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**Robert E. Bostrom**
Executive Vice President,
General Counsel & Corporate Secretary

Tel: (703) 903-2690
Fax: (703) 903-2623
robert_bostrom@freddiemac.com

8200 Jones Branch Drive
MS 200
McLean, VA 22102-3110

By E-Mail: *RegComments@OFHEO.gov*

July 31, 2006

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

Re: Proposed Record Retention Regulations/RIN 2550-AA34 (71 Fed. Reg. 31121)

Dear Mr. Pollard:

Freddie Mac is pleased to provide these comments on the proposed record retention regulations described in the Notice of Proposed Rulemaking issued by the Office of Federal Housing Enterprise Oversight (OFHEO) and published in the Federal Register on June 1, 2006.

We recognize the importance of records management, including record retention. Records management is useful both to facilitate oversight by our safety-and-soundness regulator, as well to promote compliance with other applicable legal requirements and effective performance of business activities throughout the company.

## I. COMMENTS ON THE GENERAL APPROACH UNDER THE PROPOSED REGULATION

Records management today is an ever-changing field driven by numerous factors, including advances in information technology and an increasingly complex legal and regulatory environment. The proposed regulations implicitly recognize the dynamic nature of records management by establishing qualitative standards for record retention programs expressed in relation to the desired objectives, consistent with emerging best practices in the field (*e.g.*, reasonably designed to assure that retained records are complete and accurate), with some specific requirements, rather than attempting to establish bright lines for all aspects of records retention programs. This approach also provides flexibility in how each company determines to meet its goals and responsibilities with regard to records management. Various nationally and internationally recognized authorities in the field have taken a similar approach.[1]

Section 1732.5(a) of the proposal provides the infrastructure for such an approach by requiring each Enterprise to report on its records retention program within 120 days of the effective date of a final regulation, and annual submissions thereafter, to be supplemented whenever an Enterprise's program is significantly revised. We would expect to include in our initial report to OFHEO a snapshot of our current records retention program, including any additional enhancements that are implemented by the date of that report, together with a description of planned enhancements (both short-term and long-term) to that program.

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[1] *E.g.*, The International Organization for Standardization ("ISO"); American National Standards Institute/Association of Records Managers and Administrators ("ANSI/ARMA"); and the Sedona Conference.

That first report will reflect that we have a records management program in place that encompasses records retention, but that we are continuing to develop and strengthen our program. While the use of electronic records began more than 20 years ago, the availability of sophisticated and comprehensive records management software solutions has only begun to gain adoption in business environments in the last three to five years. With OFHEO feedback on both our record retention program, and on planned enhancements, we can work to align our records retention program with OFHEO's expectations under the final regulations.

## II. TECHNICAL COMMENTS

### A. Definitions

#### 1. "Employee"

The proposal's definition of "employee" in § 1732.2(e) would include "any agent or independent contractor acting on behalf of an Enterprise." This is significant because a variety of provisions of the proposed regulations apply to "employees" (requirements for training under § 1732.6(b); record hold notifications under § 1732.7(b); reporting regarding potential investigations under § 1732.7(b)(3); and "employee" is part of the definition of "record" at § 1732.2(j)(3)).

We recommend that the definition of employee not include agents or independent contractors. To the extent that any provisions of the regulations are intended to apply to agents or independent contractors, we would recommend that those provisions include specific language making them apply to agents or independent contractors, tailored to what would be appropriate under the circumstances. We include specific recommendations, below, as to several of the provisions cited above.

#### 2. "Record"

We recommend that OFHEO modify its definition of "record" in § 1732.2(j)[2] by substituting the term "information" for "document," and inserting the term "maintained" between "employee" and "in connection with." With this modification, "record" would encompass both documents and data maintained by the company (the Sedona Conference definition of "information" includes both documents and data[3]), and would exclude records that are not typically maintained such as those that have exceeded their retention requirements and are not subject to a hold. Note that these suggested modifications are consistent with the definition of record used in ISO 15849-1, § 3.15.

To further clarify the definition, OFHEO could define "information" consistent with the Sedona Conference definition, which includes both documents and data.

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[2] This recommendation would apply to the use of "document" in the first portion of the definition of "record" at § 1732.2(j), as well in subsections (2), (3) and (4).

[3] The Sedona Conference, "*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in The Electronic Age*", App. F, p. 94 (2005).

### 3. "Active Record," "Inactive Record" and "Vital Record"

To fully incorporate the regulation's definition of "record," we recommend that the definitions in § 1732.2 of the terms "active record," "inactive record" and "vital record" replace the term "documents" with "records."

## B. Training

We support training and notifying Enterprise employees as to their record retention responsibilities, consistent with § 1732.6(b) of the proposal. However, as we noted above, the definition of "Employees" under § 1732.2(e) of the proposal includes actual Enterprise employees as well as any agent or independent contractor acting on behalf of the Enterprise. Ensuring that every contractor, contingent worker or independent contractor acting on behalf of the company is trained as to Freddie Mac's record retention responsibilities would be impracticable in that we engage numerous such individuals for a variety of purposes and time periods, for functions that may or may not relate in any way to the retention of records.

To take into account the broad range of purposes for which an Enterprise might engage an agent or independent contractor, which may or may not involve the Enterprise's records, we recommend that OFHEO modify the proposal to provide that the training provision applies only to actual employees of an Enterprise, and that the Enterprises also take reasonable steps to ensure that agents or independent contractors who are involved with creating or maintaining Enterprise records receive notice and/or training regarding record retention responsibilities in a manner appropriate to their engagement.

## C. Record Holds

Section 1732.7(a) of the proposed regulation defines the term "record hold" as "a requirement, an order, or a directive from an Enterprise or OFHEO that the Enterprise is to retain records relating to a particular issue in connection with an actual or a potential OFHEO examination, investigation, enforcement proceeding or litigation." Subsection (b) requires that the Enterprise's record retention program shall "provide that any employee who is aware of a potential investigation, enforcement proceeding, or litigation by OFHEO . . . shall notify immediately the legal department of the Enterprise and shall retain any records that that may be relevant . . ."

The use of the term "potential" requires or suggests that an Enterprise or employee is obligated and accountable to accurately guess when a matter could possibly give rise to an OFHEO examination, investigation, enforcement proceeding or litigation—an impossible standard with which to comply in practice. OFHEO is in the best position to identify potential matters that should be the subject of record holds, and could provide clarity to the Enterprises by providing explicit notice of identified potential OFHEO examinations, investigations, enforcement proceedings or litigation. Absent such notice, employees should be put under an obligation only where they have actual knowledge that a matter is subject to an enforcement proceeding or litigation by OFHEO.

To afford more reasonable and actionable thresholds under the regulations, we recommend that OFHEO modify subsection (a) of § 1732.7 by adding at the end the phrase "of which the Enterprise has received notice from OFHEO." For the same reasons, we recommend that subsection (b)(3) be modified by replacing "aware of" with "has received notice of" and also by inserting " , or otherwise has

actual knowledge that an issue is subject to such an enforcement proceeding or litigation," before "shall notify." More generally, we ask that OFHEO work with the Enterprises to establish a standardized means of notifying each Enterprise of upcoming matters, so that the Enterprises can appropriately notify individuals likely to have records relevant to those matters.

Finally, to the extent that OFHEO intends that agents or independent contractors would fall within the scope of notice requirement of this provision, we would recommend that the provision clarify that agents and independent contractors would receive notice under this provision only to the extent appropriate in light of the nature of their engagement (similarly, of course, employees would be notified to the extent appropriate in light of the nature of their responsibilities and activities).

**D. Ready Access**

Sections 1732.1, 1732.7(d) and 1732.6(a)(2)(iii) all relate to providing OFHEO with access or ready access to records. Consistent with the dynamic nature of records management, and information technology, all records are not equally accessible. For example, the methods of accessing hard copies of documents in off-site storage, electronic documents resident on a LAN, information in legacy databases, information in active databases, e-mail and voicemail are quite different, which can affect the nature of their accessibility. Similarly, the management controls and accessibility of records created and maintained years ago are not the same as that of records created and maintained today. A company cannot realistically expect to have the same level of controls and ready access to records that were created in the past as it can have with respect to records created in the future, especially when rigorous and sophisticated controls were not available then and that are in fact now, still emerging. And many of the records held by the Enterprises are subject to specific legal rights of the Enterprise or of individuals that cannot be disregarded.

We request that OFHEO clarify that such access is intended to mean access by reasonable means, consistent with the nature of the information sought and the availability of relevant and effective information technology. We also request that §§ 1732.6(a)(2)(iii) and 1732.7(d) be revised to include at the end of each such section the phrase " , subject to applicable legal rights."

**E. Supervisory Action**

Finally, we note that § 1732.10 provides that the failure of an Enterprise to comply with the regulations may subject the Enterprise or the board members, officers or employees to supervisory action by OFHEO under the 1992 Act, including cease-and-desist proceedings, temporary cease-and-desist proceedings and civil money penalties. In light of the lack of bright lines as to precisely what is required for full compliance with the regulation, the rapidly changing best practices in the records management field and the time required to develop and implement enhancements to records management programs, it would be appropriate for OFHEO to first consider using feedback, followed by a request for a remediation plan, prior to considering formal enforcement actions, in instances where OFHEO believes an Enterprise acting in good faith is not in full compliance with the regulations. In this regard, we recommend that § 1732.10(a) be revised to insert the phrase ", after appropriate supervisory notification to it," immediately after "Failure by an Enterprise to comply with the part,".[4]

[4] As revised, the beginning of § 1732.10(a) would read: "Failure of an Enterprise to comply with this part, after appropriate supervisory notification to it, may subject the Enterprise . . . ."

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Also, we recommend that "officers" be changed to "executive officers" and that the term "employees" be deleted, to conform this provision to the scope of the 1992 Act's enforcement sections to which the provision refers.

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We appreciate the opportunity to comment on these proposed regulations.

Sincerely,

Robert E. Bostrom

cc: Paul G. George, Executive Vice President—Human Resources