

April 29, 2005

**VIA EMAIL TO COMMENTS@FHFB.GOV &
VIA FEDERAL EXPRESS TO:**

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

Re: Data Reporting Manual Proposal

Ladies and Gentlemen:

On February 28, 2005, the Federal Housing Finance Board (“Finance Board”) published a proposal to reorganize the way reporting requirements are imposed on the Federal Home Loan Banks (“FHLBanks”). The majority of these requirements would now be contained in a reporting manual, to be titled the “Data Reporting Manual” (the “DRM”), which, when issued, would constitute an “enforceable order” issued pursuant to the Finance Board’s investigatory powers.

The following represents the comments of the Federal Home Loan Bank of New York (“FHLBNY”) with regard to the proposed DRM regulation.

1. While the FHLBNY supports the Finance Board’s effort to centralize and rationalize its reporting requirements, establishing the DRM as an ‘enforceable order’ appears to be inconsistent with the approach taken by other federal bank regulators with respect to manuals.
 - a. It is our understanding that other federal bank regulators do not view the various manuals they promulgate as definitive statements carrying the force of an order. Instead, their manuals constitute guidance as to the regulator’s policies and positions which can be useful to the regulator’s personnel and the institutions they regulate. The manuals are not intended to be strictly binding on either the regulator or the regulated institution.
 - b. If the DRM is issued as guidance rather than as an enforceable order, the Finance Board will still have the ability to obtain needed data from the FHLBanks, as the agency already has the right to request from the FHLBanks data that is not otherwise privileged under the Federal Home Loan Bank Act (“FHLBank Act”) and Finance Board regulations.

2. The DRM proposal is problematic from an administrative law perspective:
 - a. While the Finance Board has authority under the FHLBank Act to issue enforceable orders, as a general principle of administrative law, regulatory agencies issue enforceable orders pursuant to an adjudicatory process, where the rights and liabilities of the parties are established through a hearing based on the specific facts at issue – not through the regulatory process.
 - b. As noted above, the Finance Board can request information from the FHLBanks under current regulations. At the same time, each FHLBank also has a right to object to such requests. In no event does the law provide the Finance Board with an unfettered right to automatically sanction the FHLBank if it refuses to provide the information. However, establishing the DRM as an enforceable order could lead to that result. For example, if the DRM proposal were adopted, the Finance Board could, if it so desired, declare a FHLBank to be in violation of an “order” if it refused to provide otherwise privileged and confidential legal advice to the Finance Board -- thus automatically triggering sanctions against that FHLBank.
3. If the DRM regulation is adopted “as is”, issuance of the DRM could lead to confusion in a number of instances:
 - a. The proposal states that the Finance Board “...intends to issue many of the [reporting] requirements in a manual...”; along the same lines, the proposal also states that “...for *certain* reporting requirements currently contained in Finance Board regulations, the Finance Board proposes to relocate them to the DRM.” (emphasis added). This language suggests that not every reporting requirement will be covered by the DRM and that some requirements will remain in the regulations. This approach has the potential to cause substantial confusion. Will the FHLBanks be able to easily and readily determine when the DRM applies -- and when to look to the Finance Board’s regulations?
 - b. Separately, it would appear that if the DRM is issued, the Finance Board will retain its current ability, through the issuance of Advisory Bulletins from the Office of Supervision and other documents, to establish clarifications and provide guidance with regard to reporting requirements. This, however, will create a potential for confusion between the DRM and other clarifications/guidance issued by the agency. What steps will the Finance Board take to avoid inconsistencies between the DRM and other pronouncements issued by the agency?
4. Finally, we note that our ability to fully comment on the proposed DRM regulation is hampered because the Finance Board’s proposal does not speak to the contents of the actual DRM itself, instead saying that it intends to issue the actual DRM “in the future”. As a matter of administrative law, a regulation is only enforceable if commenters are provided with the ability to understand the requirements of the regulation being proposed so that they can offer meaningful comments.

We appreciate your consideration of our comments. Please do not hesitate to contact us if you have any questions.

Very truly yours,

Paul S. Friend
General Counsel