United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

Director

September 5, 2003

The Honorable Paul S. Sarbanes
Ranking Member
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, D.C. 20510-6075

Dear Senator Sarbanes:

This letter is in response to your letter of July 29, 2003, in which you asked several questions about the financial holdings of Mark Brickell, nominee to be Director, Office of Federal Housing Enterprise Oversight (OFHEO). The Department of Housing and Urban Development (HUD) and our agency each will be responding to your letter, but we have consulted closely with each other in our responses.

We agree with you that it is important for Mr. Brickell to be able to carry out his duties as Director of OFHEO. Both at the time HUD submitted his financial disclosure form to us for review and after we received your letter, we held extensive discussions and meetings with HUD and with OFHEO about Mr. Brickell's financial interests in various companies in the financial industry and about the role of OFHEO.

OFHEO oversees the financial safety and soundness of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In its regulations, OFHEO sets forth capitalization guidelines under which Fannie Mae and Freddie Mac must operate to be considered financially safe and sound, including matters related to derivative instruments. Additionally, in circumstances where Fannie Mae's or Freddie Mac's safety and soundness becomes an issue, OFHEO may direct the entities to take actions to achieve certain outcomes. Potentially, this might include directives related to Fannie Mae's and Freddie Mac's investment in derivatives.

The criminal statute 18 U.S.C. § 208 prohibits an employee from participating personally and substantially in a particular matter in which, to his knowledge, he or any person whose

interest is imputed to him has a financial interest if the matter would have a direct and predictable effect on the interest. In order for a particular matter to have a "direct" effect on a financial interest, there must be a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. In order for a particular matter to have a "predictable" effect on the financial interest, there must be a real, as opposed to a speculative, possibility that the matter will affect the financial interest.

As explained by HUD and OFHEO, in many situations, Fannie Mae and Freddie Mac have latitude in the methods to achieve compliance with OFHEO's rules and directives. HUD and OFHEO informed us that there are a variety of methods by which Fannie Mae and Freddie Mac may achieve the required outcomes to maintain financial safety and soundness. In such situations, the effect of OFHEO's rules and directives on any of Mr. Brickell's financial interests would not be predictable in that Fannie Mae and Freddie Mac would not be bound to take any particular action to comply. In other situations where the outcome would be predictable, we have been assured that Mr. Brickell would recuse himself. In addition, OFHEO has told us that it currently has not identified any particular matters that would require Mr. Brickell's recusal. Accordingly, applying the information supplied by HUD and OFHEO about its official activities to the relevant criminal conflict of interest provision, we again conclude that Mr. Brickell is in compliance with applicable laws and regulations governing conflicts of interest.

In your letter, you also expressed concern over the time permitted for Mr. Brickell to divest his stock in J.P. Morgan Chase and other several other companies. Nevertheless, the ninety-day time period specified in Mr. Brickell's ethics agreement complies with both the statute and the regulation governing ethics agreements and divestitures, and is an appropriate timeframe in Mr. Brickell's particular situation.

In 5 U.S.C. App. §110, Congress permitted individuals who agreed to take an action to comply with the Ethics in Government Act up to three months after the date of the agreement to notify their designated agency ethics official or other appropriate officials of the action they took. The regulatory provision (5 C.F.R. §2634.802(b)) implementing this statute provides that

"the ethics agreement shall specify that the individual must complete the action which he or she has agreed to undertake within a period not to exceed three months from the date of the agreement (or of Senate confirmation, if applicable)."

Except in unusual situations, the ninety-day time period represents the maximum period of time allowed to divest. Mr. Brickell may choose not to take the entire ninety days to accomplish this task. In fact, it has been our experience that employees will often divest their stock before the ninety days has expired. As a general matter, however, the three-month, or ninety-day, time period is and has been the standard for everyone who joins the Executive Branch. It represents a reasonable amount of time for persons who are coming from the private sector into government service to take care of their personal financial affairs. Usually, the retention of assets for the short ninety-day period will not unduly interfere with the performance of an official's duties.

Of course, if an agency deems it necessary, it may require an employee to divest assets sooner, and that shorter period of time will be reflected in the ethics agreement. Usually, an agency will require this earlier divestiture when it would be difficult or virtually impossible for an employee to perform his or her official duties with the recusals in place prior to divestiture. In this case, no shorter time period was requested of Mr. Brickell.

If you have any questions, please do not hesitate to contact me at 202-482-9292 or have a member of your staff contact Judy Kim, Deputy General Counsel for Financial Disclosure, at 202-482-9253.

Sincerely,

Amy L. Comstock

cc: Richard A. Hauser
General Counsel
U.S. Department of Housing
and Urban Development