Federal Housing Finance Board

Memorandum

July 11, 1991

TO: **Philip L. Conover**
Director, District Banks Directorate

FROM: **Beth L. Climo**
General Counsel

SUBJECT: **Waiver of the Six-Month Waiting Period Before Withdrawal From Membership**

ISSUE:

Whether the Federal Housing Finance Board (Finance Board) can waive the requirement of subsection 6(e) of the Federal Home Loan Bank Act, 12 U.S.C.A. § 1426(e) (West Supp. 1990) (Bank Act), that a withdrawing member file notice with the Finance Board six months before withdrawing from membership in a Federal Home Loan Bank (FHLBank).

CONCLUSION:

The Finance Board can waive the requirement of subsection 6(e) of the Bank Act that a member give six-months notice before withdrawing from membership in a FHLBank.

DISCUSSION:

Subsection 6(e) of the Bank Act states that "[a]ny member other than a Federal savings and loan association may withdraw from membership in **a Federal** Home Loan Bank six months after filing with the Board written notice of intention so to do ..." (six-month requirement). 12 U.S.C.A. § 1426(e) (West Supp. 1990). As discussed below, the six-month requirement is waivable since (1) it is not a mandatory requirement of the Bank Act as a matter of statutory construction, and (2) waiver does not constitute an illegal contract because it is not contrary to the public interest. Further, the Finance Board's predecessor, the Federal Home Loan Bank Board (FHLBB), interpreted the six-month requirement as a waivable provision of the Bank Act.

I) WAIVER OF THE SIX-MONTH REQUIREMENT

A) The Six-Honth Requirement is Waivable as a Matter of Statutory Construction

In order to determine whether a statutory provision is waivable, the principles of statutory construction must be applied. The classification of a statutory provision as mandatory or directory is important in helping determine what effect should be given to it. See 2A N. Singer, Sutherland Statutory Construction § 57.01, at 639,,640 (Sands 4th ed. 1984). If a statutory provision is mandatory, it is imperative and must be followed; if a statutory provision is directory, it is permissive and thus can be waived. See id. § 57.03, at 640.

In determining whether a statutory provision is mandatory or directory, the ordinary meaning of the language should be favored. See id. In general, the use of words such as "must" and "shall" indicate that a provision is mandatory. See id. § 57.03, at 643-44. The six-month requirement is not mandatory according to the plain meaning of the language in subsection 6(e) because there are no words of mandate, such as "must" or "shall," preceding the clause describing the process of membership withdrawal. See id.

When a statutory provision is not mandatory on its face, a directory construction usually prevails unless the legislative intent behind the statute dictates a different interpretation. See id. § 57.03, at 644. Although the purposes of the six-month requirement are not clear from the legislative history of the Bank Act, the Federal Reserve Act, Rub. L. No. 43, 38 Stat. 251 (1913)(codified as amended at 12 U .S.C. 221 et seq. (1988)) (FRA), has a similar notice requirement, whose legislative history sheds light on the purposes behind the six-month requirement in the Bank Act.[1]

The six-month requirement in the FRA, which appears in section 9, was amended in 1930 to spe cifically enable the Federal Reserve Board to waive the requirement in individual cases.[2] See

1. The legislative history of the FRA's six-month requirement is relevant to the purposes of the Bank Act's six-month requirement because it is likely that some provisions of the Bank Act, including subsection 6(e), are modeled on provisions of the FRA. Compare 12 U.S.C. 5 328 (1988) with 12 U.S.C.A. § 1426(e) (West supp. 1990).

2. An argument can be made that if subsection 6(e) of the Bank Act was modeled on section 9 of the FRA, then Congress' failure to incorporate section 9% waiver option into subsection 6(e) suggests a deliberate rejection of the waiver option, making the Bank Act's waiting period a strictly enforceable requirement. However, since the plain meaning interpretation of subsection 6(e) indicates that the six-month requirement is waivable, we believe

Act of April 17, 1930, Rub. L. No. 134, 46 Stat. 170 (1930) (codified at 12 U.S.C. § 328 (1988)). The legislative history of the 1930 amendment indicates the three reasons for the six-month requirement: (1) To protect the Federal Reserve System from instability in the event that too many banks decide to withdraw simultaneously; (2) To ensure that a member's withdrawal is not motivated by conditions that are only temporary; and (3) To ensure that the Federal Reserve System is able to collect all debts owed by the withdrawing member. See 72 Cong. Rec. 3946 (1930) (statement of Rep. McFadden).

It is reasonable to assume that these same three reasons provided the basis for the six-month requirement in the Bank Act. Interpretation of the Bank Act's six-month requirement as directory is consistent with what appears to be the legislative intent behind subsection 6(e). In other words, the Finance Board can waive the requirement on a case-by-case basis without frustrating any of these three purposes. First, the Finance Board would use its discretion to grant a waiver of the six-month requirement only in cases where it had determined that withdrawal of the member would not endanger the financial stability of the FHLBank to which the member belonged. [3] Second, subsection 6(h) of the Bank Act -- which places a ten-year moratorium on reacquisition of membership for those members that withdraw from the FHLBank System -- would serve to deter members from withdrawing as a result of temporary conditions. See 12 U.S.C.A. § 1426(h) (West Supp. 1990). Third, waiver of the six-month requirement would not impede a FHLBank's collection of a member's debt, because the debt is secured by collateral and paid-in-capital. See id. §§ 1426, 1430 (West Supp. 1990).

The six-month requirement is not mandatory on its face and waiver of the six-month requirement on a case-by-case basis would not frustrate the purposes behind it. Thus, as a matter of statutory construction, the six-month requirement appears to be directory and, therefore, waivable.

(Footnote 2 continued from previous page)
that result prevails over a contrary interpretation that might be derived from drawing comparisons between the Bank Act -- which has no explicit waiver authority -- and the explicit waiver provision in the FRA.

3. The Finance Board's decision to grant or deny a waiver of the six-month requirement would likely be given judicial deference if it were challenged as long as the decision represented "a reasonable accommodation of manifestly competing interests ... [and] the [Finance Board] considered the matter in a detailed and reasoned fashion." See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984).

B) Waiver of the Six-Month Requirement is not an Illegal Contract

An agreement contrary to the provision of a statute is an illegal contract only if the statutory provision "implicates the Public interest in a manner forbidding contrary contracts . . . " See Office & Professional Employees Int'l Union, Local 2 v. Washington Metro. Area Transit Auth., (WMATA) 552 F.Supp. 622, 631, aff'd without opinion, 713 F.2d 865(1983). In WMATA, the court stated that "[w]hen the provisions of the statue in question go beyond the rights of the individual to implicate the public interest, then an agreement contrary to the statute's provisions constitutes an illegal contract, not a waiver." Id.

An agreement to let a member institution withdraw without filing notice six months in advance would be contrary to the provisions of the Bank Act because subsection 6(e) plainly specifies six months as the notice period. See 12 U.S.C.A. § 1426(e) (West Supp. 1990). In addition, the six-month requirement implicates a public interest because, in part, it seems to protect the stability and solvency of the FHLBank System. The safety of the FHLBank System is in the public interest because the FHLBank System is an important source of housing finance.

However, the six-month requirement does not seem to "implicate the public interest in a manner forbidding contrary contracts . . . " See WMATA, 552 F.Supp. 622, 631, because waiver of the six-month requirement would not necessarily endanger the safety of the FHLBank System.' As long as the Finance Board makes a sound decision that waiving the six-month requirement for an individual member would not endanger the safety of the FHLBank from which the member is withdrawing, the agreement to waive the six-month requirement is not contrary to the public interest because it would not harm the FHLBank System. Therefore, the agreement would not constitute an illegal contract.

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4. WMATA involved a challenge by the Washington Metropolitan Area Transit Authority (WMATA), a unit of the District of Columbia government, to the enforceability of an arbitration award on the ground that it resulted from an illegal contract between WMATA and the plaintiff union. See WMATA, 552 F.Supp. 622, 629. WMATA and plaintiff had submitted previous dispute to arbitration by a board of only one arbitrator, though a statutory compact specified that three arbitrators should be on the board. WMATA claimed that the resulting award for plaintiff was unenforceable because WMATA'S waiver of the provision requiring three arbitrators violated the statutory compact. See id. The court held that WMATA'S waiver was not contrary to the public interest, and therefore not illegal, because it did not frustrate the Congressional intent behind the statutory rule requiring three arbitrators--namely that WMATA and the plaintiff have an efficient means to settle their disputes.

II) THERE IS FHLBB PRECEDENT INTERPRETING THE SIX-MONTH REQUIREMENT AS WAIVABLE

The former FHLBB delegated authority to waive the six-month requirement to the FHLBanks, pursuant to Resolution No. 73-317, dated February 27, 1973, and Resolution No. 86-737, dated July 15, 1986.[5] We are unable to find a FHLBB opinion that provides the legal justification for the waiver authority that is delegated by these two resolutions. However, in a letter dated August 30, 1988 to Dana A. Yealy, General Counsel for the FHLBank-Pittsburgh, the FHLBB reaffirmed its interpretation that the six-month requirement is waivable. See Document No. 10769, Westlaw Private File (August 30, 1988). Therefore, there is precedent to support waiver of the six-month requirement by the Finance Board.

CONCLUSION:

The Finance Board can waive the six-month requirement because it is not a mandatory provision of subsection 6(e) of the Bank Act. However, if the Finance Board agrees to waive the six-month requirement for a member institution and the waiver would endanger the safety of the FHLBank System, the agreement may be subject to attack as an illegal contract.

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5. Resolution 86-737, which revoked Resolution 73-317, delegated to the Principal Supervisory Agent of each FHLBank, pursuant to sections 501.10 and 501.11 of the FHLBB regulations, the authority to waive the six-month waiting period subject to conditions that were substantially the same as those set forth in Resolution 73-317. However, since FIRREA did not transfer regulations 501.10 and 501.11 to the Finance Board, the delegation of authority granted under Resolution 86-737 is no longer in