America's Community Bankers *Shaping Our Future*

Diane Casey-Landry
President & Chief Executive Officer

March 16, 2004

The Honorable John T. Korsmo
Chairman
Federal Housing Finance Board
1777 F Street N.W.
Washington, D.C 20006

Re: Registration of Each Federal Home Loan Bank of a Class of its Securities Under the Securities Exchange Act of 1934

Dear Chairman Korsmo:

America's Community Bankers filed a comment letter with the Federal Housing Finance Board in response to its request for comments on the agency's proposal to require each Federal Home Loan Bank to voluntarily register a class of its securities under the Securities Exchange Act of 1934 with the Securities and Exchange Commission. Enclosed with this letter is an opinion we prepared supporting our view that the Finance Board does not have the legal authority to require voluntary registration as contemplated by the proposed rule.

The Finance Board does not have the statutory authority to repeal the FHLBanks' long-recognized exemption from SEC registration. Additionally, Congress has not granted the Finance Board the authority to delegate its authority to the SEC. Therefore, we believe that the FHLBank system, its members, and the nation's vital housing markets would be better served if the Finance Board adopted other disclosure requirements that are within the parameters of its statutory authority to enhance the FHLBanks' financial transparency.

While we strongly support enhanced financial disclosure by the FHLBanks, we remain convinced that the Finance Board's proposal will not produce an improved, transparent FHLBank disclosure System. Because of our significant concerns, ACB reiterates its request that the Finance Board withdraw this proposal.

Thank you for consideration of our views.

Sincerely,

Diane Casey-Landry

Diane Casey -Landry

Cc: The Honorable Alicia Castaneda
The Honorable John C. Wiecher
The Honorable Allan I. Mendelowitz
The Honorable Franz S. Leichter
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March 16, 2004

MEMORANDUM FOR AMERICA'S COMMUNITY BANKERS

FROM: John F. Cooney
Brock R. Landry
Matthew Field
Venable, LLP

SUBJECT: Legality of Proposal by Federal Housing Finance Board To Require Each Federal Home Loan Bank to Register a Class of Securities with the Securities and Exchange Commission

You have asked us to analyze the legality of the proposal by the Federal Housing Financing Board ("FHFB" or "the Finance Board") to exercise its purported authority under the Federal Home Loan Bank Act to require each Federal Home Loan Bank ("FHLBank" or "the Bank") to register one class of securities with the Securities and Exchange Commission ("SEC") under Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*(g).

SUMMARY

The Federal Home Loan Bank Act, 12 U.S.C. § 1421 et seq., does not authorize the five members of the FHFB to outsource or delegate to the five members of the SEC part of their regulatory authority to ensure that the FHLBanks operate in a safe and sound manner, as proposed in the Notice of Proposed Rulemaking. 68 Fed. Reg. 54,396 (Sept. 17, 2003).

The supporting legal opinion, issued by the General Counsel of the FHFB on February 18, 2004, is demonstrably erroneous. That Opinion ignores a long line of decisions by the Supreme Court and lower federal courts, which establish that the Finance Board cannot, without an explicit grant of statutory authority, overturn Congress' decision that securities issued by the FHLBanks are exempt from SEC registration under the 1934 Act; and cannot disregard Congress' allocation of statutory functions among the Executive agencies by delegating part of its functions to the SEC.

Under the Federal Home Loan Bank Act, the FHFB would have authority, based on a proper record, to establish under its own auspices an enhanced disclosure regime for FHLBanks that could mirror or even exceed the degree of disclosure achieved by the SEC. Indeed, under the Economy Act, the FHFB could, with the agreement of the SEC, obtain the assistance of experienced SEC employees to help establish an internal periodic disclosure system and to work with Finance Board staff in assessing the adequacy of the disclosures made by the FHLBanks. This is the mechanism that Congress has enacted to permit federal agencies to address the problem the FHFB believes it faces, where statutory authority is vested in one agency, but useful expertise is located in another agency.

In sum, if the FHFB were to abandon its current proposal and follow the mechanism established by Congress, the FHFB could, with proper record justification, create a disclosure regime that provides whatever degree of protection for the public that the Board decides, as a matter of policy, is appropriate. However, the Federal Home Loan Bank Act, the Securities Exchange Act, and well-established judicial precedent prohibit the FHFB from proceeding in the manner it has proposed, by outsourcing or delegating to the SEC part of its statutory authority to regulate the safety and soundness of FHLBanks.

BACKGROUND

A. The FHFB's Proposal.

1. Requirements of the Proposed Rule. In its Notice of Proposed Rulemaking, the FHFB proposes to impose three requirements on each of the 12 FHLBanks.

-- First, each Bank would be required to prepare and make public certain disclosures relating to its business and financial condition. Proposed § 998.2(a).

-- Second, each Bank would be required to satisfy the disclosure requirements of subsection 998.2(a) by subjecting itself to the SEC's periodic disclosure regime under the Securities Exchange Act of 1934 ("the 1934 Act") and by preparing:

> an annual report, quarterly reports, current reports and such other materials as may be required under the SEC's rules and regulations, including SEC and SEC staff interpretations and rules governing audited financial statements.

Proposed § 998.2(b) (emphasis added).

-- Third, each Bank also would be required to subject itself to the 1934 Act's periodic disclosure regime by "agreeing to voluntarily register a class of its securities with the SEC under Section 12(g) of the 1934 Act . . . within 120 days of the adoption of this regulation." Proposed § 998.2(c).

In the text of Proposed § 998.1(a), the FHFB states that the required disclosures would be those "that would be provided by 1934 Act registrants subject to the 1934 Act's periodic disclosure regime, as interpreted and administered by the SEC." (Emphasis added). Similarly, in the Preamble to the NPRM, the Finance Board recognizes that the effect of its proposal would be to "bring each bank under the 1934 Act periodic disclosure regime, as interpreted and administered by the SEC." 68 Fed. Reg. at 54,398.

Under the proposal, each FHLBank would be subject to substantive SEC review of the adequacy of its financial disclosures at two stages: first, at the point of initial application for registration with the SEC under the 1934 Act; and second, when it files an annual or other periodic report with the SEC.

Although the proposed rule and the Preamble are silent on this score, the FHLBanks' participation in the SEC periodic disclosure regime presumably would subject them to the full range of the SEC's enforcement powers, should the SEC conclude that a Bank had violated its rules.[1] In making its disclosure and enforcement decisions, the SEC would be operating under the substantive standards established by Congress in the 1934 Act.

Further, the SEC's decisions on disclosure and enforcement matters apparently would be final agency action, with which the Banks would be obliged to conform. In the NPRM, the FHFB did not reserve to itself any power to review and confirm, modify or rescind the SEC's decisions under the 1934 Act. Nor did the proposal characterize the SEC's role as providing the Finance Board with factual information or as providing it with policy advice and recommendations, based on which the FHFB would then make final decisions as to the adequacy of disclosures. Rather, the SEC would make decisions under its own 1934 Act authority that would apply independently and finally to the Banks.

While the FHFB characterized its proposal as a "requirement to voluntarily register a class of securities", there would be nothing "voluntary" about this rule from the perspective of the FHLBanks. Under the proposal, they would be required, as a matter of law --a legislative rule adopted under the Federal Home Loan Bank Act -- to register a class of securities. A failure to register with the SEC would be subject to punishment under the FHFB's enforcement authorities.

2. The Legal Rationale Underlying the Proposal. The NPRM relies on two rationales as to why the Finance Board would have legal authority to issue the proposed rule. First, the FHFB states in several places that it is establishing a "voluntary"

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[1] The SEC has been more forthcoming on this point. In written testimony delivered to the Senate Committee on Banking, Housing, and Urban Affairs on February 10, 2004, Alan L. Beller, the Director of the SEC Division of Corporation Finance, stated:

> [T]he disclosure quality we seek for the GSEs [a term that includes the FHLBanks] can only result from becoming subject to the SEC's reporting system. The disclosure quality results not only from our disclosure rules but also the Commission's and the staff's administration of these rules, including our review and comment processes and our enforcement program.

Testimony at 2 (emphasis added).

registration program. Second, the agency asserts that it is implementing its powers to assure the safety and soundness of the FHLBanks and to enhance their ability to access the capital markets.

(a) "Voluntary" Registration". The FHFB's characterization of the registration requirement as "voluntary" is a classic example of Orwellian transformation of language, in which a government agency makes a word assume the opposite of its natural meaning. This choice of words is deliberate. The FHFB attempts to rely on the term "voluntary" to resolve a substantial statutory problem with the proposal.

The Preamble notes that equity securities issued by individual FHLBanks to their members and debt securities issued by the Office of Finance as agent for the Banks to public investors are exempt from registration with the SEC under the Securities Act of 1933, because they are "controlled or supervised by and acting as an instrumentality" of the United States pursuant to authority granted by Congress. 15 U.S.C. § 77c(a)(2). 68 Fed. Reg. at 54,397. Further, the Preamble recognizes that debt securities issued by the Office of Finance as agent for the Banks are exempt from registration with the SEC under Sections 3(a)(12)(A) and 3(a)(42)(B) of the Securities Exchange Act, 15 U.S.C. §§ 78c(a)(12)(A) and (42)(B), pursuant to an implementing decision adopted by the Secretary of the Treasury on April 28, 1937. 68 Fed. Reg. at 54,397.

On the face of these statutes, Congress already has decided that the FHLBanks are exempt from mandatory registration of their securities with the SEC. In the NPRM, the FHFB does not claim that Congress has given it any authority to waive this statutory exemption from registration.

Under the existing statutory structure, a truly "voluntary" decision by a Bank to register a class of its debt securities with the SEC might be lawful.[2] Here, however, the FHFB unambiguously would be utilizing its authority under the Federal Home Loan Bank Act to compel the FHLBanks to register, so the "voluntariness" rationale is inapplicable.

(b) Exercise of Safety and Soundness and Related Regulatory Authority. The FHFB based its proposal, in large part, on its powers to regulate the safety and soundness of the FHLBanks and to regulate these entities to assure their access to capital markets.

In the Preamble, the FHFB stated that "[c]omprehensive, fully transparent securities disclosure is necessary if the Banks are to maintain the long-term confidence of the investment community . . . ." 68 Fed. Reg. at 54,398. The agency found that Bank accounting and financial statement reporting issues had become significantly more complex in recent years, necessitating more comprehensive and detailed disclosure. Id.

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[2] Fannie Mae apparently has decided voluntarily to register its common stock, but not its debt securities, with the SEC under Section 12(g).

The FHFB also found that the SEC's periodic disclosure system establishes the best practices standard for disclosure by U.S. companies and that "the SEC has the resources and the expertise to ensure that individual Bank disclosure documents meet this standard." Id. Accordingly, the FHFB concluded that the Bank System's ability to access the capital markets would be enhanced if each Bank registered a class of its securities with the SEC under the 1934 Act. Id.

In proposing this requirement, the FHFB expressly stated that the rule would not "limit or restrict the Finance Board's ability to carry out its responsibilities under the Act including its responsibility to act under its safety and soundness authority to regulate the banks", including the conduct of examination, the requirement of reports and disclosures, and enforcement. Proposed § 998.1(b). Further, the FHFB specified that the rule would not "alter [its] responsibility to ensure the Bank System's continued access to the capital markets." Id.

In invoking its safety and soundness and related regulated authority, the FHFB did not claim that any part of the Federal Home Loan Bank Act or any other statute gave it authority to delegate to the SEC any part of its responsibilities to regulate the FHLBanks.

B. The SEC's Statutory Authority and Disclosure System.

1. SEC Registration Program. Section 12 of the 1934 Act, 15 U.S.C. § 78*l*, requires issuers of securities to register a class of securities with the SEC, unless those securities are otherwise exempted. The primary consequence of registration is that under Section 13(a) of the Act, 15 U.S.C. § 78m(a), the registrant is required to file annual, quarterly and current reports as prescribed by the SEC. The annual report must contain audited financial statements.

As a result of registration, the issuer also might become subject to a range of other statutory and regulatory requirements, such as certain mandatory recordkeeping and accounting requirements, 15 U.S.C. § 78m(b)(2); proxy solicitation requirements, 15 U.S.C. § 78n(c); and the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1.

Further, under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, issuers of securities who register with the SEC under Section 12 of the 1934 Act are required to comply with the substantive requirements of Sections 302 and 906 of that new statute. The FHLBanks currently are not subject to the requirements of Sarbanes-Oxley, because their securities qualify as "exempted securities" that need not be registered with the SEC under Section 12. As soon as its securities were registered with the SEC, however, each Bank presumably would become subject to Sarbanes-Oxley. The FHFB never discusses this consequence of registration in its analysis of the possible effects of the proposed rule.[3] Consequently, there is no record as to whether the application of Sarbanes-Oxley would be appropriate for the FHLBanks.

Under the proposal, Section 302 of Sarbanes-Oxley, 15 U.S.C. § 7241, would, among other things, require each FHLBank to develop, implement, and evaluate the effectiveness of a system of "disclosure controls and procedures" that ensure that all "material information relating to the issuer" is relayed to its principal executive and financial officers. In addition, each Bank would be required to file certifications with its periodic reports, stating that its principal officers have reviewed the report and believe it to be true and accurate. The certifying officers must affirm, among other things, that they have reviewed and evaluated the disclosure controls, that they have disclosed all deficiencies in the company's internal controls to their auditors, and that the report presents the officers' conclusions regarding the effectiveness of the disclosure controls.

Section 906, 15 U.S.C. § 7262, would impose a similar certification requirement on the CEO and CFO of each Bank. It would require that each periodic report be accompanied by a statement certifying that the report fully complies with Section 13(a) of the 1934 Act "and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer." The penalty for a false certification would be a $1 million fine and up to 10 years imprisonment.

2. <u>SEC Enforcement Program</u>. Part of the reason that "the 1934 Act's periodic disclosure system establish [*sic*]the best practices standard for disclosure by U.S. corporations" is that, as an integral part of that process, the SEC operates a vigorous review and enforcement program concerning the adequacy of disclosures. 68 Fed. Reg. at 54,398. Although the text of the proposed rule and the Preamble do not discuss this point expressly, by stating repeatedly that the FHLBanks will be subject to the SEC's periodic disclosure system "as interpreted and administered by the SEC," the Finance Board clearly envisions that the Banks will be subject to the SEC's enforcement powers to the same degree as any other issuer that registers its securities under the 1934 Act.

For example, under Section 12(j) of the 1934 Act, 15 U.S.C. § 78*l*(j), the SEC may deny a registration by initiating an administrative proceeding based on alleged inadequate disclosures or other problems with a registrant's application. Under this provision, the SEC would have power to block a Bank's registration and thus prevent it from complying with the FHFB's rule. The Bank would be obliged to delay any debt securities offerings while it attempted to resolve the SEC's concerns, because it would be unable to market its securities.

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[3] Again, the SEC has been more forthcoming on this issue. In his February 10, 2004 Congressional testimony, Mr. Beller testified that after registering its stock with the SEC under Section 12, "Fannie Mae is now fully subject to . . . the requirements of the Sarbanes-Oxley Act." Testimony at 3.

Similarly, under Section 21 of the 1934 Act, 15 U.S.C. § 78u(a)(1), the SEC has authority to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" any provision of the 1934 Act or the rules promulgated thereunder. The SEC possesses a full range of enforcement authorities, including the ability to seek injunctions against violations; to issue cease and desist orders; to prohibit a person from serving as an officer or director of a public company; to bring a lawsuit seeking civil penalties of up to $500,000 per violation; and to seek disgorgement. 15 U.S.C. §§ 78u(c), (d)(1)-(3).

In sum, the FHFB's proposal would subject the FHLBanks to a robust SEC enforcement regime.

C. The FHFB's Legal Opinion of February 18, 2004.

The Preamble to the proposed rule did not set forth a supporting legal rationale, other than a general reference to the FHFB's safety and soundness authority and related regulatory powers. On January 15, 2004, America's Community Bankers filed comments on the proposal which argued, among other things, that the five members of the FHFB lacked statutory authority to delegate to the five members of the SEC part of the statutory authority vested in them by Congress to regulate the safety and soundness of the FHLBanks and to assure their access to capital markets.

On February 18, 2004, the General Counsel of the FHFB issued a legal opinion that sought to provide a legal justification for the agency's proposed action ("the Opinion"). In general, the Opinion asserted that Federal Home Loan Bank Act gives the FHFB authority to require FHLBanks to register a class of securities with the SEC, upon a finding that requiring registration would help the agency ensure that the FHLBanks operate in a financially safe and sound manner, carry out their housing financing mission, remain adequately capitalized, and are able to raise funds in the capital markets. (Op. at 1).

Several subsidiary parts of the Opinion are of particular significance.

-- The Opinion notes that "[t]he FHLBank Act does not address securities disclosure directly" and that under the laws adopted by Congress, the FHLBanks are exempt from registration with the SEC under the 1933 Act and the 1934 Act. (Op. at 3).

-- The Opinion asserts that "nothing would prevent" the FHFB from "concluding that its statutory duties would best and most efficiently be accomplished" by requiring the Banks to register a class of securities with the SEC. Registration "would subject the FHLBanks to the SEC's integrated disclosure regime, thus using the SEC to support the Finance Board's performance of its duties." (Id.)

The Opinion later develops this thought, by asserting that "the registration requirement does nothing more than use the SEC's disclosure structure and SEC expertise to perform a function the Finance Board could decide to perform in-house." (Op. at 4) (emphasis added).

-- The Opinion asserts, without explanation and without citation to the Federal Home Loan Bank Act or other authority, that the proposed rule "would not cede or delegate or otherwise assign any of [the Finance Board's] responsibilities to the SEC." (Op. at 3-4). In context, the basis for this conclusion appears to be the point set forth in Proposed § 998.1(b), that the FHFB would not delegate to the SEC the entirety of its power to regulate "reports and disclosures", but would have the right to continue to exercise that authority.

-- Finally, the Opinion concludes that in adjudicating the legality of an interpretation of the Federal Home Loan Bank Act that would permit the FHFB to require the FHLBanks to register with the SEC, the courts would apply the analytical framework established by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). (Op. at 4). The Opinion asserts that under Chevron, if "an agency's enabling statute does not preclude or limit an agency's interpretation of its enabling statute . . . the court looks only to see if the interpretation is based on a permissible interpretation of the statute." (Op. at 4). In essence, the Opinion suggests that a reviewing court would consider the issue of the Finance Board's authority under Step Two of the Chevron decision.[4] On that basis, the remainder of the Opinion argues that the Federal Home Loan Bank Act does not expressly preclude the FHFB's proposal to utilize the SEC in this manner to help carry out its statutory functions; and that a reviewing court therefore is likely to uphold the agency's interpretation of the statute as reasonable.

ANALYSIS

The proposed rule would violate Congressional limitations on actions by Executive Branch agencies in two ways. First, it would purport to overturn, without specific statutory authorization, the statutory exemption from mandatory SEC registration of securities of the FHLBanks that Congress adopted in the 1933 Act and the 1934 Act.

[4] Under Chevron, a court must first exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue. This analysis is known as Step One of Chevron. If the court can determine congressional intent, then that interpretation must be given effect. As the Supreme Court held in Chevron, a reviewing "court, as well as the agency, must give effect to the unambiguously expresses intent of Congress." 467 U.S. at 842-843. If, however, the statute is silent or ambiguous with respect to the specific issue, then a reviewing court will defer to a permissible agency construction of the statute. This process of reviewing the reasonableness of an agency interpretation of an ambiguous statute is known as Step Two of Chevron. See Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). As discussed at page 12 below, the D.C. Circuit has repeatedly held that the failure of Congress to include a provision in a statute expressly prohibiting an agency from subdelegating its functions does not constitute "silence" or "ambiguity" within the meaning of Chevron, so Step Two does not apply.

Second, a series of decisions by the Supreme Court and D.C. Circuit establishes that an express grant of authority by Congress is required in order to allow an Executive agency to delegate to another entity the power that Congress has vested in it. These cases explicitly hold that this legal issue must be reviewed under Chevron step one, and not step two as the FHFB's legal Opinion erroneously concludes.

Under Chevron step one, since Congress has not explicitly granted the FHFB the power to subdelegate its authority, the members of the Finance Board must respect the Congressional allocation of responsibilities and are barred by law from transferring part of their authority to other Federal officers, no matter how strongly they may believe, as a matter of policy, that such a delegation would "better secure" the carrying out of the statutory functions vested in them.

I. GOVERNING STATUTORY PROVISIONS.

A. SEC Authorizing Statutes.

Debt securities issued by the FHLBanks are exempt from registration with the SEC under the 1933 Act and the 1934 Act.

The Securities Act of 1933, 15 U.S.C. § 77c(a), provides, in pertinent part, that its provisions "shall not apply to any of the following classes of securities":

> (2) Any security issued or guaranteed by . . . any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by Congress . . . .

Debt securities of the FHLBanks also are exempt from registration under the 1934 Act. Section 3(a)(12)(A) of that statute, 15 U.S.C. § 78c(a)(12)(A), provides:

> The term "exempted security" or "exempted securities" includes –
>
> (i) government securities, as defined in paragraph (42) of this subsection . . . .

Section 3(a)(42), 15 U.S.C. § 78c(a)(42), in turn provides:

> The term "government securities" means
>
> (B) securities which are issued or guaranteed by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors; . . . .

As the FHFB noted in the Preamble to the NPRM, on April 28, 1937, the Secretary of the Treasury exercised the authority granted him by Section 78c(a)(42) to exempt debt securities issued by the FHLBanks from registration with the SEC under the 1934 Act. 68 Fed. Reg. at 54,397.

B. Provisions of the Federal Home Loan Bank Act.

The Federal Home Loan Bank Act, as modified in 1989 by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), created the Federal Housing Finance Board and delegated to its five members authority to establish a comprehensive system of regulation for the FHLBanks. Two provisions are central to this legal analysis.

1. 12 U.S.C. § 1422a(a)(3) provides the basic grant of statutory authority to the Finance Board. It provides:

> (3) Duties
>
> (A) Safety and Soundness
>
> The primary duty of the Board shall be to ensure that the Federal Home Loan Banks operate in a financially safe and sound manner.
>
> (B) Other Duties
>
> To the extent consistent with subparagraph (A), the duties of the Board shall also be –
>
> (i) to supervise the Federal Home Loan Banks;
> (ii) to ensure that the Federal Home Loan Banks carry out their housing finance mission; and
> (iii) to ensure that the Federal Home Loan Banks remain adequately capitalized and able to raise funds in the capital markets.

These four functions were specifically cited in the Preamble to the NPRM as justification for the proposal.

2. 12 U.S.C. § 1422b(b)(1) is the only provision of the Federal Home Loan Bank Act that addresses the ability of the Board to delegate its functions. It provides, in pertinent part:

> Subject to title IV of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Board may employ, direct and fix the compensation and number of employees, attorneys, and agents of the Federal Housing Finance

> Board, except that in no event shall the Board delegate any function to any employee, administrative unit of any Bank, or joint office of the Federal Home Loan Bank System. The prohibition contained in the preceding sentence shall not apply to the delegation of ministerial functions including issuing consolidated obligations pursuant to section 1431(b) of this title.

(Emphasis added). This provision, which Congress itself characterized as a "prohibition", sharply limits the FHFB's ability to delegate powers even within the Federal Home Loan Bank System. This Section does not purport to grant the members of the Finance Board authority to delegate their statutory functions to any other Federal officer.

II. GOVERNING LEGAL PRINCIPLES.

Recent decisions of the Supreme Court and the D.C. Circuit squarely establish that an agency is a creature of Congress and possesses only such authority as Congress may have delegated to it. Federal officers who are the head of an agency may not delegate their statutory authority to another Federal agency without explicit statutory authorization.

A. Decisions Defining Agency Authority Generally.

A Federal agency is a creature of Congress and has only such authority as Congress may have vested in it. Regardless of how serious the problem an agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure Congress has enacted into law. E.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

Even if two Executive agencies agree that a particular agency should be the locus of regulation over an issue, the entire Executive Branch is not permitted to administer a statute in a manner that is inconsistent with the administrative structure that Congress has adopted. ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988). An effort to disregard the decision of Congress to vest authority in one Executive officer, rather than another, would be to challenge the wisdom of a legitimate policy judgment that is Congress', and Congress' alone, to make. Touby v. United States, 500 U.S. 160, 168 (1991).

These principles govern with full force even if Congress has given an agency authority to implement its functions through regulations. "It is axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

B. Decisions Governing the Ability of One Agency
To Delegate Its Statutory Authority to Another Agency.

The case law establishes that Executive officers cannot, without explicit Congressional authorization, delegate the functions vested in them to another agency. While Federal officials may have greater power to subdelegate their authority to subordinate officials within their own agency, they may not delegate to other agencies "absent affirmative evidence of authority to do so." United States Telecom Ass'n v. FCC, D.C. Cir., No. 00-1012, March 2, 2004 (slip op. at 14); Halverson v. Slater, 129 F.3d 180 (D.C. Cir. 1997).

In United States Telecom, the D.C. Circuit recently summarized the law governing delegations by Federal agencies. When Congress delegates authority to an Executive Branch officer, subdelegation to a subordinate official is presumptively permissible absent affirmative evidence of a contrary Congressional intent.[5] But the cases establish an important distinction between subdelegation to a subordinate and subdelegation to an outside entity.

> The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former [subordinate officials]. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization. See Shook v. District of Columbia Fin. Responsibility & Mgmt Assistance Auth., 132 F.3d 775, 783-784 & n.6 (D.C. Cir. 1998).

United States Telecom (slip op. at 13) (emphasis added). The court of appeals identified two principles that underlie this distinction.

> -- First, "[w]hen an agency delegates authority to its subordinate, responsibility – and thus accountability – clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." Id. at 13.
>
> -- Second, delegation to an outside agency increases the risk that this entity will not have the same perspective as the delegating agency, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. "In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship." Id. at 13-14.

[5] See United States v. Giordano, 416 U.S. 505, 512-513 (1974) (in delegating power to authorize wiretaps to the Attorney General or an Assistant Attorney General specified by the Attorney General, Congress intended to prevent these officials from subdelegating their responsibility to other agency officials).

Further, in United States Telecom, the D.C. Circuit clearly held that the issue of whether an agency has statutory authority to delegate its functions must be decided under Chevron step one.

> The [FCC's] plea for *Chevron* deference [under a step two analysis] is unavailing. A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates. It is clear here that Congress has not delegated to the FCC the authority to subdelegate to other parties. The statutory "silence" simply leaves the lack of authority untouched. In other words, the failure of Congress to use "Thou Shalt Not" language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference.

Id. at 14-15 (emphasis added). See ETSI Pipeline, 484 U.S. at 517.

This aspect of the decision in United States Telecom -- that the question whether Congress has authorized a Federal officer to subdelegate his authority is governed by Chevron step one, rather than Chevron step two --restates a longstanding principle recognized in many prior cases.

For example, in Halverson, the D.C. Circuit clearly rejected an argument by the Secretary of Transportation that, because the statute at issue did not affirmatively prohibit him from delegating part of his statutory authority to the Saint Lawrence Seaway Development Corporation, the statute should be interpreted to permit the delegation. Applying Chevron step one, the court rejected this argument in unambiguous terms:

> To suggest . . . that Chevron step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.,* when the statue is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law . . and refuted by precedent. . . . Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

129 F.3d at 187, quoting Railway Labor Executives' Ass'n v. National Mediation Board, 29 F.3d 655, 671 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995).

Accordingly, the D.C. Circuit held that the absence of an express proscription of delegation "provides no green light to ignore the proscription necessarily implied by the limiting language" of the statute, which authorized delegations only to the Coast Guard. Halverson, 129 F.3d at 187.[6]

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[6] A Federal officer may, without running afoul of the subdelegation doctrine, invite another Federal agency or an outside entity to provide him with advice and policy recommendations, or with information useful in

III. FHFB's PROPOSAL TO REQUIRE FEDERAL HOME LOAN BANKS TO REGISTER A CLASS OF SECURITIES WITH THE SEC IS ILLEGAL.

The FHFB legal Opinion is incorrect, as a matter of law, because it ignores the express intention of Congress in two respects: first, by law the FHLBanks are not required to register their securities with the SEC; and second, the five members of the Finance Board are not authorized to outsource or subdelegate to other Federal officials any part of their responsibility to exercise the safety and soundness or other regulatory function over the FHLBanks.

Congress has the exclusive authority to determine the proper structure of the Executive Branch and the appropriate allocation of responsibilities among agencies. The case law is clear that the FHFB must be able to identify an explicit grant of authority by Congress that would allow it (1) to waive the FHLBanks' statutory exemption from SEC registration, granted in 1937 by the agency head (the Secretary of the Treasury) to whom Congress had delegated that power; and (2) to subdelegate its regulatory authority to another agency. Congress plainly did not grant such authority to the Finance Board in the Federal Home Loan Bank Act. Indeed, the FHFB's Opinion does not even purport to rely upon a provision of law that affirmatively authorizes the proposed action.

Instead, the Opinion points to the absence of a statutory provision as a factor that makes the Federal Home Loan Bank Act ambiguous on these issues. It suggests that any legal challenge would be resolved under Chevron step two, in which the courts would defer to a reasonable agency interpretation of an ambiguous statutory provision.

However, prior Supreme Court and D.C. Circuit cases establish beyond question that any legal challenge would be addressed under Chevron step one. Under a longstanding line of cases, the D.C. Circuit would hold that absent an express grant of power by Congress, the FHFB lacks authority to waive the statutory exemption from SEC registration for securities of FHLBanks; and that the FHFB lacks authority to delegate to the SEC a portion of its safety and soundness regulatory authority to establish a periodic disclosure regime for the Banks.

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carrying out his statutory responsibilities. In order to avoid the subdelegation problem, the Federal officer must retain final control and reviewing authority over any suggestion or recommendation from the other entity. United States Telecom, slip op. at 17; Shook, 132 F.3d at 784; Assiniboine and Sioux Tribes v. Board of Oil & Gas Conservation, 792 F.2d 782 (9th Cir. 1986); National Parks & Conservation Ass'n v. Stanton, 54 F.Supp.2d 7, 19-20 (D.D.C. 1999).

The FHFB's Opinion does not attempt to defend the proposal on the ground that the SEC's role is purely advisory. Further, the text of the proposal does not preserve any role for the FHFB in determining the adequacy of a FHLBank's disclosures, once it has registered with the SEC. This function and the related enforcement function, will be performed by the SEC, and its decisions will be final and not subject to revision by the Finance Board.

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A. The FHFB Lacks Authority To Waive the Exemption from SEC Registration.

The proposed rule would have the effect of revoking the statutory exemption from mandatory registration with the SEC under the 1934 Act that was granted by a statute and an implementing decision of the Secretary of the Treasury. Congress has not granted the Finance Board the authority to waive that exemption.

The FHFB's legal Opinion does not cite any statutory provision that purports to give the agency authority to revoke the existing exemption from registration. Rather, the Opinion suggests that the registration of a class of securities by the FHLBanks would be a "voluntary" act. The proposed rule clearly demonstrates, however, that registration by the Banks would be a mandatory requirement of the agency's exercise of its regulatory authority, not a matter of discretion. The proposed rule is expressed in terms of commands to the Banks.[7]

The FHFB does not have authority to issue a binding instruction to the Banks to take an action – registration with the SEC – from which the FHLBanks are exempt under a prior decision of the Secretary of the Treasury that such an exemption would be "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78c(a)(42). Accordingly, the proposed rule is illegal, because it would overturn Congress' allocation of responsibilities among Executive agencies. "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" Brown & Williamson, 529 U.S. at 125, quoting ETSI Pipeline, 484 U.S. at 517.

The Opinion attempts to justify the proposal by arguing (Op. at 4) that the FHFB could exercise its safety and soundness regulatory authority to establish its own "in-house" periodic disclosure system for the FHLBanks. This observation would be correct, as long as the Finance Board had a sufficient basis in the rulemaking record and established a system that was consistent with the powers granted it by the Federal Home Loan Bank Act. However, contrary to the suggestion in the Opinion, this point cannot justify the agency's proposal to override a statutory exemption and compel the Banks to participate in the SEC's periodic disclosure program.

[7] Proposed § 998.1(a) provides that "[t]he purpose of this part is to require each Bank to prepare and publicly distribute certain financial and other disclosures." Proposed § 998.2(a) provides that "[e]ach bank shall prepare and make public disclosures" relating to its finances. Proposed § 998.2(b) provides that "[e]ach bank shall satisfy the disclosure requirements of paragraph (a) of this section by subjecting itself to the 1934 Act's periodic disclosure regime . . . ." Proposed § 998.2(c) provides that "[e]ach bank shall subject itself to the 1934 Act's periodic disclosure regime by agreeing to voluntarily register a class of its securities with the SEC . . . ." (Emphasis added)

B. The FHFB Lacks Authority To Delegate Part of
Its Safety and Soundness Authority to the SEC.

"The relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate [subdelegate] the authority conferred by Congress." National Park & Conservation Ass'n v. Stanton, 54 F.Supp.2d 7, 18 (D.D.C. 1999). It is clear from the language of the Federal Home Loan Bank Act that Congress intended to prohibit any delegations of authority from the five members of the FHFB to other agencies.

In the Act, the only provision in which Congress addresses delegations of functions by the Finance Board is Section 1422b(b)(1). That Section does not contain an affirmative grant of authority to delegate functions to other agencies. Rather, the plain language of this provision, which Congress itself called a "prohibition", sharply limits the Board's ability to subdelegate.

This conclusion, drawn from examining the literal language of the statute, is reinforced by prior D.C. Circuit cases considering whether statutory language permits subdelegations. Those cases establish that by granting one form of delegation authority, Congress thereby impliedly withholds other power to subdelegate. As the court of appeals held in Halverson, the inclusion by Congress of language concerning delegations constitutes a "proscription necessarily implied by the limiting language" that no further power to delegate is granted. 129 F.3d at 187.

The FHFB's Opinion relies on the same defective argument that the D.C. Circuit has rejected in Railway Labor Executives, Halverson, and United States Telecom. The Opinion argues that the failure of Congress to include a provision in the Federal Home Loan Bank Act which expressly prohibits the FHFB from delegating its regulatory authority to the SEC means that the law is ambiguous; and that a reviewing court will resolve this ambiguity in favor of the Finance Board's interpretation if the agency can show that it used the delegation in a reasonable fashion, to address a serious issue.

The D.C. Circuit, however, has unequivocally rejected prior arguments that the failure of Congress to include "Thou Shalt Not" language creates a statutory ambiguity within the meaning of Chevron. The court of appeals has stated, in the most direct manner possible, that an agency may not "*presume* a delegation of power absent an express *withholding* of such power." Halverson, 129 F.3d at 187. The agency must, instead, identify a provision in the statute that expressly authorizes the subdelegation. There simply is no such provision in the Federal Home Loan Bank Act, and the Opinion does not claim that there is.

As noted, United States Telecom identified two policy principles on which the courts rely in refusing to construe "silence" as an authorization to delegate. These concerns are fully operative in the case of the FHFB proposal to delegate part of its regulatory authority to the SEC.

-- First, there would be a diminution in accountability by a subdelegation to the SEC. Congress gave the responsibility to protect the safety and soundness of the FHLBanks to five specific Federal officers – the five members of the FHFB. They are the only officials that Congress intends to hold accountable for the performance of this function. The proposal, however, would transfer an important part of their regulatory authority to five officers who were not so designated by Congress – the five members of the SEC.

-- Second, there is a substantial risk that the five Commissioners of the SEC or its staff will not have the same perspective as the members of the FHFB, and thus may – even with the best of intentions – pursue goals that are inconsistent with the overall approach of the Federal Home Loan Bank Act to regulation of the FHLBanks.

The members of the SEC and its staff administer a statute that has the predominant goal of protecting investors, through public disclosure and prohibition of various kinds of frauds and other abusive conduct related to securities transactions. The members of the FHFB, however, administer a statute with purposes that are both different from and broader than those of the SEC. The primary duty of the FHFB is to ensure that the FHLBanks operate in a safe and sound manner. Its subsidiary duties include supervision of the Banks, ensuring that they carry out their housing finance mission, and ensuring that they remain adequately capitalized and are able to raise funds in the capital markets. These duties are plainly different from the goals of the SEC under the 1934 Act.

To some degree, there may be overlap between the results that would be obtained at a particular moment if the SEC conducted a periodic disclosure program for the Banks or if the FHFB ran the program. But there may well be times when an FHFB program would produce different kinds and degrees of disclosure from those the SEC would achieve, based on the Finance Board's implementation of the four statutory goals in Section 1422a(a)(3). This is why Congress decided in the first place to put the FHFB, rather than the SEC, in charge of determining what disclosures the FHLBanks should make at any given time and why Congress determined that those disclosures should made to the FHFB. Congress wanted a financial institution regulator, rather than a general purpose regulator of securities transactions, to make these decisions.

In sum, a delegation to an outside entity that does not share the FHFB's unique statutory responsibilities would "aggravate[] the risk of policy drift" against which the D.C. Circuit warned in United States Telecom. Slip op. at 13-14.

-- The concerns presented by these two policy factors – the risk of loss of accountability and the risk of policy drift – exist whenever Congress considers granting an agency the power to subdelegate its responsibilities to another agency. For these reasons, the D.C. Circuit has found that there is a strong presumption against one multi-member federal agency having authority to delegate its statutory powers to another multi-member agency, as the FHFB has proposed here.

> It would be unusual, if not unprecedented, for Congress to authorize [one multi-member agency] to delegate its own governing authority, its policymaking function, to another outside multi-member body. That sort of delegation is inconsistent with the grant of overall authority [to the first agency].

Shook, 132 F.3d at 783. The FHFB's Opinion provides no basis for overcoming this presumption.

C. The Rationales Offered by the FHFB's Legal Opinion Are Invalid.

The FHFB's Opinion essentially offers three justifications for the proposal: that the decision of the FHLBanks to register a class of securities with the SEC would be voluntary; that the FHFB would not constitute a delegation of authority, because the Finance Board would continue to carry out its responsibilities to assure the safety and soundness of the Banks; and that the statute is ambiguous about the Board's ability to delegate its functions and that the courts therefore are likely to uphold the agency's decision under Chevron step two. None of these rationalizations can survive review.

(1) Voluntary Registration. As discussed above, there is no plausible argument that promulgation of the proposal in final form would result in a "voluntary" registration by the FHLBanks with the SEC. The proposal clearly states that the Banks would be required by rule to register with the SEC. Failure to register would make the banks subject to exercise of the FHFB's enforcement authorities for non-compliance with an agency directive.

(2) No Delegation of Functions Would Occur. The Opinion suggests (Op. at 3-4) that issuance of a rule requiring registration would not constitute a cession or delegation of authority, or otherwise transfer any of the FHFB's responsibilities to the SEC, because the Finance Board would continue to exercise its safety and soundness and other regulatory powers.

There are at least two problems with this suggestion. First, a delegation of authority from the FHFB must occur under the proposal. The SEC itself lacks the authority to compel the FHLBanks to participate in its public disclosure process, due to the Banks' statutory exemption from registration. Thus, the only way that the Banks may be participating in a compulsory registration process is if some amount of the FHFB's authority is transferred or delegated to the SEC.

Second, the fact that the FHFB would retain the right to carry out all its authority under the Federal Home Loan Bank Act, including the power to require reports and disclosures and enforce compliance with applicable rules, does not validate the attempted subdelegation. As the Preamble to the proposal notes, the periodic disclosure regime would be "interpreted and administered by the SEC." 68 Fed. Reg. at 54,398. The proposal reserves no role for the FHFB in the process of administering the new disclosure program. It simply provides that unless otherwise required by the Finance Board, each FHLBank shall provide it "on a concurrent basis copies of all disclosure documents filed with the SEC." Proposed § 998.2(d).

Whatever disclaimers may be included in the Preamble or set forth in the Opinion, examination of the actual language of the NPRM makes clear that the proposed mechanism would delegate the substantive authority over disclosure issues to the SEC. The FHFB would be copied on the submissions but would not play an independent role.

Currently, the FHFB is responsible for all aspects of supervision of FHLBanks, including disclosures. Upon adoption of the proposal, however, the SEC would be "perform[ing] a function that allegedly would "best and most efficiently" accomplish the Finance Board's statutory duties. (Op. at 3, 4). Accordingly, some degree of authority would be transferred from the FHFB to the SEC. Many of the D.C. Circuit cases that have invalidated attempted delegations from one agency to another have involved only a partial delegation of a function. The court has held that even a partial delegation of a function, undertaken without express Congressional authorization for the transfer, was illegal.

The FHFB cannot defend this proposal on the ground that it is simply using the SEC to provide it with nondiscretionary factual information, with the Finance Board retaining the authority to interpret the facts and make final decisions. [8] The proposal would allow the SEC to make final decisions that are binding on the FHLBanks and to take enforcement action against any Bank that failed to comply with the 1934 Act, or an SEC regulation or order. Indeed, the essence of the SEC's review process is not to gather information, but rather to make determinations as to whether a particular disclosure complies with the registrant's obligations under the 1934 Act and its implementing regulations.

Nowhere in the NPRM is the SEC's role defined as one of fact gathering for the FHFB. Nowhere in the proposal does the FHFB purport to create a process by which a regulated entity would be assured that it could appeal to the Finance Board for timely or assured review of any SEC decision the Bank believed was unlawful or otherwise

[8] The absence of any defined review process also is fatal to the ability of the FHFB to defend the proposal on the ground that by requiring each Bank to register a class of securities with the SEC, it is simply seeking advice and policy recommendations from that entity. "An agency may not . . . merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice' . . . nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation . . . ." United States Telecom, slip op. at 17, quoting Assiniboine, 792 F.2d at 795, and Stanton, 54 F.Supp.2d at 20-21.

inappropriate. Rather, the SEC's decision is final, with no process for further review by the FHFB.[9] Accordingly, under these circumstances, the Finance Board's "attempted punt does not remotely resemble nondiscretionary information gathering" and therefore cannot be defended under this exception to the subdelegation doctrine. United States Telecom, slip op. at 16.

(3) Chevron Step II Applies. As discussed above, the D.C. Circuit has repeatedly rejected arguments similar to the one set forth in the Opinion, that the failure of Congress explicitly to forbid an agency to delegate a function creates an ambiguity about the agency's authority, and that the courts will defer to the agency's interpretation if its use of the power is reasonable in a particular case. The case law holds that the matter will be resolved under Chevron step one. In order to prevail in that analysis, the FHFB must identify express statutory language that authorizes the delegation of functions to the SEC. United States Telecom, slip op. at 13-14; Shook, 132 F.3d at 781-783; Halverson, 129 F.3d at 185-187; Railway Labor Executives, 29 F.3d at 671. There is no such language in the Federal Home Loan Bank Act.

D. While the FHFB May Not Delegate its Powers to the SEC, the Agency May Lawfully, and Should, Implement its Own Periodic Disclosure Program.

The Opinion's ultimate justification for the proposal (Op. at 4) is pragmatic: the FHFB could exercise its safety and soundness power to create its own periodic disclosure program for the FHLBanks, so no harm would occur if the Finance Board outsourced this responsibility and "use[d] the SEC's disclosure structure and SEC expertise to perform a function that the Finance Board could decide to perform in-house."

The FHFB's legal Opinion is correct, in part. The FHFB has legal authority to adopt an enhanced disclosure mechanism. If the record supported it, the FHFB presumably could adopt a system that exactly mirrored the SEC's regime or was more comprehensive than that program. As a matter of fact, ACB believes that the record compiled by the agency in this rulemaking would not support such an approach and that the principles underlying the Federal Home Loan Act would be better served by an enhanced securities disclosure system that was modeled on the disclosure rules of the federal banking agencies.[10] But that is an issue for another day.

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[9] SEC orders are subject to exclusive review in the federal courts of appeals. 15 U.S.C. § 78y.
[10] The discussion in the text highlights the other major legal issue presented by this rulemaking, and one that is not discussed at all in the agency's legal Opinion -- whether the record in this rulemaking provides a sufficient justification for the agency to change its longstanding approach to the disclosure issue and establish a different regime, within the standards established by Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983). As set forth in its prior comment letter, ACB has substantial doubts as to whether a move toward an SEC-style disclosure approach would be deemed rational under MVMA. However, that more traditional issue under the Administrative Protection Act is beyond the scope of this Opinion.

For present purposes, the critical consideration is that the five members of the FHFB cannot achieve the goal of an enhanced disclosure regime by outsourcing this function or delegating part of the safety and soundness regulatory authority vested in them by Congress to other Federal officials to whom Congress has not entrusted that function. The end does not justify the means.

First, as the Supreme Court stated in FDA v. Brown & Williamson, the FHFB may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. 529 U.S. at 125. Since Congress did not expressly grant the five members of the FHFB the power to delegate this function, they must create and administer any enhanced disclosure process themselves.

Second, such a delegation would produce a diminution in accountability to Congress and the public. It also could well lead to different results, because the SEC administers a statute whose purposes are substantially different from those that the FHFB implements.

For these reasons, it is important that the FHFB follow the law and the division of responsibilities within the Executive Branch ordained by Congress. If any new public disclosure system is to be established, it should be set up within the FHFB and administered according to the four policy principles set forth in Section 1422a(a)(3) of the Federal Home Loan Bank Act.

In establishing this in-house system, the FHFB could still take advantage of the expertise that the SEC has acquired in disclosure issues over the years. Federal law provides mechanisms by which the FHFB can comply with Congress' allocation of authorities among the agencies, while still taking advantage of the staff expertise located in the SEC.

For example, with the consent of the boards of both agencies, the FHFB and the SEC could enter into an agreement under the Economy Act, 31 U.S.C. § 1535, by which the SEC could make available to the FHFB the services of employees who could educate the FHFB staff on issues connected with a periodic disclosure regime and could advise on the design and implementation of such a process.[11] The FHFB would, however, have to compensate the SEC for its use of those resources.

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[11] In pertinent part, the Economy Act provides:

> The head of an agency . . . may place an order with . . . another agency for goods or services if –
>
> (1) amounts are available;
> (2) the head of the ordering agency . . . decided the order is in the best interest of the United States Government;
> (3) the agency . . . to fill the order is able to provide the ordered goods or services; and
> (4) the head of the agency decides ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.

The Economy Act transaction is a mechanism specifically established by Congress to resolve the type of issue that the FHFB believes that it faces – that it wishes to take advantage of another agency's accumulated expertise and wants to be able to operate a regulatory program that will achieve high levels of performance from the outset, and not have to wait years to build up its own level of expertise to the level already possessed by another agency.

Pursuit of an Economy Act transaction is infinitely superior to the approach proposed by the FHFB, in which it would attempt to achieve the same result by outsourcing its regulatory authority to another agency in a manner that is virtually certain to be overturned by the courts.

CONCLUSION

The FHFB proposal is defective as a matter of law and should be withdrawn. The FHFB should adopt an approach to enhanced disclosure that follows the allocation of authority within the Executive Branch that Congress has created and that keeps this critical aspect of safety and soundness regulation within the Finance Board.

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31 U.S.C. § 1535(a). The ordering agency must make payment "promptly" on the written request of the agency filling the order, and may be demanded in advance of the recipient agency's providing the goods or services. 31 U.S.C. §§ 1535(c), 1536. An agreement reached by two agencies under the Economy Act constitutes an obligation of the appropriations of the ordering agency. 31 U.S.C. § 1535(d).