February 26, 2001

By Courier and Electronic Mail

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1700 G Street, NW
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RE: Rules of Practice and Procedure, Notice of Proposed Rulemaking, 65 *Fed. Reg*. 81775 (December 27, 2000), RIN 2550-AA16

Dear Mr. Pollard:

Freddie Mac appreciates the opportunity to comment on the Office of Federal Housing Enterprise Oversight's (OFHEO) proposed amendments to OFHEO's rules governing administrative enforcement proceedings. Freddie Mac supports OFHEO's efforts to bring greater transparency to its supervisory oversight and to the relevant standards and safeguards affecting Freddie Mac and Fannie Mae (the Enterprises). Such transparency would be of most benefit in the unlikely event that OFHEO had occasion to exercise its enforcement authority, and it is our hope and belief that such an occasion will never arise. However, should such an occasion arise, the benefits of transparency would be realized only if all final regulations pertaining to the exercise of OFHEO's authority were clear and correct in all respects. Working out the ambiguities or technical meaning of regulatory provisions should not occur during a time of crisis. In that spirit, we have very carefully reviewed the proposed amendments and provide OFHEO with our comments below.

Our comments make the following recommendations:

1. We recommend amending any final rule to recognize the exclusive and interdependent authorities of OFHEO and HUD with respect to enforcement of the 1992 Act and the Enterprises' charters. Consistent with the congressional framework established in the 1992 Act, any final rule must expressly recognize that the Secretary of HUD possesses primary regulatory authority with respect to any non-safety-and-soundness charter or regulatory matter and that any enforcement action relating to such a non-safety-and-soundness matter should be initiated only at the Secretary's request.

2. We recommend amending any final rule to address fundamental concerns with the proposed enforcement standard for "unsafe and unsound practices."

3. Finally, we recommend amending any final rule to clarify a specific aspect of the proposed language dealing with factors for determining the amount of civil money penalties to be assessed.

I. Any Final Rule Should Recognize the Secretary of HUD's Primary Role with Respect to Interpretations under the 1992 Act and the Charter Acts of the Enterprises

A. The 1992 Act Establishes Exclusive and Interdependent Authorities

A review of the entire regulatory and enforcement framework established in the 1992 Act shows that OFHEO and HUD have both exclusive and interdependent authorities. The 1992 Act provides OFHEO with a fundamental safety and soundness role.[1] Section 1313(a) of the 1992 Act establishes the duty of the Director of OFHEO as follows: "The duty of the Director shall be to ensure that the enterprises are adequately capitalized and operating safely, in accordance with this title." Section 1313(b) of the 1992 Act sets forth the exclusive authorities of the Director of OFHEO to make determinations, take actions, and perform functions, "without the review or approval of the Secretary" of HUD.

Section 1313(c) of the 1992 Act provides that "[a]ny determinations, actions, and functions" of the Director of OFHEO that are not referred to in the Director's exclusive authorities enumerated in section 1313(b) are "subject to the review and approval of the Secretary" of HUD. The 1992 Act also grants to the Secretary of HUD specific exclusive powers over the Enterprises. For example, section 1322 of the 1992 Act provides exclusive authority to the Secretary of HUD to determine whether a "new program" of an Enterprise is authorized under its charter act.[2] Finally, and critically, section 1321 of the 1992 Act provides the Secretary of HUD with "general regulatory power" with regard to Freddie Mac and Fannie Mae and with authority to "make such rules and regulations as shall be

[1] Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (the 1992 Act), PUB. L. No. 102-550, 106 Stat. 3672 (1992).

[2] The 1992 Act expressly provides for the Secretary to make determinations regarding whether new programs are authorized under specified provisions of Freddie Mac and Fannie Mae's respective charter acts. *Id*. at § 1322. The 1992 Act involves OFHEO in the new program approval process on a transition basis until twelve months after the effective date of OFHEO's regulations establishing the risk-based capital test. However, during this transition period, the Director's role is exclusively focused on safety and soundness—permitting the Director to determine whether a new program "would risk significant deterioration of the financial condition" of an Enterprise. *Id*. at § 1322(b)(2).

necessary and proper to ensure that" the non-safety-and-soundness portions of the 1992 Act and the purposes of the congressional charters of Freddie Mac and Fannie Mae are accomplished.[3]

In other words, under the scheme of the 1992 Act, the authorities of OFHEO are enumerated and specified; the grant of residual, general regulatory authority under the 1992 Act is vested not in the Director of OFHEO, but, rather, with the Secretary of HUD.

The legislative history of the 1992 Act is replete with statements demonstrating that Congress made express choices limiting the Director of OFHEO's role in non-safety-and-soundness matters generally, and in interpreting the charters of Freddie Mac and Fannie Mae in any non-safety-and-soundness matter. Congress considered and rejected providing OFHEO with exclusive authorities beyond safety and soundness. Prior versions of the 1992 legislation would have expressly provided OFHEO with authority to interpret the Enterprises' charter acts,[4] but the version of the bill ultimately enacted as the 1992 Act did not contain these provisions. When Congress did enact the 1992 Act, specific floor statements of the sponsors of the legislation demonstrate that Congress intended OFHEO's exclusive authorities to be limited solely to safety and soundness matters and not to extend to interpretation or enforcement of Freddie Mac and Fannie Mae's charters in matters not primarily relating to safety and soundness.[5]

B. Consistent with the Congressional Framework Established in the 1992 Act, the Regulation Must Expressly Recognize the Primary Role of the Secretary of HUD

[3] *Id*. at § 1321.

[4] *See* S. REP. NO. 282, 102d Cong., 2d Sess., §§ 102(a) and (b), pp. 101 and 102 (1992) (Senate Report). The Senate bill required the Director of OFHEO to ensure that the Enterprises carried out the public purposes of their Charter Acts, although the "primary" duty of the Director was still to ensure that the Enterprises were operating safely. Neither the Senate Banking Committee bill nor the House Banking Committee bill provided OFHEO with exclusive authority to interpret the Enterprises' charter acts. Senate Report and H.R. REP. NO. 206, 102d Cong., 1st Sess. §§ 103(a) and (b), p. 4 (1991).

[5] On the day the Senate adopted the conference report on H.R. 5334 (October 8, 1992), in explaining the differences between S. 2733, the original Senate bill, and title XIII of H.R. 5334, which is the 1992 Act, Senator Donald Riegle, Chairman of the Senate Banking Committee and sponsor of the legislation, addressed the precise question of OFHEO's independent charter interpretive and enforcement authority stating:

> This bill differs from the Senate bill in that the Director's authority to enforce provisions of the act and the charter acts not dealing primarily with safety and soundness is subject to the review and approval of the Secretary.

138 Cong. Rec. S17921 (daily ed. October 8, 1992) (statement of Chairman Riegle).

The proposal provides that the Director of OFHEO may initiate a cease-and-desist proceeding if the Director determines, or has reasonable cause to believe that, an Enterprise or an executive officer or director of an Enterprise has engaged, or is about to engage, in any conduct that violates any provision of the 1992 Act, an Enterprise's charter Act, or any regulation, rule, or order under such statutes, except the proposal would not allow the Director to enforce compliance with affordable housing goals and related reports, leaving this area to HUD's exclusive jurisdiction.[6] With the exception of the proposed regulatory text dealing with unsafe and unsound practices and conditions (discussed in detail below), the proposed regulatory text specifying grounds for initiating an enforcement proceeding and the proposed regulatory text permitting the Director to impose civil money penalties on those grounds are essentially identical to selected provisions of the 1992 Act, namely section 1371(a)(3).[7] Unfortunately, reliance solely on this single excerpt from the 1992 Act text ignores the provisions of sections 1313(c) and 1321 of the 1992 Act and, if adopted in this form, would be likely to create significant misunderstandings of the actual scope of the Director of OFHEO's enforcement authority for non-safety-and-soundness matters.

As presently drafted, the proposed rule provides only a partial picture of the statutory scheme described above, particularly the relationship between the respective regulatory and enforcement authorities of OFHEO and HUD. Although the proposed regulatory text is identical to selected enforcement provisions contained in the 1992 Act, the proposed text omits any reference to the Secretary of HUD's specific role in interpreting the 1992 Act and Freddie Mac and Fannie Mae's charter acts, or to the Secretary's more general, residual regulatory authority under the 1992 Act.[8] By omitting reference to the Secretary

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[6] Rules of Practice and Procedure, 65 *Fed. Reg*. 81775, 81779 (to be codified at 12 C.F.R. part 1780) (proposed December 27, 2000), Proposed § 1780.10(b)(1)(iv). In addition, the proposed rule's text would permit the Director to impose civil money penalties against an Enterprise, or any executive officer or director of an Enterprise, for each day that the Enterprise, officer or director engages in conduct that violates any provision of the 1992 Act, an Enterprise's charter act or any regulation, rule, or order issued under these laws. However, the proposal would not allow the Director to impose civil money penalties related to enforcing compliance with affordable housing goals and related reports. *Id*. at 81779-81780 (Proposed §§ 1780.20(c)(1)(i), (2)(i) and (3)).

[7] The statutory language in section 1371 of the 1992 Act allows the Director to initiate a cease-and-desist proceeding for "any conduct that violates any provision of" the 1992 Act. The proposal does not include the phrase "any provision of" and, therefore, would permit the Director to initiate a cease-and-desist proceeding for "[a]ny conduct that violates the 1992 Act." The language for proposed section 1780.20(b)(1)(iv) specifying certain grounds for initiating a cease-and-desist proceeding appears in section 1371(a)(3) of the 1992 Act. The language for proposed sections 1780.20(c)(1), (2)(i) and (3) related to imposing civil money penalties appears in section 1376(a)(1) of the 1992 Act.

[8] It is a well-settled principle of statutory construction that a statute must be construed as a whole so that each part is considered in light of the context, purpose and intent of the law's enactment. United States

of HUD's primary regulatory role, as established in the 1992 Act, the proposed regulatory text could be read to imply that OFHEO possesses separate or independent authority to interpret and enforce all provisions of the 1992 Act and the Enterprises' charters, without reference to the Secretary's primary role.

Such a reading would be contrary to the express language of the 1992 Act, as well as its overall framework.[9] Moreover, the proposed regulatory provisions, if adopted, would not result in greater transparency consistent with OFHEO's objectives, but rather would create confusion regarding whether the conduct and violations forming the basis for administrative enforcement proceedings falls within the Director's exclusive authority or requires primary regulatory action by the Secretary of HUD.

OFHEO has recently acknowledged that the 1992 Act does not provide OFHEO any exclusive authority to interpret and enforce the charter acts. The legislative proposal OFHEO submitted for consideration by the House Banking Subcommittee on Capital Markets, Securities and Government Sponsored Enterprises in August 2000 would have provided OFHEO with new exclusive authorities. Specifically, the proposal would have provided OFHEO authority, without the review and approval of the Secretary of HUD, to promulgate regulations and issue orders to fulfill the responsibilities of the Director under the Enterprises' charter acts, "and to ensure that the purposes of [the 1992 Act and the charter acts] are accomplished."[10] These legislative recommendations would be

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National Bank v. Indep. Ins. Agents, 508 U.S. 439, 455 (1993) (Statutory construction "must account for a statute's full text, language as well as punctuation, structure and subject matter."); Dunn v. CFTC, 519 U.S. 465, 478 (1997) ("[I]n expounding a statute, we [are] not …guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy."); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986) (In interpreting a statute, each provision must be construed "in light of the language of the Act as a whole, the legislative history, [and] the congressional purposes underlying the Act . . ."); and Smith v. United States, 508 U.S. 223 (1993) (All parts of a statute must be considered together without according undue importance to a single or isolated portion.).

[9] Congress has spoken to the precise question of the scope of OFHEO's interpretative and enforcement authorities, leaving no room for a contrary administrative construction. In other words, there is no statutory ambiguity at issue here and thus no opportunity for application of regulatory interpretation. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984) ("When a court reviews an agency's construction of [a] statute which it administers . . . . First, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *accord* Contract Courier Services v. Research and Special Programs Administration, 924 F.2d 112, 115 (7th Cir. 1991) ("[d]eference depends on ambiguity, step one of the formula in Chevron.").

[10] *See* Materials submitted for GSE Summit of September 12, 2000, App. 2 § 103(c) (submitted August 25, 2000) ("OFHEO Legislative Recommendations").

unnecessary if the 1992 Act already granted OFHEO these expanded and exclusive authorities.

C. Recommendations

To ensure transparency and understanding of the respective roles of OFHEO and HUD consistent with the congressional framework established in the 1992 Act, Freddie Mac recommends adding regulatory language to any final rule recognizing that the Secretary of HUD possesses primary regulatory authority with respect to any non-safety and soundness charter or regulatory matter, and that any enforcement action relating to such a non-safety and soundness matter would be initiated only at the Secretary's request. Any proposed standard providing a more diminished role for the Secretary of HUD, such as mere consultation on an OFHEO-initiated action, would not satisfy the requirements of the 1992 Act. These additions will assist OFHEO in achieving its objective to improve the transparency and clarity of its administrative enforcement process.

II. Any Final Rule Should Be Amended to Address Fundamental Concerns with the Proposed Enforcement Standard for "Unsafe and Unsound Practices."

A. The Proposed Rule's New Standard

Section 1371 of the 1992 Act specifies three separate grounds for OFHEO to initiate cease and desist enforcement proceedings against adequately capitalized Enterprises, one of which applies to conduct that violates a provision of the 1992 Act.[11] In the proposed regulation, OFHEO seeks to add a broad and entirely

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[11] OFHEO may initiate cease-and-desist enforcement proceedings against an adequately capitalized enterprise for:

> (1) any conduct that threatens to cause a significant depletion of the core capital of the enterprise;
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> (2) any conduct or violation that may result in the issuance of an order [to require, among other things, that an executive officer or a director to make restitution or otherwise rectify any unjust enrichment arising from such conduct or violation]; or
>
> (3) conduct that violates –
>
> > (A) any provision of [the 1992 Act, the charter acts], or any order, rule, or regulation under any such . . . Act . . . .; or
> > (B) any written agreement entered into by the enterprise with the Director.

1992 Act § 1371(a). Section 1371(b) of the 1992 Act specifies identical grounds for the Director to issue a notice of charges initiating cease-and-desist proceedings against a less-than-adequately-capitalized Enterprise, except that the conduct under the first item need only be likely to result in a material, not substantial, depletion of the core capital of the Enterprise.

distinct ground for initiating such proceedings that is not included in the text of section 1371(a), as follows:

> Any unsafe and unsound practice (in that it is contrary to prudent standards of operation which might cause loss or damage to the Enterprise, or is likely to cause such loss or damage in the future if continued unabated) or any unsafe or unsound condition.[12]

In explaining this addition to the statutory text, the preamble to the proposed rule includes a one-paragraph statement that (1) the 1992 Act "subjects the Enterprises to an overarching obligation to conduct their operations in a manner that maintains the safe and sound operation of the Enterprises, the boundaries of which are set by OFHEO in its supervisory discretion"; and (2) unsafe or unsound practices or conditions are deemed to be violations of the Act, even if they are not "specifically defined as such by a particular statutory or regulatory provision."[13] The preamble appears to conclude that such a standard is appropriate because bank regulatory agencies have a similar enforcement power with respect to the banks under their jurisdiction.

B. The Proposed Rule's Standard Regarding "Unsafe and Unsound Practices" Is More Expansive than the Standards for Bank Agencies

The proposed rule's standard for permitting OFHEO to determine that an act or omission constitutes an "unsafe and unsound practice" is more expansive than the standard applying to bank regulatory agencies' exercise of cease-and-desist authority for unsafe and unsound practices or conditions. The proposed rule's preamble explains that the concept of unsafe and unsound practices or conditions,

> encompasses any action or inaction that contravenes prudent standards of operation that *might result in loss or damage* to the Enterprise. . . . The risk of loss or damage need not be immediate, so long as the loss or damage is likely if the conduct continued unabated or action is not taken to address the condition.[14]

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[12] 65 *Fed. Reg*. 81779 (proposed § 1780.1(b)(iv)).

[13] *Id*. at 81776.

[14] 65 *Fed. Reg*. 81777 (italics added).

Such a standard goes considerably beyond prevailing standards for bank regulatory agencies, as established by the United States Court of Appeals for the District of Columbia and other U.S. Courts of Appeal – a result we do not believe Congress could have intended.

Congress did not import the entire bank regulatory framework or specific enforcement standards into the 1992 Act, so enforcement standards derived from banking law do not necessarily serve as the model for the standards applying to Freddie Mac and Fannie Mae under the 1992 Act. Yet, even were OFHEO following established banking standards for determining those acts or omissions that constitute "unsafe and unsound practices," the proposed standards would fail to follow the most commonly accepted judicial standards applicable to banking institutions. The banking standards suggest that unsafe and unsound conduct must threaten the overall financial integrity or soundness of a regulated financial institution.[15]

The D.C. Circuit Court has held, in the bank agency context, that unsafe and unsound practices are practices that the Comptroller of the Currency, "in his discretion, . . .*finds threatening* to a stable and effective national bank system."[16] The standard followed by both the Third and Fifth Circuit Courts of Appeal relies on the expressed intent of the Congress at the time of passing the law authorizing the federal banking agencies to initiate cease-and-desist proceedings for unsafe and unsound practices.[17]

These standards require an existing or immediate threat to the overall integrity of the regulated financial institution, and an abnormal risk of loss or damage, before an agency may initiate a cease-and-desist proceeding on grounds that an institution is engaging, or is about to engage in, an unsafe and unsound practice. By contrast, the standard proposed by OFHEO requires only that the act or omission *might* result in a loss or damage to an Enterprise, or is *likely* to cause

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[15] *See, e.g.,* Johnson v. OTS, 81 F.3d 195, 204 (D.C. Cir. 1996) (citations omitted) (the "weight of case law hold[s] that '[t]he unsafe or unsound practice provision . . . refers only to practices that threaten the financial integrity of the association"); s*ee also* Matter of Seidman, 37 F.3d 911, 926 (3d Cir. 1994) (holding that "[t]he imprudent act must pose an abnormal risk to the financial stability of the banking institution. This is the standard that the case law and legislative history indicates we should apply in judging whether an unsafe or unsound practice has occurred."); Hoffman v. FDIC, 912 F.2d 1172, 1174 (9th Cir. 1990).

[16] Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1169 (D.C. Cir. 1979)(italics added); *Accord* Lincoln Savings & Loan v. Federal Home Loan Bank Board, 856 F.2d 1558, 1563 (D.C. Cir. 1988).

[17] *See, e.g.,* MCorp Fin., Inc. v. Board of Governors of the Federal Reserve Sys., 900 F.2d 852, 863 (5th Cir. 1990) (italics added) (quoting 112 Cong. Rec. 24984, 26474 (1966)), *aff'd in part and rev'd in part on other grounds*, 502 U.S. 32 (1991); Matter of Seidman, 37 F.3d 911, 932 (3d Cir. 1994) (quoting the legislative history passage from MCorp).

such a loss or damage at some unspecified time in the future if allowed to continue.

Establishing an unsafe and unsound enforcement standard on this basis would be inconsistent with the clear intent of Congress in the 1992 Act. In enacting the 1992 Act, Congress spoke directly to the issue of the appropriate balance between regulatory action and interference with an Enterprise's business judgment. The Senate Banking Committee Report stated:

> The Committee recognizes the resulting need to establish a competent and potentially forceful regulator, and to avoid creating a regulatory overseer that questions at every turn the risk-taking judgments of the enterprises.
>
> The Committee does not mean for the Director [of OFHEO] or HUD Secretary to impose his or her business judgment on, or interfere with, the normal management prerogatives of an enterprise that has sound financial controls, and is adequately capitalized, and profitable.[18]

Adopting the proposed standard for initiating a cease-and-desist proceeding would suggest that OFHEO possesses unfettered authority to impose its business judgment on any business initiative or process improvement of Freddie Mac or Fannie Mae and to prohibit an Enterprise from going forward with its plans. For example, under the language proposed, before automated underwriting became an accepted way of evaluating mortgages, it could have been "deemed" contrary to prudent standards of operation and, because nothing is entirely free of risk, could have been halted through a cease and desist order. We do not believe this is the appropriate legal standard for application under the 1992 Act.

C. The Proposed Rule Is Inconsistent with the 1992 Act and Its Legislative History

Reading an "unsafe and unsound" standard into the 1992 Act's enforcement provisions also would be inconsistent with the enforcement structure established in the 1992 Act. Sections 1371(a) and (b) of the 1992 Act establish the standards upon which OFHEO may base a cease-and-desist proceeding against, respectively, an adequately capitalized and a less than adequately capitalized Enterprise. By reading an "unsafe or unsound practices or conditions" standard into one paragraph of section 1371(a), the proposed rule would render the other paragraphs of section 1371 – and the clear distinctions Congress drew between

[18] S. REP. NO. 282, 102d Cong., 2d Sess., 25 (1992).

adequately and less than adequately capitalized Enterprises – entirely superfluous, a result that undermines the legitimacy of the proposed rule's approach.[19]

The legislative history of the 1992 Act demonstrates that Congress did not intend to provide OFHEO with the same power that bank regulators have to initiate enforcement action for any conduct deemed to be an unsafe or unsound practice. The first version of the legislation ultimately enacted as the 1992 Act included the express power for OFHEO to initiate enforcement actions against the Enterprises for any conduct deemed an "unsafe or unsound practice," but this express power was omitted from the final version of the 1992 Act enacted by Congress.[20] The legislative history also demonstrates that Congress did not intend to permit the Director of OFHEO to infer new authorities beyond the specific authorities conferred under the 1992 Act.[21] Indeed, OFHEO appears to have recognized

[19] OFHEO may base a cease-and-desist order against an "adequately capitalized" Enterprise on "any conduct that threatens to cause a significant depletion of the core capital of the enterprise." 1992 Act § 1371(a)(2). OFHEO may base a cease-and-desist order against an "undercapitalized" Enterprise on "any conduct likely to result in a material depletion of the core capital of the enterprise," a deliberately lower threshold for bringing an enforcement action. *Id*. at § 1371(b)(1). Reading a general "unsafe or unsound practices or conditions" concept into one subsection of section 1371(a) would eviscerate Congress' carefully drawn distinctions between adequately capitalized and undercapitalized Enterprises in setting OFHEO's enforcement authority. If OFHEO may initiate an action against an adequately capitalized Enterprise based on conduct that "might result in loss or damage to the enterprise," which is OFHEO's proposed standard for an unsafe and unsound practice, the distinction between the "significant depletion of core capital" and "material depletion" standards for issuing cease-and-desist orders against adequately capitalized and undercapitalized Enterprises, respectively, is rendered meaningless. Yet, "'[t]he cardinal principle of statutory construction is to save and not to destroy.' Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30. It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v. Ramsdell, 107 U.S. 147, 152, rather than to emasculate an entire section, as the Government's interpretation requires." United States v. Menasche, 348 U.S. 528, 538-39 (1955); *accord* National Credit Union Admin v. First National Bank & Trust Co., 522 U.S. 479, 487 (1998) (agency interpretation of term "common bond" untenable because it rendered the term surplusage when applied to credit unions made up of multiple unrelated employer groups).

[20] *Compare* H.R. 2747, § 141, 102d Cong., 1st Sess. (1991) *with* 1992 Act §§ 1371 and 1372.

[21] In a footnote, the preamble to the proposed rule refers to safety and soundness language appearing in several provisions of the 1992 Act, but none of these specific provisions expressly authorizes the broad unsafe and unsound practices standard in the proposed enforcement provision, and Congress did not intend for the Director to imply such additional authority. For example, the proposed rule cites as a basis for the new standard section 1313(a), which provides generally that the "duty of the Director shall be to ensure that the enterprises are adequately capitalized and operating safely, in accordance with the [1992 Act]." *See* 65 *Fed. Reg*. at 81776, n. 14. However, Congress, in adopting the 1992 Act, specifically stated that this section was not a grant of additional authority beyond the terms of the 1992 Act. The 1992 Act as adopted was debated on the House floor on October 3, 1992. Chairman Gonzalez, the House floor manager, responded to a series of questions from Rep. Frank regarding the scope of the OFHEO Director's enforcement authority. Rep. Frank stated:

these facts: The legislative recommendation OFHEO submitted for consideration by the House Banking Subcommittee on Capital Markets, Securities and Government Sponsored Enterprises would have provided OFHEO with express statutory authority to bring an enforcement action based on Enterprise conduct that OFHEO deemed to be an "unsafe and unsound practice."[22] If the 1992 Act already provided OFHEO with authority to adopt an enforcement rule that includes "unsafe and unsound practices," there would be no reason to request the Congress to provide new authority.[23]

D. Recommendations

In sum, we have serious questions regarding OFHEO's basis for adopting an enforcement regulation that adds "unsafe and unsound practices or conditions" as a separate ground for initiating a cease-and-desist proceeding. Freddie Mac recommends that any final rule address the fundamental problems with OFHEO's proposed enforcement standard. OFHEO's standard would be more expansive than that applying for bank regulatory agencies and would permit regulatory intervention into the business determinations of Freddie Mac and Fannie Mae in a significantly intrusive manner. Further, such a standard would be inconsistent with the statutory enforcement structure and Congressional

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> I would like to ask the Chairman about the authority the Director of the GSE Oversight Office has to take actions that are outside the scope of the specific responsibilities set forth in titles II and III concerning capital enforcement. . . . It is my understanding that the bill contains all the Director's authorities and those that are not specified are not meant to be implied.

138 Cong. Rec. H11101 (daily ed. October 3, 1992). Chairman Gonzalez replied, in pertinent part, as follows:

> The gentleman from Massachusetts is correct. Let me say with respect to his question about section 103(a) [1992 Act § 1313(a)], and 103(b) [1992 Act § 1313(b)] that 103(a) in general terms, specifies or rather sets forth the specific authorities in section 103; but these are not to be construed, as you well point out, as additional grants of authority even indirectly.

Id. at H11102 (daily ed. October 3, 1992) (Statement of Chairman Gonzalez). *See also* floor statements of Senators Garn and D'Amato, 138 Cong. Rec. S8779 (daily ed. June 24, 1992) (Senator D'Amato: "If I understand the Senator correctly, section 102 requiring the Director to ensure that the enterprises are adequately capitalized and operating safely does not provide some broad grant of authority apart form the express authorities granted under the bill." Senator Garn: "That is correct.").

[22] *See* OFHEO Legislative Recommendations § 101(d)(3).

[23] In addition, the legislative proposal would have provided OFHEO with new exclusive authority to promulgate regulations on "other matters related to safety and soundness and other applicable laws" beyond those listed in the exclusive authorities of the Director (section 1313(b) of the Act), *id*. at § 103(a)(1), and would have granted "such incidental powers as may be necessary or appropriate" to carry out the duty and exclusive authorities of the Director. *Id*. at § 103(a)(2). These legislative recommendations would be unnecessary if the 1992 Act already granted OFHEO these expanded and exclusive authorities.

intent of the 1992 Act. For these reasons, we believe a thorough reconsideration of such a proposal is warranted.

III. Recommendation Regarding Assertion of Legal Privileges

The 1992 Act permits the Director to impose civil money penalties against an Enterprise or an Enterprise's executive officers or directors in an amount within a range of amounts established for each tier of penalties. In determining the amount of a civil money penalty, section 1376(c)(2) of the 1992 Act requires the Director of OFHEO to consider various factors set forth in the statute and allows the Director to consider "any other factors the Director may determine by regulation to be appropriate."

The proposed regulation would add "candor and cooperation after the fact" to the list of factors the Director would consider in determining the appropriateness and amount of a civil money penalty within the range established for each tier of penalties.[24]

Freddie Mac recommends clarifying that an Enterprise's decision to assert a legal privilege would not negatively affect the Director's evaluation of the Enterprise's candor and cooperation. Without this clarification, the proposed new regulatory factor would operate to prevent an Enterprise from asserting its full legal privileges due to the threat of having greater civil money penalties imposed for doing so. The proposed new regulatory factors would thereby have the anomalous, and surely unintended, effects of chilling an Enterprise's assertion of bona fide and well-established legal privileges and potentially undermining the effectiveness and fairness of administrative proceedings.

Conclusion

In sum, Freddie Mac commends OFHEO's efforts to bring greater transparency to OFHEO's administrative process. Our recommendations are intended to ensure that Freddie Mac is subject to strong safety-and-soundness oversight and that any final rule reflects the overall regulatory structure Congress established in the 1992 Act. Achieving both of these objectives in a final enforcement rule will promote the effectiveness and fairness of OFHEO's administrative proceedings.

Sincerely,

[24] 65 *Fed. Reg*. 81780 (proposed § 1780.1(c)(4)).

Maud Mater
General Counsel