GAO

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General Government Division

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The Honorable Richard K. Armey
Majority Leader
House of Representatives

Dear Mr. Armey:

This letter responds to your request for information regarding the benefits that the U.S. government has conferred upon the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), as well as the applicability of certain statutes to these two government-sponsored enterprises and their employees. Specifically, you requested that we (1) identify and estimate the value of the major benefits that are derived from the enterprises' federal sponsorship, and (2) determine the extent to which the enterprises are subject to federal laws that affect government entities and their employees regarding certain activities, such as lobbying and political activities, employment practices, ethics, and disclosure of information to the public.

RESULTS IN BRIEF

On the basis of our review of relevant federal statutes, economic and legal research, and interviews with agency, enterprise, and industry representatives, we identified several benefits and privileges that Congress has conferred upon the enterprises to assist them in their primary mission of creating and maintaining a secondary market for residential mortgages. These direct benefits include (1) $2.25 billion conditional lines of credit with the Department of the Treasury, (2) exemptions from state and local corporate income taxes, and (3) exemptions from Securities and Exchange Commission (SEC) registration requirements for their securities. More importantly, the enterprises' federal ties have created the perception in the financial markets that the federal government would not allow either enterprise to fail even though the enterprises' federal charters state that their obligations must include a statement that they are not guaranteed by the United States. The markets' perception of implicit government support creates an important indirect benefit by reducing the expected risks associated with holding

enterprise securities, thus lowering their funding costs compared to those of other private companies. Although the enterprises receive certain benefits, their charters also impose certain restrictions on their business activities; most significantly, the enterprises are restricted to operating in the secondary market for residential mortgages below a specified loan amount called the conforming loan limit.[1]

We estimated the value of the enterprises' major direct and indirect benefits in 1995 to be about $2.2 billion before payment of federal income taxes, and about $1.6 billion after tax. The estimated funding advantage associated with government sponsorship accounted for about 80 percent of these amounts. These estimates are based on several simplifying assumptions, including an assumption that the enterprises' operations and activities would not have changed in the absence of these benefits. Our review indicated that there is a substantial debate as to how much of the value of these benefits flows through to homebuyers in the form of lower interest rates, but there is agreement that mortgage interest rates are lower due to government sponsorship of the enterprises. Some analysts contend that the benefits pass entirely through to mortgage borrowers in the form of lower mortgage rates, while others contend that some of the value of the benefits could be retained by the enterprises in the form of higher profits or higher expenditures, such as those for compensation.

Our review of the enterprises' charters, judicial decisions, and selected federal statutes indicated that the enterprises are not subject to statutes that impose obligations on federal government entities and their employees in the areas of employment practices, lobbying and political activity, ethics, and disclosure of information to the public. Although the enterprises are not subject to restrictions applied to federal government entities in these areas, they are covered by statutes that impose obligations on private parties in connection with lobbying and political activity.

THE ENTERPRISES RECEIVE SEVERAL BENEFITS BUT ARE ALSO SUBJECT TO CERTAIN RESTRICTIONS ON THEIR BUSINESS ACTIVITIES

Congress granted federal charters to Fannie Mae and Freddie Mac to operate as privately owned corporations to help ensure that there is an adequate supply of credit available nationwide for residential mortgage loans. The enterprises seek to accomplish this mission by purchasing mortgage loans from banks, thrifts, and

[1]The conforming loan limit depends on how many housing units are financed by a single residential mortgage loan. Currently, the conforming loan limit on a single-unit residence is $207,000.

mortgage lenders nationwide, thereby improving liquidity[2] and increasing the supply of mortgage credit across the nation. The enterprises obtain the funds necessary to purchase mortgage loans by issuing debt instruments or by pooling the mortgages and selling mortgage-backed securities (MBS) to outside investors.[3] By year-end 1995, the enterprises had about $419 billion in debt obligations outstanding and about $1 trillion in MBS outstanding.

Congress granted the enterprises several direct benefits to assist them in developing and maintaining a secondary market for residential mortgage loans. For example, each of the enterprises has a $2.25 billion conditional line of credit with the Treasury Department.[4] The enterprises could potentially use the proceeds from selling debt to the Treasury to help support their operations in the event of financial difficulties. The enterprises are also exempt from paying state and local corporate income taxes, although they are not exempt from property taxes or the federal corporate income tax. In addition, enterprise debt and security issuances are exempt from SEC registration requirements and fees.

Although the enterprises' charters state that their securities are not guaranteed by the U.S. government, the enterprises' federal ties have created the perception in the financial markets that the federal government would not allow either enterprise to fail. The markets' perception of implicit government support reduces the expected risks associated with holding enterprise debt and MBS and thereby lowers their funding costs compared to those of other private companies. The enterprises' federal ties also allow them to market their securities without obtaining and paying for the services of private rating agencies.[5] Among the other benefits that we identified, enterprise debt and MBS are

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[2]A market is more liquid if investors can buy and sell large holdings without affecting the prices of the traded securities.

[3]The investors receive principal and interest payments from the mortgages while the enterprises collect a fee for managing the mortgage pools and guaranteeing the timely payment of principal and interest.

[4]These lines of credit are conditional because the Secretary of the Treasury has the option of purchasing up to $2.25 billion of each enterprise's debt.

[5]Fees are charged by bond rating agencies, such as Fitch, Standard and Poors, and Moodys Investors Services, to assess the creditworthiness of the issuer and the associated risks of the securities, and assign the securities commonly used credit ratings such as AAA or AA.

- eligible for purchase by the Federal Reserve;

- eligible for purchase without limit by federally insured depository institutions; and

- issuable and payable through the Federal Reserve.

In addition, federal bank and thrift regulators assign enterprise MBS to a lower risk-based capital category than MBS issued by other secondary market participants. This regulatory treatment allows these depository institutions to hold less capital for their investments in enterprise MBS than in other MBS and illustrates how regulators perceive enterprise MBS as lower-risk investments.

Although the enterprises receive certain benefits, their charters also impose certain restrictions on their business activities that may affect their profitability. These restrictions include (1) operations confined to the secondary mortgage market; (2) limits on the maximum size of mortgages they can purchase; (3) an obligation to be active in the secondary market across the country; (4) regulations requiring them to meet certain numerical goals regarding purchases of mortgages to very low-, low-, and moderate-income borrowers, and borrowers in central cities and other underserved areas; and (5) compliance with capital requirements and safety and soundness regulations issued by the Office of Federal Housing Enterprise Oversight.

ESTIMATED VALUE OF MAJOR FINANCIAL BENEFITS

There are inherent difficulties associated with any attempt to estimate the value of the major financial benefits that are derived from the enterprises' federal sponsorship. Estimating the value of the enterprises' exemption from state and local corporate income taxes is difficult because tax rates, exemptions, and tax bases vary widely across the nation.[6] In addition, estimates of the enterprises' total funding advantage are not precise because enterprise debt instruments and MBS have characteristics that differ from those of debt and MBS issuances by other secondary mortgage market participants.[7] Finally, the operations and funding activities of the enterprises could be

[6]For example, states may use formulas that apportion total corporate income from a multistate operation based on sales or gross receipts, share of the corporation's property, and/or share of the corporation's payroll. Therefore, some corporate income could be subject to taxation in more than one state.

[7]In particular, the characteristics of MBS issued by the enterprises vary significantly from those of MBS issuances by other secondary market participants.

substantially changed if some or all of these benefits were reduced or removed, but predicting such behavioral responses is difficult. [8]

By making several simplifying assumptions to address these difficulties, including an assumption that the enterprises' operations and activities would have been the same in the absence of these benefits, we estimated that the major direct and indirect financial benefits derived from the enterprises' federal sponsorship had a pretax value of about $2.2 billion in 1995. We estimated the pretax value of the state and local corporate income tax exemption to be $367 million on the basis of the enterprises' $4,581 million in 1995 pretax net income and assuming an average state corporate income tax rate of 8 percent.[9] We estimated the pretax value of the exemptions from SEC registration fees to be $102 million on the basis of the enterprises having issued about $299 billion in long-term debt and MBS in 1995 and after applying the statutory SEC fee of 3.4 basis points.[10] In making this calculation, we excluded short-term debt issuances by the enterprises because SEC officials told us that such debt could be defined as commercial paper and not be subject to SEC registration fees.[11] In addition, our calculations do not include an estimate of the amount of fees that the enterprises might have to pay to private rating firms if they did not have federal sponsorship. We

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[8]For example, some analysts believe that, if the funding advantage were no longer in effect, the enterprises would be more likely to issue additional MBS rather than fund mortgages directly.

[9]The 8 percent average state corporate income tax rate is based on a Congressional Research Service (CRS) report entitled "Unfunded Mandates and State Taxation of the Income of Fannie Mae, Freddie Mac, and Sallie Mae: Implications for D.C. Finances" written by Dennis Zimmerman (Sept. 8, 1995). CRS estimated an average 8-percent state corporate income tax rate by reviewing data collected by the Advisory Commission on Intergovernmental Relations, which provides information on corporate tax law provisions in all 50 states and the District of Columbia. The report indicates that states apply different factors in apportioning corporate income and have different exemptions. Therefore, the assumed 8-percent average rate is not a precise estimate.

[10]A basis point is one one-hundredth of a percent.

[11]The House of Representatives has passed H.R. 2972, which would gradually reduce SEC registration fees to about 2 basis points by the year 2001.

understand that these rating fees average about 3 basis points on debt, MBS, and equity issuances, but are subject to substantial discounts for large issuers.[12]

We estimated the value of the enterprises' funding advantage on the basis of estimates from the Congressional Budget Office (CBO) that the enterprises' perceived federal government guarantees allows them to (1) borrow at interest rates at least 30 basis points lower than those of corporations of comparable financial condition, and (2) issue MBS that yield at least 5 basis points less than those of other secondary mortgage market participants.[13] Thus, we estimated the value of the enterprises' funding advantage on debt to be $1.256 billion and the funding advantage on MBS to be $521 million on the basis of the enterprises' outstanding debt of about $419 billion and outstanding MBS of about $1 trillion in 1995. Table 1 summarizes the pretax value of the major benefits derived from the enterprises' government sponsorship.

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[12]If the enterprises had to obtain bond ratings, they would pay fees on their issuances of debt, MBS, and equity. Most MBS are called single-class because the principal and interest payments from the mortgage pool backing the MBS flow through to investors in proportion to their holdings. The enterprises also issue multiclass securities that are often called collateralized mortgage obligations (CMO) or real estate mortgage investment conduits (REMIC) in which investors invest in classes that have differing cash flows. We assume that if the enterprises had to obtain bond ratings, they would have to obtain them on multiclass securities issued in addition to the MBS that may back such issuance. Likewise, we assume that SEC registration fees would also be charged on multiclass issuance.

[13]CBO, Reducing the Deficit: Spending and Revenue Options (February 1995) pp. 318-319.

Table 1: Estimated Pretax Value of Major Financial Benefits in 1995

Dollars in millions

Financial benefit	Estimated value
State income tax exemption	$367
SEC registration exemption (3.4 bp)	102
Funding cost advantage on debt (30 bp)	1,256
Funding cost advantage on MBS (5 bp)	521
Total estimated pretax value	$2,246

Note: bp refers to basis point which is one one-hundredth of a percent.

Sources: GAO estimates based on information provided by the enterprises, including their unaudited 1995 quarterly reports, CRS, and CBO.

We also estimated the value of the benefits on an aftertax basis as about $1.6 billion in 1995. We made this calculation because, presumably, the enterprises would have deducted such additional expenses as state and local taxes and SEC registration fees on their federal tax returns if the current exemptions for such expenses had not been in effect.[14] To calculate the aftertax amounts, we applied each enterprise's effective federal corporate tax rate (tax liability divided by pretax income) to the pretax measure of increased costs applicable to that enterprise. We then subtracted that amount from the pretax amount to reflect the value of the deductions. Table 2 summarizes the aftertax value of these benefits.

[14]It should be noted that the estimated pretax value of major financial benefits is consistent with a scenario in which the extra costs to the enterprises resulting from repeal of benefits would be passed through entirely to homebuyers with no corresponding loss in each enterprise's corporate income. The estimated aftertax value is consistent with a case in which the enterprises would not be able to pass through any extra costs to homebuyers. As a result, deductibility of these extra costs would directly lower corporate income.

Table 2: Estimated Value of Major Benefits After Adjusting for Federal Tax Deductibility of Additional Expenses

Dollars in millions

Financial benefit	Estimated value
State income tax exemption	$256
SEC registration exemption (3.4 bp)	72
Funding cost advantage on debt (30 bp)	893
Funding cost advantage on MBS (5 bp)	368
Total estimated aftertax value	$1,589

Note: bp refers to basis point which is one one-hundredth of a percent.

Sources: GAO estimates based on data provided by the enterprises, CRS, and CBO.

Our review indicated that there is a substantial debate as to how much of the value of these benefits flows through to homebuyers in the form of lower interest rates, but there is agreement that mortgage interest rates are lower due to government sponsorship of the enterprises. Some analysts contend that the benefits pass entirely through to mortgage borrowers in the form of lower mortgage rates, while others contend that some of the value of the benefits could be retained by the enterprises in the form of higher profits or higher expenditures, such as those for compensation.[15]

THE ENTERPRISES ARE NOT SUBJECT TO STATUTES THAT RESTRICT THE ACTIVITIES OF GOVERNMENT ENTITIES

Our review of the charters of the enterprises, judicial decisions, and selected federal statutes indicates that the enterprises are not subject to statutes that impose obligations on federal government entities and employees in the areas of employment practices, lobbying and political activity, ethics, and disclosure of information to the public. Although the enterprises are generally not subject to restrictions applied to

[15]See, for example, CBO (op. cit.) for an analysis of how the enterprises' advantages could reduce competition in the secondary mortgage market and thus allow them to retain some of the benefits.

government entities in these areas, they are covered by statutes that impose obligations on private parties in connection with lobbying and political activity.

On the basis of your written request and subsequent discussions with your office, we agreed to analyze 18 statutes as they may apply to the enterprises. Table 3 lists these statutes and summarizes our reasons for believing that the statutes governing federal government entities do not apply to the enterprises. In general, we concluded that these statutes do not apply to the enterprises because they have been established as private corporations rather than as "agencies" of the federal government. Two of the statutes, those that apply to disclosure of lobbying activities and campaign activities of private entities, do apply to the enterprises. See the enclosure for a detailed legal analysis of the applicability to the enterprises of the statutes listed in table 3.

Table 3: Application of Selected Statutes to Freddie Mac and Fannie Mae

Statutes	Application To Freddie Mac And Fannie Mae	Reason
Privacy Act Regulates the collection, maintenance, use, and dissemination of information about individuals, and generally grants individuals access to information about themselves. (5 U.S.C. § 552a)	Does not apply.	The Privacy Act applies to "agencies" as defined in 5 U.S.C. § 552(f); definition does not include the enterprises.
Freedom of Information Act Requires federal agencies to make publicly available a broad range of records and materials related to the performance of agency activities. (5 U.S.C. § 552)	Does not apply.	FOIA applies to "agencies" as defined in 5 U.S.C. § 552(f); definition does not include the enterprises.
Government in the Sunshine Act Primarily requires that meetings held by multimember agencies be open to the public unless one of the exceptions specified in the statute applies. (5 U.S.C. § 552b)	Does not apply.	The Act uses the FOIA definition of "agency"; definition does not include the enterprises.

Title 5: Employee Classification Provides for the classification of federal agency employee positions for grade and pay purposes. (5 U.S.C. §§ 5101-5115)	Does not apply.	Enterprises' charters make clear the title 5 personnel provisions do not apply. Additionally, chapter 51 of title 5 defines agency to mean, in relevant part, "an Executive agency" (except a government controlled corporation), and it defines "employee" to mean an individual employed in or under an "agency." 5 U.S.C. § 5102(a)(2); definition of agency does not include the enterprises.
Title 5: Pay Rates and Rate Systems Establishes pay rates and systems for agency employees. (5 U.S.C. §§ 5301-5392)	Does not apply.	Enterprises' charters make clear that title 5 personnel provisions do not apply. Additionally, subchapter III of chapter 53, governing the General Schedule pay system, uses the definitions of "agency" and "employee" contained in section 5102(a). Subchapter IV, governing prevailing rate pay systems, uses essentially the same definition.

Chapter 71 of Title 5 Governs labor-management and employee relations with respect to federal agencies.	Does not apply.	Enterprises' charters make clear that title 5 personnel provisions do not apply. Additionally, title 5 definition of "employee" generally applies, and "agency" is defined to mean "Executive agency." 5 U.S.C. § 7103(a)(2) and (3).
Chapter 73 of Title 5 Prescribes standards with respect to suitability for federal employment and employee conduct. Includes the Hatch Act, 5 U.S.C. §§ 7321-7326, which limits the political conduct of federal employees, and includes restrictions on campaign contributions, participation in political campaigns, and use of "official authority or position" to influence or interfere in elections.	Does not apply.	Enterprises' charters make clear that title 5 personnel provisions do not apply. Additionally, the term "employee" is defined in chapter 73 to mean, in relevant part, an individual employed or holding office in an Executive agency or in a position within the competitive service. 5 U.S.C. § 7322(1).
Chapter 75 of Title 5 Provides authority for adverse actions against federal employees. 5 U.S.C. §§ 7501(1), 7511(a)(1), and 7541(1).	Does not apply.	Enterprises' charters make clear that title 5 personnel provisions do not apply. Additionally, chapter 75 applies to various categories of individuals meeting the definition of "employee" for title 5 purposes.

Federal Property and Administrative Services Act Subjects purchases and contracts for services and property to certain procurement requirements. (41 U.S.C. §§ 251-260)	Does not apply.	40 U.S.C. § 472(a) defines "executive agency" for purposes of application of the procurement requirements; definition does not include the enterprises.
Federal Tort Claims Act Provides a limited waiver of sovereign immunity of the United States for certain torts committed by federal agency employees. (28 U.S.C. §§ 2671 et. seq.)	Does not apply.	28 U.S.C. § 2671 defines "federal agency" for purposes of the Federal Tort Claims Act; definition does not include the enterprises.
Ethics in Government Act Contains post-employment, financial disclosure, gift, outside employment, honoraria, and related ethics requirements. (5 U.S.C. App. 4)	Does not apply.	The enterprises' charters make clear that the personnel provisions of title 5 do not apply. Additionally, title I of the Act, imposing financial disclosure requirements, applies generally to "each officer or employee in the executive branch" who meets specified pay or other criteria. Title V of the Act, imposing limits on outside income and employment, defines "officer or employee" to mean "any officer or employee of the Government" other than a "special government employee." Definition does not include the enterprises.

Title 18 prohibitions against bribery and conflicts of interest Section 201 of title 18 prescribes criminal sanctions relating to bribery; the conflict of interest sanctions are located at 18 U.S.C. §§ 203, 205, and 207 through 209.	Does not apply.	Section 201 of title 18 applies generally with respect to any "public official," defined to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof. . .;" the conflict of interest sanctions apply to officers and employees of one or more branches of the Federal Government, depending on the section involved. Definition does not apply to the enterprises.
18 U.S.C. § 1913 Provides criminal sanctions for use of appropriated funds for lobbying.	Does not apply.	Controls the use of appropriated funds; the enterprises receive no appropriated funds.
Federal Advisory Committee Act Regulates the establishment, composition, and conduct of advisory committees. An advisory committee is established to obtain advice or recommendations for the President or one or more agencies. (5 U.S.C. App. 2)	Does not apply.	Section 3(3) of the Act provides that the term "agency" has the same meaning as in 5 U.S.C. § 551(1). Definition does not include the enterprises.

Whistleblower Protection Act of 1989 Makes it a prohibited personnel practice to retaliate against any "employee" who discloses information which indicates violations of law, rule or regulation, gross mismanagement or waste of funds, abuse of authority, or a substantial and specific danger to public health. (5 U.S.C. § 2302(b)(8))	Does not apply.	The enterprises' charters make clear that the personnel provisions of title 5 do not apply. Additionally, the prohibited personnel practices section of title 5 applies generally to each "Executive agency."
Chapter 23 of title 5 Prescribes merit principles for federal personnel management and specifies prohibited personnel practices. (5 U.S.C. §§ 2301(a)(1) and 2302(a)(2)(C))	Does not apply.	The enterprises' charters make it clear that the personnel provisions of title 5 do not apply. Additionally, the merit principles apply generally to each "Executive agency."
Lobbying Disclosure Act of 1995 Provides for public disclosure of the identity and extent of the efforts of paid lobbyists to influence federal officials. (2 U.S.C. §§ 1601-1612, 22 U.S.C. § 611, 5 U.S.C. § 3304 note)	Applies.	Section 4 of the Act provides for registration of any organization that has one or more employees that are lobbyists. Enterprises meet the definition of organization.

Federal Election Campaign Act of 1971 Limits the campaign contributions from individuals and corporations (2 U.S.C. §§ 431 et. seq.)	Applies.	Section 441b of title 2 makes it unlawful for any corporation organized by any law of Congress to make contributions in connection with any election for political office. Applies to the enterprises.

There are several legal factors that distinguish the enterprises as private corporations rather than as government entities subject to the statutes that we reviewed. Under their charters, each enterprise is "a body corporate" operating under a board of directors, the majority of whom are elected by common shareholders.[16] The charters grant the enterprises the authority to prescribe rules governing the general conduct of their business and the authority to enter into contracts, sue and be sued, acquire and dispose of property, and set the compensation of their employees. The charters also exempt the personnel practices of the enterprises from the requirements of title 5 of the United States Code. Moreover, judicial decisions we reviewed have held that the enterprises are not governmental agencies and that their actions are not federal actions.

However, as private entities, the enterprises are subject to the provisions of the Lobbying Disclosure Act of 1995 and the Federal Election Campaign Act of 1971 that impose requirements on the lobbying and political fundraising activities of private corporations. Enterprise officials we contacted acknowledged that they are covered by these requirements.

SCOPE AND METHODOLOGY

While we estimated the value of the major benefits that are derived from government sponsorship, we did not attempt to measure the distribution of those benefits among mortgage market participants. To identify the direct benefits that are derived from the enterprises' federal sponsorship, we reviewed the enterprises' charters and the relevant statutes. To identify other benefits and to determine how to measure the value of the major benefits, we reviewed academic, professional, and business literature on the role of the enterprises in the mortgage market. We also interviewed representatives from the enterprises, SEC, and mortgage market experts. To determine the extent to which the enterprises are subject to certain federal laws, we reviewed the relevant statutes and court cases.

ENTERPRISE COMMENTS AND OUR RESPONSE

We obtained comments on a draft of this correspondence from senior enterprise officials, including Fannie Mae's Senior Vice President and Deputy General Counsel; and Freddie Mac's Associate General Counsel, Vice President of Government and Industry Relations, and Chief Economist. Fannie Mae stated that making meaningful

[16]Fannie Mae and Freddie Mac each has 18 members on its board of directors. In each case, the President appoints 5 board members annually while shareholders elect the other 13 annually.

estimates of the value of the benefits of federal sponsorship was not feasible because there is no way to reliably predict how the enterprises' activities and operations would have been affected in the absence of these benefits. Freddie Mac stated that our estimates were reasonable and conservative measures of the cost advantages derived from their federal sponsorship. Both enterprises stated that several studies have shown that the benefits of federal sponsorship were passed on to homebuyers in the form of lower interest rates. Furthermore, both enterprises emphasized that the benefits of federal sponsorship help them to fulfill their missions, including the provision of mortgage credit to very low-, low-, and moderate-income borrowers. The enterprises agreed with our legal analysis.

We agree that it is difficult to estimate the benefits of federal sponsorship given the lack of any reliable predictions about how the enterprises would change their operations in the absence of these benefits. This is why we believe our assumption of no behavioral change is the only reasonable one we could have made in deriving our estimates. We further note that this assumption is also used by CBO and others when estimating changes in government policies. We also agree with the enterprises that the benefits derived from government sponsorship result in lower mortgage interest rates and that the enterprises have important goals regarding purchase of mortgages to very low-, low-, and moderate-income borrowers. We modified the text to clarify these points and to make explicit that determining how the benefits of federal sponsorship are distributed among mortgage market participants was not within the scope of our work.

We appreciate the opportunity to provide you with information about the benefits and statutes that apply to the enterprises. As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this correspondence until 30 days from the date of this letter. At that time, we will send copies to Fannie Mae and Freddie Mac and other interested parties. In the event you or your office have any further questions, please contact me at (202) 512-8678.

Sincerely yours,

James L. Bothwell
Director, Financial Institutions
and Markets Issues

Enclosure

I. STATUTORY BACKGROUND OF THE ENTERPRISES

Fannie Mae

The statutory provisions specifying the status and powers of the Federal National Mortgage Association ("Fannie Mae") are contained in the Federal National Mortgage Association Charter Act, as amended, 12 U.S.C. §§ 1716 et seq.

Prior to the comprehensive amendments to the Charter Act made by title VIII of the Housing and Urban Development Act of 1968,[1] Fannie Mae was a wholly-owned government corporation located within the Department of Housing and Urban Development. It was assigned three functions relating to federally insured housing programs: secondary market operations, special assistance, and management and liquidation functions. The 1968 amendments partitioned the former corporation into two separate entities. See generally, 12 U.S.C. § 1717(a).

The special assistance and management and liquidation functions were assigned to a new entity–the Government National Mortgage Association–which was established as a wholly owned government corporation within the Department of Housing and Urban Development. Secondary market operations remained in the reconstituted Fannie Mae.

The 1968 amendments converted Fannie Mae into "a Government-sponsored private corporation." 12 U.S.C. § 1716b. The amendments describe Fannie Mae as "a body corporate . . . which shall have succession until dissolved by Act of Congress." 12 U.S.C. § 1717(a)(2)(B). They further provide that Fannie Mae:

> "shall maintain its principal office in the District of Columbia or the metropolitan area thereof and shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." Id.

Section 308(b) of the Charter Act, as amended, 12 U.S.C. § 1723(b), vests the management of the enterprise in a board of directors consisting of 18 members. Five of the directors are appointed annually by the President, and the remainder are elected annually by the common stockholders.

Section 309 of the Act, as amended, 12 U.S.C. § 1723a, prescribes Fannie Mae's general powers. Among other things, the enterprise has the power to enter into contracts and other arrangements, to sue and be sued, to acquire real and personal property, and to

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[1]Pub. L. No. 90-448 (August 1, 1968), 82 Stat. 536.

prescribe rules governing the general conduct of its business. § 1723a(a). The corporation is exempt from state and local taxes, except real estate taxes. § 1723a(c)(2). The enterprise's board of directors is authorized to select and fix the compensation of its officers and employees "without regard to the Federal civil service and classification laws." § 1723a(d)(2).[2] Except with respect to continued coverage of certain pre-1972 employees under the federal civil service retirement system, "the corporation shall not be subject to the provisions of title 5."

Freddie Mac

The Federal Home Loan Mortgage Corporation ("Freddie Mac") is governed by the Federal Home Loan Mortgage Corporation Act,[3] as amended, 12 U.S.C. §§ 1451 et seq. As originally constituted in 1970, Freddie Mac's board of directors consisted of the three members of the Federal Home Loan Bank Board. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[4] amended several provisions of the 1970 Act to give Freddie Mac a structure similar to Fannie Mae's.

Under section 303 of the 1970 Act, as amended, 12 U.S.C. § 1452, Freddie Mac is "a body corporate" under the direction of a board of directors. § 1452(a)(1). The board consists of 18 members, 5 of whom are appointed annually by the President; the remainder are elected annually by the common stockholders. § 1452(a)(2).

Section 303 grants Freddie Mac powers that include authority to enter into contracts, to sue and be sued, to acquire and dispose of property, to determine its necessary expenditures and how to incur them, and to appoint and fix the compensation of its employees. § 1452(c). All of these authorities may be exercised "without regard to any other law except as may be provided by the Corporation or by laws hereafter

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[2]Section 309(d) does impose some requirements with respect to personnel matters. The compensation of employees is to be "comparable with compensation for employment in other similar businesses"; a "significant portion" of the potential compensation of executives is to be based on the performance of the enterprise; personnel actions are to be based on merit and efficiency; and political tests or qualifications are not permitted. Section 1216(b) of the FIRREA, 12 U.S.C § 1833e(b), made applicable to Fannie Mae (as well as Freddie Mac) Executive Order No. 11478, providing for the adoption and implementation of equal employment opportunity. Section 1381(j)(2) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 1723a(d)(3)(A), provides that Fannie Mae is to submit a report annually to the House and Senate Banking Committees that compares its compensation policies with those of other similar businesses.

[3]Pub. L. No. 91-351 (July 24, 1970), title III, 84 Stat. 451.

[4]Pub. L. No. 101-73 (August 9, 1989), § 731, 103 Stat. 429.

enacted by the Congress expressly in limitation of this sentence." Id.[5] The corporation has the same tax exemption status as Fannie Mae. § 1452(e). The corporation is treated as an agency for purposes of invoking the jurisdiction of the federal courts and removing actions to federal court. § 1452(f).

Regulatory Authority of HUD

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992,[6] 12 U.S.C. §§ 4501 et seq., established the Office of Federal Housing Enterprise Oversight (OFHEO) within the Department of Housing and Urban Development as a safety and soundness regulator for Fannie Mae and Freddie Mac. Section 1318 of the Act, 12 U.S.C. § 4518, requires that OFHEO prohibit the enterprises from providing compensation to any executive officer that is not reasonable and comparable with compensation for employment in similar businesses. Sections 1381(j)(3)(B) and 1382(f)(2) of the Act, 12 U.S.C. § § 1723a(d)(3)(B) and 1452(h)(2), provide that OFHEO must approve in advance any termination of employment payment to any executive officer by Fannie Mae and Freddie Mac respectively.

As to matters other than safety and soundness, section 1321 of the Act, 12 U.S.C. § 4541, retained the general regulatory authority of the Secretary of Housing and Urban Development over the two enterprises, which previously had been set forth in their Charter Acts. Section 1321 provides

> "Except for the authority of the Director of the Office of Federal Housing Enterprise Oversight described in section 1313(b) [12 U.S.C. § 4513(b)] and all other matters relating to the safety and soundness of the enterprises, the Secretary of Housing and Urban Development shall have general regulatory power over each enterprise and shall make such rules and regulations as shall be necessary and proper to ensure that this part and the purposes of the Federal National Mortgage Association Charter Act and the Federal Home Loan Mortgage Corporation Act are accomplished."

The legislative history of the Fannie Mae and Freddie Mac Charter Acts shows that Congress did not envision federal regulatory control over the internal management of the corporations. The report of the House Committee on Banking and Currency on the Housing Act and Urban Development Act of 1968 expressed its intent that

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[5]Section 303(c) imposes similar personnel requirements on the enterprises as described in footnote 2, above, with respect to Fannie Mae.

[6]Pub. L. No. 102-550 (October 28, 1992), title XIII, 106 Stat. 3941.

"the regulatory powers of the Secretary will not extend to [Fannie Mae's] internal affairs, such as personnel, salary, and other usual corporate matters, except where the exercise of such powers is necessary to protect the financial interests of the Federal Government or as otherwise necessary to assure that the purposes of the Charter Act are carried out."[7]

The legislative history of the FIRREA amendments to Freddie Mac's charter shows a similar intent.[8]

II. JUDICIAL DECISIONS ON THE STATUS OF THE ENTERPRISES

Judicial decisions that have analyzed the status of Fannie Mae and Freddie Mac have generally found that they do not possess characteristics that would make them government agencies or make their activities federal actions subject to constitutional restrictions. Courts have also addressed the application of the Federal Tort Claims Act and the Freedom of Information Act to Freddie Mac and have analyzed the application of the doctrine of promissory estoppel to Freddie Mac.

Most recently, in *American Bankers Mortgage Corporation v. Federal Home Loan Mortgage Corporation*,[9] the Ninth Circuit found that Freddie Mac was not restricted by the Fifth Amendment Due Process Clause because it is not a governmental entity and its actions do not constitute federal action. In *American Bankers*, Freddie Mac had terminated the status of a mortgage banking corporation as an approved seller/servicer. American Bankers alleged that Freddie Mac had violated its due process rights in terminating its approved status.

In determining that Freddie Mac is not a governmental entity, the Ninth Circuit relied on the framework set out by the Supreme Court in *Lebron v. National Railroad Passenger Corp.*,[10] where the Court held that Amtrak was an agency or instrumentality for First Amendment purposes. In *Lebron*, the Court established two relevant criteria for judging the status of a government-chartered corporation for constitutional purposes. The two criteria set out in *Lebron* are the extent to which the entity's objectives are governmental and the extent to which the government directs and controls the corporation's pursuit of those objectives.

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[7]H .R. Rep. No. 1585, 90th Cong., 2d Sess. at 71 (1968).

[8] H. R. Rep. No. 54, 101st Cong., 1st Sess., pt. 3, at 2 (1989).

[9]75 F.3d 1401 (1996).

[10]__U.S.__ , 115 S.Ct. 961, 130 L.Ed. 2d 902 (1995).

The Ninth Circuit noted that the congressional purpose for Freddie Mac was to serve the public interest by increasing the availability of mortgages on housing for low- and moderate-income families by promoting nationwide access to mortgages. Thus, the court found, Freddie Mac's objectives are "federal government objectives" for the purpose of analyzing whether or not Freddie Mac is a government entity. However, the court found that the government does not control the operation of Freddie Mac because the government is entitled to appoint fewer than one-third of Freddie Mac's directors. This level of control is lower than that exercised over Amtrak in *Lebron*. Consequently, the court found that Freddie Mac is not a government agency subject to the Fifth Amendment's Due Process Clause.

The court also found that Freddie Mac's actions did not constitute federal action for constitutional purposes, relying on the Supreme Court's standards for analysis set out in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee.*[11] In that case, the Court examined (1) the nexus between the government and the challenged action, (2) whether the alleged government actor performed functions traditionally exclusively reserved to the government, and (3) whether the government coerced or encouraged the challenged action.

Applying the first of the three criteria, the Ninth Circuit considered whether there was a sufficiently close nexus between the government and the challenged action of the regulated entity so that the action of the regulated entity might be treated as that of the government. Finding no connection between the action of Freddie Mac in the termination decision and the federal government, the court decided that the challenged action was not government action.

The second factor to be considered was whether the entity performs functions that have been "traditionally the exclusive prerogative of the Federal Government."[12] The court found that the powers exercised by Freddie Mac in participating in the secondary market for mortgages and improving access to home loans for low- and moderate-income families do not qualify as powers traditionally associated with sovereignty.

The final factor to be considered was whether the government has exercised coercive power or has provided such significant encouragement that the action must be deemed to be that of the government. Here, there was no evidence suggesting that the federal government in any way coerced or encouraged Freddie Mac to terminate American Bankers as sellers and servicers.

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[11]483 U.S. 522 (1987).

[12]*Id.* at 544.

Consequently, the court found that Freddie Mac's action did not constitute federal action subject to the requirements of the Fifth Amendment Due Process Clause.

Two other circuits likewise have held that Fannie Mae is not subject to the Fifth Amendment Due Process Clause. In *Northrip v. Federal National Mortgage Association,*[13] the Sixth Circuit found that Fannie Mae's action in foreclosing on a mortgage was not federal action subject to the Fifth or Fourteenth Amendments. The court reviewed the creation of Fannie Mae by the National Housing Act of 1968 and found significant the fact that the legislation was designed to transfer the secondary market operations of Fannie Mae to completely private ownership and that ten of the 15 member board of directors were elected by the common stockholders.

In *Roberts v. Cameron-Brown Co.,*[14] the Fifth Circuit found that there was not a sufficient nexus between the government and Fannie Mae's exercising a private right of sale to transform the action into that of the federal government for purposes of the Due Process clause of the Fifth Amendment. The court found that the act of foreclosure was part of the parties' contractual undertaking. It also found that Fannie Mae is essentially a privately-owned mortgage banker providing secondary mortgage loans and that, although the government exercises some control over Fannie Mae, the government and Fannie Mae have not become so interdependent as to make the corporation's actions the actions of the federal government.

At least two district courts also have held that Freddie Mac's termination of a seller/servicer was not subject to the Fifth Amendment. In *Liberty Mortgage Banking, Ltd. v. Federal Home Loan Mortgage Corp.*,[15] the court found that Freddie Mac was a private corporation rather than a government agency and that the decision to terminate the seller/servicer could not be deemed government action. The *Liberty Mortgage* court discussed *FMBC Fin., Inc. v. Federal Home Loan Mortgage Corp.*,[16] stating that the *FMBC* court "could not 'find a sufficient nexus between Freddie Mac's actions [terminating a seller/ servicer] and the federal government to support the invocation of a Fifth Amendment due process analysis.'"

In *Rocap v. Indiek,*[17] a 1976 pre-FIRREA case, the District of Columbia Circuit found that Freddie Mac was subject to the Freedom of Information Act. In *Rocap*, the court

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[13]527 F.2d 23 (1975).

[14]556 F.2d 356 (1977).

[15]822 F. Supp. 956 (E.D.N.Y. 1993).

[16]No. 91 cv. 1226-R (S.D. Cal. Sept. 26, 1991).

[17]539 F.2d. 174 (1976).

relied on a number of characteristics of the organizational structure of Freddie Mac in effect at that time. The court cited the fact that Freddie Mac was federally chartered; its board of directors was presidentially appointed; and it was subject to close governmental supervision and control over its business transactions and to federal audit and reporting requirements.

No published case decided since *Rocap* has considered the application of FOIA to Freddie Mac or to Fannie Mae. Litigation addressing when private entities are subject to FOIA has focused on the existence of government control over the entity. In *Forsham v. Harris*,[18] the Supreme Court held that a private organization will constitute a federal agency subject to FOIA only if it is subject to extensive, day-to-day control by the government.

The D.C. Circuit in *Rocap* found that several features of Freddie Mac–including a federal charter, a presidentially appointed board of directors, and staff who are considered federal employees for certain purposes–were "indicia of federal involvement and control which courts have generally relied upon in determining whether an entity is a federal agency." The D.C. Circuit recently characterized its inquiry in determining whether an entity fits the agency definition in FOIA as a "fact-specific functional approach."[19] Because several of the characteristics relied on by the *Rocap* court were either eliminated or modified by FIRREA, it is likely that a court considering the application of FOIA today would reach the conclusion that it did not apply. [20]

In *Mendrala v. Crown Mortgage*,[21] the Seventh Circuit concluded that Freddie Mac was not a federal agency for purposes of the Federal Tort Claims Act (FTCA). The FTCA provides a limited waiver of sovereign immunity for torts committed by federal agency employees; "federal agency" under FTCA includes "corporations primarily acting as instrumentalities of the United States." The question addressed by the court was whether Freddie Mac was primarily acting as an agency or instrumentality of the United States. The following factors were deemed relevant: the federal government has no ownership interest in Freddie Mac; the board of directors is controlled by

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[18]445 U.S. 169 (1980).

[19]*Cotton v. Heyman*, 63 F.3d 1115, 1121 (1995).

[20]*Cf. Liberty Mortgage,* discussed previously, explaining that since *Rocap* was decided before the 1989 changes to Freddie Mac's charter, it was irrelevant to the court's determination of whether Freddie Mac is subject to Fifth Amendment constraints.

[21]955 F.2d 1132 (7th Circuit 1992).

private shareholders; the board has authority to determine the general policies that govern the operations of the corporation; and Freddie Mac receives no appropriations. The court found that although Freddie Mac furthers an important of mission of the federal government, that factor was not dispositive.

The *Mendrala* court did, however, find Freddie Mac to be a federal instrumentality for purposes of protection from estoppel under the doctrine of *Federal Crop Ins. Corp. v. Merrill*,[22] citing the opinion of the D.C. Circuit in *McCauley v. Thygerson.*[23] In *Mendrala*, the plaintiff alleged that the actions of a Freddie Mac loan servicer should bind Freddie Mac. The *McCauley* court had found that classification as a government entity in the context of the estoppel doctrine turns on whether estoppel would thwart congressional intent. In finding that Freddie Mac was protected by promissory estoppel, the Seventh Circuit cited Freddie Mac's statutory mission of maintaining the secondary mortgage market and assisting in meeting low- and moderate-income housing goals. The court found that holding Freddie Mac responsible for the actions of its loan servicer would thwart its congressional purpose.

The federal courts have consistently held that Fannie Mae and Freddie Mac are not engaged in federal government action when they undertake various activities. The courts have examined the organizational structure of the enterprises–their ownership, management, and regulation as well as the congressional intent underlying the revisions to their charters in 1968 and 1989–and held that the enterprises have attributes of private corporations, not government agencies. The existence of a federal charter and extensive regulation by the federal government does not transform the actions of the enterprises into federal government action.

Only a few courts have considered the application to the enterprises of statutes that apply generally to government agencies. In 1992, the Seventh Circuit held that Freddie Mac was not a federal agency for purposes of the Federal Tort Claims Act. In 1976, the D.C. Circuit held that the pre-FIRREA Freddie Mac was subject to the Freedom of Information Act. However, significant changes to Freddie Mac's organizational structure in FIRREA make it unlikely that a court would reach the same result today.

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[22]332 U.S. 380 (1947). The general principle of the *Merrill* case is that federal instrumentalities cannot be bound by government officials acting beyond their authority.

[23]732 F.2d 978 (1984).

III. APPLICABILITY OF SPECIFIC STATUTORY PROVISIONS TO THE ENTERPRISES

Title 5 provisions governing federal agency procedures and operations

Title 5 of the United States Code contains a number of provisions that apply generally to federal agencies. While the definitions of "agency" that apply to these title 5 provisions differ in some respects, all of them are limited to federal governmental entities. The current statutory structure for both Fannie Mae and Freddie Mac, as described previously and construed by the judicial decisions discussed above, treat the two enterprises as essentially private entities. Therefore, none of these title 5 provisions appears applicable to them.[24]

The Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., establishes procedures that federal agencies must comply with in conducting rulemakings and adjudications. For purposes of the Act, the term "agency" is defined to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .." 5 U.S.C. § 551(1).[25]

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires federal agencies to make publicly available a broad range of records and materials related to the performance of agency activities, other than those specifically excluded by the Act. For purposes of the FOIA, the definition of "agency" in section 551(1) includes

> "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f).

Section 103(1) of title 5 defines "Government corporation" to mean "a corporation owned or controlled by the Government of the United States . . .." Section 104(1) of title 5 defines "independent establishment" to mean "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment . . .."

The Privacy Act, 5 U.S.C. § 552a, regulates the collection, maintenance, use, and dissemination by federal agencies of information about individuals, and generally

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[24]As noted previously, one judicial decision held that Freddie Mac was subject to the Freedom of Information Act. However, since this decision predated the restructuring of the corporation in 1989, it is unlikely that the result would be the same now.

[25]Section 551(1) goes on to list exceptions to the definition of "agency," which essentially limit its application to the executive branch.

grants individuals access to information about themselves. The Act uses the same definition of "agency" as the FOIA. See 5 U.S.C. § 552a(a)(1).[26]

The Government in the Sunshine Act, 5 U.S.C. 552b, primarily requires that meetings held by multimember agencies be open to the public unless one of the exceptions specified in the statute applies. This Act also uses the FOIA definition of "agency." See 5 U.S.C. § 552b(a)(1).

The Federal Advisory Committee Act, 5 U.S.C. App. 2, regulates the establishment, composition, and conduct of advisory committees. Section 3(2) of the Act defines "advisory committee" to mean, in relevant part

> "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is
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> (A) established by statute or reorganization plan, or
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> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ."

Section 3(3) of the Act provides that the term "agency" has the same meaning as in 5 U.S.C. § 551(1).

Title 5 Provisions Governing Federal Officers and Employees

The statutory provisions described below apply generally to federal officers and employees. Title 5 contains definitions of the terms "officer" and "employee" that apply throughout that title except as otherwise indicated.[27] A number of the specific provisions described below supplement these general definitions. As in the case of the

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[26]Section 552a(a)(1) actually refers to the definition of "agency" contained in 5 U.S.C. § 552(e), but the reviser's note to the U.S. Code indicates that this reference should be to section 552(f).

[27]With respect to title 5 generally, the terms "officer" and "employee" mean individuals appointed in the civil service by a federal authority who are engaged in the performance of a federal function and are supervised by a federal authority in the performance of their duties. See 5 U.S.C. §§ 2104(a) and 2105(a).

title 5 provisions governing federal agency procedures, described previously, the title 5 personnel provisions are limited to officers and employees of the Federal Government. The organic statutes for Fannie Mae and Freddie Mac make clear that their personnel are not federal officers or employees, and that the title 5 personnel provisions do not apply to the corporations.

Chapter 23 of title 5 prescribes merit principles for federal personnel management and specifies prohibited personnel practices. These provisions apply generally to each "Executive agency." See 5 U.S.C. §§ 2301(a)(1) and 2302(a)(2)(C).

The Whistleblower Protection Act of 1989 (Public Law 101-12) amended various provisions of title 5 to enhance whistleblower protections. As amended by the Act, section 2302(b)(8) of title 5 makes it a prohibited personnel practice to retaliate against any "employee" or "applicant for employment" who discloses information which indicates violations of law, rule or regulation, gross mismanagement or waste of funds, abuse of authority, or a substantial and specific danger to public health.

Whistleblower protections are enforced by the Merit Systems Protection Board and the Office of Special Counsel. See generally 5 U.S.C. §§ 1212-1215, 1221. As noted above, the prohibited personnel practices section of title 5 applies generally to each "Executive agency." The jurisdiction of the Office of Special Counsel generally extends to "employees, former employees, and applicants for employment." 5 U.S.C. § 1212, 1213.

Chapter 51 of title 5, 5 U.S.C. §§ 5101-5115, provides for the classification of federal agency employee positions for grade and pay purposes. It defines "agency" to mean, in relevant part, "an Executive agency" (except a government controlled corporation). 5 U.S.C. § 5102(a)(1). It defines "employee" to mean an individual employed in or under an "agency." 5 U.S.C. § 5102(a)(2).

Chapter 53 of title 5, 5 U.S.C. §§ 5301-5392, establishes pay rates and systems for agency employees. Subchapter III of chapter 53, governing the General Schedule pay system, uses the definitions of "agency" and "employee" contained in section 5102(a), described above. See 5 U.S.C. § 5331(a). Subchapter IV, governing prevailing rate pay systems, uses essentially the same definitions for purposes here relevant. See 5 U.S.C. § 5342(a).

Chapter 71 of title 5 governs labor-management and employee relations with respect to federal employees and agencies. For purposes of its coverage, the title 5 definition of "employee" generally applies, and "agency" is defined to mean "Executive agency." See 5 U.S.C. § 7103(a)(2) and (3).

Chapter 73 of title 5 prescribes standards with respect to suitability for federal employment, and employee conduct. These include the Hatch Act, 5 U.S.C. §§ 7321-

7326, which limits the political conduct of federal employees, and restricts campaign contributions, participation in political campaigns, and the use of "official authority or position" to influence or interfere in elections. The term "employee" is defined for purposes of the Act to mean, in relevant part, an individual employed or holding office in an Executive agency or in a position within the competitive service which is not in an Executive agency. 5 U.S.C. § 7322(1).

Chapter 75 of title 5 governs adverse actions taken against federal employees, including suspensions and removals. These provisions apply to various categories of individuals meeting the general definition of "employee." See 5 U.S.C. §§ 7501(1), 7511(a)(1), and 7541(1).

The Ethics in Government Act, 5 U.S.C. App. 4, contains post-employment, financial disclosure, gift, outside employment, honoraria, and related ethics requirements. Title I of the Act, imposing financial disclosure requirements, applies generally to "each officer or employee in the executive branch" who meets specified pay or other criteria. See 5 U.S.C. App. 4, § 101(f). Title V of the Act, imposing certain limits on outside income and employment, defines "officer or employee" to mean "any officer or employee of the Government" except a "special Government employee" as defined in 18 U.S.C. § 202.

Title 18 Prohibitions Against Bribery and Conflicts of Interest

Section 201 of title 18, prescribing criminal sanctions relating to bribery, applies generally with respect to any "public official," defined to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . .." 18 U.S.C. § 201(a)(1). The conflict-of-interest sanctions–18 U.S.C. §§ 203, 205, and 207 through 209–apply to officers and employees of one or more branches of the Federal Government, depending on the section involved. Section 202(e)(1) of title 18 defines "executive branch" for purposes of these sections as including each executive agency as defined in title 5 and any other entity or administrative unit in the executive branch. Section 6 of title 18 defines the term "agency," for purposes of that title generally, to include

> "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

For the same reasons previously discussed, it appears that neither Fannie Mae nor Freddie Mac would be subject to these title 18 provisions. A letter opinion dated July 10, 1970, from William H. Rehnquist, then-Assistant Attorney General for the Office of Legal Counsel, specifically addressed the applicability of 18 U.S.C. § 208 to Fannie Mae and concluded that it did not apply. Further, section 731(k) of FIRREA, 103 Stat. 435,

repealed language from Freddie Mac's charter act that had made its employees subject to the criminal provisions of title 18–including the bribery and conflict-of-interest provisions– applying to federal officers and employees.

Prohibitions Against Lobbying with Appropriated Funds

Section 1913 of title 18, United States Code, makes it a crime to use appropriated funds, directly or indirectly, for lobbying purposes in the absence of an express congressional authorization. Also, many annual appropriations acts prohibit the use of funds appropriated therein for "publicity and propaganda purposes." Since Fannie Mae and Freddie Mac are not supported by appropriated funds, these restrictions do not apply to them.

The Federal Tort Claims Act

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680, provides a limited waiver of sovereign immunity of the United States for certain torts of federal agency employees. A "federal agency" under the Act includes "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." 28 U.S.C. § 2671.

As noted previously, the Seventh Circuit in *Mendrala v. Crown Mortgage Corporation*, concluded the Freddie Mac was not a federal agency for purposes of the Federal Tort Claims Act because Freddie Mac is privately owned, is structured to function independently of the federal government to a great extent, and receives no appropriations from Congress. Similar reasoning would apply to Fannie Mae.

Title 41 Provisions Regulating Procurement of Services and Property

The Federal Property and Administrative Services Act, 41 U.S.C. §§ 251-260, requires that purchases and contracts for services and property comply with certain procurement requirements. Section 252 of title 41 applies the Act to "executive agencies." 40 U.S.C. § 472(a) defines executive agency for this purpose as "any executive department or independent establishment in the executive branch of the government, including any wholly owned Government corporation." Fannie Mae and Freddie Mac are not within the executive branch, so these procurement requirements do not apply.

Lobbying Disclosure Act of 1995

The Lobbying Disclosure Act of 1995 (Public Law 104-65) provides for public disclosure of the identity and the extent of the efforts of paid lobbyists to influence federal officials in the conduct of Government actions. Section 4 of the Act, 2 U.S.C.

§ 1603, provides for registration of any organization that has one or more employees that are lobbyists. Section 3, 2 U.S.C. § 1602, defines "lobbyist" to mean any individual who is employed for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period. "Organization" is defined to mean a person or entity other than an individual. Person or entity is defined to mean any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

Both Fannie Mae and Freddie Mac are included under this definition of organization and both indicated they are subject to the requirements of the Act.

Federal Election Campaign Act of 1971

The Federal Election Campaign Act, 2 U.S.C. §§ 431-456, limits political contributions to candidates, provides for the organization of political committees, and for the establishment of the Federal Election Commission. Section 441b of title 2, United States Code, provides that it is unlawful for any corporation organized by authority of any law of Congress to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever to make a contribution or expenditure in connection with any federal primary or general election.

Fannie Mae and Freddie Mac are "corporations organized by authority of any law of Congress" and both indicated they are subject to these limitations.

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