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Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Attention: Comments/RIN 2590-AA10 (Proposed Record Retention Regulations)

Dear Mr. Pollard:

Freddie Mac is pleased to submit these comments concerning the proposed record retention regulations that were published by the Federal Housing Finance Agency ("FHFA") on August 4, 2009.¹ The proposed regulations establish record retention requirements for Freddie Mac, Fannie Mae, the Federal Home Loan Banks and the Office of Finance of the Federal Home Loan Bank System. The regulations are nearly identical to the Office of Federal Housing Enterprise Oversight ("OFHEO") record retention regulations that currently apply to Freddie Mac and Fannie Mae. However, the proposed regulations add language in a new § 1235.6, "Access to Records" that, as explained below, creates certain presumptions regarding reasonable time periods for document production that are inconsistent with past experience and that are, as a practical matter, unworkable.

I. REASONABLE PERIOD

Proposed § 1235.6 would establish a regulatory requirement that regulated entities and Office of Finance make their records available to FHFA upon request within a reasonable period, as follows:

(a) *Access to records.* Each regulated entity or the Office of Finance shall make its records readily available for inspection and other supervisory purposes within a reasonable period upon request by FHFA, at a location acceptable to FHFA and by reasonable means, consistent with the nature and availability of the records and existing information technology.

Freddie Mac appreciates the importance of making complete and accurate records available to FHFA for examination and other supervisory purposes. We fully support a requirement that we respond to FHFA requests within a reasonable period, and we agree with the factors that this provision identifies as appropriate for FHFA to consider when determining whether a response period was reasonable.²

¹ 74 Fed. Reg. 38559.

² The language "by reasonable means, consistent with the nature and availability of the records and existing information technology" was added to several provisions of the OFHEO record retention regulations in recognition that "all records are not equally accessible," in response to several comments to that effect. See 71 Fed. Reg. 62879, 62880 (Oct. 27, 2006) (language added to 12 C.F.R. §§ 1731.1; 1732.6(a)(iii); and 1732.7(d)).

However, we are concerned that effective implementation of this provision would be undermined by the presumption under subparagraph (b), which provides as follows:

(b) *Reasonable period.* For requests for documents made during the course of an on-site examination and pursuant to the examination's scope, a reasonable period is presumed to be no longer than one business day. For requests for documents made outside of an on-site examination, a reasonable period is presumed to be three business days.

Historically, reasonable response periods for FHFA document requests have frequently been longer than one or three days.³ In our experience, the time required to respond to those requests has varied over a very broad range, and has often exceeded three days. For example, many FHFA formal document requests are in the form of requests for documents that fall within various categories, such as any and all policies and procedures, board presentations and reports, or management reports, regarding a particular subject matter. The process of responding to such requests necessarily involves having subject-matter experts review and analyze each of the categories to identify what document would be responsive to the request. This process can easily take longer than three days.

Even after a responsive document is identified, the nature of the records requested, the availability of the records requested and the state of existing information technology will affect the time required to make it available to FHFA. Inactive documents typically take longer to retrieve than active documents, and documents in off-site storage tend to take longer to retrieve than documents stored on-site. Older documents tend to take longer to retrieve than newer documents. Very large numbers of documents take longer to retrieve than individual documents — and responses can consist of thousands of pages of documents. Finally, FHFA typically requests that documents be made available in electronic form, which can add to the response period where the requested documents exist only in hard copy form.

The time required both to identify responsive documents and to retrieve them can also be prolonged if the requested documents are not within the immediate custody of Freddie Mac, for example, where FHFA requested documents “in the possession of outside counsel, accountants, consultants, vendors, and other third-parties acting on behalf of Freddie Mac.”

Current FHFA practice implicitly recognizes the impact that the complex nature of many of its requests and the other factors described above can have on reasonable response times. For example, formal document requests in targeted examinations typically specify a response date of two weeks from the request date. Moreover, we often provide the documents on a rolling basis as they can be made available over a time period that may extend past three days. In these cases, by agreement with the requester, the response period may extend past the originally specified response date.

Based on historical response times, and consistent with FHFA request practice, Freddie Mac strongly believes that the one- or three-day presumption would understate the reasonable time period for responding in a large number of cases. Therefore, the presumption would create an unnecessary risk of non-compliance or even initiation of unwarranted enforcement proceedings.

³ Freddie Mac responds to a variety of FHFA document requests. These include (1) formal requests for sets of documents needed to initiate an on-site examinations or other reviews; (2) standing requests for reports or other periodically generated documents; (3) oral and written *ad hoc* requests for documents; and (4) requests to conduct analysis or prepare reports. In response to such requests, we have provided over 9000 documents to FHFA so far this year (an average of about 1000 documents per month, or about 50 documents per business day).

As an alternative, Freddie Mac recommends relying on the FHFA personnel initiating each FHFA document request to specify a response period, rather than relying on a presumption. A benefit of this approach is that the FHFA requester would be in a position to be aware of any supervisory need for the requested documents within a particular time period, and would likely have a good understanding of what may be involved in responding to the particular request. To the extent that the recipient of a request believed that the specified response time was not reasonable, they could communicate that belief and the basis for it to the FHFA requester. After considering that information, the FHFA requester could modify the original response period in whole or in part, or leave it as originally specified, as appropriate.

If FHFA were to determine, at any time during or after the process, that the response was not provided within a reasonable period, FHFA would have the facts necessary to initiate enforcement proceedings if warranted, and so would have no need to rely on an impractical regulatory presumption as the basis for initiating enforcement proceedings.

We believe that the approach described above would be well supported by the use of subparagraph (a) alone. Alternatively, this approach could be supported by replacing proposed subparagraph (b) with the following:

(b) *Reasonable period.* The Director will determine the reasonableness of a response period based on the facts and circumstances, as described in subparagraph (a). If a regulated entity or the Office of Finance believes that a response period specified in an FHFA request for documents is not reasonable, in whole or in part, the regulated entity or the Office of Finance shall promptly notify FHFA of that belief and the facts and circumstances underlying that belief.

II. NOTIFYING REGULATED ENTITY GENERAL COUNSEL OF FHFA INVESTIGATION

Section 1235.5(a)(3) of the proposed regulation would require personnel and contractors of the regulated entities or the Office of Finance to notify the legal department of the enterprise if they receive notice, or otherwise become aware of a potential investigation, enforcement proceeding or litigation by FHFA, so that the regulated entity or the Office of Finance can ensure that it preserves applicable documents.

We believe that a more appropriate and reliable way for FHFA to ensure that the legal department made aware of FHFA investigations would be for FHFA to notify the appropriate General Counsel directly of the investigation and the corresponding need to preserve documents. FHFA will always be in the best position to determine when an investigation has begun or is sufficiently likely to warrant taking steps to retain records in a manner other than what is called for under the standard document retention program of a regulated entity or the Office of Finance.

Accordingly, we recommend that FHFA modify § 1235.5(a)(3) to reflect that FHFA will directly provide notice to the General Counsels of the regulated entities or the Office of Finance of a potential investigation, enforcement proceeding, or litigation by FHFA that warrants taking steps to retain records. Alternatively, the provision could be deleted.

III. SUBMISSION OF RECORD RETENTION PROGRAM

Section § 1235.3(A) requires regulated entities to submit their record retention programs to FHFA within 120 days of issuance of the final regulation, and to submit their programs annually thereafter. Freddie Mac submitted its record retention program to OFHEO under OFHEO's record retention regulation, within 120 days of the issuance of the final rule and has done so annually thereafter (most recently, on February 23, 2009).

Because Freddie Mac and Fannie Mae are already on an annual cycle of submitting their record-retention programs, we recommend that FHFA indicate in the FHFA record retention regulation that Freddie Mac and Fannie Mae may elect either to submit their record retention program within 120 days of the issuance of the final regulation or to continue to submit annually on the same timeline as under the OFHEO regulation.

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Freddie Mac understands the importance of ensuring that complete and accurate records are readily accessible by FHFA for examination and other supervisory purposes, and we appreciate the opportunity to comment on these proposed document retention regulations.

Sincerely,



Robert E. Bostrom