Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: 202.639.7000
Fax: 202.639.7003
www.friedfrank.com

April 29, 2005

VIA EMAIL TO COMMENTS@FHFB.GOV &
BY HAND TO:

Federal Housing Finance Board
1777 F Street, N.W.
Washington, DC 20006
Attention: Public Comments

FRIED FRANK

Re: Proposed Rule on Data Reporting Requirements for the Federal Home Loan Banks, RIN Number 3069-AB28, Docket No. 2005-04

Ladies and Gentlemen:

We are writing on behalf of our client, the Federal Home Loan Bank of Indianapolis (the "Indianapolis Bank") regarding the proposal by the Federal Housing Finance Board (the "Finance Board") to reorganize the reporting requirements imposed on the Federal Home Loan Banks (the "Banks") by moving certain of these requirements to a reporting manual (the "Data Reporting Manual" or "DRM"), which the Finance Board proposes to issue as an "enforceable order" pursuant to its investigatory powers.[1] The Finance Board also proposes to impose, in a new part 914 of its regulations, certain obligations on the Banks regarding the reporting requirements and the availability to the Finance Board of the Banks' books and records.

The Indianapolis Bank believes that accurate and efficient reporting is important to both the Federal Home Loan Bank System and the public at large, and it supports any regulatory proposal which furthers these goals. Thus, the Indianapolis Bank does not object to the consolidation of various reporting requirements in a compilation, such as the DRM, given the Finance Board's authority to request information that is not otherwise privileged from the Banks under its investigatory powers. However, for the reasons discussed below the Indianapolis Bank does not believe that the Finance Board should seek to issue the DRM in the form of an enforceable order.

The Proposal goes beyond the existing regulatory structure, by stating that the DRM "would represent an enforceable order issued pursuant to the Finance Board's investigatory powers" and that "the Finance Board will deem data reporting problems as violations of an investigatory order."[2] While the Finance Board does not fully explain

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[1] *See* Data Reporting Requirements for the Federal Home Loan Banks, 70 Fed. Reg. 9551 (proposed Feb. 28, 2005) (the "Proposal").

[2] *See id.*, 70 Fed. Reg. at 9552-53.

the rationale or statutory authority for its proposal to issue the DRM as an enforceable order, it does make clear that the DRM will be issued under its investigatory power and not its adjudicatory power or rulemaking power. However, the Proposal applies procedures used in notice-and-comment rulemaking to the issuance of an "investigatory order" which the Finance Board apparently intends to apply both *generally* to all the Banks and *specifically* on a case-by-case basis. By doing so, the Finance Board appears to be short-cutting both the administrative procedures that would apply to a rule of general application issued under its rulemaking authority, and the procedures that must be followed in a particular adjudication involving specific facts and circumstances.

The Finance Board's explanation of its investigatory powers in the Proposal also suggests the possibility that the Finance Board views the DRM as, in effect, the equivalent of an administrative subpoena. On the other hand, the Finance Board does not describe the DRM as a subpoena. Nor does the Proposal indicate that the Banks would have the right to challenge the requirements of the DRM in a federal district court, as they would if the same requirements were imposed in the form of a Finance Board subpoena (to the extent available). Notably, two of the court cases the Finance Board cites to explain the scope of its investigatory power arise from challenges, brought by parties subject to an agency order requiring the submission of information, to the scope of such orders.[3]

By attempting to transform the DRM into an "investigatory order" that is "enforceable," the Finance Board appears to be positioning itself to assert in the future that a Bank's violation of the DRM could result in the filing of charges pursuant to 12 U.S.C. § 1422b and the initiation of a cease and desist or civil money penalty assessment proceeding under part 908 of its regulations. That proceeding would turn on the question of whether the Bank had violated an "order," as opposed to the questions that would be at issue in a motion to enforce or quash an administrative subpoena.

The case of *Clarke v. American Commerce National Bank*, which involves the limits imposed on a federal bank regulator's authority by the attorney/client privilege, is instructive in this regard.[4] In *Clarke*, the Office of the Comptroller of the Currency ("OCC") issued an administrative subpoena to American Commerce National Bank

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[3] *See* Proposal, 70 Fed. Reg. at 9552 (citing *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 695-96 (D.C. Cir. 1978) (challenge to FTC petition to enforce orders requiring the filing of certain forms) and *FTC v. Invention Submission Corp.*, 965 F. 2d 1086, 1089 (D.C. Cir. 1992) (challenge to FTC petition to enforce subpoenas)).

[4] *Clarke v. American Commerce National Bank*, 974 F.2d 127, *reh'g denied*, 977 F.2d 1533 (9th Cir. 1992).

("ACNB"), an institution that it regulated, requesting, among other things, all billing statements from outside legal counsel to ACNB. ACNB provided the billing statements with certain redactions based on the attorney-client privilege. The OCC then brought an action in federal district for an order to enforce its subpoena. The district court granted the OCC's motion in part and denied it in part. ACNB appealed the portion of the district court's decision requiring the production of certain of the disputed billing statements. On appeal, the Court of Appeals for the Ninth Circuit initially upheld the district court's decision, but upon further consideration determined that the billing statements did include information that fell within the attorney-client privilege and therefore were to be redacted by ACNB before they were provided to the OCC.[5]

By categorizing the DRM as an "order," and perhaps invoking it in conjunction with the language of the proposed new § 914.3 of its regulations, it appears that the Finance Board might assert that it could demand the production by a Bank of privileged legal advice in the possession of that Bank, without the Bank having any opportunity to challenge the Finance Board's right to obtain materials subject to the attorney-client privilege, in the manner which was available to, and ultimately successful for, the national bank in *Clarke*. As an "order," it appears that the DRM, as well as proposed new § 914.3, are designed to provide the Banks lesser rights to contest a specific informational request than would be otherwise available.

Even acknowledging that the Finance Board may seek to enforce its investigatory authority when necessary, it is highly unusual for a regulatory agency to resort to its enforcement powers *before* an investigatory request has been refused. As a leading commentator on administrative law notes:

> "[A]lmost all the information that agencies receive from private parties comes in voluntarily. . . . Numerous statutes require reports, with penalties in the background, but penalties are seldom brought to the foreground."[6]

The only rationale offered for a deviation from this accepted practice is the Finance Board's reference to "problems it [the Finance Board] has experienced with the timeliness, accuracy and completeness of data reporting by the Banks." This does not provide an appropriate justification for a structure that is designed to invoke the potential

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[5] *See Clarke*, 977 F.2d at 1533 (ordering specific portions of attorney billing statements to be redacted before submission to the OCC).

[6] R. Pierce, ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002); *see also* J. Stein et al., ADMINISTRATIVE LAW § 19.01 (2004) (generally no need for agencies to issue subpoenas to enforce investigatory powers).

for enforcement action based merely on a determination that a data reporting "problem" has occurred.

In a similar vein, we note that the proposed new § 914.3 of the Finance Board's regulations appears to suggest that it would presume that a regulatory violation has occurred if certain information is not provided within one business day of its request. Given the wide range of circumstances in which such a presumption would be wholly inappropriate for technical, logistical, privilege or other reasons, the Indianapolis Bank requests that the Finance Board remove the deadlines contained in proposed § 914.3. Moreover, the proposed § 914.3 also appears, perhaps unintentionally, to be an effort to create an opportunity to initiate an enforcement action on the most minimal of grounds and without taking into account potential privileges that may be asserted with respect to such requests.

We appreciate your consideration of our comments and hope that they assist you in the construction of a fair and appropriate process. Should you have any questions, please do not hesitate to contact us.

Sincerely,

Robert H. Ledig

cc: Martin L. Heger, President – CEO,
Federal Home Loan Bank of Indianapolis