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Alfred M. Pollard, Esquire
General Counsel
Office of Federal Housing Enterprise Oversight
Fourth Floor
1700 G Street, NW
Washington, D.C. 20552

Attention: Comments/RIN 2550-AA34 (Record Retention)

Dear Mr. Pollard:

Fannie Mae appreciates this opportunity to provide OFHEO with our comments regarding the agency's proposal (71 *Fed. Reg.* 31121, *et seq.* (June 1, 2006)) to issue a new 12 C.F.R. Part 1732 that would contain rules establishing record retention requirements for the enterprises. OFHEO notes that sound record retention policies and procedures not only facilitate the examination process, but also allow an enterprise to manage its business more effectively, detect improper behavior that might cause financial damage to the corporation and address any controversy over its business activities or transactions.

Fannie Mae is committed to establishment of a comprehensive records management regime that will meet the needs both of operational discipline and regulatory compliance. We have devoted significant resources to this objective over the past year, and kept OFHEO, which has provided us with very valuable input, fully apprised of our plans and timetables. Fannie Mae looks forward to continuing to work closely and cooperatively with OFHEO in this area.

As part of that cooperative effort, and as per our discussions, we will be prepared to submit a written plan for a company-wide records management program to the examiner-in-chief ("EIC") within 120 days of the regulation's effective date. We understand that in this manner, the EIC will be in a position to tell an enterprise whether its planned program is acceptable before investments are made so that the need for costly changes and unnecessary delays in implementation can be avoided. It will also allow the EIC to have continued input as the program develops.

In terms of the build-out process, as OFHEO is aware, we have anticipated relying on one or more pilots to test and improve our proposed policy, approach and technology, and are pleased that nothing in the proposal would bar such an approach.

In short, Fannie Mae supports OFHEO's records management proposal, and looks forward to continuing to work cooperatively with OFHEO on the design and implementation of Fannie Mae's program. We do, however, have some observations to make and modifications to suggest regarding specific components of the proposal. We believe that these suggestions will make the proposal more consistent with industry best practices and more workable in practice without in any way compromising OFHEO's objectives.

Our detailed comments are as follows:

1) Definition of employee: The definition of "employee" found in proposed section 1732.2(e) encompasses an enterprise's agents and independent contractors. Consequently, these individuals would be covered by such aspects of the proposal as the provisions applicable to training (proposed section 1732.6(b)), notifications of record holds (proposed section 1732.7(b)), and reporting on potential investigations (proposed section 1732.7(b)(3)). Extending the rule's general reach in this way to create obligations with regard to parties and documents beyond an enterprise's control would generate considerable burden and expense for the enterprises without, we believe, yielding commensurate gains with respect to improved operations or supervision. Moreover, we are concerned that it would increase litigation risk by exposing the enterprises to potential liability for the actions (or non-actions) of third parties or individuals outside the enterprises' control. Accordingly, we respectfully request that OFHEO not include agents and independent contractors within the general definition of employee, specifically deleting the phrase "or any agent or independent contractor acting on behalf of an Enterprise" from section 1732.2(e). Rather, amendments to sections 1732.6(b), 1732.2(j) and 1732.7(b), as discussed below, would address the need to ensure that, to the extent necessary to meet the program's objectives, agents and contractors are included in the training, notifications and other provisions of the program.

2) Definition of record: The definition of "record" contained in proposed section 1732.2(j) is inconsistent with industry standards and is also excessively broad, reaching "any document whether generated internally or received from outside sources ... in connection with Enterprise business," regardless of: (1) form or format; (2) where the document is stored or located; (3) whether the document is maintained or stored on company or personal equipment; or (4) whether the document is active or inactive. This definition appears to sweep in everything regardless of its value to the enterprise's business or its obligations. Indeed, it would appear to cover documents beyond those generated or received by Fannie Mae. If interpreted this broadly, this provision would add considerable implementation difficulty and expense to our records management efforts without materially advancing the quality of information that is retained or available for business, regulatory and other purposes.

As an alternative, we suggest that OFHEO consider adopting a definition of the term "record" that is consistent with industry best practices, such as those contained in *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information*

& Records in the Electronic Age, App. F at 95 (The Sedona Conference 2005) (“*Sedona Guidelines*”)¹; Internal Organization for Standards, ISO 15489-1 § 3.15; and ARMA International Standards Program, ANSI/ARMA 8-2005 § 3.² For example, ISO 15489-1 § 3.15 provides that a record “is information created, received, and maintained as evidence and information by an organization or person, in the pursuance of legal obligations or in the transaction of business.”³ The current draft of Fannie Mae’s records management policy adopts this language. We believe that this definition is appropriate for our corporate needs and would address as well the supervisory imperatives of concern to OFHEO. In addition, OFHEO’s adoption of this definition would be consistent with industry best practices and would enable reference to a broader set of principles in the interpretation and application of this term.

3) Definition of vital records: Proposed section 1732.2(m) defines the term “vital record” to include documents “needed...to protect the legal and financial rights of...those affected by Enterprise activities.” We are very concerned about the possible impact of this broadly phrased language, as it arguably could be read to create new, unpredictable obligations to third parties, and thus potential legal risk. Fannie Mae suggests the words “those affected by Enterprise activities” be substituted with the phrase “its employees, creditors, customers and holders of its securities.” This is also consistent with industry best practices. *See, e.g.*, ANSI/ARMA 5-2003 § 9.1, Figure 1.

4) Definition of record retention schedule: Proposed section 1732.2(k) states that “the record retention schedule includes reproductions.” The standard industry approach does not require retention of copies because of the burden and expense that retention would require. Instead, only the official record copy and those copies needed to conduct the daily operations of the business must be retained. *See, e.g.*, ANSI/ARMA 8-2005 § 4.2; ANSI/ARMA 9-2004 §§ 3 (definition of official record copy) & 8.4.

An example illustrates why this approach is sensible. Fannie Mae occasionally holds town halls or “brown bag” lunches which are offered to all employees. If a PowerPoint presentation accompanies the presentation, it may be sent to every employee via email. A requirement that each and every one of these thousands of duplicate copies be retained would be difficult and costly to administer, with no added benefit to the company or to OFHEO. Indeed, quite the opposite is true. Retention of volumes of duplicate copies of documents would actually make any collection and production effort much slower. And, of course, any significant increase in retention obligations only diverts employees from

¹ The *Sedona Guidelines* are a series of electronic evidence and records management related guidelines produced by The Sedona Conference, a I.R.C. § 501(c)(3) non-profit organization and leading think tank on law and policy.

² ARMA International is a not-for-profit professional association and a recognized authority on records management. ARMA’s Standards Program develops guidelines, technical reports, and American National Standards Institute (ANSI) develops standards related to records information management.

³ In certain respects industry definitions are actually broader than OFHEO’s proposed definitions. For example, OFHEO’s proposed definition of “record” refers to “documents.” The standard industry definition, which uses “information,” captures both documents and data. *See* ANSI/ARMA 8-2005 § 3; ANSI/ARMA 10-1999 at 19; ISO 15489-1 § 3.15; *Sedona Guidelines*, App. F at 94, 95.

substantive job functions; an unwarranted result when the effort serves no business purpose.

Because requiring incorporation of reproductions into the retention schedules will add significant burdens and expenses without materially advancing the quality of information available for business, regulatory and other purposes, we respectfully suggest that OFHEO drop the reference to the inclusion of reproductions from this provision.

5) Record hold notification requirements: Proposed section 1732.7(a) defines record holds in connection with both “an actual or a potential OFHEO examination, investigation, enforcement proceeding, or litigation.” We are concerned that the criteria for a record hold stated in terms of a “potential ... investigation, enforcement proceeding or litigation” is overly broad as virtually everything that an enterprise does raises some “potential” for litigation, and virtually every question that OFHEO asks raises some “potential” for an OFHEO investigation. A standard stated this broadly and ambiguously would needlessly create an onerous burden both on the enterprises and OFHEO (*e.g.*, in terms of clarifying whether particular questions asked raise the potential for an investigation) and increase litigation risk. We propose instead that the word “likely” be substituted for “potential”.

In addition, proposed section 1732.7(b)(1) would specify that the enterprise’s record retention program would have to “[a]ddress how all employees will receive prompt notification of a record hold.” We understand this provision to require only that the program provide the mechanism by which all relevant employees will be notified of a record hold, not to require that all employees in fact be made aware of each and every record hold issued. Otherwise, this would result in a great deal of cost, confusion and unnecessary effort, as the vast majority of enterprise employees would have nothing germane to a particular hold. Moreover, industry best practice is not to notify every employee at a company of every records hold, but rather to notify only those employees who are likely to have records covered by the records hold. *See, e.g., Sedona Guidelines* Comment 5.f. We propose that OFHEO clarify this provision with an amendment to make this point more clearly by deleting the words “all employees” and substituting the phrase “the Enterprise will determine which employees, agents and independent contractors need to and.” This would represent a more targeted and efficient method of communicating the existence of holds without negatively affecting OFHEO’s needs.

Similarly, under paragraph (3) of this same subsection, an enterprise’s record retention program also would have to provide that “any employee who is aware of a potential investigation, enforcement proceeding, or litigation by OFHEO involving the [e]nterprise shall notify immediately the legal department of the [e]nterprise and shall retain any records that may be relevant in any way to such investigation, enforcement proceeding or litigation.” In our view, this requirement raises concerns as it requires the enterprise to surmise at what point something of interest to OFHEO has crossed the threshold into becoming a potential investigation, enforcement proceeding, or litigation worthy of instituting a record hold. Moreover, given the proposal’s broad definition of “employee,” the burden for making this determination would fall on numerous individuals ill-equipped

to ascertain when this threshold has been passed. In order to ensure that the enterprises meet OFHEO's needs, therefore, Fannie Mae suggests that this paragraph be deleted, and that OFHEO add to proposed section 1732.7 a new subsection containing language to the effect that: "The record retention program will address how the Chief Compliance Officer will institute a procedure for working with OFHEO and the legal department of the Enterprise to ensure that the Enterprise is aware of the timing, breadth, and scope of the likely OFHEO examination, investigation, enforcement proceeding or litigation in order to ensure that a record hold is sufficiently comprehensive to meet OFHEO's needs." This approach would ensure that relevant items are preserved for the regulator's use without requiring the enterprises to be placed in the position of speculating what OFHEO potentially might be interested in making the subject of an examination, investigation or lawsuit.⁴

6) Supervisory action: Federal banking regulators generally take the approach with regard to safety and soundness standards that regulatees should be provided an opportunity to work with the regulator to remedy deficiencies prior to the initiation of supervisory action. *See, e.g.,* 12 C.F.R. Part 30 (Appendix A). As noted in proposed section 1732.10(a), violation of the rule potentially could lead to supervisory action. *See* 12 U.S.C. §§ 4631(a), 4636(a). Given the necessary complexities of developing a comprehensive record retention scheme we suggest that, consistent with the general federal banking regulator approach referenced above, OFHEO put in place a specific system for the submission of enterprise remediation plans (over perhaps a thirty-day period) with regard to any deficiencies regarding compliance with proposed Part 1732. This would provide a routine, efficient framework for the resolution of issues that do not merit formal enforcement action, without foreclosing the agency's ability to take more formal action, as it deemed appropriate.

7) Training: As discussed above, should OFHEO concur with and adopt our proposal with respect to the definition of the term "employee," Fannie Mae would propose modifying section 1732.6(b)'s requirements with respect to training of agents and independent contractors by amending this section as follows: "The record retention program shall also provide for training for the Enterprises' agents and/or independent contractors, as necessary, consistent with their respective roles and responsibilities to the Enterprises."

8) Technical Suggestions

In addition to our comments above, there are several instances in the proposal in which clarity could be enhanced or consistency with industry standards obtained through minor changes in word choice, as follows:

a) An "inactive record" is defined by proposed section 1732.2(h) as "a document that is seldom used but must be retained ... for legislative, fiscal, legal,

⁴ We would note that if OFHEO does not concur with this suggestion, we would propose that the language of proposed section 1732.7(b)(3) be modified to address the concerns discussed above in the text with respect to the term "potential" and substitute the term "likely" instead.

archival, historical, or vital records purposes.” The words “legislative” and “archival” do not appear to add anything substantive to the other qualifying terms, and the proposal provides no elaboration as to what these words are intended to capture that is not otherwise covered. We note that, as an industry practice, records generally are defined for record retention purposes as having operational, vital record, legal/regulatory, fiscal and historical value. *See ANSI/ARMA 8-2005 §7.5*. Accordingly, we suggest that the terms “legislative” and “archival” be deleted.

b) We propose substitution of the term “record” or “records” for the term “document” or “documents,” respectively, in the definition of the following terms: “Active Record” (§ 1732.2(b)), “Inactive Record” (§ 1732.2(h)), and “Vital Records” (§ 1732.2(m)). The broader term “record” would capture with more clarity what is intended by the proposal and is in keeping with best practices. *See Sedona Guidelines*, App. F at 91, 94; ANSI/ARMA 8-2005 §4.1; ANSI/ARMA 10-1999 at 19.

c) Under proposed section 1732.2(k), the envisioned record retention schedule is described as a “form.” We suggest that the word “schedule” be substituted for the term “form” in this provision consistent with the standard industry approach. *See ANSI/ARMA 8-2005 §§ 3.1 & 7; Sedona Guidelines* App F at 96.

d) Proposed section 1732.2(l) defines “retention period” as “the length of time that records must be kept before they are destroyed,” and specifies that records would have a retention period of “permanent” if they were not scheduled for destruction. This introduces some ambiguity. As a clarifying matter, therefore, we suggest that OFHEO amend the second sentence to state that: “Records not provided with a ‘retention period’ must be retained, unless scheduled for destruction.”

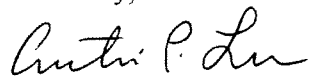
e) Proposed section 1732.6(a) lists minimum requirements for an enterprise’s record retention program. Paragraph (5) specifies that a program would have to be “consistent with applicable legal, regulatory, fiscal, and administrative requirements...” The term “administrative” is ambiguous, and we ask that OFHEO clarify. If the term is intended to reference OFHEO’s administrative requirements, the term “regulatory” in this paragraph already capture these requirements, so the term “administrative” should be deleted. If, however, what is intended to be captured are the enterprises’ business needs, we would propose substituting either “operational” or “business” for the term “administrative.” *See ANSI/ARMA 8-2005 § 7.5*.

f) Proposed sections 1732.1, 1732.7(d) and 1732.6(a)(2)(iii) require that the format of retained records permits ready access by OFHEO. Obviously, because various media are involved and because technology evolves over time, the ease with which various types of records can be retrieved, searched, and reviewed varies and will vary over time. We do not understand the proposal to require anything other than reasonable access given existing technological constraints. We believe it would be appropriate to clarify this point in any final rule issued.

We appreciate this opportunity to comment on OFHEO's record retention proposal. Again, we support the proposed rules, and hope you will give our proposed revisions your full consideration. If you have any questions, please do not hesitate to contact me (202-752-4850) or Associate General Counsel Evan Stolove (202-752-1130).

Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Arthur P. Lu".