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BY FEDERAL EXPRESS AND EMAIL

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, DC 20552
Attention: Comments/RIN 2590-AA10

RE: Records Retention

Dear Mr. Pollard:

On August 4, 2009, the Federal Housing Finance Agency (FHFA) issued a notice of proposed rulemaking with respect to records retention (the Proposed Regulation). This letter sets forth the comments of the Federal Home Loan Bank of Atlanta (the Bank) with respect to the Proposed Regulation. We thank you for the opportunity to be heard on this important matter.

We offer the following comments, suggestions, and requests for clarification in respect of the Proposed Regulation:

- Clarify Whether FHFB Resolution 93-50 Survives After the Regulation Becomes Final. The final rule should specify whether it supersedes the Federal Housing Finance Board's Resolution 93-50, dated May 26, 1993.
- Clarify That a Regulated Entity May Elect to Destroy Records Immediately, Absent a Record Hold or Another Mandatory Retention Requirement. Please clarify that a regulated entity¹ may structure its records retention program to provide that certain categories of records are destroyed immediately, so long as (i) they are not subject to a record hold, (ii) there is no applicable mandatory legal requirement to retain the record, and (iii) the regulated entity (or appropriate department thereof) has determined that retention of such categories of records is not necessary to support litigation or the

¹ For convenience, each reference to "regulated entities" in this comment letter should be read to include the Office of Finance in addition to the regulated entities.

administrative, business, external audit, or internal audit functions of the regulated entity. For example, if a regulated entity decided as a matter of policy to destroy drafts of legal agreements immediately (as some of the records retention literature recommends), this would be permitted under the Proposed Regulation, subject to the caveats noted in the previous sentence.

- Clarify That a Regulated Entity Is Not Required to Retain All Records in All Formats, Absent a Record Hold or Another Mandatory Retention Requirement. For records existing in multiple formats, please clarify that a regulated entity may elect to maintain the record in only one format, so long as (i) the record is not subject to a record hold, (ii) there is no applicable mandatory legal requirement to retain the record in all formats, and (iii) the regulated entity (or appropriate department thereof) has determined that retention of all formats of the relevant category of records is not necessary to support litigation or the administrative, business, external audit, or internal audit functions of the regulated entity.
- Delete Definitions of “Active Record”, “Inactive Record” and “Vital Record”. Proposed Section 1235.2 provides definitions for all of these terms, but none of them is used elsewhere in the Proposed Regulation. These definitions should be deleted, as their presence tends to confuse, rather than clarify, the requirements of the Proposed Regulation.
- Modify Definition of “Record Hold”. The definition of “record hold” in Proposed Section 1235.2 should be modified to remove the reference to “examination.” The mere occurrence of an FHFA examination (or a request for documents by FHFA staff during an examination) should not trigger the formal record hold process. Document requests made by FHFA staff during an examination benefit from the Proposed Section 1235.6 presumption, which as proposed generally requires the regulated entity to produce the requested records within one business day. Note that Proposed Section 1235.5(a)(3) by its terms only applies in connection with a potential or actual FHFA investigation, enforcement proceeding, or litigation. The definition of record hold in Proposed Section 1235.2 should be conformed to this more limited scope of the substantive record hold provision.

In addition, if FHFA is aware of a potential investigation, enforcement proceeding, or litigation and FHFA wishes for the subject regulated entity to institute a record hold under this regulation, we believe FHFA should provide written notice to the regulated entity that it is required to institute a record hold.

- Modify Definition of “Record Retention Schedule”. We suggest that the first sentence of this definition be revised as follows: “*Record retention schedule* means a schedule that details the categories of records a regulated entity or the Office of Finance ~~is required to~~ retains and the corresponding retention periods.” The changes clarify that many records retained by a regulated entity are kept for discretionary business reasons, and

not because a legal requirement forces retention. A regulated entity should be permitted to include, on the same record retention schedule, records that are subject to mandatory legal retention and records retained at the option of the regulated entity.

- Modify Definition of “Retention Period”. For the same reason, we suggest that the first sentence of the definition of “Retention Period” be revised as follows: “*Retention period* means the length of time that records ~~must be~~ are kept before they are destroyed.”
- Clarify That Proposed Section 1235.3(a) Only Requires Delivery to FHFA of Records Retention Policy and Significant Revisions Thereto. Please clarify that the requirements in Proposed Section 1235.3(a) to provide the relevant FHFA deputy director a copy of a regulated entity’s “written record retention program” (and any significant revisions thereto) apply only to the regulated entity’s records retention policy, and not to procedures or records retention schedules developed under the policy.
- Permit a Regulated Entity to Define in its Records Retention Policy Which Agents and Independent Contractors Should be Made Subject to the Records Retention Program. In order for agents and independent contractors of a regulated entity, as appropriate, to be bound to comply with the Proposed Section 1235.5 record hold requirements of a records retention program, the regulated entity presumably would need to obtain the advance contractual commitment of each such appropriate agent and independent contractor to abide by the regulated entity’s records retention policy. In order to comply, then, a regulated entity will need to identify in advance which agents and independent contractors it is appropriate to subject to the records retention policy.² The final rule should indicate that a regulated entity may specify in its records retention policy (i) which kinds of agents and independent contractors of the regulated entity should be subjected to the records retention policy, (ii) how and how often training will be provided to those agents and independent contractors, and (iii) whether the regulated entity should seek amendment of existing contracts with these agents and independent contractors or instead only include records retention provisions in new contracts executed after the effective date of the final rule.
- Indicate Whether the Requirement to Notify Agents and Independent Contractors of Record Hold Supersedes a Regulated Entity’s Obligations of Confidentiality to the FHFA. Please indicate in the final rule how the obligation under Proposed Section 1235.5(a) to notify certain agents and independent contractors of a record hold (i.e., the need to retain records relating to an FHFA investigation, enforcement proceeding, or

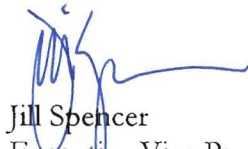
² The Proposed Regulation fairly clearly implies that not all of a regulated entity’s agents and independent contractors are required to be bound by the record hold requirements. This is appropriate, since (i) those requirements are only relevant to a small subset of agents and independent contractors and (ii) as a practical matter it would be impossible to obtain this contractual commitment from all of a regulated entity’s agents and independent contractors.

litigation) relates to other obligations a regulated entity may have to ensure the confidentiality of FHFA materials (e.g., confidentiality requirements of an FHLBank under 12 CFR § 911.3). In the event a regulated entity faces inconsistent regulatory obligations, which controls?

- Clarify That Proposed Section 1235.5(a)(3) Does Not Require a Regulated Entity to Have an In-House Legal Department. Proposed Section 1235.5(a)(3) appears to presume that each regulated entity has an in-house legal department. Please clarify that there is no strict regulatory requirement to have such a department.
- Modify “Reasonable Period” Presumption. If a records request by FHFA under Proposed Section 1235.6(a) is very broad, it may be impossible for the regulated entity to provide all of the records within the timeframes established by Proposed Section 1235.6(b). For this reason, we ask that this provision be modified to provide that (i) FHFA staff are permitted to establish a longer response period at the time of the records request and (ii) the “reasonable period” presumptions are rebuttable by the regulated entity.

Thank you for your consideration of our comments.

Sincerely,



Jill Spencer
Executive Vice President, General Counsel,
and Chief Strategy Officer