the Proposal unnecessarily intrude on this Board function. We also request the FCA to clarify that the language about Board committees in the Proposal is not intended to alter the long-established principle of corporate law that directors may reasonably rely on corporate records, management, experts, and separate committees to inform themselves when making decisions. We would also like to better understand the intent behind the comments to proposed section 651.50, in which the FCA notes that risk and audit committees “cover essentially the entire breadth of [Farmer Mac’s] operations.” To the extent the FCA intends that authority for all aspects of risk oversight be removed from other committees (*e.g.*, finance, credit, and compensation), we ask that the FCA explicitly state this intent, although we believe it is appropriate for each Board committee to retain some element of risk management responsibilities in areas within each committee’s oversight.

The Proposal would require that each committee adopt a charter that the Farmer Mac Board shall approve. To the extent that any rule mandates that each committee of the Board of Directors have a charter, we suggest the language be modified to require charters only for the required committees that address risk management, audit, compensation, and corporate governance, and not for other permanent standing committees or ad hoc committees formed from time to time to deal with specific issues. The language of proposed section 651.50(c) transfers from the full Board to each committee the power to adopt committee charters. Under Farmer Mac’s current process, which we believe to be consistent with existing practices at other corporations, the Board adopts committee charters as an exercise of its power of delegation. Accordingly, we recommend that the responsibility for adopting committee charters remain with the full Board of Directors and that the FCA omit from the proposed rule that each committee “adopt” its own charter.

In terms of the proposed requirement for each committee to have at least one member from each class of director and the prohibition on serving as chairman of more than one committee,

Farmer Mac believes that the proposed requirement takes an unduly restrictive approach. This is especially true because the Act contains no requirements related to Board committees and broadly authorizes the Farmer Mac Board to prescribe by-laws not inconsistent with law. We believe that the Farmer Mac Board should have flexibility to constitute committees and appoint chairmen that are the most qualified and skilled candidates to satisfy the needs of Farmer Mac and its Board, irrespective of the class to which those directors belong. For example, if the FCA insists that the “representational affiliation” for elected directors requires “close” and “visible and substantial” relationships with Farmer Mac voting stockholders, it might not be possible to find any independent directors elected by one class of stockholders to serve on the committees required by SEC and NYSE rules to be comprised entirely of independent directors. As another example, the Proposal would require appointed members, who are not permitted to have any prior experience as an officer or director of a financial institution, to be on a Farmer Mac Board committee that is deeply involved in issues where they may have no relevant background or expertise. This approach to improving corporate governance by mandating the composition of Board committees would have the paradoxical effect of potentially reducing the effectiveness of Board committees through less experienced committee members. Also, in Farmer Mac’s experience, some Board committees benefit most from the expertise of the individual directors when committees are not “balanced” by the members’ source of election or appointment. For example, for many years Farmer Mac’s Public Policy Committee functioned well with a membership that included only directors who had been appointed by the President of the United States. The Proposal’s prescriptive requirements for Farmer Mac’s Board committees also seems to be at odds with the intent of the provision contained in proposed section 651.50(a) that no committee of Farmer Mac’s Board of Directors shall relieve the Board or any Board member of responsibility imposed by law or regulation.

As discussed in more detail in Part III of the Comment Letter, we also are concerned that abiding by the Proposal’s artificial construct in this regard may engender factionalism on the Board by emphasizing the differences between directors based on their source of election or appointment to the Farmer Mac Board. We note that in 2002, the Office of Federal Housing Enterprise Oversight (“OFHEO,” the regulator of Freddie Mac and Fannie Mae at the time) specifically rejected the notion that Board committees should be formed with only the source of appointment to the Board in mind in the context of considering a recommendation to establish a separate committee composed of presidential appointees with specific responsibility to publish periodic reports on the entity’s fulfillment of its public purposes. In rejecting the recommended separate committee, OFHEO concluded that “each board member, whether elected by shareholders or appointed by the President, is responsible for overseeing the operation and direction of the Enterprise in accordance with its chartering act and the public purposes set forth therein. The chartering acts do not differentiate between elected and appointed board members with respect to their duties and responsibilities.”<sup>14</sup>

Farmer Mac is also concerned that the proposed record-keeping requirements included in proposed section 651.50(d) are unduly prescriptive. Even within the bounds of good corporate governance, it may not always be possible to meet the proposed requirements given the scope of a specific meeting. As an example, not every committee meeting has an agenda. In connection with the record-keeping requirements, the Proposal fails to specify a consequence if Farmer Mac fails to

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<sup>14</sup> 67 Fed. Reg. 38361 at 38367 (June 4, 2002).

comply with all requirements. Without further refinement, Farmer Mac may be in violation of this regulatory provision when in fact no failure of effective corporate governance has occurred.

B. Part 653 – Federal Agricultural Mortgage Corporation Risk Management (12 C.F.R. Part 653)

Proposed section 653.2 provides that Farmer Mac’s Board of Directors must approve Farmer Mac’s overall risk-appetite and risk tolerance and ensure risk-taking activities are conducted in a safe and sound manner. Proposed section 653.3 sets out other requirements for risk management, including the establishment of a Board risk committee and the duties of a required risk officer (“RO”). Proposed section 653.4 expands upon the risk management concept and prescribes certain requirements for Farmer Mac’s system of internal control, including an assessment of the efficiency and effectiveness of Farmer Mac’s activities.

Farmer Mac recognizes that risk oversight is of the utmost importance to its operation in a safe and sound manner and agrees that the Farmer Mac Board should be an active participant in Farmer Mac’s risk governance, as it has been throughout Farmer Mac’s history. Farmer Mac believes that its existing risk governance framework is effective. As described in more detail in Farmer Mac’s most recent proxy statement filed with the SEC, that framework empowers Farmer Mac’s executive officers with the primary responsibility for managing the day-to-day risks associated with Farmer Mac’s business, including operational, credit, asset and liability management, legal, human resources, regulatory, reputational, and political risks. The Farmer Mac Board currently oversees Farmer Mac’s enterprise risk primarily through its Risk Committee and the delegation of specific areas of risk to the other six standing Board committees, as well as through Farmer Mac’s internal audit and internal credit review functions. Each of the committees and management regularly report to the Risk Committee about the risks within their respective jurisdictions, and the Risk Committee provides a report to the full Board at each Board meeting. As a public company, Farmer Mac also is required by the Sarbanes-Oxley Act to develop, regularly evaluate, and certify the effectiveness of its internal controls and procedures, which is also an important element of Farmer Mac’s existing risk governance framework.

1. General (Proposed 12 C.F.R. § 653.2)

Proposed section 653.2 would require the Farmer Mac Board to approve Farmer Mac’s overall risk appetite and risk tolerance and monitor internal controls “to ensure risk-taking activities are conducted in a safe and sound manner.” Given the complexity and diversity of Farmer Mac’s business operations and areas of identified risks, we are concerned that it may be challenging to establish risk appetite and tolerance at an enterprise level, and believe it is more practical and ultimately more meaningful to address risk appetite and tolerance by risk area (*e.g.*, “liquidity” risk tolerance and “operational” risk tolerance). While the rule text refers to “overall” risk appetite and tolerance, the FCA seems to contemplate our suggested approach in its recommendation that Farmer Mac’s risk profile be periodically reviewed and assessed. Accordingly, we ask that the FCA clarify its intent consistent with a risk-area-by-risk-area approach. Also, we do not believe that it is reasonable to expect the Farmer Mac Board “to ensure” that risk-taking activities are conducted in a safe and sound manner. We suggest that the Proposal should be changed to use a more appropriate phrase to reflect the Board’s oversight function in this area.

## 2. Risk Management (Proposed 12 C.F.R. § 653.3)

Proposed section 653.3 requires Farmer Mac to have in place an enterprise-wide risk management program that “ensures” that Farmer Mac’s activities are exercised in a safe and sound manner and is overseen by a risk management committee and implemented by an RO. The Board risk committee must have “at least one member with risk management *expertise* commensurate with [Farmer Mac]’s capital structure, risk profile, complexity, activities, size, and other appropriate risk-related factors” (emphasis added). This expertise requirement for a member of the Board risk committee is slightly different from (and could be construed as requiring more than) the requirement for the RO to “have risk management *experience* commensurate with [Farmer Mac]’s capital structure, risk profile, complexity, activities, and size” (emphasis added).

We believe that it could be difficult to be sure that the Farmer Mac Board will always include at least one member who meets the “risk management expertise” requirement, which would, as a practical matter, appear to require an individual who has served at a major financial institution in a senior, hands-on risk management position. Should the FCA adopt any rule, Farmer Mac requests that the provision be modified to require both the RO and at least one member of the risk oversight committee to have an “understanding” of risk management principles relevant to Farmer Mac’s capital structure, risk profile, complexity, activities, size, and other appropriate risk-related factors. Also, Farmer Mac believes that it would be appropriate for the FCA to provide for a one-year phase-in period from the effective date of any final regulation related to risk management for Farmer Mac to hire the required RO. Farmer Mac believes that it could take up to that long for Farmer Mac to recruit, interview, and hire a qualified RO.

As a more technical point, the Proposal requires that the risk program “ensure” that Farmer Mac’s activities are exercised in a safe and sound manner. To avoid such an absolutist position, we request that in any rule the FCA replace “ensure” with “reasonably designed.” As a matter of administrative ease, we also request that the FCA eliminate the documentation requirement from any rule about the risk management committee’s responsibility to “document” Farmer Mac’s enterprise-wide risk management policies and programs of Farmer Mac (currently in proposed section 653.2(b)(2)(i)), which is not traditionally a Board function.

## 3. Internal Controls (Proposed 12 C.F.R. § 653.4)

The Proposal would impose additional internal control regulations on Farmer Mac. More specifically, proposed section 653.4 would prescribe specific requirements for Farmer Mac’s system of internal controls “to ensure that [Farmer Mac]’s powers, functions, and duties are exercised in a safe and sound manner and in compliance with all applicable laws and regulations.” The Proposal would require Farmer Mac’s internal control system to address the “efficiency and effectiveness of [Farmer Mac]’s activities” and to annually report on the effectiveness of the internal control system to OSMO. We believe additional regulation in this area is unnecessary because Farmer Mac is already subject to regulatory requirements related to internal control, including SEC requirements to conduct and report on an annual assessment of Farmer Mac’s internal control under Section 404 of the Sarbanes-Oxley Act. Also, for the reasons discussed above related to proposed sections 653.2 and 653.3, we believe that the phrase “to ensure” should be changed to a more appropriate phrase in recognition of the inherent limitations of any system of risk management or internal controls.

Farmer Mac supports a principles-based approach to internal control, which is the approach we currently use in our assessment of our internal control. Specifically, Farmer Mac applies principles-based guidance from the Committee of Sponsoring Organizations of the Treadway Commission (“COSO”) in *Internal Control – Integrated Framework (2013)*, which is recognized as a leading framework for assessing the effectiveness of internal control. The COSO framework provides Farmer Mac with flexibility in application that allows Farmer Mac to sustain a system of internal control relevant to Farmer Mac’s operations, specific needs, and circumstances.

Farmer Mac already has a robust system of internal controls in place. The proposed additional requirements would unnecessarily overlap with rules with which Farmer Mac already complies.<sup>15</sup> These additional requirements would also expand the roles of directors for risk management, oversight, and reporting. The Proposal provides no justification for adding the proposed requirements, which would impose a new regime that would require Farmer Mac to interpret new terms and compare to its current system that already complies with SEC requirements. For example, one new requirement would be for Farmer Mac to have the internal control system address the “transparency of information” provided to the Farmer Mac Board of Directors, which is a concept that is ambiguous and undefined. Management must make balanced decisions as to what information is appropriate and relevant to provide to a public company’s board of directors, and we are concerned that introducing a requirement for “transparency” could lead management to err on the side of caution and “flood” directors with more information than would otherwise be provided to avoid violating this requirement. Such a result would not be consistent with the role of a board of directors to provide oversight while allowing management to run the day-to-day business activities of a corporation.

For all these reasons, we request that the FCA withdraw the internal controls portion of the Proposal or to make it consistent with the SEC requirements with which Farmer Mac must comply.

D. Part 655 – Federal Agricultural Mortgage Corporation Disclosure and Reporting Requirements (12 C.F.R. Part 655)

As a general matter, other than requiring the filing of SEC reports with the FCA, Farmer Mac strongly believes that the FCA should not seek to create new or different reporting or disclosure obligations. Rather, we believe that our system of reporting and public disclosure, aside from Uniform Call Reports currently required by the FCA, should remain within the SEC’s jurisdiction and that any additional or conflicting FCA requirements will be confusing to the marketplace and unworkable for Farmer Mac. Accordingly, Farmer Mac requests that the FCA reconsider its proposals in this regard entirely. To the extent the FCA determines to nonetheless adopt rules in this area, we believe certain changes are necessary to make the new rules workable for Farmer Mac and its stockholders. To illustrate our concerns, the following subsections note several specific examples.

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<sup>15</sup> We note that requirements for internal controls similar to those contained in the Proposal do not currently apply to Freddie Mac and Fannie Mae and would not apply to them under the Federal Housing Finance Agency’s proposed corporate governance rules. 79 Fed. Reg. 4414 (January 28, 2014) (proposed rule 12 C.F.R. § 1239.32).

## Subpart A – General

### 1. Definitions (Proposed 12 C.F.R. § 655.1)

Proposed section 655.1 would define “material” for purposes of qualifying requirements to furnish information on any subject according to whether “a reasonable person would attach importance [to the information] in making investor decisions or determining the financial condition of [Farmer Mac].” As previously discussed in connection with the definition of “material” in proposed section 651.1 in the context of conflicts of interest, Farmer Mac strongly believes that the FCA should not redefine “material” for any purpose. “Material” is a well-understood concept under federal securities jurisprudence, and imposing an alternative definition would add unnecessary complexity and confusion to any determinations Farmer Mac makes under the new rules.

### 2. Prohibition Against Misleading, Inaccurate, and Incomplete Reports and Disclosures (Proposed 12 C.F.R. § 655.2)

Proposed section 655.2 would prohibit Farmer Mac and “any agent, employee, officer, or director of [Farmer Mac]” from making “any report or disclosure to FCA, stockholders or the general public concerning any matter required to be disclosed ... that is incomplete, inaccurate, or misleading.” Notably, these provisions about the FCA’s regulation of reports and disclosures is devoid of any concept of materiality, which we believe is essential for this type of regulation. Also, as discussed previously, the term “agent” is broadly defined under the proposed rules. It is unclear how the extension of the prohibition against misleading, inaccurate, and incomplete reports and disclosures to “agents” would work with existing SEC regulations, and further, how Farmer Mac could practically comply with this provision. We believe that providing the FCA with discretion to determine whether any report meets these standards and to require corrective disclosure without regard to materiality would constitute a significant intrusion into areas under the SEC’s jurisdiction. If the FCA determines to adopt the proposed rules in this area, we suggest that the FCA revise the rule to mirror the SEC’s prohibition on material misstatements or omissions. This proposed section is also overly broad in other ways by encompassing *any* disclosure to the general public concerning *any* matter required to be disclosed by proposed Part 655 (which contemplates a very wide range of information) and then further expanding the potential universe of FCA regulated disclosures by including even reports and disclosures *not required* by applicable FCA regulations. Although the only specified remedy in proposed section 655.2 is additional or corrective disclosure, we note that proposed section 650.3(a) gives the FCA broad enforcement authority for violations of any regulation, including assessment of civil monetary penalties, which we do not believe would be appropriate in the case of an incomplete or inaccurate statement that was not material.

## Subpart B – Reports of Condition of the Federal Agricultural Mortgage Corporation

### 3. Reports of Condition (Proposed 12 C.F.R. § 655.10)

Proposed section 655.10(b) would require that each report be signed by representatives designated by Farmer Mac and that those components of the report containing financial information be separately certified as financially accurate. The Proposal neither separately defines “financially accurate” nor does it reference the standard set forth in the annual and quarterly certifications that Farmer Mac’s Chief Executive Officer and Chief Financial Officer are required to make pursuant to

the Sarbanes-Oxley Act (*i.e.*, that the financial statements and other financial information included in the annual or quarterly report filed with the SEC “fairly present in all material respects the financial condition, results of operations and cash flows” of Farmer Mac as of, and for, the periods presented in the report).<sup>16</sup> In addition, the Proposal sets out requirements relating to these signatures and certifications. It is unclear from the Proposal whether the term “financially accurate” and the specified signature and certification requirements are intended to mirror the existing standard under the Sarbanes-Oxley Act referenced above and the signature and certification requirements under the federal securities laws, respectively, or, rather, are intended to be additive to existing requirements. We believe it would be unnecessary, confusing, and unwieldy to add additional requirements in this area and therefore ask that the FCA reconsider these requirements. At a minimum, we believe the FCA should clarify how the term “financially accurate” and any new signature and certification requirements would interact with existing SEC requirements.

In addition, proposed section 655.10(c) would reduce the current 120-day timeframe to distribute reports to stockholders to a 90-day timeframe. This reduction in the time to distribute annual reports to stockholders deviates from SEC rules, which provide issuers 120 days to deliver annual reports to stockholders. If the FCA were to require that Farmer Mac distribute annual reports within the proposed abbreviated timeframe, this would also shorten Farmer Mac’s timeline to review and send out its proxy statement (because a proxy statement must be accompanied by an annual report), which could, in turn, create unnecessary complications in the scheduling of Farmer Mac’s annual meeting. Accordingly, Farmer Mac requests that the FCA reconsider this proposed requirement and retain the 120-day timeframe to correlate with the SEC requirements and not impose an accelerated delivery requirement on Farmer Mac, which could increase Farmer Mac’s compliance burden.

#### 4. Interim Reports, Notices, and Proxy Statements (Proposed 12 C.F.R. § 655.15)

Proposed section 655.15 adds a new requirement for Farmer Mac to send OSMO one paper and one electronic copy of every “notice, interim report, and proxy statement filed with the SEC within 1 business day of filing the item with the SEC, including all papers and documents that are part of the report, notice, or statement.” In addition, Farmer Mac must “publish a copy of each interim report, notice, and proxy statement on its Web site within 5 business days of filing the document(s) with the SEC.” These items must remain on Farmer Mac’s Web site for “6 months or until the next annual report of condition is posted, whichever is later.”

Farmer Mac believes the proposed rule increases the regulatory demands on Farmer Mac without a clear justification for the purpose of the new regulatory requirement. With SEC filings publicly available on the SEC’s Electronic Data Gathering, Analysis, and Retrieval system, the requirement to provide a paper copy seems antiquated and inefficient. Furthermore, the Proposal fails to explain what “interim reports” and “notices” filed with the SEC would include. Conceivably, this could include more than Current Reports on Form 8-K such as requests for confidential treatment and other confidential correspondence with the SEC that is not publicly available. Without additional clarification, the Proposal creates an ambiguous supplementary filing requirement. Should the FCA adopt the Proposal, Farmer Mac requests that the FCA define “interim reports” and “notices” and provide its rationale for proposing this new requirement. We

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<sup>16</sup> 17 C.F.R. § 240.13a-14(a), 17 C.F.R. § 240.15d-14(a).

also believe that any requirement for Farmer Mac to publish on its website documents filed with the SEC should be limited to only those documents *publicly* filed with the SEC.

Subpart C – Reports Relating to Securities Activities of the Federal Agricultural Mortgage Corporation

5. Securities Not Registered Under the Securities Act (Proposed 12 C.F.R. § 655.20)

Proposed section 655.20 includes the substantive provisions currently contained in 12 C.F.R. § 655.50(b) for filings related to unregistered securities but revises the delivery requirement to OSMO from three paper copies to one paper and one electronic copy. As previously discussed, Farmer Mac believes that a requirement to provide any paper copies (even only one) of the specified documents seems antiquated and inefficient given available technology. Also, if the current regulation on Farmer Mac’s reporting related to unregistered securities is to be revised, Farmer Mac believes that some of the terminology used (such as “pooling and servicing agreement”) should be contemporized and made more precise about the types of documents expected to be filed with OSMO. For example, the FCA has not objected to Farmer Mac’s practice of posting to its public website but not filing with OSMO the Pricing Supplements related to Farmer Mac’s regular issuance of medium-term note debt securities because those documents are not the types specified in the regulation (offering circulars, private placement memoranda, or information statements). Because Farmer Mac issues unregistered debt securities every business day, we request that any final rule clarify that the documentation related to these daily transactions need not be filed with OSMO, which would dramatically increase the compliance burden associated with Farmer Mac’s debt securities offerings.

6. Filings and Communications with the U.S. Treasury, the SEC, and NYSE (Proposed 12 C.F.R. § 655.21)

Proposed section 655.21 significantly expands Farmer Mac’s current requirement to send the FCA copies of substantive correspondence with the SEC or U.S. Treasury “relating to securities activities or regulatory compliance.” Specifically, the proposed rule would require Farmer Mac to send the FCA copies of “*all* substantive correspondence between [Farmer Mac] and the U.S. Treasury, the SEC, or NYSE” (emphasis added). Furthermore, Farmer Mac must notify the FCA within one business day if it becomes exempt or claims exemption from any filing requirements of the Securities Act (defined to include the Securities Act of 1933 and the Securities Exchange Act of 1934). This expands the current requirement contained in 12 C.F.R. § 655.50(d) for Farmer Mac to notify the FCA if it becomes exempt from the filing requirements of the Securities Exchange Act of 1934.

Farmer Mac believes that compliance with the proposed requirements for all “substantive correspondence” between Farmer Mac and the U.S. Treasury, SEC, and NYSE without any limitation like the one currently in place of “relating to securities activities or regulatory compliance” has the potential to become unworkably burdensome. As an example, in the context of NYSE communications, many individuals within Farmer Mac receive multiple communications from NYSE on a daily basis. These communications, such as general market updates and information of general interest to market participants, are likely considered “substantive” by the NYSE even though they do not specifically relate to Farmer Mac or trading in its listed securities. A requirement to file routine notices from Farmer Mac to NYSE such as dividend declarations,

intent to issue a press release, and annual meeting information often would be duplicative because that type of information is usually also disclosed in Farmer Mac's SEC filings that are already required to be filed with the FCA. Many notices to NYSE are provided electronically through NYSE's secure website for listed companies, and it is unclear how some of these notices should be documented to then file with the FCA. Also, several individuals at Farmer Mac are also on SEC mailing lists and routinely receive releases and bulletins from the SEC of a general nature about issues and developments that do not specifically relate to the SEC's regulation of Farmer Mac, all of which could be viewed as "substantive correspondence" from the SEC. As drafted, the Proposal appears to require Farmer Mac to send the FCA all of these types of routine communications, and perhaps all emails between Farmer Mac employees and the SEC and NYSE. Although we recognize that these requirements address the FCA's oversight of Farmer Mac, we believe that the proposed rules are overbroad and create an inefficiency in the area of regulatory reporting. We request that the FCA clarify its intent with regard to this proposed requirement and consider maintaining a limitation on what types of substantive correspondence is expected to be filed with the FCA.

As for notice of exemptions under the Securities Act, Farmer Mac believes this provision is unwarranted because, except for certain mortgage-backed securities that are not exempt under a generally available exemption, Farmer Mac is not subject to the Securities Act of 1933 and is subject to reporting requirements only pursuant to the Securities Exchange Act of 1934. For notices of exemptions, Farmer Mac requests that the FCA clarify the Proposal to exempt Farmer Mac from reporting exemptions claimed for equity and debt offerings under Section 3(a)(2) of the Securities Act of 1933 or revert to the language of the existing regulation and require notices only related to exemptions from the Securities Exchange Act of 1934.