January 15, 2004

Federal Housing Finance Board
1777 F Street, NW
Washington, DC 20006

Attention: Public Comments

Re: Registration of Each Federal Home Loan Bank of a Class of its Securities Under the Securities Exchange Act of 1934
68 FR 54396 (September 17, 2003)

Dear Sir or Madam:

America's Community Bankers ("ACB")[1] appreciates the opportunity to comment on the Federal Housing Finance Board's ("Finance Board") proposal to require each Federal Home Loan Bank ("FHLBank") to voluntarily register a class of its securities under the Securities Exchange Act of 1934 ("Exchange Act") with the Securities and Exchange Commission ("SEC").[2]

ACB Position

The continued financial health and viability of the FHLBanks is vitally important to ACB members and, ultimately American homeowners. Therefore we strongly support enhanced financial disclosure by the FHLBanks. ACB members own over half of the stock of the FHLBank System; for many of them it is their single largest asset. In addition, ACB members depend tremendously on the advances provided by their FHLBanks to provide the liquidity necessary to fund their home mortgage lending business. Unfortunately, the Finance Board's proposal will not produce an improved, enhanced FHLBank disclosure system. Because of our significant concerns, ACB requests the Finance Board to withdraw this proposal.

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[1] America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than $1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

[2] 68 Fed. Reg. 54396 (September 17, 2003)

ACB strongly believes that the Finance Board does not have the statutory authority to repeal the FHLBanks' long-recognized exemption from SEC registration. The Federal Home Loan Bank Act[3] provides the Finance Board no authority to adopt this proposal. The fact that it attempts to require voluntary registration highlights the legal contradictions it faces. 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.

As noted at the outset, ACB does not believe that the Finance Board must abandon the desirable goal of improving the FHLBanks' disclosures. Rather, it simply could exercise its ample safety and soundness authority[4] to directly require enhanced disclosures to the Finance Board, possibly using the model provided by long-standing securities disclosure rules of the federal banking agencies[5], adopted under their safety and soundness authority and under section 12(i) of the Exchange Act.[6]

Further, going forward with the Finance Board's proposal would ignore the unique structure, mission, and duties of the FHLBank System, attributes that have made the system vital to a strong, robust housing finance market. It would also fail to address important operational and accounting issues that SEC registration raises for the FHLBanks and their members. Unless these issues can be satisfactorily resolved with finality, the FHLBank System's access to the capital markets could be disrupted. Such disruption would, in turn, severely limit access to credit for the nation's homebuyers and homeowners.

By mandating "voluntary" registration, the proposal undermines the ability of the FHLBanks to make agreements with the SEC that attempt to resolve these issues. This compounds the difficulties already inherent in the proposal.

Thus, ACB believes that this proposal imprudently would force otherwise responsible corporate directors to undertake all of the risks associated with voluntary registration without a clear understanding of the operational and accounting issues it raises. If those issues cannot be resolved, the proposal's arguable legal protection from shareholder lawsuits is a totally inadequate response to the board members' fiduciary responsibilities.

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[3] 12 U.S.C. 1421 *et. seq.*
[4] 1422a(a)(3)(A)
[5] See 12 C.F.R. Parts 563b and 574 (Office of Thrift Supervision ("OTS") mutual to stock securities offering rules); 12 C.F.R. Parts 563g (OTS securities offering and disclosure rules); 12 C.F.R. Parts 563c, 563d (accounting and disclosure requirements for 1934 Act reports; 12 C.F.R. Part 11 (Office of Comptroller of the Currency 1934 Act disclosure rules; 12 C.F.R. Part 335 (Federal Deposit Insurance Corporation ("FDIC") rules governing securities of nonmember insured banks); 12 C.F.R. 333.4 (FDIC mutual to stock offering rules).
[6] Securities Act Amendments of 1964, Pub. L. 88-467, Sec. 3(e), 78 Stat. 565, 651 (1964)

ACB reserves the right to submit further comments on this proposal in view of the fact that the Finance Board has not provided a thorough and timely response to ACB's Freedom of Information Act ("FOIA") request, first submitted on March 11, 2003 and again, on November 14, 2003. The Finance Board's January 7, 2004 response followed communications from the Finance Board that the passage of time and other events had rendered our legitimate request obsolete. The material that the Finance Board did provide was not responsive to our request for research, analysis, and findings that would demonstrate the impact that SEC registration on the operations, structure, or finances of the FHLBank System. Either such material does not exist or was redacted under the provisions of FOIA. The timing and inadequacy of the Finance Board's response has not afforded ACB and its members the opportunity to fully review the Finance Board's rationale for its proposal, which was at the heart of our FOIA request.

In addition to being beyond the Finance Board's authority, ACB believes the proposal is ill-timed. The FHLBanks are in the midst of converting their capital structures in accordance with the provisions of the Gramm-Leach-Bliley Act.[7] The success of these conversions should not be undermined by the threat of "voluntary" registration and the associated unresolved issues with the SEC.

The Finance Board Lacks Legal Authority

Absent clear statutory authority, ACB does not believe that the Finance Board can adopt a regulation that requires the FHLBanks to voluntarily register a class of their equity securities with the SEC under the Exchange Act. In fact, the very operative words of the proposal demonstrate its fatal flaw.

The Finance Board, by characterizing registration with the SEC as "voluntary," appears to recognize that the FHLBanks are exempt from any requirement to register their equity securities with the SEC under the Exchange Act.[8] To the contrary, the Finance Board has affirmed the exemption of the FHLBanks from registration under the federal securities laws[9] and has adopted its own regulations that govern periodic securities disclosures by the FHLBank System and the financial statements distributed by the FHLBanks to their members.[10]

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[7] Public Law 106-102

[8] A 1992 joint report on the government securities market by the SEC, the Department of the Treasury and the Board of Governors of the Federal Reserve System stated that securities issued by government sponsored entities (including the FHLBanks) "historically have been exempt from registration under the federal securities laws." Joint Report on the Government Securities Market, Appendix D (Jan. 1992).

[9] In a 1998 proposed rule regarding financial disclosure by the FHLBanks, the Finance Board stated that, "securities issued by both the Finance Board [which at that time was the issuer of FHLBank System consolidated obligations] and the Banks are exempt from the registration and reporting requirements of both the Securities Act and the Exchange Act." Financial Disclosure by Federal Home Loan Banks, 63 Fed. Reg. 5315, 5316 (1998).

[10] 12 C.F.R. § 985.6, 12 C.F.R. pt. 985 Appendix A; 12 C.F.R. § 989.4.

The proposal suggests the Finance Board believes Congress erred in enacting the Exchange Act in a manner that exempts the FHLBanks from registration with the SEC. As the courts have repeatedly held, however, an administrative agency cannot take actions beyond the scope of the authority conferred by Congress on the agency, regardless of how well intentioned such actions may be. To the contrary, administrative agencies, including the Finance Board, are legally bound to operate within the limitations of the authority that Congress has conferred on them when they undertake implementing rulemaking.

The Finance Board in the proposal makes no claim that Congress, in establishing the Board under the FHLBank Act, expressly authorized it to require the FHLBanks to register with the SEC. In support of its unilateral rulemaking initiative, the Finance Board sets forth three rationales for the proposal:

- The FHLBank System's ability to access the capital markets may be better secured if each of the twelve FHLBanks voluntarily registers with the SEC, thereby subjecting the FHLBanks to the SEC's periodic disclosure system.

- FHLBank accounting and financial statement reporting issues have become significantly more complex in recent years, particularly with respect to the application of FAS No. 133, and this necessitates more comprehensive and detailed disclosure by the FHLBanks. The SEC staff has the extensive accounting experience required to review this FHLBank disclosure.

- Since Fannie Mae has voluntarily registered its common stock with the SEC under the Exchange Act and Freddie Mac has agreed to do so, there may be merit in having the securities disclosures of all of the housing GSEs overseen by the same securities regulator.

The Finance Board's first rationale is presented as a speculative one, without any effort to provide empirical, or factual evidence or other forms of support. Changes in a system that has functioned for over 70 years pursuant to congressional mandate cannot be made without the authority to do so. To make such fundamental changes without any demonstrable evidence or support is arbitrary and capricious.

The second rationale is simply inconsistent with the responsibilities that Congress has given directly and exclusively to the Finance Board. Review of the accounting and financial reporting of the FHLBanks has always been an integral part of the Finance Board's responsibility to examine and supervise the FHLBanks, in just the same way that such review is integral to the responsibilities of all bank regulators. As the safety and soundness regulator of the FHLBs, ACB believes that the Finance Board itself is the agency charged with conducting this essential review. We note that in the context of

bank supervision, the Congress has explicitly recognized under section 12(i) of the Exchange Act that the financial services regulators are in the best position to assess the securities disclosure of institutions they regulate.

In fact, until 2001, the Finance Board itself prepared the FHLBank System's periodic securities disclosures. Since that time, the Board by virtue of 12 C.F.R. § 985.6(b)(5) has undertaken and presumably discharged its obligation to determine whether the FHLBank System periodic reports comply with the Finance Board's requirements for financial statements and disclosures under 12 C.F.R. § 985.6. Given that the Finance Board has in the past utilized its financial and regulatory expertise to review and regulate approximately three quarters of a trillion dollars of FHLBank assets and debt, as well as portfolios that include complex interest rate exchange agreements and hedging strategies and instruments, it must possess the financial ability to review annual and quarterly reports of the FHLBanks.

Finally, the registration of Fannie Mae and Freddie Mac, publicly traded companies listed on the New York Stock Exchange, bears no relationship to the cooperatively owned FHLBanks. Unlike Fannie Mae and Freddie Mac, the FHLBanks do not have a stock instrument that can be registered. A number of members of Congress recognized this very point when they wrote to Treasury Secretary John Snow, Finance Board Chairman John Korsmo, and Stephen Freidman, the Director of the National Economic Council on April 29, 2003. They wrote that, "As twelve separate cooperative institutions, the FHLBanks do not fit the profile of publicly traded companies whose stock falls under the jurisdiction of the SEC."

By bringing the FHLBanks under the purview of the SEC, the proposal would introduce an entirely new regime of regulation. Under well-settled principles of administrative law, a federal agency may not regulate beyond the scope of authority delegated to it by Congress. No matter how admirable an agency's goal, good intentions cannot empower an agency to regulate – only Congress can grant such power. Similarly, an agency cannot regulate in a particular area simply because no statute expressly forbids its actions -- agencies may act only because, and to the extent that, Congress delegates them the power to do so. Furthermore, there is absolutely no evidence that Congress gave the Finance Board the authority to repeal by rulemaking a long-standing exemption from registration under the federal securities laws. Thus, absent new legislation, we believe that the Finance Board is without authority to adopt the proposal in its current form.

As a creature of statute, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[11] Thus, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated

[11] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002).

by Congress."[12] Because an agency's authority is strictly circumscribed by congressional delegation of power, it is well-settled that, "[r]egardless 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.'"[13]

In light of these conclusions and the long historical record of exemption, the Finance Board should withdraw this proposal and explore alternative ways to improve disclosure by the FHLBanks.

The Finance Board Could Adopt Its Own Enhanced Disclosure Rules

The Finance Board and the FHLBank System could avoid the legal and other difficulties presented by SEC registration by adopting an approach similar to that used by federal banking agencies in regulating the securities disclosure of institutions they regulate. Such authority is derived from their safety and soundness authority, and as provided by Congress in Section 12(i) of the Exchange Act. The securities disclosure rules of the banking agencies provide an appropriate disclosure regime for financial institutions that are regulated for purposes of the securities laws by the banking agencies.

Under the approach we recommend, the Finance Board would, using its safety and soundness authority in a manner similar to the banking agencies, adopt and enforce rules that incorporate the relevant SEC disclosure requirements. The Finance Board would also, as appropriate, consult with the SEC, and adopt accommodations necessary to address the FHLBanks' cooperative form and other unique characteristics. The Finance Board would adopt the rules in this area following a normal notice-and-comment procedure. The Finance Board would enforce the rules just as it enforces all others that apply to the FHLBanks.

In addition to accommodating the unique features of the FHLBank System, this approach has other advantages:

- It avoids possible conflicts between the missions of the SEC and the Finance Board. The SEC has one mission: investor protection. The Finance Board's mission is broader. Congress requires it to ensure the safety and soundness of the FHLBank System, and ensure its continuous access to the capital markets and its fulfillment of its housing finance mission. The SEC could ignore these requirements. Fortunately, when the Finance Board is successful, investors are

[12] *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).
[13] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *see also Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (holding that rules promulgated by the Federal Communications Commission were not authorized by statute; although "[t]he rules may be highly salutary[,] . . . [w]hat is determinative here is the FCC acted without delegated authority from Congress").

well protected and the Congressionally mandated mission of the FHLBank System is also fulfilled.

- As the safety and soundness regulator, the Finance Board has frequent, ample opportunities to review the FHLBank's financial reports.

Operational and Accounting Issues are Unresolved

Enhanced disclosures through the Finance Board's own processes, rather than through SEC registration, is more suited to the FHLBank System. The SEC disclosure regime is designed for individual, publicly traded companies. The FHLBank System is quite different. Each FHLBank is owned cooperatively by members that purchase shares in amounts based on the advances they draw from their FHLBank. Each share costs $100, its price never varies, and it is not publicly traded. While each FHLBank is separately managed, they are jointly and severally liable for the debt that other FHLBanks issue through the Finance Board's Office of Finance ("OF"). However, the OF is not a legal entity that could become an SEC registrant. Therefore, each FHLBank would have to register, but because of their joint and several liability, each could be affected by the others' disclosures.

Under the Finance Board's proposal, the SEC may at any time raise questions about individual FHLBanks' disclosures, which could cause the entire System to delay going to the capital market to issue debt while questions resulting from disclosures of the individual FHLBanks are resolved. This is because the OF could be reluctant to enter the capital market before the issues are resolved. This process would likely take longer in the case of the System than in the case of a single company, because of the joint and several liability of all the FHLBanks.

The frequency of issuance and the magnitude of System debt might make such disruptions highly problematic. In several typical five-day periods in 2003, the System refinanced between $45 and $65 billion of its debt. If the refinancing of similar amounts were delayed in the future, the Banks would have to suspend lending to their stockholders to ensure that they had sufficient liquidity. Alternatively, the System could vastly increase its liquidity, raising its funding costs. Either result would severely diminish the value of FHLBank membership and, by extension, the members' investments in the system. It would also significantly hamper the ability of the FHLBank System to fulfill its statutory mission.

Unresolved accounting issues include the treatment of the System's obligation to pay 20 percent of its net earnings to the Resolution Funding Corporation, the classification of the Banks' stock, and the effect of the joint and several liability of the FHLBanks.

Mandating SEC Registration Undermines the FHLBanks' Corporate Governance

The Finance Board's proposal raises a host of serious and complicated issues. Unfortunately, the proposal seeks to resolve just one of them, and does so in a way that undermines sound corporate governance and severely compromises the ability of the management of each of the FHLBanks to reach satisfactory arrangements with the SEC.

Members of the boards of the various FHLBanks have expressed concern that if they voluntarily give up their statutory exemption from SEC registration and their FHLBank suffers losses as a result, they could be sued by their members. The proposal attempts to eliminate the voluntary nature of SEC registration and thus protect directors from legal liability by overriding the FHLBanks' current exemption from SEC registration.

Assuming for purposes of argument that the Finance Board has this authority, this proposal does not solve the problems inherent in SEC registration. More broad, recently evolved principles of corporate governance require FHLBank board members to work in the System's best interests. However, the Finance Board directs the FHLBanks' boards to undertake an imprudently hasty course of action. As a representative of the System's stockholders, ACB is deeply troubled by this.

Compounding this shortcoming, the Finance Board's proposal undermines the FHLBanks' ability to reach effective operational and accounting arrangements with the SEC that will remain in place over time. If this rule becomes final in its current form, the SEC would have no incentive, given the FHLBanks' untenable bargaining position, to accommodate the FHLBank System's unique needs.

The Finance Board Should Be Engaged in the Process

Based on repeated statements by the Chairman of the Finance Board and the issuance of this rule, it appears that the Finance Board is unwilling to adopt the 12(i)-type option or similar approach and wishes to delegate its authority over the FHLBanks' financial disclosures to the SEC. If so, ACB believes the Finance Board must reverse its hands-off approach to this issue and actively consult with the SEC to ensure that registration does not disrupt the operations of the FHLBank System. ACB is disappointed that, to date, the Finance Board has been unwilling to take this step, even after hearing repeated concerns that SEC registration could disrupt the operations of the System. This is inconsistent with the Finance Board's statutory responsibility "to ensure that the Federal Home Loan Banks remain...able to raise funds in the capital markets."[14]

Since none of the FHLBanks have taken any irrevocable steps toward registering with the SEC, there is still time for the Finance Board to begin working with the SEC to resolve the operational and accounting issues we have identified. This action would be necessary

[14] 12 U.S.C. 1422a(a)(3)(B)(iii)

if the Finance Board decides to adopt its own disclosure regime (as we recommend) or even if it attempts to finalize this current proposal. Therefore, ACB strongly recommends that the Finance Board undertake discussions with the SEC on a priority basis.

The Stock Conversion Process Should be Completed First

The Gramm-Leach-Bliley Act ("GLB") required each FHLBank to substantially revamp its capital structure. This has been a complicated and time-consuming undertaking. Some of the FHLBanks have completed their conversion, while others have not. If the Finance Board adopts this proposal, the FHLBanks would be making quite different disclosures, depending on where they stand in the conversion process. It would make far more sense to impose any new disclosure regime only after all the FHLBanks have completed their GLB stock conversions.

Conclusion

ACB believes the Finance Board does not have the statutory authority to adopt the proposed regulation and requests that the Finance Board completely withdraw it. A statutorily authorized approach would be for the Finance Board to develop its own enhanced disclosure regime for the FHLBanks that meets the stated objectives of the Board and the administration. This would avoid the legal and practical pitfalls found in this proposal. Regardless, ACB believes very strongly that the Finance Board must promulgate rules that are statutorily defensible.

We appreciate the opportunity to share our views on this important matter. If you have any questions about this letter, please contact Steve Verdier at 202-857-3132 or sverdier@acbankers.org.

Sincerely,

Diane Casey-Landry
President & CEO