



OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

NEWS RELEASE

FOR IMMEDIATE RELEASE

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**OFHEO ISSUES
TWO FINAL RULES AND ONE NEW
POLICY GUIDANCE
(Attached)**

WASHINGTON, D.C. — Armando Falcon, Jr., Director of the Office of Federal Housing Enterprise Oversight (OFHEO), safety and soundness regulator of Fannie Mae and Freddie Mac (the Enterprises), today released one internal policy guidance and sent two final rules to be published in the *Federal Register*.

FINAL RULES:

Assessments

OFHEO finalized a rule which codifies the practice and procedure of the collection of funds by OFHEO from the Enterprises as provided by statute.

Rules of Practice and Procedure

OFHEO also finalized a rule which amends OFHEO's rules governing enforcement proceedings. The amendments summarize OFHEO's statutory authority to issue cease and desist orders and to impose various corrective and remedial sanctions including civil money penalties against the Enterprises and, when appropriate, respective executive officers and directors.

POLICY GUIDANCE:

To reduce regulatory burden, OFHEO has released an internal policy guidance which creates a process for routine review and, where appropriate, revision of its rules and regulations. The review will be completed by the General Counsel of OFHEO not less than every five years.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1701

RIN 2550-AA15

Assessments

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final regulation.

SUMMARY: The Office of Federal Housing Enterprise Oversight is issuing a final regulation setting forth its policy and procedures with respect to the annual assessment of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation as provided by statute.

EFFECTIVE DATE: The effective date of this regulation is [insert date 30 days from the date of publication].

FOR FURTHER INFORMATION CONTACT: David W. Roderer, Deputy General Counsel, telephone (202) 414-3804; or Isabella W. Sammons, Associate General Counsel, telephone (202) 414-3790, (not a toll-free number); Office of Federal Housing Enterprise Oversight, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, entitled the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Act), established OFHEO as an independent office within the Department of Housing and Urban Development to ensure that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) are capitalized adequately and operate safely and in compliance with applicable laws, rules and regulations.

Section 1316 of the Act (12 U.S.C. 4516) provides that OFHEO may establish and collect annual assessments from the Enterprises. OFHEO has been assessing the Enterprises pursuant to procedures developed under section 1316. OFHEO recently published a proposed regulation for comment to spell out and clarify its policies and procedures with respect to such assessments at 65 FR 81768 (December 27, 2000).

Comments

In response to the proposed regulation, OFHEO received comments from Freddie Mac and Fannie Mae, as follows.

Adequately Capitalized (§ 1701.2(b))

One Enterprise suggested a technical change to the proposed definition of the term "adequately capitalized." OFHEO agrees that such change will clarify the definition and accordingly modifies § 1701.2(b) to read:

Adequately capitalized means the adequately capitalized capital classification under section 1364 of the Act (12 U.S.C. 4614).

Enterprise (§ 1701.2(d))

One Enterprise suggested a revision to the definition of the term "Enterprise" to include also a definition of the term "Enterprises." OFHEO agrees that such a technical change would be appropriate and has modified § 1701.2(d) of the proposed regulation to read:

(d) Enterprise means the Federal National Mortgage

Association or the Federal Home Loan Mortgage Corporation; and the

term "Enterprises" means, collectively, the Federal National Mortgage

Association and the Federal Home Loan Mortgage Corporation.

Surplus Funds (§ 1701.2(e))

In connection with a comment on "Increase in Semiannual Payments," § 1701.4, discussed below, one Enterprise suggested that the regulation clarify that in calculating the following year's assessment, OFHEO will credit any surplus funds that were previously collected pursuant to § 1701.4 in addition to those surplus funds collected pursuant to § 1701.3. OFHEO agrees that this clarification is best accomplished by a technical modification of the definition of the term "surplus funds," as follows:

(e) Surplus funds means funds that are not obligated as of September 30 of each fiscal year that were collected from any Enterprise pursuant to § 1701.3 or § 1701.4.

Total Assets (§ 1701.2(f))

Section 1701.2(f) of the proposed regulation defines the term "total assets."

Both Enterprises suggested that the definition incorporate by reference the methodology applied under the OFHEO minimum capital regulation at 12 CFR part 1750, rather than describe such methodology in detail. OFHEO agrees with the comment to incorporate 12 CFR part 1750 by reference and accordingly modifies § 1701.2(f) to read:

(f) Total assets means the sum, as of the most recent June quarterly minimum capital report of the Enterprise, of the amounts of the following assets that are used to calculate the quarterly minimum capital requirement of the Enterprise under 12 CFR part 1750:

- (1) On-balance sheet assets;
- (2) Off-balance sheet mortgage-backed securities; and
- (3) Other off-balance sheet obligations.

One Enterprise suggested that OFHEO calculate the allocation of the annual assessment semiannually rather than annually. If this suggestion were accepted, the definition of the term "total assets" would require additional modification. As discussed more fully below under "Allocation and Proportional Share," § 1701.3(b), OFHEO has rejected the recommendation and determined not to calculate the annual assessment

semiannually; therefore, additional modification of the definition of the term "total assets" is not required.

Establishment of Assessment (§ 1701.3(a))

Section 1701.3(a) of the proposed regulation recites the statutory bases of the authority of the Director to collect the annual assessment from the Enterprises. One Enterprise recommended that OFHEO reference the narrow statutory language of 12 U.S.C. 4516(a) (section 4516(a)), rather than the amplifying statutory language of 12 U.S.C. 4516(f) (section 4516(f)), in determining the amount of the assessment that may be collected.

Section 4516(a) provides that the Director may collect an annual assessment "in an amount not exceeding the amount sufficient to provide for reasonable costs and expenses of [OFHEO], including the expenses of any examinations under [12 U.S.C. 4517]." In further delineating the authority of OFHEO, section 4516(f) provides more broadly that the amount of the assessment collected may be used for "carrying out the responsibilities of the Director relating to the enterprises" and "necessary administrative and nonadministrative expenses of [OFHEO] to carry out the purposes of [the Act]." The narrow language of section 4516(a) is not reasonably to be read to restrict the amount of funds that may be collected to an amount arguably less than contemplated under section 4516(f). It would be inconsistent with a reading of the Act, as a whole, to set forth in the regulation restrictions on the collection of funds that are greater than the restrictions on the use of such funds after they are collected. OFHEO, therefore, has

determined to reject and not to make the recommended modification. While referring only to examination expenses, the non-exclusive language of the law presumably contemplates the use of the authorized assessment to meet all costs and expenses of the agency.

Allocation and Proportional Share (§ 1701.3(b))

One Enterprise suggested that OFHEO calculate the proportional share of the annual assessment for each Enterprise semiannually rather than annually. The Enterprise suggested that it would be more equitable to the Enterprise to have a subsequent recalculation of its proportional share because the total assets of the Enterprises may vary during any year.

There is, however, no overriding reason to depart from the statutory scheme that clearly contemplates that the proportional share to be paid by each Enterprise is to be calculated on an annual basis. Therefore, OFHEO has determined to reject and not to make the suggested modification to calculate the proportional share semiannually.

Timing of Payment (§ 1701.3(c))

One Enterprise pointed out that proposed § 1701.3(c) mistakenly contains inapplicable references to other sections of the proposed regulation. Section 1701.3(c)(1) is accordingly revised to correct and clarify which references are applicable.

Surplus Funds (§ 1701.3(d))

One Enterprise suggested that proposed § 1701.3(d) be modified to clarify that surplus funds be credited fully to the first semiannual assessment payment. Section 1316(d) of the Act (12 U.S.C. 4516(d)) requires that surplus funds "be credited to the assessment to be collected from the enterprise for the following year," without specifying to which semiannual payment such surplus funds must be credited. OFHEO cannot determine the amount, if any, of surplus funds until about mid-October; therefore, OFHEO cannot credit the surplus funds to the first semiannual payment due on or before October 1, but rather credits the surplus funds to the second semiannual payment due on or before April 1. Consequently, OFHEO cannot adopt the suggestion that would require it to credit surplus funds to the first semiannual payment. Where OFHEO is operating under one or more continuing resolutions and does not receive its full appropriation until later in the fiscal year, OFHEO may be able to determine the amount of surplus funds before the first full semiannual payment is made. In such a case, OFHEO has and will continue to credit the surplus funds to the first full semiannual payment.

The Enterprise also suggested that, in any instance when OFHEO determines that there was a surplus for the prior year after the first semiannual payment has been made, OFHEO immediately return such surplus to the Enterprises, i.e., refund the overpayment of the first semiannual payment. OFHEO has determined not to adopt this suggestion because section 1316(d) of the Act (12 U.S.C. 4516(d)) requires that

surplus funds be credited to the next annual assessment, not refunded as an overpayment.

Increase in semiannual payments (§ 1701.4)

Section 1701.4 of the proposed regulation sets forth the statutory authority of OFHEO to increase the semiannual payment of an Enterprise that is not classified as adequately capitalized. Both Enterprises suggested that this section include the regulatory purposes for which such an increase may be used, as provided in 12 U.S.C. 4516(c). OFHEO agrees and modifies § 1701.4 to read:

§ 1701.4 Increase in semiannual payments.

The Director, in his or her discretion, may increase any semiannual payment to be collected under § 1701.3 from an Enterprise that is not classified as adequately capitalized as necessary to pay additional estimated costs of regulation of the Enterprise.

Notice and Review (§ 1701.5)

Section 1701.5 of the proposed regulation requires that the Director provide written notice of the annual assessment, the semiannual payments, and any partial payments to be collected from each Enterprise. It also provides that the Enterprises receive notice of any changes to the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

One Enterprise requested that actual notice of any semiannual payment be made at least five business days prior to the due date. A minimum five-day-notice, the

Enterprise asserted, is needed for the Enterprise to review the calculation, process the notice of payment, and make the payment in a timely manner. OFHEO is not required by statute to provide a minimum notice period for any semiannual payment and believes that it would be inappropriate to bind itself to a specific notice period. OFHEO, nevertheless, will continue to provide the Enterprises with ample notice of the actual semiannual payment.

The Enterprise also suggested that any change to current assessment procedures would require notice and comment rulemaking under the Administrative Procedure Act (APA). To the extent, however, that a particular change is not subject to the APA notice and comment procedures, the Enterprise further suggested that notice of such change should be given at least 30 days in advance of the implementation of the change in order for the Enterprises to review, understand, prepare for, and respond to the change.

OFHEO does not agree that every change to the assessment procedures would require notice and comment rulemaking under the APA. Furthermore, OFEHO has determined not to adopt the 30-days advance notice suggested by the Enterprise because to do so would unnecessarily restrict the statutory authority of OFHEO to assess and carry out its statutory duties and responsibilities with regard to the Enterprises and the mortgage market.

Delinquent Payment (§ 1701.6)

Section 1701.6(a) of the proposed regulation provides that the Director may assess interest and penalties on any delinquent payment of any assessment under this part in accordance with 31 U.S.C. 3717 (interest and penalties on claims) and 12 CFR part 1704 (debt collection).

One Enterprise suggested that § 1701.6(a) be modified to provide details as to how the interest on delinquent payments is to be calculated pursuant guidance published by the Department of the Treasury (Treasury guidance) as required by 31 U.S.C. 3717 and 12 CFR part 1704. OFHEO does not agree that providing such detail in § 1701.6(a) is necessary or appropriate. OFHEO is required to follow the Treasury guidance regardless whether the details of such guidance are spelled out in the regulation. By not spelling out the details, OFHEO avoids the need to revise the regulation if the Treasury guidance were to be revised.

In addition to the modifications discussed above, which OFHEO considers to be nonsubstantive, OFHEO makes minor editorial modifications to the proposed regulation. Accordingly, OFHEO has determined to issue the proposed regulation, as modified, as a final regulation.

Regulatory Impact

Executive Order 12866, Regulatory Planning and Review

The final regulation is not classified as a significant rule under Executive Order 12866 because it will not result in an annual effect on the economy of \$100 million or more or a major increase in costs or prices for consumers, individual industries, Federal,

State, or local government agencies, or geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. Accordingly, no regulatory impact assessment is required and this final regulation has not been submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). OFHEO has considered the impact of the final regulation under the Regulatory Flexibility Act. The General Counsel of OFHEO certifies that the regulation, as herein adopted, is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1701

Government Sponsored Enterprises, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, OFHEO adds 12 CFR part 1701 as follows:

PART 1701 — ASSESSMENTS

Sec.

1701.1 Purpose.

1701.2 Definitions.

1701.3 Annual assessment.

1701.4 Increase in semiannual payment.

1701.5 Notice and review.

1701.6 Delinquent payment.

1701.7 Enforcement of payment.

1701.8 Deposit in fund.

Authority: 12 U.S.C. 4513(b)(1) and 12 U.S.C. 4516.

§ 1701.1 Purpose.

This part sets forth the policy and procedures of OFHEO with respect to the establishment and collection of the annual assessments of the Enterprises under section 1316 of the Act.

§ 1701.2 Definitions.

For purposes of this part, the term –

(a) Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Title XIII of the Housing and Community Development Act of 1992,

Pub.L. No. 102-550, § 1301, Oct. 28, 1992, 106 Stat. 3672, 3941 - 4012 (1993)
(12 U.S.C. 4501 et seq.).

(b) Adequately capitalized means the adequately capitalized capital classification under section 1364 of the Act (12 U.S.C. 4614).

(c) Director means the Director of the Office of Federal Housing Enterprise Oversight or his or her designee.

(d) Enterprise means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and the term "Enterprises" means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

(e) Surplus funds means funds that are not obligated as of September 30 of each fiscal year that were collected from any Enterprise pursuant to § 1701.3 or § 1701.4.

(f) Total assets means the sum, as of the most recent June quarterly minimum capital report of the Enterprise, of the amounts of the following assets that are used to calculate the quarterly minimum capital requirement of the Enterprise under 12 CFR part 1750:

- (1) On-balance sheet assets;
- (2) Off-balance sheet mortgage-backed securities; and
- (3) Other off-balance sheet obligations.

(g) OFHEO means the Office of Federal Housing Enterprise Oversight.

§ 1701.3 Annual assessment.

(a) Establishment of assessment. The Director may, to the extent provided in appropriation acts, establish and collect from the Enterprises an annual assessment for each fiscal year, as allocated under paragraph (b) of this section. The amount of the annual assessment shall not exceed the estimated amount to be sufficient to provide for the necessary administrative and non-administrative expenses to carry out the responsibilities of the Director relating to the Enterprises and to carry out the purposes of the Act.

(b) Allocation and proportional share. The annual assessment established under paragraph (a) of this section shall be allocated between the Enterprises. Each Enterprise shall pay a proportional share of the annual assessment that bears the same ratio to the total annual assessment as the total assets of each Enterprise bears to the total assets of both Enterprises.

(c) Timing and amount of semiannual payment. (1) Each Enterprise shall pay on or before October 1 and April 1 of each fiscal year an amount of one-half of its proportional share of the annual assessment, except:

- (i) As provided in paragraph (c)(2) of this section;
- (ii) To the extent surplus funds are credited under paragraph (d) of this section;

and

- (iii) To the extent a semiannual payment is increased under § 1701.4.

(2) If OFHEO is operating under a continuing appropriation as of October 1 of any year, each Enterprise shall pay, on such date as determined by the Director, an amount calculated by applying the annual assessment proportion calculated under paragraph (b) of this section to the amount authorized for expenditure. When OFHEO receives a regular appropriation, the amount of the allocation share of the annual assessment collected from each Enterprise shall be reduced by any partial payments made by each Enterprise in connection with any continuing appropriations.

(d) Surplus funds. Surplus funds shall be credited to the annual assessment by reducing the amount collected by the amount of the surplus funds. Surplus funds shall be allocated in the same proportion in which they were collected, except as determined by the Director.

§ 1701.4 Increase in semiannual payment.

The Director, in his or her discretion, may increase any semiannual payment to be collected under § 1701.3 from an Enterprise that is not classified as adequately capitalized as necessary to pay additional estimated costs of regulation of the Enterprise.

§ 1701.5 Notice and review.

(a) Written notice. The Director shall provide each Enterprise with written notice of the annual assessment, the semiannual payments and any partial payments to be collected under this part. In addition, the Director shall provide each Enterprise with written notice of any changes in the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

(b) Request for review. At the written request of an Enterprise, the Director, in his or her discretion, may review the calculation of the proportional share of the annual assessment, the semiannual payments, and any partial payments to be collected under this part. The determination of the Director is final. Except as provided by the Director, review by the Director does not suspend the requirement that the Enterprise make the semiannual payment or partial payment on or before the date it is due.

§ 1701.6 Delinquent payment.

(a) Interest and penalties. The Director may assess interest and penalties on any delinquent semiannual payment or partial payment collected under this part in accordance with 31 U.S.C. 3717 (interest and penalty on claims) and 12 CFR part 1704 (debt collection). The Director may waive interest and penalties in his or her discretion.

(b) Transfer to general fund. Any interest and penalties collected under this section shall be transferred to the general fund of the Treasury of the United States.

§ 1701.7 Enforcement of payment.

Notwithstanding § 1701.6, the Director may enforce the payment of any assessment under this part pursuant to the authorities of sections 1371 (12 U.S.C. 4631) (cease-and-desist proceedings), 1372 (12 U.S.C. 4632) (temporary cease-and-desist orders), and 1376 (12 U.S.C. 4636) (civil money penalties) of the Act.

§ 1701.8 Deposit in fund.

OFHEO shall deposit any annual assessment collected under this part in the Federal Housing Enterprise Oversight Fund established in the Treasury of the United States.

Signature

Date

Armando Falcon, Jr.
Director,
Office of Federal Housing Enterprise Oversight.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1780

RIN 2550-AA16

Rules of Practice and Procedure

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final Rule.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a final rule amending OFHEO's rules governing administrative enforcement proceedings. The amendments summarize OFHEO's statutory authority to issue cease and desist orders and to impose various corrective and remedial sanctions, including, among other things, civil money penalties, against the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), as well as their respective executive officers and directors, in appropriate cases. By describing the grounds on which such actions might be instituted, and providing examples of the terms and conditions the agency might impose, OFHEO seeks to ensure greater transparency to and public awareness of the agency's supervisory regime and the safeguards affecting Freddie Mac and Fannie Mae.

EFFECTIVE DATE: [Insert date 30 days after the date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: David W. Roderer, Deputy General Counsel, (202) 414-6924, Jamey Basham, Counsel (202) 414-8906 (not toll-free numbers), 1700 G Street NW, Fourth Floor, Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is: (800) 877-8339 (TDD only).

SUPPLEMENTARY INFORMATION:

Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, entitled the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (the Act), established OFHEO. OFHEO is an independent office within the Department of Housing and Urban Development (HUD) with responsibility for ensuring that Fannie Mae and Freddie Mac (collectively, the Enterprises) are adequately capitalized and operate safely and in conformity to the requirements of applicable statutes, rules and regulations, including their respective charter acts. The Enterprises are Federal instrumentalities established under Federal law to effect various broad public policy purposes.¹ These include providing liquidity to the residential mortgage market and promoting the availability of mortgage credit benefiting low- and moderate-income families and areas that are underserved by lending institutions.

The enumerated statutory authorities of the Director explicitly include the authority to issue rules to carry out the duties of the Director,² as well as other broad supervisory powers similar to those of the Federal bank regulatory agencies. OFHEO is empowered, among other things, to conduct examinations of the Enterprises; to require

¹ See Federal Home Loan Mortgage Corporation Act, 12 U.S.C. 1451 et seq.; Federal National Mortgage Association Charter Act, 12 U.S.C. 1716 et seq.; Act at 12 U.S.C. 4561-67, 4562 note.

² 12 U.S.C. 4513(b)(1).

the Enterprises to provide reports;³ to establish capital standards for the Enterprises;⁴ and, in appropriate circumstances, to take prompt corrective action against an Enterprise that fails to remain adequately capitalized, including but not limited to possible imposition of a conservatorship.⁵

In addition, the Act grants OFHEO administrative enforcement authority similar to that granted by Congress to the Federal bank regulatory agencies, including the power to issue temporary and permanent cease and desist orders to an Enterprise or its executive officers or directors, and to impose sanctions, including civil money penalties when appropriate.⁶ Prior to issuing a cease and desist order, OFHEO is to conduct a hearing on the record and provide the subject of an order with notice and the opportunity to participate in such hearings.⁷ Prior to imposing civil money penalties, OFHEO is to provide notice and the opportunity for a hearing to the persons subject to the penalties.⁸ Part 1780 of OFHEO's rules and regulations currently sets out the procedural rules under which such notices are provided and hearings conducted.

On December 27, 2000, OFHEO issued a Notice of Proposed Rulemaking (NPR), in which OFHEO proposed to clarify the agency's enforcement rules at part 1780 by describing briefly various circumstances in which OFHEO may initiate enforcement actions, the procedures involved, as well as the types of remedies and sanctions OFHEO may impose through a cease and desist order or civil money penalty. 65 FR 81,775. OFHEO received two comments on the NPR, one from each of the Enterprises. Copies

³ 12 U.S.C. 4514, 4517, 1456(c), 1723a(k).

⁴ 12 U.S.C. 4611-4614.

⁵ 12 U.S.C. 4615-4623.

⁶ 12 U.S.C. 4631-4641.

⁷ 12 U.S.C. 4631(c), 4633.

⁸ 12 U.S.C. 4636(c), 4633.

of the comments are posted on the OFHEO web site at <http://www.ofheo.gov>. After careful consideration of the comments received, as discussed below, OFHEO has decided to adopt the proposed rule as a final rule, without substantive change.

Comments on the Proposed Rule

OFHEO received comments from Fannie Mae and Freddie Mac. In general, Fannie Mae largely concurred with the goals and language of the proposed rule, and Freddie Mac endorsed OFHEO's efforts to bring greater transparency to OFHEO's supervisory oversight and standards. However, both Enterprises lodged two broad objections to the proposed rule, as discussed below.

First, both Enterprises assert that § 1780.1(b) of the proposed rule, summarizing OFHEO's statutory authority to institute cease and desist proceedings under 12 U.S.C. 4631, should be expanded to address the extent to which the Department of Housing and Urban Development (HUD) holds authority over the Enterprises under Part 2 of the 1992 Act (12 U.S.C. 4541-4589).

OFHEO has determined to issue § 1780.1(b) without change. The language of § 1780.1(b) accurately recites OFHEO's authority under 12 U.S.C. 4631. In connection with their comments seeking changes to the rule to address this ancillary matter of intragovernmental coordination and cooperation, the Enterprises both stressed a different section of the 1992 Act, 12 U.S.C. 4513. Section 4513(b) enumerates certain authorities under the 1992 Act that are held exclusively by the Director of OFHEO. Section 4513(c) also provides that determinations, actions, and functions of the Director not referred to in section 4513(b) are subject to the review and approval of the Secretary of HUD. Section 4513(c) is outside the scope of part 1780. Whenever the Director's determination to

issue a notice of charges under section 4631 constitutes, within the meaning of section 4513(c), an “action . . . of the Director not referred to in subsection [4513(b)],” the Director will obtain the “review and approval of the Secretary” of HUD, as contemplated by section 4513(c). Part 1780 more narrowly addresses, however, the procedures by which the Director’s determinations set forth in a notice of charges are to be adjudicated. The scope of part 1780 does not extend to OFHEO’s procedures before a notice of charges has been issued by the Director.

Second, both Enterprises object to a portion of § 1780.1(b)(1)(iv) of the proposed rule that describes OFHEO’s authority under 12 U.S.C. 4631 to institute a cease and desist action on the basis of unsafe or unsound conduct by an Enterprise or an executive officer or director thereof or based on the unsound condition of an Enterprise. In their comments, the Enterprises objected to this provision on a twofold basis.

Both Enterprises asserted that section 4631 does not contain language authorizing OFHEO to institute a cease and desist proceeding on the basis of unsafe or unsound conduct. To the contrary, as set forth in the preamble of the proposed rule, the 1992 Act necessarily and explicitly authorizes OFHEO to pursue cease and desist proceedings on the basis of unsafe and unsound practices or conditions. In particular, section 4631(a)(3)(A) authorizes OFHEO to issue a notice of charges for violations of the 1992 Act. The 1992 Act subjects the Enterprises to an overarching obligation to conduct their operations in a manner that maintains the safe and sound condition of the Enterprise, the parameters of which may be determined by OFHEO, as the safety and soundness regulator, in its supervisory discretion.

As both Enterprises otherwise recognized in their comments, Congress constituted OFHEO with broad authorities, described above, sufficient to empower the agency to serve as a strong financial institution regulatory agency with the responsibility of ensuring the Enterprises are adequately capitalized and operate safely (i.e., in a safe and sound manner and in compliance with applicable laws, rules, and regulations). The commenters assert, however, that OFHEO's reading of the 1992 Act, and particularly of section 4631(a)(3)(A), does not comport with congressional intent, and that, in effect, Congress intentionally refrained from empowering OFHEO to compel an Enterprise to cease demonstrably unsafe and unsound conduct. The language of the 1992 Act makes clear that Congress constituted OFHEO as more than a mere advisory oversight body for the Enterprises on safety and soundness issues and concerns.

In addition, both Enterprises objected to the manner in which § 1780.1(b)(1)(iv) of the proposed rule describes an unsafe and unsound practice as conduct that is contrary to prudent standards of operation that might cause loss or damage to the Enterprise, or is likely to cause such loss or damage in the future if continued unabated. In their comments, both Enterprises cited to judicial precedents construing a provision of the Federal Deposit Insurance Act, 12 U.S.C. 1818(b), under which the Federal bank regulatory agencies may institute cease and desist proceedings to halt, among other things, "unsafe or unsound practices." As noted by the Enterprises, some courts construing section 1818(b) suggest that the statute requires the practice in question to threaten the financial integrity of the institution.

Case law construing section 1818(b), however, is informative but not determinative of the scope of OFHEO's authority. Congress did not wholly import the

bank regulatory framework or specific enforcement statutes into the 1992 Act, so enforcement standards applicable to thousands of insured banks under banking law do not necessarily serve as the sole foundation for the standards applying to the two Enterprises under the 1992 Act. Nevertheless, to the extent such case law arguably has a bearing on these issues, the language of § 1780.1(b)(1)(iv), as proposed, fairly describes judicial views of section 1818(b), under which an unsafe or unsound practice exists if the practice is deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder.⁹ Moreover, the cases that suggest an unsafe or unsound practice must threaten the very financial integrity of an institution do not look at the unencumbered language of section 1818(b) or its legislative history. No reference to such a heightened standard is included in either section 1818(b) or its legislative history.

Taken in the full context of the 1992 Act and the responsibilities of OFHEO thereunder – both similar to and distinct from those of the Federal bank regulatory agencies – OFHEO’s rule articulates a standard that comports with the intent of Congress and a robust safety and soundness regime. The 1992 Act, as interpreted in § 1780.1(b)(1)(iv) of the proposed rule, imposes upon the Enterprises an affirmative obligation to conduct their operations safely, that is, in a manner that reasonably maintains the safe and sound condition of the Enterprise.¹⁰ The parameters of safety and soundness are to be determined by OFHEO, as the safety and soundness regulator, in its

⁹ See, e.g., Greene County Bank v. FDIC, 92 F.3d 633 (8th Cir. 1996), cert. denied, 519 U.S. 1109 (1997); Doolittle v. NCUA, 992 F.2d 1531 (11th Cir. 1993), cert. denied, 516 U.S. 987 (1995); Hoffman v. FDIC, 912 F.2d 1172 (9th Cir. 1990).

¹⁰ As is discussed in the “Background” material above, OFHEO exercises exclusive authority for matters relating to the Enterprises’ safety and soundness, and is vested with broad powers to that end. See, e.g., 12 U.S.C. 4513(a), 4513(b)(5), 4517(a), and 4521(a)(2)-(3).

supervisory discretion. If an Enterprise fails to operate within such boundaries, it violates the 1992 Act for purposes of 12 U.S.C. 4631. Viewed in this light, judicial precedents that address the setting of standards by a financial safety and soundness regulator, based on safety and soundness concerns, are instructive. The courts in these cases have long acknowledged that safety and soundness regulators may take action against practices that the agency, in its expert judgment, determines are likely to be detrimental to the institution or the industry.¹¹ This case law does not impose standards limiting the regulator's authority to those practices having dire consequences for the institution; the 1992 Act at several points contemplates action long before the Enterprises reach such critical stages of corporate survival.

It is also important to note that, in adopting the final version of 12 U.S.C. § 4631, Congress abandoned language in Senate Bill S. 2733, the Senate version of the legislation, which would have prohibited OFHEO from taking any cease and desist action against an adequately capitalized Enterprise unless the conduct or violation in question threatened to cause a significant depletion of the Enterprise's capital. S. Rep. No. 102-282, 102nd Cong., 2nd Sess. 25-26, 120 (1992). That Congress considered and rejected a limiting standard for cease and desist proceedings counsels against engrafting one by regulation as the Enterprises suggest.

Each Enterprise expressed concerns about the practical implications of § 1780.1(b)(1)(iv) of the proposed rule and apprehension that OFHEO might use the rule to micro-manage the Enterprises. The Enterprises posit that, in the absence of an explicit requirement that the conduct in question threaten the very integrity of the Enterprise, the

¹¹ See, e.g., Independent Bankers Ass'n of America v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), cert.

standard in § 1780.1(b)(1)(iv) would permit OFHEO to take action against any business activity, given that every business activity involves some element of risk. To the contrary, the rule does not assert unfettered authority for OFHEO to impose its business judgment on the Enterprises, as the comments suggest. As § 1780.1(b)(1)(iv) states, the challenged conduct must, in addition to causing loss or being likely to cause loss in the future, also be contrary to prudent standards of operation. Further, and as a practical matter, cease and desist proceedings are not resorted to by the agency routinely, and are comparatively protracted in nature and subject to immediate judicial review. Moreover, the standard reiterated in § 1780.1(b)(1)(iv) is that which OFHEO has employed in connection with its safety and soundness supervision of the Enterprise since OFHEO's inception. In light of these considerations and the due process attendant to OFHEO's enforcement proceedings, concerns about micro-management are misplaced. Under the enforcement process, OFHEO may not superimpose its business judgment upon the Enterprises; the safety and soundness of the Enterprise must be addressed by the agency on a case-specific basis.

As another matter, Freddie Mac's comments on the rule addressed proposed § 1780.1(c)(4)(xii). This subsection includes "candor and cooperation after the fact" in the list of factors that may be considered by OFHEO in determining the appropriateness and amount of civil money penalties. More particularly, Freddie Mac recommended clarifying that an Enterprise's decision to assert a legal privilege, such as the attorney-client privilege, would not adversely affect OFHEO's evaluation of the Enterprise's candor and cooperation. Freddie Mac asserted that without such a clarification, the

denied, 449 U.S. 823 (1980).

proposed factor might dissuade an Enterprise from asserting its full legal privileges due to a perceived threat that larger civil money penalties would be imposed for doing so.

OFHEO has adopted § 1780.1(c)(4)(xii) without change. Section 4636(c)(2) of Title 12 enumerates various factors that the Director of OFHEO is to consider and allows the Director to consider “any other factors that the Director may determine by regulation to be appropriate.” OFHEO has determined to take the candor and cooperation of an Enterprise, executive officer, or director into account as a mitigating factor in assessing a civil money penalty. The language of § 1780.1(c)(4)(xii) includes no implication that an assertion of a valid legal privilege will be viewed as an aggravating circumstance resulting in to higher civil money penalty amounts. Similarly, it is the practice of the Federal bank regulatory agencies to consider the cooperation of regulated entities as a mitigating factor in determining civil money penalties.¹² The extent to which an Enterprise, executive officer, or director receives the benefit of this mitigating factor in the face of an assertion of a valid legal privilege is a case-specific issue. The degree of mitigation may depend in part upon whether the assertion is consistent with candor and cooperativeness meriting reduction in the amount of the penalty that is otherwise appropriate in light of the seriousness of the offense.

Final Rule

OFHEO is adopting the proposed rule as a final rule without substantive change. The text of the proposed rule and a description thereof are contained in OFHEO’s NPR at 65 FR 81,775 (December 27, 2000). OFHEO is making one technical change. The authority citation in the NPR inadvertently omitted the citation to the Federal Civil

¹² See, e.g., FDIC Manual of Examination Policies, Section 10.2 (CMP Matrix).

Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. The final rule adds a citation for this act. OFHEO is also making one editorial change. Proposed § 1780.1(b)(1)(iv) included the wholly redundant phrase “in the future” which has been deleted from the final rule.

Regulatory Impact

Executive Order 12866, Regulatory Planning and Review

The final rule is not classified as a significant rule under Executive Order 12866 because it will not result in an annual effect on the economy of \$100 million or more or a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based Enterprises to compete with foreign-based enterprises in domestic or foreign markets. Accordingly, no regulatory impact assessment is required and this proposed regulation has not been submitted to the Office of Management and Budget for review.

Unfunded Mandates Reform Act of 1995

This final rule does not include a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year. As a result, the proposed rule does not warrant the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). OFHEO has considered the impact of the proposed regulation under the Regulatory Flexibility Act. The General Counsel of OFHEO certifies that the final regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation only affects the Enterprises, their executive officers, and their directors.

Paperwork Reduction Act of 1995

This final rule contains no information collection requirements that require the approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

List of Subjects in 12 CFR Part 1780

Administrative practice and procedure, Penalties.

Accordingly, for the reasons set out in the preamble, the Office of Federal Housing Enterprise Oversight amends 12 CFR part 1780 as follows:

PART 1780 – RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 1780 is revised to read as follows:

Authority: 12 U.S.C. 4501, 4513, 4517, 4521, 4631-4641, 28 U.S.C.

2461 note.

Subpart A – General Rules

2. Revise § 1780.1 to read as follows:

§ 1780.1 Scope.

(a) Types of proceedings governed by these rules. This part prescribes rules of practice and procedure applicable to the following adjudicatory proceedings :

(1) Cease-and-desist proceedings under sections 1371 and 1373, title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, entitled The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act) (12 U.S.C. 4631 and 4633);

(2) Civil money penalty assessment proceedings under sections 1373 and 1376 of the 1992 Act (12 U.S.C. 4633 and 4636);

(3) Civil money penalty assessment proceedings under section 102 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012a; and

(4) Other adjudications required by statute to be determined on the record after opportunity for hearing, except to the extent otherwise provided for in the regulations specifically governing such an adjudication.

(b) Cease and desist orders. (1) Grounds for instituting proceedings. Sections 1371(a) and (b) of the 1992 Act specify when the Director of OFHEO may issue a notice of charges instituting cease and desist proceedings, to be conducted according to the procedural rules in this part. The Director may issue a

notice of charges as described in § 1780.20 if the Director determines, or the Director has reasonable cause to believe that, an Enterprise or an executive officer or director thereof has engaged in, or its is about to engage in, any of the following conduct or violations:

(i) for an adequately capitalized Enterprise, any conduct which threatens to cause a significant depletion of the Enterprise's core capital; or for an Enterprise which is not in the adequately capitalized category, any conduct that is likely to result in a material depletion of the Enterprise's core capital;

(ii) any conduct that may result in the issuance of a cease and desist order that requires an executive officer or director of an Enterprise to make restitution, provide reimbursement, indemnification or guarantee against loss to the Enterprise, where such person was either unjustly enriched or engaged in knowing misconduct likely to cause substantial loss to the Enterprise;

(iii) any conduct that violates a written agreement entered into by an Enterprise with the Director; or

(iv) any conduct that violates the 1992 Act, the Federal National Mortgage Association Charter Act (12 U.S.C. 1716 et seq.), the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451 et seq.), or any regulation, rule, or order under such Acts, or 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 if continued unabated), or any unsafe and unsound condition, except that the Director may not enforce compliance with housing goals established under subpart B of part 2 of subtitle A of the 1992 Act (12 U.S.C. 4561 through 4567), with section 1336

or 1337 of the 1992 Act (12 U.S.C. 4566 or 4567), or with subsection (m) or (n) of section 309 of the Federal National Mortgage Association Charter Act (12 U.S.C. 4566 or 4567), or subsection (e) or (f) of section 307 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1456(e) or (f)).

(2) Remedial provisions of cease and desist orders. As provided by sections 1371(c) and (d) of the 1992 Act, a cease and desist order issued as set out in § 1780.55 may require the Enterprise, or an executive officer or director thereof, to refrain from engaging in conduct or violations specified in paragraphs (b)(1)(i) through (iv) of this section and/or require correction of an unsafe or unsound condition specified in paragraph (b)(1)(iv) of this section, as found by the Director, and may also require the Enterprise, an executive officer, or director thereof to take such action as the Director determines to be appropriate to correct or remedy the conditions resulting from such conduct or violation. This may include, but is not limited to, provisions to:

- (i) require the Enterprise to seek restitution, or to obtain reimbursement, indemnification, or guarantee against loss;
- (ii) require the Enterprise to obtain new capital;
- (iii) restrict asset or liability growth of the Enterprise;
- (iv) require the Enterprise to dispose of any asset involved;
- (v) require the Enterprise to improve design or implementation of internal policies, compliance efforts, internal controls, risk measurement and limits, and management reporting systems;

(vi) require the Enterprise to employ qualified officers or employees (who may be subject to approval by the Director at the direction of the Director);

(vii) require the Enterprise, an executive officer or director thereof to adhere to limits on activities or functions; or

(viii) require the Enterprise to take such other action as the Director determines appropriate.

(3) Restitution and indemnification by executive officers and directors.

As part of the affirmative relief described in paragraph (b)(2) of this section, section 1371(d)(1) of the 1992 Act provides that the Director may require an executive officer or director of an Enterprise to make restitution or reimbursement to the Enterprise, or to provide indemnification or guarantee against loss, to the extent such person was:

(i) unjustly enriched in connection with the conduct or violation in question; or

(ii) engaged in such conduct or violation knowingly, and such conduct or violation caused or would be likely to cause a substantial loss to the Enterprise.

(4) Temporary cease and desist orders. (i) Under sections 1372(a) and (b) of the 1992 Act, if the Director determines that any conduct or violation or threatened conduct or violation described in the notice of charges in cease and desist proceedings described under § 1780.20 is likely to cause insolvency, to cause significant depletion of core capital, or to cause other irreparable harm to an Enterprise before proceedings described in this part will be completed, the Director may issue a temporary cease and desist order. Such order may direct the

Enterprise, executive officer or director thereof to refrain from the conduct or violation, and to take whatever affirmative action the Director determines to be appropriate to prevent or remedy such insolvency, depletion, or harm pending completion of such cease and desist proceedings.

(ii) In addition, section 1372(c) of the 1992 Act addresses cases in which the Director determines that the books and records of an Enterprise are so incomplete or inaccurate that the Director is unable through normal supervisory processes to determine either the financial condition of the Enterprise or the details or purpose of transactions that may have a material effect on the financial condition of the Enterprise. In connection with issuance of the notice of charges in cease and desist proceedings specified by § 1780.20, the Director may issue a temporary order directing the Enterprise to cease the activity or practice that gave rise, whether in whole or in part, to the incomplete or inaccurate state of the records, and may require the Enterprise to take affirmative action to make the records complete and accurate.

(c) Civil money penalties. (1) First tier CMPs. Section 1736 of the 1992 Act authorizes the Director to assess civil money penalties against an Enterprise, in proceedings to be conducted according to the procedural rules in this part. The Director may issue a notice of charges to an Enterprise, as described in § 1780.20, to impose money penalties of up to \$5,000 (adjusted for inflation as described in § 1780.80) for each day that the Enterprise engages in conduct that violates:

(i) the 1992 Act, the Federal National Mortgage Association Charter Act, the Federal Home Loan Mortgage Corporation Act, or any regulation, rule, or order under such Acts, except with regard to housing goals established under subpart B of part 2 of

subtitle A of the 1992 Act, with section 1336 or 1337 of the 1992 Act, or with subsection (m) or (n) of section 309 of the Federal National Mortgage Association Charter Act, or subsection (e) or (f) of section 307 of the Federal Home Loan Mortgage Corporation Act;

(ii) any written agreement entered into by the Enterprise with the Director; or

(iii) any permanent or temporary cease and desist order entered under sections 1371 or 1372 of the 1992 Act, or sections 1365 (12 U.S.C. 4615, setting out supervisory actions applicable to undercapitalized Enterprises) or 1366 (12 U.S.C. 4616, setting out supervisory actions applicable to significantly undercapitalized institutions) of the 1992 Act.

(2) Second tier CMPs. The Director may issue a notice of charges to an Enterprise to impose money penalties of up to \$25,000 (adjusted for inflation as described in § 1780.80) for each day that the Enterprise engages in the following violation or conduct, or to an executive officer or director of an Enterprise to impose money penalties of up to \$10,000 (adjusted for inflation as described in § 1780.80) for each day such person or persons engages in the following violation or conduct, if the Director finds that the violation or conduct was either part of a pattern of misconduct or involved recklessness and causes or is likely to cause a material loss to the Enterprise:

(i) any violation described in paragraphs (c)(1)(i) through (iii) of this section; or

(ii) any conduct that causes or is likely to cause a loss to the Enterprise.

(3) Third tier CMPs. The Director may issue a notice of charges to an Enterprise to impose money penalties of up to \$1,000,000 (adjusted for inflation as described in § 1780.80) for each day that the Enterprise engages in a violation or conduct described in paragraphs (c)(2)(i) and (ii) of this section, or to an executive officer or director of an

Enterprise to impose money penalties of up to \$100,000 (adjusted for inflation as described in § 1780.80) for each day such person or persons engages in such violation or conduct described in subparagraphs (c)(2)(i) and (ii) of this section, if the Director finds that the violation or conduct was knowing and caused or is likely to cause a substantial loss to the Enterprise.

(4) Amount of CMPs. In determining the amount of a civil money penalty within the range of penalties described in paragraphs (c)(1) through (3) of this section, the Director may fashion sanctions in any such amount as deemed to be appropriate taking into consideration such factors as:

- (i) the gravity of the violation or conduct;
- (ii) any loss or risk of loss to the Enterprise;
- (iii) any benefits received;
- (iv) any attempts at concealment;
- (v) any history of prior violations or conduct;
- (vi) any related or unrelated previous supervisory actions;
- (vii) any injury to the public;
- (viii) deterrence of future violations or conduct;
- (ix) the effect of the penalty on the safety and soundness of the Enterprise;
- (x) any circumstances of hardship upon an executive officer or director;
- (xi) promptness and effectiveness of any efforts to ameliorate the consequences of the violations or conduct; and
- (xii) candor and cooperation after the fact.

(d) Coordination with other supervisory actions. In addition to cease and desist and/or civil money penalty proceedings under this part, the 1992 Act grants the Director other authority to take supervisory action, including requiring mandatory and discretionary supervisory actions against an Enterprise that fails to remain adequately capitalized; appointment of a conservator for an Enterprise; entering into a written agreement the violation of which is actionable through proceedings under this part, or any other formal or informal agreement with an Enterprise as may be deemed by the Director to be appropriate. Under the 1992 Act, the selection of the form of supervisory action is within the Director's discretion, and the selection of one form of action or a combination of actions does not foreclose the Director from pursuing any other supervisory action.

(e) Proceedings against affiliates. Under subtitle C of the 1992 Act, the Director may institute proceedings as described under this part against an affiliate of an Enterprise as well as an executive officer or director of such affiliate. An entity is affiliated with an Enterprise if the entity controls the Enterprise, is controlled by the Enterprise, or is under common control with the Enterprise. For purposes of this part, control means the ability to exercise a controlling influence over the management and policies of the entity or Enterprise, whether it be by ownership of or the power to vote a concentration of any class of voting securities, the ability to elect or appoint members of the board of directors or officers of the entity, or otherwise.

(f) Public nature of proceedings. As described in § 1780.6 of this part, all hearings shall be open to the public unless the Director in his discretion determines to the contrary based on public interest. The Director shall also make final orders available to the public, as well as modifications to or terminations thereof, except that the Director may

determine in writing to delay public disclosure of such final orders for a reasonable time if immediate disclosure would seriously threaten the financial health or security of the Enterprise.

Date: _____

Armando Falcon, Jr.
Director,
Office of Federal Housing Enterprise Oversight.

OFHEO

Director's Advisory

Policy Guidance

Issuance Date: April 2, 2001

Doc. #: PG-00-003

Subject: Regulatory Review

To: Chief Executive Officers of Fannie Mae and Freddie Mac
All OFHEO Personnel

Background

The Federal Housing Enterprises Safety and Soundness Act of 1992, Title XIII of Pub. L. No. 102-550 (the Act), empowers the Director of OFHEO to undertake rulemaking and such other actions as the Director determines to be appropriate to oversee the activities and operations of Freddie Mac and Fannie Mae (the Enterprises). In the course of exercising such authority, the Director promulgates regulations and adopts guidances and supervisory policies.

In this Policy Guidance, OFHEO creates a process for routine review and, where appropriate, revision of its rules and regulations. Such a process aims to provide for planned reviews of the entire regulatory infrastructure and to consider certain criteria that assist in determining whether an inefficiency or unwarranted burden exists. Once a review is completed, the Director will determine what steps may be necessary including the amendment or repeal of existing regulations or guidances. The General Counsel, as OFHEO's Regulatory Policy Officer, is charged with undertaking the regulatory review and reporting to the Director findings and recommendations.

The review process set forth in this Policy Guidance will be conducted by the Office of General Counsel, under the direction of the General Counsel and subject to any additional guidance provided by the Director. The review is to include internal consultation with other OFHEO offices and staff. The review and report of findings and recommendations to the Director are to occur on a timely basis. Results of the internal review will be privileged and confidential.

In his or her discretion, the Director may call for public comment at the time of a review and may limit such comments to a list of specific topics.

Pursuant to this Policy Guidance, at least every five years, or sooner if determined by the Director, OFHEO is to conduct a review of its rules and regulations as they relate to compliance with the laws administered by the agency. The review will

consider whether existing rules have become inefficient or create unwarranted burden and identify possible revisions where such conditions are found.

This Guidance sets forth criteria for review of OFHEO regulations to assist in the process of assessing whether rules or regulations present obsolete, duplicative or otherwise inefficient or burdensome requirements. Additional factors are identified to assist in determining whether an unwarranted burden exists under the enunciated criteria. The criteria and factors set forth herein are intended to provide assistance to the agency in its review, but would not constitute limiting factors to such review. The Director and the General Counsel have discretion to set other criteria and add other factors to aid in conduct of the review.

The Guidance does not provide, either explicitly or implicitly, for a right of action against OFHEO for its review process or determinations made in the course of such review.

Regulatory Review Process

(1) Authority and Scope. Pursuant to the Act, the Director may, among other authorities, promulgate regulations and guidances to carry out OFHEO's statutory duties and responsibilities. Executive Order 12866 calls upon Federal agencies to reduce, where appropriate, regulatory burden or inefficiencies on regulated industries. The purpose of this Policy Guidance is to set forth a procedure for routine, periodic review of OFHEO rules, regulations and guidances in keeping with the intent of federal directives. This Guidance applies to all major OFHEO rules, regulations and guidances promulgated and affecting both agency supervisory processes as well as the Enterprises directly.

Nothing in this Policy Guidance in any way limits the authority of OFHEO otherwise to review and revise existing rules, regulations, orders and written policies or adopt any rules, regulations, orders or policies as deemed to be appropriate by the Director under the Act and other applicable laws.

(2) Process.

(a) Timing and Scope. Not less than every five (5) years, after the effective date of this Policy Guidance, OFHEO expects to complete a review of its rules and regulations, including the written policies, supervisory procedures, and recordkeeping and documentation requirements used to oversee the operations of the Enterprises and to monitor or enforce their compliance with the laws administered by the agency. Such review shall consider whether such rules, regulations and guidances have become inefficient or create unwarranted burdens and shall identify revisions that might address such conditions without in any respect diminishing compliance with or enforcement of laws under OFHEO's jurisdiction or in any respect endangering the safety and soundness of the Enterprises. The Director of OFHEO may set earlier reviews of rules and regulations in his or her discretion and shall determine the scope of the review in his or her discretion.

(b) Role of Office of General Counsel. The Office of General Counsel shall conduct such general or specific review, as delineated by the Director, in consultation with other OFHEO offices and expert agency staff. Such review shall take place in a timely manner and a report of findings and recommendations is to be provided to the Director by the General Counsel as OFHEO's Regulatory Policy Officer. The report shall recommend to the Director whether and what action should be taken in light of the review.

(c) Public Comment. The Director may provide, in his or her discretion, notice to the public of such review and the opportunity for public comment either in general or on a specific list of regulations under review.

(3) Criteria.

(a) Among the considerations that may be used in the review of the existence of regulatory inefficiencies or burden are the following:

(i) legal or regulatory developments, including new laws, executive orders and judicial decisions that have been adopted since the promulgation of a rule or regulation that make such rule or regulation inefficient, obsolete, contrary to controlling legal precedent or unduly burdensome;

(ii) application by an Enterprise for revision of a rule or regulation, because of reasonably discernible regulatory burden or inefficiency;

(iii) marketplace developments, technological evolution and related changes that may have rendered an existing rule or regulation, in whole or in part, inefficient, outmoded or outdated; and

(iv) such other occurrences or developments as determined by the Director or General Counsel to be relevant to a review for inefficiency or unwarranted regulatory burden.

(b) Among other factors that may be considered in reviewing possible inefficiency or unwarranted regulatory burden are the following:

(i) compelling evidence that a consolidation of two or more rules, elimination of a duplicative rule or regulation, or other revision to regulatory requirements would facilitate compliance or supervision;

(ii) a demonstration of a better alternative method to effect a regulatory purpose or requirement supported by compelling evidence of significantly less intrusive means or of a substantially more efficient method of accomplishing the same supervisory purpose; and

(iii) such other factors as determined by the Director to be relevant to determining and evaluating the need for, appropriateness of, and effectiveness of a particular rule or regulation.

(4) No Right of Action. A review conducted pursuant to this Policy Guidance is not a formal or informal rulemaking proceeding under the Administrative Procedure Act and creates no right of action against OFHEO. An agency determination to conduct or not to conduct review of a rule regulation and any determination, finding or recommendation resulting from such review under this Policy Guidance are not final agency actions and are not subject to judicial review.

Dated: _____

Armando Falcon, Jr.
Director,
Office of Federal Housing Enterprise Oversight